JOURNAL

THE NATIONAL PRISON PROJECT

We must always take sides.
Neutrality helps the oppressor, never the victim.
Silence encourages the tormentor,
Never the tormented.
—*Elie Wiesel*
on accepting the Nobel Peace Prize, December 1986.

INSIDE . . .

■ **Testing for AIDS**
A Public Health Perspective.... p. 10

■ **DC Juvenile Case**
NPP, PDS Sue Over Conditions.................................. p. 12

■ **Community Service Sentencing**
Is it a real alternative?.............. p. 13

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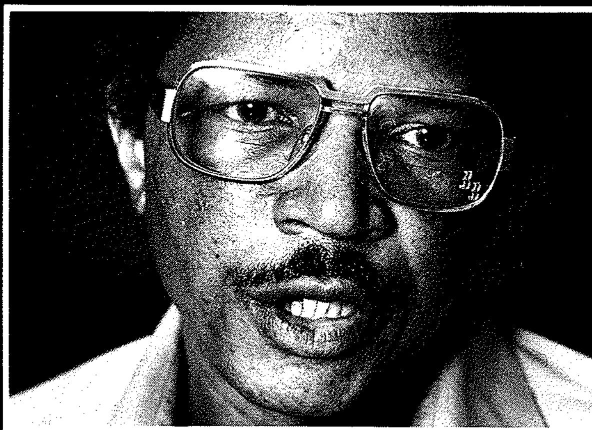
Oklahoma Prisoner Earns Place in History: The Story of *Battle v. Anderson*

by Jan Elvin



Struggle's long, but hope is longer.
—Jacob's Ladder

The book numbered "376" in the long row of Federal Supplements in the law library can be readily picked out, since it is more dog-eared and worn than any of the others on that shelf. The book opens easily to page 402, where a paper clip marks the beginning of U.S. District Court Judge Luther Bohanon's opinion in *Battle v. Anderson*, a landmark prisoners' rights case. Cases such as *Battle*, *Sostre v. Maginnis*, *Hutto v. Finney*, and *Pugh v. Locke* are so familiar to prisoners' rights lawyers (and to many prisoners) that the books and the case names line up like old friends sitting on a park bench.

In each of these cases mentioned, one prisoner's sense of injustice led him to seek remedy through the courts, changing forever his own life and the lives of his fellow prisoners.

This is the story of *Battle v. Anderson*, a 14-year effort to reform the harsh and oppressive Oklahoma prison system, and the man who began that fight, Oklahoma prisoner Bobby Battle.

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Photo by Randy Pruitt

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History of the Case

Before World War I, when Oklahoma was still enjoying its frontier vitality, Kate Barnard was elected as the first State Commissioner of Charities, the equivalent of Director of Corrections. "Our Kate", as she was called, was a courageous social reformer who established a system whereby inmates who chose to rehabilitate themselves through work programs could gain early release as a reward. Conditions at the Oklahoma State Reformatory at Granite and the Oklahoma State Prison at McAlester ("Big Mac") were to be spartan but sanitary, and the administration was to be strict but fair. However, "Our Kate," although beloved by the public, challenged too many establishment interests during her tenure, and in 1912 the legislature reduced her department's appropriation, except for her salary, to nothing.

Efforts at building a humane correctional program were abandoned after that, and each institution became a political fiefdom, ruled by wardens who bestowed pork barrel favors and unmercifully punished fractious prisoners and errant staff. The classification system so painstakingly developed by Barnard had deteriorated: long-termers and juveniles were routinely thrown in cells together. By 1930, "Big Mac" was bursting at the seams, its population having climbed to 219% of capacity. A system emerged in Oklahoma which paralleled the brutal pattern characterizing American, especially Southern, penal history.

Inmates were often put into the "crib" for punishment, strapped into unnatural and painful positions, and subjected to water torture; they were also made to stand in a circle, three feet in diameter, for an undetermined length of time in the hot sun or winter weather. If the prisoner put one foot outside the circle, guards threatened to shoot.

By 1970, little had changed. Prisoners were still thrown into the hole, naked, for months on end, without light or ventilation, and denied medical attention, adequate nutrition, and exercise. Sadistic guards routinely gassed prisoners. Sanitation was non-existent, racial segregation institutionally mandated, and Judge Bohanon later called the access to legal assistance and material "a joke." Mail was censored, and religious freedom severely curtailed, if allowed at all. Prisoners were not only housed two, three and four to a cell but they also slept in hallways and fire exits. By 1972, the Oklahoma State Prison held 2,350 prisoners. With an incarceration rate of over twice the national average, the state also kept prisoners for 50% longer than the average and had a 70% recidivism rate. For the maintenance of any order they had become dependent on the use of gassings, beatings, and drugs.[1]

The first rift in this barbaric system came in April of 1972, when a prisoner named Bobby Battle filed suit in the United States District Court, alleging that conditions of confinement within the Oklahoma State Penitentiary violated the constitutional prohibition against cruel and unusual punishment. In keeping with the "hands off" doctrine of most courts at that time, the federal court in Oklahoma was reluctant to become involved in state proceedings, especially those involving prisons. Few attorneys were willing to take such cases because they were unpopular, costly to prepare, and there was little or no money in them. Ultimately, it was the intervention of the United States Department of Justice which made it possible to fund the massive discovery and seemingly endless compliance hearings in *Battle v. Anderson*. Until the complete policy reversal of Justice's Civil Rights Division under the Reagan Administration in the early 1980s, the Department played a major role in litigating the case.

Battle was consolidated with numerous other prisoner complaints received by the court, and the Oklahoma ACLU (whose litigation budget was $2,000 per year) was asked by the Chief Judge to supply an attorney to represent the inmates.

The case interested Stephen Jones, an ACLU cooperating attorney at that time, who was assisted by a recent law school graduate, Mary Bane. Bane played a major role in the litigation over the next four and a half years, eventually to be succeeded by Tulsa lawyer Louis Bullock.

Battle v. Anderson alleged violations of the right to due process and equal protection under the law; free speech; access to the courts; and the Eighth Amendment prohibition on the infliction of cruel and unusual punishment.

It seemed, though, that no one in Oklahoma was listening. The *Battle* trial had not even begun before Oklahoma reeled in the shock of a riot and the burning of "Big Mac." On a sweltering day in late July of 1973, smoke and flames filled the rec yard, and the word went out over the public address system: "We've taken over . . . it's a revolution. Come on and help us." The news media carried the story to the people of Oklahoma, and the suffering of over 2,500 of its citizens was no longer a well-guarded secret. Where *Battle v. Anderson* had failed to garner much notice, the riot and burning captured the attention of the public and the legislature. Some observers give equal credit to the uprising and the lawsuit for the eventual

[1]John Thompson, "Why Our Prisons Exploded," The *Oklahoma Observer*, October 25, 1983, pp.8,9.

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Photo by Randy Pruitt

improvement in the Oklahoma system. Official recognition of the problems, however, had been slow in coming: one week before the riot, Governor David Hall had delivered a speech in which he cited prison reform as one of the great accomplishments of his administration.

Three minutes before a 7:30 a.m. deadline, when an all-out assault by the Highway Patrol and the National Guard would have begun (as occurred after the Attica uprising), prisoners released four of the 21 hostages. The rebellion began to calm. Total destruction added up to four people dead, many more injured, and 24 buildings either severely damaged or decimated. Property damage amounted to more than $30 million.

The 1974 Order

Nearly two years after the suit was filed, and nine months following the riot, Judge Bohanon issued a 37-page order [376 F. Supp. 402 (1974)]. He found that the riot had exacerbated an already desperate situation. Prisoners had been on

Photo by Randy Pruitt

24-hour lockdown for nearly a year, forcing total idleness. Lost were any opportunities for involvement in educational and vocational programs, or physical exercise. Bohanon was dismayed by prison records which revealed 19 violent deaths, 40 stabbings, and 44 serious beatings during the time period from 1970 through the day of the McAlester riot in 1973; that included only officially recorded violence. According to inmates, gassings and beatings of prisoners by guards were even more routine, but went unreported.

The court found evidence of racial discrimination which violated the equal protection clause of the Fourteenth Amendment. Cell assignments were made routinely on the basis of race, except in Maximum Security. Despite the fact that this policy had been rescinded in October of 1972, the practice continued: the reception area, the mess hall, the barber shop, and the recreation yard were all segregated, and all job assignments were made according to race. Bohanon ordered that cellhouses be integrated according to a ratio approximating the racial composition of the population. Jobs could no longer be assigned on the basis of color.

At the initial trial in May of 1974, Judge Bohanon sat and listened to outrage after outrage, brutality upon brutality. A captain who testified about the

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Photo by Randy Pruitt

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macing of a mentally retarded inmate said, "He was just like a little kid, you know ... he is just a nut and everyone knows it." Then this same captain acknowledged having gassed another mentally retarded prisoner, admittedly not dangerous, for the crime of "destroying state property ... i.e., breaking spoons." A prison chaplain testified that a prisoner was beaten during a disciplinary hearing after balking at being told to "go get a nigger haircut." The guard "began to hit him on the head with his gas gun or whatever instrument that he carried." That prisoner was pistol-whipped inside the hearing room.

Use of mace or other chemical agents for punishment rather than control was found to violate the Eighth Amendment prohibition against cruel and unusual punishment as well as Oklahoma law, which specifically outlawed corporal punishment of prisoners. The court found that guards were gassing prisoners at McAlester for such misconduct as refusing to get a haircut or shave, possession of contraband (like instant coffee) in the cell, destruction of state property (such as breaking spoons), and screaming for a doctor.

Medical facilities were found to be grossly inadequate on both a routine and an emergency basis. In addition, guards and inmates screened medical complaints and provided nursing care. The court proceeded to detail minimum standards for medical, dental and psychiatric care.

The judge concluded that correspondence to and from inmates had been arbitrarily and unreasonably interrupted and delayed. Letters to any attorney other than one "attorney of record," to the federal courts, or to federal government officials were not granted the "sealed" privilege. Personal correspondence was routinely opened, censored, copied, and recorded. Even legal mail, often containing complaints about the miserable conditions, was opened regularly.

"You've got to understand," said plaintiffs' attorney Mary Bane, "they were just tearing up the prisoners' pleadings and not mailing them out."

Judge Bohanon ordered an immediate halt to such censorship.

Muslim prisoners had not been permitted to hold religious meetings, nor were they entitled to a pork-free diet, as required by their religious laws. After the riot, a Muslim minister said in newspaper accounts that he could neither confirm nor deny that Muslim inmates were involved, because they would not let him into the prison. He had been trying to get in for nearly four years.

Absolutely key to successful prosecution of the prisoners' lawsuit were the depositions taken from correctional personnel candidly describing conditions within the prison and the routine brutality by staff against inmates. The matter-of-fact attitudes revealed in the depositions shocked and infuriated Judge Bohanon.

"I don't think we convinced Judge Bohanon until he sat down and read those depositions," said ACLU attorney Mary Bane. "Being the kind of judge he is, he was totally incensed. Reading those

depositions would set any halfway decent person's teeth on edge.

"They [prison officials] weren't afraid of us, weren't afraid of the lawsuit. Their attitude was, 'Nobody's going to interfere with us, how dare you poke your nose in here.' It didn't faze them one bit. It was such arrogance of power.

"They were continually throwing Bobby [Battle] in the hole, for nothing, and saying, 'You'll stop this,' but he didn't stop. Four or five of them [prisoners] just wouldn't stop."

In summary, Judge Bohanon ordered that the East and West cellblocks of McAlester and Granite Reformatory be closed, that the state end racial segregation, allow due process in disciplinary hearings, cease the use of corporal punishment and chemical agents as punitive measures, stop the confinement of prisoners in "subterranean isolation," provide adequate medical care and access to legal materials, and allow religious freedom.

The Oklahoma prison system would meet constitutional requirements, ordered Judge Bohanon, and he held hearings at about six-month intervals to make sure of it.

For the first five years the state stubbornly opposed the ruling. Oklahoma's already anomalous rate of incarceration climbed even higher. Crowding and sanitation failed to improve. Medical and psychiatric treatment and law library access still fell short. Two inmates were gassed to death for minor infractions. The classification system was still faulty, allowing some inmates to prey upon others.

By 1976, the prison population had increased to over 4,200. In 1977, Judge Bohanon reluctantly reopened the case and placed a ceiling on the inmate population. Prisoners, he ordered, would be allowed 60 square feet of cell space instead of the 17.5 square feet which was common, and he ordered that the firetraps, inadequately ventilated buildings, and foul and unsanitary units be eliminated or cleaned up.

In October of 1977, the United States Court of Appeals for the Tenth Circuit upheld Judge Bohanon's order. In perhaps the most important and enduring legacy of the *Battle v. Anderson* case, the Court of Appeals ruled that a prisoner, while he does not have a federal constitutional right to rehabilitation, *is* entitled to "be confined in an environment which does not result in his degeneration or which threatens his mental and physical well being." [564 F.2d 388 (1977)].[2]

Judge Bohanon was impressed by the investment of hundreds of millions of dollars into the system and the new spirit of cooperation ushered in by Governor George Nigh's administration in 1979. Overcrowding, nonetheless, strained the system beyond its capabilities. Louis Bullock, ACLU attorney for the prisoners, told the judge he was afraid that the system was on the verge of being destroyed by dangerous overpopulation. Looking back, Bullock now says, "By 1980, Oklahoma had one of the best prison systems in the nation. The prisons were new, they were generally well staffed, and very importantly, they were single celled. Then, with the Supreme Court decision in *Rhodes v. Chapman*, 452 U.S. 337 (1981), the district court was forced to modify its orders which prohibited double celling." Bohanon believed that the influx of prisoners into the system designed for far fewer was pushing it back into the "twilight" of constitutional compliance.

Bohanon recused himself from the case in 1983. "I think the *Rhodes* case really made me get out of it. They have everything now that *Rhodes* calls for," says the judge. Costly improvements in conditions had been made, but there were still many problems. Because of the population increases and the need for money, "I felt like I had to either deny further relief or start taking it over and hope to find money to run it through a receiver. By that time, I had

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[2]This important principle was first enunciated by Judge Frank M. Johnson, Jr., in the Alabama prison case in 1976. *Pugh v. Locke*, 406 F.Supp.318 (M.D.Ala.1976).

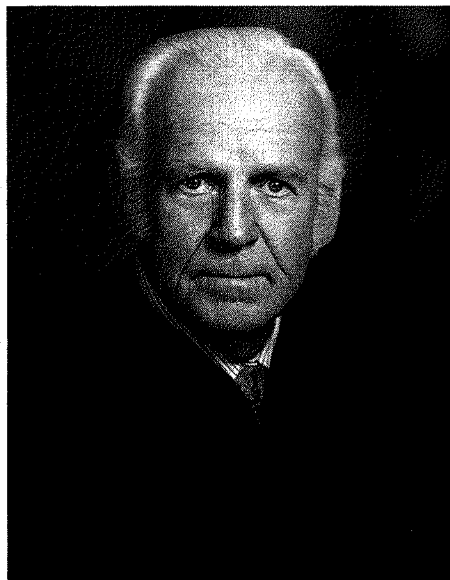
Judge Bohanan is now 84 years old, although he looks younger. He has a shock of white hair, rosy cheeks, and muttonchop sideburns. He is modest about his role in prisoners' rights history:

"I really knew nothing about prison matters. Through this case I did a lot of studying and reading. The Justice Department as well as the ACLU put on exceedingly good evidence of past behavior and the necessary things a court must do to correct the abuses. Those lawyers were exceedingly well-trained and competent."

NPP: When you first took this case, did you see that it might be of historic importance?

Judge Bohanon: Oh, yes. Oh, yes. I saw it was a very important case. After reading those depositions . . . how could they treat people like they did? It was shocking. Literally shocking.

NPP: Did you believe at the time that federal court intervention was



the only way to turn things around [at the prison]?

Judge Bohanon: There wasn't any question about it. Court intervention had to be. If it wasn't for the court, it might be just like it was in the last century. People hate to spend money to feed, to doctor, to care for, to clothe, to house a prisoner. They didn't even have a doctor down there. But it was a shocking thing for people to understand that the federal court had the duty under the Constitution to see that the state penitentiary met certain standards of treatment and it took a long time for it to soak in.

NPP: What role did the riot and the burning play?

Judge Bohanon: It made the Governor and others want to punish the people for the riot. And they *were* punished. They were put two, three, four to a cell, fed little or nothing, locked up for a month at a time, no exercise; they did everything to punish them not only to show that they were mad, but that they were determined *not* to do anything to alleviate the situation. They made their bed, they could lie in it.

Prisoner frustration continued to mount. Several disturbances occurred after the 1973 riot, including the burning of the isolation unit, "the rock," in 1974.

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created so much ill will. . . . In particular, the Civil Rights Division of the Department of Justice had turned the tables on me when they pulled out. Without the Civil Rights power and money, there wasn't much I could do."

When asked what effect the Justice Department's pullout had on the case, Louis Bullock replied, "Actually, Justice didn't pull out, they switched sides. If they had pulled out, which is what we asked them to do but which they refused to do, their actions would not have been nearly as destructive. By throwing their weight against the plaintiffs, they seriously changed the dynamics of the case. I have serious reservations about whether the United States Government should ever take the side of state governments against civil rights plaintiffs . . . The concept of the Justice Department's Civil Rights Division as an intervenor against civil rights plaintiffs is an 'Orwellian' reality which I find frightening."

Like the French saying, "The more things change, the more they stay the same," the situation in Oklahoma has improved remarkably, yet remains caught in a cycle of overcrowding and violence. According to Bullock, "For all intents and purposes the prison is closed and a new one has been built. Also dramatic is the fact that such things as racial integration and due process, as well as certain measures of religious freedom have become accepted day-to-day occurrences . . . Violence and the threat of violence continue to be prevalent in the lives of these inmates, and for all of the due process protections, the reality of life in prison is still one of arbitrary authority wielded by the officials . . . The due process merely seems to be a window dressing provided to avoid judicial review of what is otherwise a predetermined and arbitrary decision. The lawsuit did make a difference. The record is quite clear that it is only because of litigation that these improvements were made. The *Battle v. Anderson* lawsuit was the central focus for all reforms, whether court ordered or 'state initiated.' "

Bobby Battle

Life in prison is predicated on mistrust and hostility. For some men and women inside, presenting grievances to a court of law regarding unconstitutional living conditions may be the key to reversing a lifetime of failure; a way to build confidence and gain respect. It can also provide the rare opportunity for lasting friendship between inmate and lawyer. The adversarial relationship between a prisoner and his keepers will most likely be aggravated by the filing of a lawsuit, yet it allows one of the few legitimate expressions of resentment and hope for change. As Richard Korn, noted expert on prison psychology, observed, "By persuading outsiders to acknowledge their terrible circumstances, prisoners can obtain confirmation that their difficulties are not 'merely' internal."[3] The process of becoming a prisoner-plaintiff can strengthen the thin thread that binds self-respect and the reality of life within a closed and often cruel society.

What drives a Martin Sostre, a Pat Canterino, a Bobby Battle, a Dwight Duran, or a David Ruiz forward out of forsaken surroundings in search of a measure of dignity for themselves and their fellow prisoners? Where does an ordinary person, however alienated under other circumstances, acquire the courage and the will not only to do the work to grasp the necessary legal skills, but to follow through, sometimes at great personal risk? Those "jailhouse lawyers" who undertake such a task are often subjected to harassment, both psychological and physical, by prison administrators.

Of course, a lawsuit documents prison life only through the eyes of lawyers and expert witnesses. It leaves out the desperate search for self-respect in a place devoid of any dignity of its own. Here is a small part of the story of one man who, in that search, used the law in his own behalf and on behalf of his fellow prisoners.

"No one had ever taken them on before," said Mary Bane, "I think it took guts."

According to Louis Bullock, Bobby Battle is "charismatic . . . he has a phenomenal amount of courage and intelligence. If it had not been for his courage and his intelligence the lawsuit would never have gotten off the ground. His refusal to buckle under heavy pressure during those first years is to be credited."[4]

"Over the years," said Oklahoma ACLU Director Shirley Barry, "you hear about all kinds of terrible abuses, and people want something done about them. However, those who will put up with the attacks and with an unsympa-

[3]Richard R. Korn, "Litigation Can Be Therapeutic," *Corrections Magazine*, October 1981, p.48.

[4]Clyta Foster Harris, "A History of the Oklahoma Prison System—1967-1983," Unpublished Ph.D. dissertation, University of Oklahoma, 1985.

thetic public are few and far between, and they certainly do suffer in the state of Oklahoma. Bobby Battle is one ... It takes a special kind of courage."

"I saw such a division between what was supposed to be and what was," says Battle, "and that strengthened my belief in what was right and what was wrong ... motivated me to fight for the rights of prisoners and other oppressed people."

No stranger to political organizing within the walls, "Bobby is a virtual hero in Oklahoma among prisoners," according to Bullock. "He is a symbol to activist inmates."

In 1970, Captain B.E. Mann beat a prisoner named Raymond Fowler, who was reported to have weighed under 100 pounds. Several inmates, including Battle, looked on in horror as 275-pound Mann pulled Fowler out of a disciplinary hearing, kicking and beating him nearly senseless with his gas gun. The next afternoon hundreds of prisoners refused to return to their cells, in a sit-down strike led by Battle and several other prisoners. The assault infuriated inmates who were already angered by the appalling and fearful conditions under which they were confined.

Several of the inmates wanted to take hostages and make demands through force, but Battle persuaded them to conduct a strike in the yard, where they insisted on seeing the Governor. Having pooled their money for coffee and sandwiches, they sat in the rec yard and waited. Suddenly, they heard what sounded like a tractor, looked up and saw a huge tank barrelling towards them. The gun was never fired, and the prisoners remained in the yard at Battle's urging, only slightly calmed by his assurances that "if they fire, they'll kill us anyway, so there's no sense in running."

Battle and the other strikers spent the next 90 days in the hole. Physical abuse of prisoners by guards became even more flagrant after that.

Chosen by their peers, Battle and five others submitted a list of grievances to administration officials. It was that list, drawn up in 1970, which laid the groundwork for *Battle v. Anderson*. "We asked them to make changes, tried to clear the air. We realized it couldn't happen overnight. But things were getting so bad. Guards were openly beating prisoners," Battle said. He tried to find out about other prison systems, such as Denmark, Sweden, and other states in the U.S., to see how prisoners were treated there. He could see that by almost any standard, Oklahoma prisoners were in a very bad way.

Battle was no favorite among prison administrators because of his activity as a writ writer. One of the grievances filed by the prisoners requested that they be allowed to purchase their own law books, to which the warden responded: "Inmates may not purchase their own law books. This practice enables certain talented inmates to become professional writ writers which results in the courts being flooded by frivolous writs and the more gullible inmates being milked of their few assets—i.e. another opportunity for an inmate racket to flourish." And, as the inmate handbook distributed at orientation pointed out,

You are bound to meet 'jailhouse lawyers,' prison wise guys and know it alls who will no doubt tell you to ignore these rules and regulations. Pay no attention to them; they mean you no good ... Don't let another inmate 'Rib' you into doing something that you know is not right. Just use common sense, good judgment, conduct yourself like a gentleman at all times and Good Luck.

The grievance list included a request that prisoners sentenced to death be allowed outside once in awhile. The only time death row prisoners ever left their cells was for an occasional visit, or for the final walk to the execution chamber.

"When you see those grievances, you can see that we were all but crawling," says Battle, "trying to get them to just give us a little air."

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The Killing of Robert Forsythe

"After the riot," said Bobby Battle, "they brought me back to McAlester and locked me up on 'the rock' [isolation] for months. Nobody ever told me what I was charged with.

"The rock was a bunch of small cells with solid steel doors—real old, dungeon-type cells. The bed was a slab of concrete, that's why it was called the rock.

"There was a kid in the trusty building named Robert Forsythe, who they'd found with some cash on him, maybe ten dollars. That was grounds for being thrown down into the rock. In May of 1974 he came down there, at the same time we got word that the guards were planning an assault on the leaders of the riot.

"We heard about it from a convict medic assistant who overheard some officers talking with the warden about how to combat the ongoing rebellion. The best way, they said, was to get the 'leaders.' And the leaders were housed on the rock where they'd brought this innocent kid for having too much money. We prepared for the gassing by getting as much mineral oil [to coat the inside of their throats and stomachs] as we could, that's the only protection we had. This kid's out there and he don't know anything and we can't teach him everything he needs to know to protect himself. In come 15, 20 guards, and they've got all kinds of gas ...

"Forsythe's the one who died. Robert Forsythe. And that's how he lost his life. When they came that day to gas, nobody was getting up any noise, nobody was talking. It was real quiet. They came in, one or two of them walked down the rung, couldn't get anybody to smart off or anything. The first thing they did was cut off the water to the toilets, which means you can't flush out the gas. Then they cut off the fan. When they locked all the shutters on all of the windows, that's when I knew ...

"It seemed like hours they were setting those cannisters off, and the gas was thick. The officers had all come prepared with gas masks. Forsythe asked the running boy named Alvin to find him a pen, so much of that gas was eating his insides up. A ball point pen, he wanted to stick it through his armpits and tear his veins out so he could die real quick. I sent him some mineral oil after I drank half of what I had, but it was too late. He didn't know what to do, and he just stood up and breathed all that gas. He didn't know."

Four other prisoners were hospitalized as a result of the gassing, three of them for a week. The State Medical Examiner, Dr. A. Jay Chapman, found that Forsythe's death was caused by "severe inflammation of the entire airway from the area of the larynx and including the lungs."[5] Nevertheless, he ruled the death "accidental." Two guards were transferred to other correctional facilities and one was fired in connection with his death. Under pressure from an FBI investigation, Warden Sam Johnston resigned. No charges were ever brought.

[5]Harris, p.108.

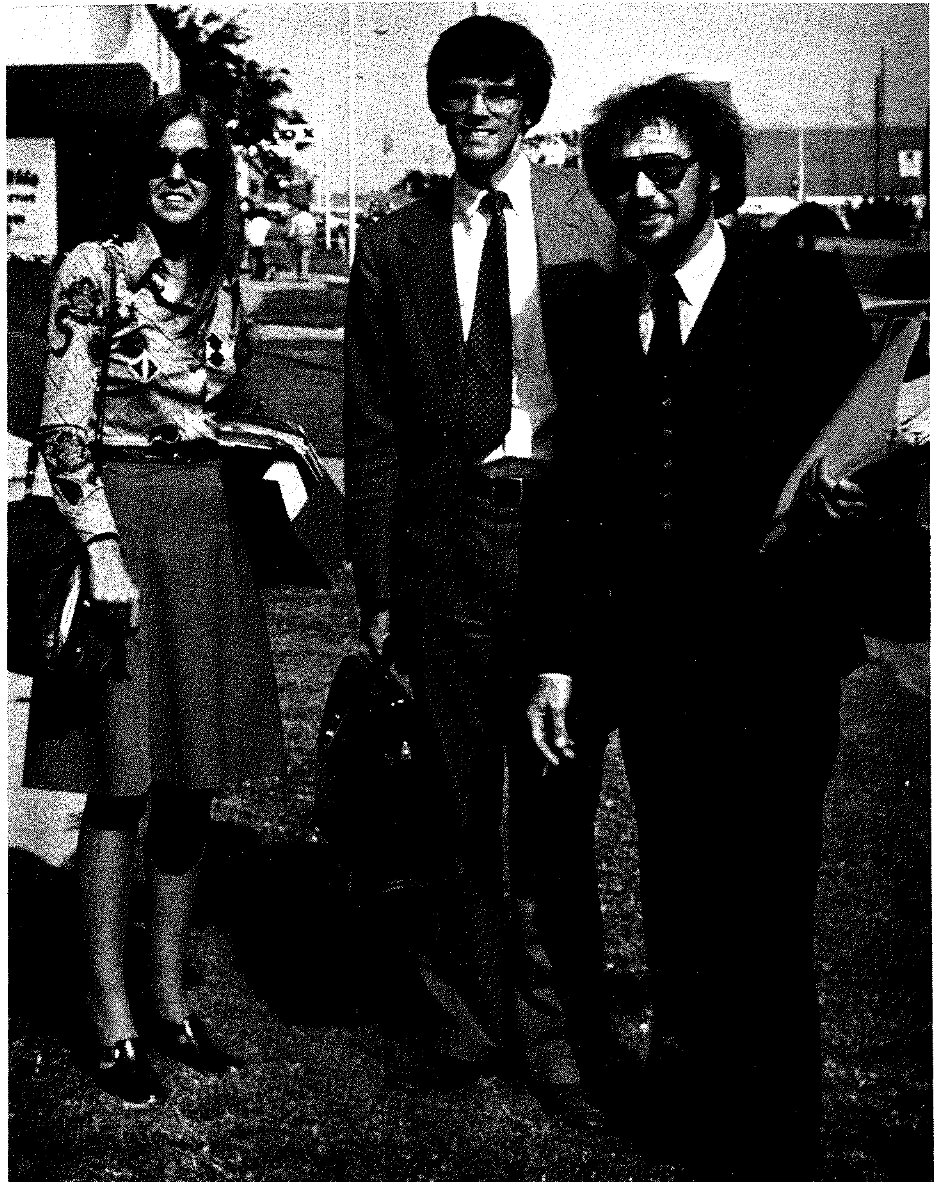
I am generally satisfied with the effort we have made in trying to accomplish the task. Of course, I wish that Judge Bohanon had not withdrawn from the case. I believe that if he had not, there are some things which still could have been accomplished, including major improvements in the manner in which women are treated by the system. The real problems which eventually prevented the plaintiffs from realizing the success which I believe could have been achieved were those caused by the Supreme Court, particularly in its Rhodes decision, and by the Justice Department's political operatives. Those created too strong of a tide for even those judges who knew what needed to be done. My personal regret is that we did not achieve the success I had hoped for. I do not regret that we tried.

—Louis Bullock

In filing the lawsuit, Battle showed he had done his homework. He knew that the allegations of racial segregation might entice the federal government to join the lawsuit on behalf of prisoners in order "to compel . . . integration within the Oklahoma State Penitentiary as required and is acceptable by the Federal Government."

While Battle's role in the lawsuit was very important in the first stage, he has not played a significant role in the litigation since 1975. Released from prison in 1981, he has continued his fight on other fronts, forming a group called the Committee Against Prisoner Exploitation (CAPE), aimed at registering exconvicts to vote. He uncovered a little-known state law which allowed convicted felons to vote after their prison term had expired, even if they had not been pardoned by the governor. "This will help ex-offenders," said Battle, "get back into the mainstream. They are pushed together . . . but they have no representation or way to approach legislators."

In November of 1984, Bobby Battle pleaded guilty to one count of a federal indictment alleging possession with intent to distribute an ounce of cocaine. Battle, then 47 years old, told U.S. District Judge David Russell that he sold cocaine to someone he thought was a friend but who turned out to be a government informant. Some consider the arrest a frame-up in retaliation for his activism against the state. While Battle did in fact commit the crime, many feel he may have been set up by law enforcement officials who were determined to "help" him fall back into his old ways. He had already spent 18 years of his life in prison. The judge handed down a four year sentence on the drug charge, and ordered Battle to be taken into custody immediately, as a threat to the community. He denied requests from both the defense and the prosecution to give Battle 30 days to get his affairs in order.



Oklahoma ACLU Staff photo

Standing outside the federal courthouse in McAlester in 1976 are counsel for plaintiffs Mary Bane, Louis Bullock, and Charles Ory.

"Bobby Battle deeply disappointed me," says Louis Bullock. "People like simple heroes. Battle was a man who fought for reform and who had given up on his past illegal ways. People could believe in him, listen to his message and hear it with clarity. When he committed another crime, he kept his voice from being heard with any clarity. He was no longer a simple hero. He was a complex man and what he said became discordant. He reaffirmed some people's view that inmates are beyond rehabilitation."

According to Bullock, history has shown that Battle fares better inside institutions than outside. "Even when he's out of prison, he's fascinated by and interested in what is happening in prison. To be successful on the outside, the guy has to quit talking about prison."

"I simply cannot disassociate myself from prisoners when I am out," argues

Battle. "People who say that don't understand me. To me, any person who lives out there in Texarkana on the poverty level is a prisoner. Those are the people who fill up the prisons."

He would like to see a prison which teaches inmates how to live on the outside. "When I got out of prison I didn't know how to eat. I went to dinner with my lawyer and I was ashamed because I didn't know how to handle the utensils."

Battle is currently serving out his sentence at the El Reno Federal Correctional Institution in Texarkana, Texas, where prison officials refer to him as "Mr. Battle." Slightly built and softspoken, his power comes from within. Despite his limited education (grade-school), he is articulate and chooses his words carefully.

"Looking back on my efforts, and the efforts of others, I feel good. Especially when I see these young folk coming into the system today ... to see how much it's changed since my McAlester days. It's better than it was."

Like many prisoners, Battle's sensitivity to injustice is finely tuned, and his refuses to die. Battle points out that most prisoners at El Reno are Hispanic, but not one of the three unit managers can speak Spanish. "I have spent a lot of time trying to explain to these people what they're charged with, or just helping them write a letter. They have come into a situation of slavery where there's no help for them."

Bobby Battle's long struggle against injustice has earned his name a place in prisoners' rights history. One hopes that the self-respect he gained in that fight will help him find a place for himself in another world, outside the walls. ■

Jan Elvin is the editor of the JOURNAL.

Much of the material for this article was gathered from personal interviews with Mary Bane, Shirley Barry, Bobby Battle, Judge Luther Bohanon, and Judge Tom Brett; correspondence with Louis Bullock; and material from the Stephen Jones Collection, Western History Collection, University of Oklahoma. My thanks for all the time these individuals gave me.

Jail Inspections Trigger Improvements

Greye Verstraete

In 1982, the ACLU of Montana concluded a successful conditions lawsuit against the Yellowstone County Jail in Billings, working in conjunction with the ACLU Mountain States Regional Office. The Yellowstone County Jail was considered by many to be one of the better jails in the state. This victory, compounded by numerous complaints received from inmates in other jails, prompted the ACLU-MT to instigate a series of jail inspections in January 1985 to determine if further lawsuits were warranted.

Now, nearly two years later, the ACLU-MT has completed tours of 16 of Montana's worst facilities. Not one lawsuit has been filed, but something surprising and ultimately more productive has happened. Through these inspections, the ACLU has been able to engage in open and frank discussions with local officials about conditions in their jails. ACLU volunteer paralegal Greye Verstraete, who directs the program, has developed a professional relationship with jail personnel, educating them about jail standards and working with them to make needed changes. With few exceptions, local sheriffs have welcomed the ACLU, knowing that its findings and, indeed, just its presence, can help convince local governments that funds are needed for jail improvements. The generous publicity which has accompanied most inspections has helped to educate the public and, again, to provide the incentive to county boards to make jails a priority.

These negotiations have resulted in numerous voluntary improvements in jail conditions. Exercise equipment has been purchased or repaired and put into use. Outdoor recreation facilities have been constructed. Inadequate inmate rules and regulations have been completely rewritten. Restrictions on rehabilitative programs have been eased and jail personnel have received first aid training and courses on jail management practices. Some facilities have added automatic sprinkler systems and secondary exits for emergency evacuations. The visits prompted many jails to give the cell area a thorough washing, to fumigate for pests and often to repaint. Some jails were inspired to purchase new towels, blankets and coveralls for the inmates.

... The ACLU has been able to engage in open and frank discussions with local officials about conditions in their jails.

Only one county has resisted the attempt to inspect their jail. While they did not actually refuse entry, they did demand an inspection fee of $15 per hour, plus excessive fees for photocopies. The ACLU publicly protested these outrageous charges, which prompted a local corporation to step in and pay for the inspection. In two other instances, the request for a jail inspection has come from the community itself. In fact, one county, located in a remote corner of the state, has decided to fund an ACLU inspection of their jail, from their own budget.

This year, as a result of the Jail Inspection Program, the ACLU-MT was asked to participate in a statewide Jail Recodification Committee sponsored by the State Board of Crime Control. The task of the committee is to revise Montana statutes relating to jail management and conditions. The ACLU is working with the Montana Sheriffs' Association to incorporate current national jail standards into state law, as well as advocating further improvements in the code such as "good time" provisions, the installation of a state-run jail inspection program, educational programs for inmates, mandatory first aid training for jailers, menus planned by registered dieticians, and criminal penalties for abusive jailers. The committee's recommendations will be presented to the Montana Legislature in January 1987. Once counties know what is expected of them under state law, it is believed that more changes in Montana jails will be forthcoming. Clear state standards will also make it easier for inmates to challenge inadequate conditions.

This process, spearheaded by the initial lawsuit, and involving public education and a cooperative effort with local and state officials, has resulted in the beginning of meaningful change in Montana's jails. ■

Greye Verstraete is a staff paralegal with the Montana Civil Liberties Union.

AIDS Policies Raise Civil Liberties Concerns

Larry Gostin

In the Winter 1985 issue of the *JOURNAL* we reported the results of an NPP survey of state correctional systems which identified both the scope of AIDS in prison and what states were doing to manage its occurrence. In the following issue we provided some medical background about AIDS, and discussed two of the major policy questions: whether to screen inmates for the HIV antibody, and whether to segregate inmates with AIDS related conditions. We also broached some of the emerging legal issues. In this article, Dr. Gostin gives his views on the above mentioned policy questions from a public health standpoint.

Testing for the AIDS virus and segregation of AIDS carriers raise extremely important civil liberties questions in contemporary corrections. The NPP survey revealed 420 cases of fully diagnosed AIDS cases in state prisons across the country. Given the AIDS-to-infection ratio used by the U.S. Centers for Disease Control, there are between 21,000-42,000 prisoners infected with HIV. Up to 30% of these prisoners will probably develop some serious manifestations of AIDS.[1] More importantly, this figure may continue to double every year.[2] Corrections departments have responded to the AIDS crisis in a variety of ways: 90% use the ELISA test to detect antibodies to the AIDS virus (human immunodeficiency virus-HIV); 8% have already instituted systematic screening of the prison population; virtually all states segregate prisoners with AIDS; and educational programs have been undertaken by most systems.[3]

A policy of full-scale screening and segregation may be adopted throughout the country within the next five years. Erosions of the civil rights of prisoners in recent years suggest that the courts will uphold prison discretion to test and segregate, provided there is a colorable public health rationale.[4] Screening sets the stage for widespread invasion of privacy for prisoners, under the guise of public health, while segregation may take place under conditions which trigger Eighth Amendment violations.[5] In a recent report for the U.S. Assistant Secretary for Health, my colleagues and I at the Harvard School of Public Health argued strongly against screening and segregation in prisons.[6]

Public Health Objectives

Effective public health measures to control the spread of AIDS in prisons can be implemented without harming the civil liberties interest of prisoners, for the right to a healthy and safe environment is their primary right. There is no direct conflict between public health and civil liberties. Protection of the latter should be seen as a means to effectively achieve the former. The real question is whether screening and segregation are effective public health measures, and whether there are less restrictive, more effective interventions available.

Antibody screening and segregation of AIDS carriers would be an effective policy if HIV were an airborne virus, or if early identification offered therapeutic value to patients. Prisoners have the right not to be exposed to a communicable disease by their association with guards or other prisoners. But HIV is not spread through non-intimate contact. Several careful studies have shown that, even in the close association of family units and in hospitals, HIV has never been communicated non-sexually. HIV is transmitted almost exclusively through the use of shared intravenous needles and sexual intercourse. These are the behaviors to be focused upon and prevented.

The screening and segregation of the prison population according to serological status does not in itself reduce high risk behaviors. More effective public health policies would stress broad educational efforts designed to inform inmates about preventive and risk behaviors. Informing prisoners of the potential harm in unsafe consensual sex, forced sexual acts or intravenous drug use is essential. While the real challenge is to discover and prevent unhealthy *behavior*, prison resources are being increasingly used instead to detect who is seropositive and who is not.

Some state corrections departments also claim that screening is necessary as a diagnostic tool and that isolation of AIDS patients is necessary to prevent immunosuppressed individuals from acquiring infections in the prison environment. Yet, if the purpose of screening were purely diagnosis of AIDS, then it would be administered only where therapeutically indicated with the prisoner's consent, and not on a systematic basis. Further, the limited objective of protecting immunocompromised prisoners could be achieved without a mass screening program by hospitalization of AIDS patients where necessary on a case by case basis. Finally, the HIV antibody test is not in itself an adequate diagnostic tool and should not substitute for comprehensive medical examinations and laboratory tests.

A policy of full-scale screening and segregation will probably be adopted throughout the country within the next five years.

Restriction of Rights Caused by Prison Screening and Segregation

The widespread collection of information on the serologic status of prisoners and the isolation of AIDS carriers unnecessarily invades the privacy of prisoners. The existence of a large collection of sensitive, personal data can have serious consequences for prisoners if disclosed. In Delaware, for example, an arbitrator ruled that state corrections officers be given the names of HIV antibody positive prisoners pursuant to a collective bargaining agreement. Disclosing an-

[1] Gostin, "Acquired Immune Deficiency Syndrome: A Review of Science, Health Policy and Law", *Health Matrix*, Vol. IV, no. 2, pp.3-13 (1986).

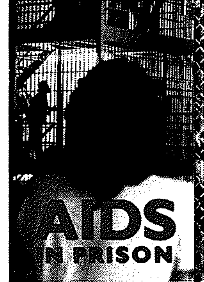
[2] Curran, Meade, Morgan, Hardy, et al., "The Epidemiology of AIDS: Current Status and Future Prospects," *Science*, Vol. 229, pp.1352-7 (1985).

[3] Vaid, "NPP Gathers the Facts on AIDS in Prison," *NPP JOURNAL*, Winter 1985, p. 1.

[4] *LaRocca v. Dalsheim*, 120 N.Y. Misc. 2d 697 (1983) (upheld prison decision to segregate AIDS prisoners but not to maintain a central AIDS unit); *Cordero v. Coughlin*, 607 F.Supp. 9 (S.D.N.Y. 1984) (rejected equal protection claim that segregation of AIDS patients resulted in inadequate social, rehabilitative and recreational activities).

[5] See, e.g., *Cordero v. Coughlin*, 607 F.Supp. 9 (S.D.N.Y. 1984); *Cody v. Hillard*, 599 F.Supp. 1025 (D.S.D. 1984).

[6] W. Curran, L. Gostin and M. Clark, "AIDS: A Legal and Regulatory Analysis," (1986) (avail. from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161). See also, L. Gostin and W. Curran, "The First Line of Defence in Controlling AIDS: Compulsory Casefinding — Testing, Screening and Reporting," *American Journal of Law and Medicine* (in press).



tibody status can expose a prisoner to risk of assault while in prison and to loss of future employment, housing and insurance when released.

Potentially, the segregation of all seropositive prisoners could result in a further health hazard within the segregated population. One of the basic principles of public health law is that the control measure itself should not cause harm to its subjects.[7] There is currently no clear understanding of the natural history of HIV infection; up to 35% of those with the infection will contract the full-blown disease within a five year period.[8] It is conceivable that repeated exposure to the virus through sexual relations or needle use and/or less healthful living conditions could contribute to onset of the disease. Given these risks, to segregate all seropositive prisoners in an environment with the likelihood of repeated exposure to the virus may pose a significantly increased health hazard. Staff recruitment in such an environment would be very difficult. Isolation in inadequate facilities without sufficient opportunity for social integration and use of other prison facilities such as recreational and exercise resources could also lead to serious psychiatric disturbances.[9]

The existence of a large collection of sensitive, personal data can have serious consequences for prisoners if disclosed. . . . [Education] includes explicit information which encourages safer forms of sex and the use of sterilized needles.

The decision to impose mandatory screening and segregation in prison facilities sends a harmful message to the public, as if the state were developing an "AIDS colony." It conveys a leprosy image that will affect public perceptions of the nature of the disease and how to deal with it. It will also further damage the reputation of prisoners in the segregated facility long after discharge. Friends and potential employers would possibly know or seek information about the prisoner's placement in the segregated facility and infer their disease status from that information.

If prison screening and segregation were adopted as policy in geographic areas at high risk for AIDS, substantial parts of the prison population would need to be housed in separate facilities. Since most prisons have serious overcrowding problems, the building of new "AIDS prisons" might be required. To ensure safety, periodic re-testing of the non-infected populations would also be required to identify those individuals who seroconvert. The financial and administrative costs involved in such a program are prohibitive.

Less Restrictive Alternatives to Prison Screening and Segregation

Policies designed to impede the spread of HIV in prisons should seek to eliminate unsafe sexual and drug sharing behaviors, already proscribed in prison. Corrections officials can seek to reduce these behaviors without instituting screening and segregation. Comprehensive and continuing education about the ways the virus is spread and on specific risk reduction behavior must be implemented. This includes explicit information which encourages safer forms of sex and the use of sterilized needles. While such education is difficult in prisons where these behaviors are not permitted, it is nonetheless necessary for maintaining the health of the prison population. Tackling the problem of coerced sex in prison is essential, not only because of the public health implications, but because it is a gross invasion of personal rights. Corrections officials should establish stringent preventive measures, whether or not the aggressor is seropositive. The introduction of better lighting, increased staffing, staff training, and improved supervision, monitoring and enforcement to prevent such dangerous activity should clearly be the major priority. The presence of HIV in America's prisons should be a strong reason to re-double efforts in this direction.

There is no direct conflict between public health and civil liberties.

Conclusion

Prisoners are likely to be subjects for screening and segregation programs—not in order to promote public health, but because prison populations are easy targets due to their political impotence. Unproven control measures not implemented widely in the general population are often first tested in closed institutions where it is administratively easier. In the case of AIDS screening, the availability of a medical technology has inappropriately determined the social policy. Screening and segregation will not protect the health of prisoners, will be a serious invasion of their privacy, and will divert attention from less restrictive, more effective policy alternatives. ■

Larry Gostin is a lecturer in Health Law at the Harvard School of Public Health and the Executive Director, American Society of Law and Medicine. He is also on the National Board of Directors of the American Civil Liberties Union.

[7]See *Kirk v. Wyman*, 65 S.E. 387 (S.Ct.S.C. 1909).

[8]H.W. Jaffe, A.M. Hardy, Morgan W. Meade, et al. "The Acquired Immunodeficiency in Gay Men," Ann. Intern. Med. 1985; 103: 662-664. D.P. Francis, H. W. Jaffe, P.N. Fultz, et al., "The Natural History of Infection with Lymphadenopathy-Associated Virus Tuman T-Lymphotropic Virus Type III," *Ann. Intern. Med.* 1985; 103: 719-722.

[9]Gostin and Staunton, "Rights of Prisoners: A Case for Minimum Standards," in McGuire, Vaag and Morgan, *Prisoners and Accountability*, London: Tavistock, 1985.

The District of Columbia Chapter of the American Red Cross is sponsoring **The American Red Cross Conference on AIDS and IV-Drug Use** to be held Friday and Saturday, February 27 and 28, 1987 at the Sheraton-Washington Hotel. This conference is the first in the nation to deal specifically with the issue of AIDS as related to IV-use. The conference will have 300 participants and will consist of three keynote speeches, two panels, and 35 workshops. Workshops will examine IV-use/AIDS issues as they pertain to organized religion, health and social service, women and children, public policy, scientific research, the neighborhood, and the "worried well."

The Conference is undertaking a special advocacy for the plight of the IV-user with AIDS. It will ask the hard questions society needs to address about addiction, pharmacology, free needles, and HIV transmission prevention. The heterosexuality of most IV-users infected with HIV presents an excellent opportunity for the virus' entry into the general population. The American Red Cross Conference on AIDS and IV-Drug Use, by frankly addressing these sensitive problems, is attempting to provide a forum whereby the serious issues which surround AIDS and IV-use will receive widespread public attention.

To register, contact Sheila Gallagher, (202) 728-6554.

JERRY M. v. D.C.

Settlement Reached in Juvenile Case

Mary E. McClymont

Extensive and often exhaustive negotiations with officials of the District of Columbia and their lawyers have finally resulted in a court-approved settlement concerning the three D.C. secure facilities for juvenile offenders. Under the comprehensive agreement, reached in July 1986, the District promised wide-ranging reform: closure of one of the facilities, Cedar Knoll; a major restructuring of the juvenile residential system; a cap on the number of secure beds in the system; and extensive improvements in all aspects of resident living in the facilities. The District further agreed to the appointment of Michael Lewis[1] as the court's monitor under the settlement and to the designation of a number of expert consultants who will devise plans to achieve compliance.

Jerry M. v. District of Columbia was originally filed by the D.C. Public Defender Service (PDS) in March 1985 in the local D.C. Superior Court. The National Prison Project joined in as co-counsel for the plaintiff class, which consisted of all juveniles residing in the three secure facilities—Oak Hill, Cedar Knoll, and the Receiving Home.

The suit was filed in the face of numerous long-standing problems at the institutions, and the case was assigned to the chief of the Family Division, Judge Ricardo Urbina. The suit alleged Fifth and Eighth Amendment violations in the District's failure to provide adequate treatment and safe conditions of confinement for youngsters. The complaint also alleged a violation of the D.C. statute which ensures youthful offenders care and treatment in as homelike a setting as possible.[2] Discovery began in earnest in November 1985 on a broad range of issues; over 50 depositions were taken, and a large number of expert tours were conducted. It is no secret that the District has one of the highest detention rates in the country for its youthful offenders. The Cedar Knoll facility had residents sleeping in the dayrooms and in packed dormitories, and all the facilities were beginning to burst at the seams. We not only attacked overcrowding, substandard environmental conditions, and inadequate medical and mental health care, but also challenged the dearth of rehabilitative programs and special education services for the troubled youth.

On top of our lawsuit, at the request of a U.S. Congressional committee, the U.S. Government Accounting Office (GAO) began an investigation of the District's utter failure to provide special education services required by federal law, P.L. 94-142. The landmark *Mills* case, which was brought against the District in the 1970s and which served as the precursor of P.L. 94-142, had never succeeded in ensuring that educational services actually reached the delinquent population in the District. No special education was being provided to a population obviously in need of it.

A grand jury investigation also placed pressure on the troubled juvenile facilities. Employees of the Youth Services Administration (YSA) were being investigated for corrupt overtime practices and policies. The *Washington Post* simultaneously published a string of telling articles, revealing abuse after abuse in the YSA.

It is no secret that the District has one of the highest detention rates in the country for its youthful offenders.

We believed that the distress within the agency boded well for a good settlement of the suit. Nonetheless, the District's lawyers pressed on, not only responding to our substantial discovery but conducting a good deal of their own. Despite several meetings in March and April 1986 with the District's lawyers, no meaningful settlement effort began until June, when the YSA director was fired by D.C. Mayor Marion Barry.

We had continually pushed for three major pieces in the agreement: the appointment of a monitor; a cap on the population; and the closure of Cedar Knoll. Our negotiations were hard fought; each word, each comma was discussed, it seemed, as we negotiated and finally reached agreement on the major sticking points. At 4 a.m. on July 7, the day the trial was to begin, the parties finally recognized that a meeting of the minds had been reached on all key issues. Soon after we had finally agreed to and sought a continuation of the trial proceedings, the negotiations were concluded. On July 24, the court approved the agreement.

Under the settlement, a court monitor is authorized to gather facts and file regular reports with the parties and the court on compliance, and will assist in the mediation of substantial disputes. In addition, a panel of three experts agreed upon by the parties will determine the number of secure beds the District may use for juvenile offenders and will also design a comprehensive system of community alternatives for juvenile offenders. The cap on the number of secure beds is to be accomplished by no later than December 1, 1987, the same date the Cedar Knoll facility is to be closed. At Oak Hill and the Receiving Home the defendants have also agreed to provide single rooms for the youths.

A grand jury investigation also placed pressure on the District's troubled juvenile facilities.

The agreement further requires an increase in the number of cottage staff as well as increases in mental health, medical, treatment, and education staff. Two consultants have been appointed to devise comprehensive special education and vocational plans. The monitor will be assisted by the appointed special education consultant in overseeing the facilities' compliance in the area of education.

The provisions of the agreement detail comprehensive diagnostic work; treatment planning and services; mental health and social services; aftercare services; medical services; and educational and vocational programming for all youngsters. In addition, the settlement limits the use of disciplinary measures and restraints and further ensures proper due process procedures. Finally, the agreement requires compliance with American Public Health Association and American Correctional Association standards in the area of environmental health and safety.

The provision in the agreement for the design and implementation of a system of alternatives to secure confinement will be a positive step forward. If fully implemented, the reforms promise a favorable impact on the lives of many troubled juveniles in the District of Columbia. ■

Mary McClymont is a staff attorney with the Prison Project.

[1] Lewis served as the Special Master in the Washington State Prison case and is also a specialist in mediation.

[2] At a later stage in the litigation, we also added a claim arguing that the youth were entitled to the least restrictive alternative as a component of their constitutionally required treatment.

Community Service Sentences Pose Problems, Show Potential

Russ Immarigeon

American criminal justice and correctional systems are in a seriously tumultuous state. The National Institute of Justice reported several years ago that nearly all sectors of the criminal justice and corrections community, including prosecutors, probation and parole officials, the courts and corrections administrators, agreed that prison and jail crowding was the most serious problem facing them.[1] As a result, correctional policymakers and planners at all levels of government have found themselves scrambling for inexpensive yet effective remedies.

In this context, community service sentences are routinely offered as feasible alternatives to incarceration. One recent report, for example, suggested that "properly administered, community service programs offer the benefits of reducing correctional costs and jail overcrowding while providing useful services to communities and a more constructive penalty for non-violent offenders."[2] Still another recent report asserted with confidence more than documentation, that community service was a useful measure to "assist in reducing overcrowding of jails."[3]

... [C]ommunity service is rarely used as an alternative to incarceration ...

This is the second in our series on alternatives to prison confinement. (See "Surveys Reveal Broad Support for Alternative Sentencing," 9 *JOURNAL* at 1.)

Past Practice

A brief review of American practices, however, suggests that community service is rarely used as an alternative to incarceration, and is therefore unlikely, by itself, to reduce or control correctional crowding.

In 1977, Beha, Carlson and Rosenblum observed that "the record of community service programs to date in the United States indicates that they have been used primarily for cases that might otherwise be handled by fine or probation, rather than for cases in which a jail sentence is the traditional alternative. In some situations, this is an explicit facet of the program; elsewhere, it is simply a characteristic of the caseload."[4]

In 1980, Hudson, Galaway and Novack evaluated over 20 community service and restitution programs and found that they consistently failed to divert offenders from incarceration.[5] A year later, Harland's national review of community service and restitution practices also found that these programs are "almost exclusively designed either explicitly not to divert offenders from custodial dispositions, or to deal only with offenders who, by virtue of their offense, usually of a minor property type, are extremely unlikely candidates for imprisonment from the onset."[6]

A Dilemma

Given this bleak picture, community service advocates face a crucial dilemma. British community service evaluator Anthony Vass has raised "the serious question whether it is desirable to expand or label methods of control as 'community-based' or 'alternatives' when in fact their capacity or intention to divert is of a very dubious nature. If they do not divert but merely expand the field of activity by offering 'new ways of dealing with criminals', they can only succeed in impregnating the criminal justice system—and its chaotic tariff system—with even more confusion and strain. If they only expand the selection or choice of sanctions without demonstrating a real and direct challenge to penal establishments, at best these sanctions can only succeed in becoming satellites of custodial institutions and, at worst, the leitmotif for their continued existence."[7]

Some Hope

Two recent studies add some needed light to the generally gloomy history of community service as an effective alternative to incarceration by suggesting that community service programs can be designed and implemented to displace offenders from local jails or state prisons.

In the first study, Douglas Corry McDonald, a senior researcher for the Vera Institute of Justice, examines the history and development of the Institute's community service programs in the boroughs of the Bronx, Brooklyn, and Manhattan.[8] In the second, Stevens H. Clarke, a criminal justice researcher with the Institute of Government at the University of North Carolina at Chapel Hill, evaluates the effectiveness of Repay, Inc., a community service and restitution program located in Hickory, North Carolina.[9]

Together, these studies offer a useful contrast in the administrative uses of research by a rural and an urban program designed to focus on jail- or prison-bound offenders, instead of simply serving as an add-on to other non-incarcerative sanctions. They offer no evidence, however, that they can profoundly relieve jail or prison crowding.

Community Service as a Jail Alternative

In late 1978, the Vera Institute of Justice started the Bronx Community

—continued on next page

[1]Stephen Gettinger, "Assessing Criminal Justice Needs," Washington, DC: National Institute of Justice (Research in Brief), June 1984.

[2]American Correctional Association and National Highway Traffic Safety Administration, *The Drunk Driver and Jail: Alternatives to Jail*, Washington, DC: U.S. Department of Transportation, 1986, p.viii.

[3]National Highway Traffic and Safety Administration, *Community Service Restitution Programs for Alcohol Related Traffic Offenders: The 5 A's of Community Service*, Washington, DC: U.S. Department of Transportation, 1986, p.1.

[4]James Beha, Kenneth Carlson and Robert Rosenblum, *Sentenced to Community Service*, Washington, DC: National Institute of Law Enforcement and Criminal Justice, 1977, p.25.

[5]Joe Hudson, Burt Galaway and Steve Novack, *National Assessment of Adult Restitution Programs: Final Report*, Duluth, MN: University of Minnesota School of Social Development, 1980.

[6]Alan Harland, "Court-Ordered Community Service in Criminal Law: The Continuing Tyranny of Benevolence?" Buffalo Law Review, 1981, p.450.

[7]Anthony A. Vass, *Sentenced to Labor: Close Encounters with a Prison Substitute*, St. Ives, UK: Venus Academic, 1984, p.177.

[8]Douglas Corry McDonald, *Punishment Without Walls: Community Service Sentences in New York City*, New Brunswick, NJ: Rutgers University Press, 1986, $30.00.

[9]Stevens H. Clarke, "Effectiveness of the Felony Alternative Sentencing Program in Hickory, North Carolina," Chapel Hill, NC: University of North Carolina Institute of Government, February 1986.

North Carolina, like many other states, uses community service for offenders who are neither jail- nor prison-bound.

Service Sentencing Project in the Bronx County Criminal Court. By 1983, the programs had expanded to two other boroughs (a fourth has since been added), bringing its caseload to over 1,000.

A central function of Vera's program is to offer the courts a new sentencing option—70 hours of supervised, non-paid community work in place of short-term jail sentences. Potential community service clients are screened by the program's court representative who reviews court records, interviews offender candidates and consults with prosecutors or defense attorneys, depending on the program's borough of operation.

In the beginning, the project successfully showed that "the courts will sentence even chronic thieves with very long criminal records to labor in densely populated urban neighborhoods." The program's enforcement and surveillance procedures were extremely helpful in this regard.

Other research, however, suggested a rather low rate of jail displacements. As a result of these findings, a new city-wide project director was appointed. Immediately, she began to establish stricter selection criteria. As the project grew, caseload characteristics increasingly reflected those who were typically jailed in New York City. A crucial aspect of these developments was that community service advocates improved court acceptance of their proposals by understanding local court culture and by becoming institutionalized as part of the process by which these sentences were routinely imposed.

McDonald's study reaches three broad conclusions: 1) community service is not a panacea, i.e., something that is good for all purposes, in all situations; 2) community service is a worthwhile and proportional punishment for certain offenses; and 3) courts will use community service for offenders who would have ordinarily been imprisoned; thus, local sentencing patterns can be altered through program intervention.

Community Service as a Prison Alternative

North Carolina, like many other states, uses community service for offenders who are neither jail- nor prison-bound. North Carolina has used such programs since the early 1970s but state statistics show that community service program clients are mostly first offenders, property offenders, and, since 1983, driving-while-intoxicated (DWI) offenders. During 1984 and 1985, 90.5% of all non-DWI community service case referrals were the result of misdemeanor offenses; 88.93% of these cases came from the district courts; 57.24% of case referrals came from suspended sentences and 29.4% resulted from deferred prosecution; and slightly more than 40% of these case referrals were unsupervised.

Repay, Inc. offers community service and restitution sanctions to offenders facing state prison terms. Working with the defense attorney, Repay staff interviews offenders, investigates relevant charge-related evidence and circumstances, and examines past criminal records, work and educational histories and psychological backgrounds. "Alternative punishment plans" are then developed to match offenders with particular community work placements. Both offenders and defense attorneys can raise objections or drop out of the process at any point. Once "plans" are developed, offenders are asked to sign a "contract" with program staff to show that they understand what is asked and required of them. Plans are then presented to the court, and, if accepted, Repay staff then monitors each offender's process and reports back to the court.

A crucial element of the Repay program is an assessment of which offenders are prison-bound. In selecting their clients, program staff use a "prison risk scoresheet" developed by University of North Carolina researchers W. LeAnn Wallace and Stevens H. Clark.[10] The scoresheet bases its "reasonably accurate predictions" of which offenders are prison-bound on defendant and offense characteristics and other data available in local records systems. The scoresheet is designed to accompany "common sense" or "clinical" assessments of the information involved in individual cases. The scoresheet itself was derived from an evaluation of over 1,000 felony cases which reached disposition in the 1981-1982 period.

The Institute of Government's evaluation of Repay, Inc. compared a randomly assigned sample of 1984-1985 program-eligible offenders divided into a control (non-service) group and a service group. Both groups scored similarly on the prison risk scale. The results were significant: only 30.6% of the service group received prison terms, while 77.1% of the non-service group were imprisoned. Moreover, the length of prison terms was slightly less for the service group (21 months) than for the non-service group (24 months). The study also suggests that informal presentations of "punishment plans" has greater impact than formal presentations.

Conclusion

In the 1970s, community service programs, regardless of whether they were part of the public or private sector, were frequently separate from regular probation services. In the 1980s, community service is being used for a wide range of offenders and offenses. Unfortunately, little guidance exists, particularly if one compares the practices of different jurisdictions, where specific offenses or offender-types call for specific community service requirements (number of hours, completion period, type of supervision). And, community service is increasingly becoming a routine part of sentencing plans proposed by state agents (prosecutors, probation officers), defense attorneys, and community advocates, with little consensus about the purpose of its use or for which offenders its use is most appropriate.

Clearly, if a central function of community service is to serve as an alternative to penal confinement,[11] serious attention should be addressed to its purposes and use. If community service is expected to fit most circumstances most of the time, it will lose part of its usefulness. Jurisdictions should carefully examine whether community service is better offered as a punitive or rehabilitative measure. Jurisdictions should then accurately assess how their existing community service programs are being implemented. If they inaccurately believe that they are offering penal alternatives, they are in effect wasting a scarce sentencing resource; moreover, they are disabling serious discussion about how imprisonment can be effectively used less, and how jail and prison crowding can really be reduced.

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[10] W. LeAnn Wallace and Stevens H. Clarke, "The Institute of Government's Prison Risk Scoresheet: A User's Manual." Chapel Hill, NC: University of North Carolina Institute of Government, April 1984.

[11] Reflecting on community service's early history in the United States, McDonald observes: "The most powerful impulse animating the creation of community service programs across the country came from a desire for a new sanction to be used in place of locking up offenders." McDonald, p.12.

In the long term, if community service blurs in comparison with other sentencing choices, then perhaps the best option is to follow Sweden's instructive lead. In 1984, the final report of the National Prison and Probation Administration's Committee on Probation recommended that community service should not become part of the Swedish system of sanctions. The Swedish report dutifully detailed a number of advantages offered by community service options, but decided, nonetheless, that difficulties existed in defining who should receive how much community service and in assessing whether the sanction was truly used as a substitute for imprisonment. Moreover, the report observed that the sanction might disrupt the purpose and functioning of other sanctions, such as criminal fines, which are already used widely.

Jurisdictions should carefully examine whether community service is better offered as a punitive or rehabilitative measure.

To date, the American practice of community service has been unguided by any sense of national policy development. While the imposition and implementation of community service is primarily a state and local matter, few effective voices have emerged to provide a sensible direction for developing community service across the country. The Vera Institute of Justice's experience in New York and Repay, Inc.'s experience in North Carolina offer hope that community service can be used as a substitute for confinement. Unless their experiences can be replicated elsewhere, however, community service will only increase the punitiveness of state intervention into offenders' lives without any concomitant savings or advantages for either corrections policy, offenders and victims, or society at large. ■

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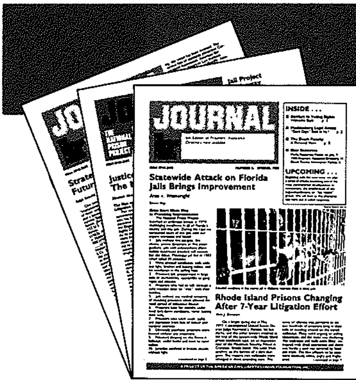
PUBLICATIONS



______ | ______ **The National Prison Project *JOURNAL*,** $20/yr. $2/yr. to prisoners.

______ | ______ **The Prisoners' Assistance Directory,** the result of a national survey, identifies and describes various organizations and agencies that provide assistance to prisoners. Lists national, state, and local organizations and sources of assistance including legal, library, medical, educational, employment and financial aid. 7th Edition, published April 1986. Paperback, $20 prepaid from NPP.

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HIGHLIGHTS

The following are major developments in the Prison Project's litigation program since June 30, 1986. Further details of any of the listed cases may be obtained by writing the Project.

Bobby M. v. Graham—This case challenges conditions and practices at three Florida training schools. Full discovery is underway; the court has set trial for May 4, 1987.

Bush v. Viterna—This case involves all local jails in the state of Texas. In August we received a disappointing decision affirming the district court's dismissal of the case.

Cody v. Hillard—This case challenges overcrowding and related conditions at the South Dakota Penitentiary. We received a favorable opinion which, among other things, prohibited double-celling, and on September 2, the Eighth Circuit Court of Appeals affirmed the decision. In early November, the Court of Appeals granted the defendants' petition for rehearing *en banc* and a briefing schedule has been set.

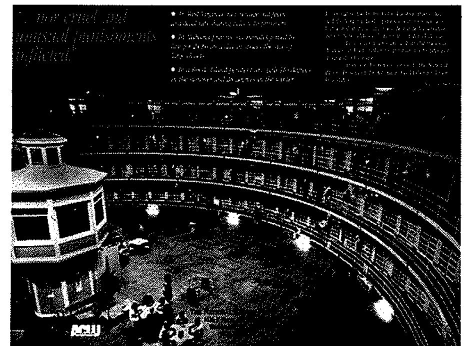
Duran v. Anaya—This case challenges conditions in the entire state prison system of New Mexico. In early November, a settlement was reached on a number of pending matters, including our motion to hold the defendants in contempt for violating the consent decree. This new settlement will involve substantial restoration of good time to our clients and we will proceed shortly on other open matters.

Garza v. Heckler—This national class action challenges the 1983 amendments to the Social Security Act which deny retirement benefits to incarcerated felons. In late July, we obtained an unfavorable ruling from a federal magistrate which recommended granting the government's motion for summary judgment. We filed objections with the court seeking reversal of the magistrate's opinion.

Inmates of Occoquan v. Barry—This recently filed lawsuit challenges overcrowding and related conditions at three D.C. prisons. A preliminary injunction imposing population caps was obtained after a hearing in August but was stayed pending an expedited trial on the merits. The trial was held during the last week of October and first week of November.

Nelson v. Leeke—This case involves the entire South Carolina prison system. In July, the court found the defendants in violation of certain portions of the consent decree involving overcrowding and ordered certain prisoners to be released on parole. The state appealed and after denying a stay of the district court order, the Fourth Circuit Court of Appeals affirmed the lower court orders in November.

U.S. v. Michigan/Knop v. Johnson—This action challenges conditions and practices at four major Michigan prisons. After four days of trial in June, during which the court imposed sanctions on the defendants for filing frivolous motions, the trial commenced again in August and continued for a month. Further proceedings were held in October after which the plaintiffs rested. ■



New Brochure Available

A new brochure offering a comprehensive overview of the National Prison Project, and including an order form for the NPP's key publications, is available by writing to The National Prison Project, 1616 P St. NW, Suite 340B, Washington, DC 20036.

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