JOURNAL

THE NATIONAL PRISON PROJECT

15 Years of Prison Litigation
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In this issue, we present the first of a two-part article raising serious doubts about the propriety and efficacy of imprisoning women offenders who are not a public safety risk. In the first part, Russ Immargeon describes the state of women's imprisonment in the United States, and offers some suggestions about how this situation has developed. In the second part, to be published in the next issue, he describes a range of programs and policies in various states which are making an effort to reduce the number of women imprisoned in this country.

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WOMEN IN PRISON

Is Locking Them Up the Only Answer?

By Russ Immargeon

INSIDE . . .

may i touch you?
that is what i have missed
more than anything else
a warm human touch.
i will not touch you hard.
—Norma Stafford[1]

Photo by Ruth Morgan

"Women are anomalies as offenders," an advocate for community-based alternatives for women offenders said recently, "and women offenders are anomalies as women in most people's eyes, so women offenders do not fit anybody's categories. Corrections is very much like the military, and women just don't fit such a worldview. So nobody knows what to do with these women."

—*continued on next page*

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Photos by Pete Taft

The Extent of Women's Imprisonment

Women are being imprisoned in the United States at a rapidly expanding rate. Recently, for example, a Massachusetts prison overcrowding commission found disturbing patterns associated with what it called a "dramatic population growth" at MCI-Framingham, the state's only women's prison.

MCI-Framingham's population nearly tripled from 362 in 1980 to 838 in 1985. "Aside from a surge of drunk driving commitments as the initial product of enforcing a tough new law," the commission observed, "women have clearly experienced the sharpest rise in prison admissions among all classes of offenders."

Moreover, this surge of women prisoners was unrelated to a comparable increase in female criminality. "The growth in female prison commitments," the commission found, "was not accompanied by increases in the proportion of women on probation, the lengths of women's sentences, or the incidence of convictions for more serious crimes."

Women imprisoned in Massachusetts were, in fact, mainly non-violent, property offenders. "Women continue to serve average sentences of five months or less," the commission reported, "and two-thirds are committed for the comparatively minor categories of 'property' and 'other' offenses. Even within these categories," the commission stressed, "the majority were committed for one of only five offenses: larceny, prostitution, theft, receiving stolen goods, and disturbing the peace."[2]

[1]Norma Stafford, *Dear Somebody: The Prison Poetry of Norma Stafford* (Seaside, CA: Academy of Arts and Humanities, 1975); Norma Stafford's poem is reprinted in *Wall Tappings: An Anthology of Writings by Women Prisoners* (Boston, MA: Northeastern University Press, 1986), an excellent collection of diverse writings by women prisoners, edited by Judith A. Schleffler.

[2]The Hon. Paul A. Chernoff, Chairman, *Report of the Governor's Special Commission on Correction Alternatives*, Boston, MA: The Governor's Special Commission on Correction Alternatives, July 1986, p.5.

Problems with Women's Imprisonment

In recent years, the national debate on jail and prison crowding, the dominant correctional crisis of the 1980s, has forced correctional administrators and policymakers to examine their penal populations to assess which offenders should really be imprisoned. Increasingly scarce jail and prison space is compelling county and state governments to decide, as a matter of explicit policy, who should be imprisoned. State and federal courts across the country are requiring defendants in overcrowding cases to place ceilings on population and as a result, states are being forced to develop alternatives to incarceration. A consensus may be emerging that scarce correctional resources—jail and prison cells—should be reserved for real or serious public safety risks. Alternatives to confinement, this emerging consensus suggests, should be increasingly used for offenders who are not a risk to safe communities across the country.

Important policy-oriented guidelines exist concerning the criminal justice system's treatment of female offenders. The American Correctional Association (ACA) recently approved a policy statement supporting women offenders' access to alternatives to incarceration:

"It is fiscally and programmatically sound," the ACA states, "that the alternatives available for adult and juvenile female offenders include programs and services that address their needs in the least restrictive setting consistent with public safety."

"Community placement—whether on pre-adjudicated release or probation, in a residential program, or on parole—can provide the level of structure and support needed by many female offenders. At the same time, community placement considerably reduces the cost burden to taxpayers. Programs that allow female offenders to be gainfully employed not only promote self- sufficiency; they enable the individual to make restitution and constribute to the cost of her correctional program."

"Substance abuse is a significant problem that can best be treated in the kinds of programs that generally are available in the community but not in traditional institutions. Treatment in the community may also be the most efficient and effective means for some offenders to address other areas of personal need, such as education, employment, and maintaining family and community ties."[3]

The major difficulty with crowded women's prisons, however, is that most imprisoned women are not public safety risks, and very little policy-oriented discussion centers on applying a least restrictive alternative standard for women offenders. Curiously, two basic questions—why are women imprisoned in the first place and aren't there better ways than incarceration to respond to women offenders—are rarely raised. In addition, correctional standards such as the ACA's frequently receive inadequate attention from policymakers and, too often, reform advocates.

[3]American Correctional Association, *Public Policy for Corrections: A Handbook for Decision-Makers*, College Park, MD: ACA, 1986, p.29.

The Imprisonment of Kathleen Neal: An Unusual Case Shows How Easily, Inappropriately, and Routinely Women Are Imprisoned Without Anyone Asking Why

Kathleen Neal, a 34-year old mother of three, was recently incarcerated for more than 20 hours a day in a crowded cell at MCI-Framingham. As an alcoholic, she was involuntarily committed under a little-known statute allowing courts to send alcoholic men or women to a state correctional facility for up to 30 days for "inpatient care." Under the civil commitment law, she was separated from "convicted criminals," but, like them, she rarely received help for her disease.

"Women such as Neal," an article in The Boston Globe reported, "receive almost none of the treatment the law requires. They are locked up for all but a few hours a day, often in crowded cell-like rooms in the prison's two-story brick Health Services Unit. Treatment consists of withdrawal medication, an occasional Alcoholics Anonymous meeting or a discussion session about what ser-

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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.

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

vices are available upon release. But mostly, it's just waiting."[4]

Women have been imprisoned in this manner at MCI-Framingham for 13 years. Last year, 30 alcoholic women experienced similar treatment in Massachusetts. "I kept saying," said Kathleen Neal, "Why am I in prison? I am an alcoholic, but I don't have a record. I haven't broken any laws. And (prison officials) kept saying, 'You are here for 30 days; that's it'."[5]

After Kathleen Neal's story was reported in *The Boston Globe*, state officials halted the practice of imprisoning alcoholic, civilly-committed women. However, Kathleen Neal's story is important because it shows that women like her were imprisoned in the state for 13 years until someone—in this case, a district court clerk—asked why. Similarly, other non-dangerous, criminally-convicted women are routinely imprisoned in increasing numbers across the United States, and very few people are asking why.

Photo by Ruth Morgan

Now's the Time

On May 1, 1973, the National Council on Crime and Delinquency (NCCD) issued a policy statement urging that non-violent offenders should not be imprisoned. Instead, NCCD suggested that the expanded use of diversion, suspended sentence, deferred prosecution, probation, fine, restitution and boarding home options constituted a less destructive and less costly correctional policy than excessive reliance on imprisonment.

A year earlier, NCCD and the National Advisory Commission on Criminal Justice Standards and Goals argued that new detention or penal institutions should not be constructed until a full, community-based system of alternatives to incarceration had been achieved. NCCD, in particular, supported a finding of the First Annual Chief Justice Earl Warren Conference on Advocacy, held in 1972, that releasing "the majority of the prison population, coupled with the provision of community programs and services, would not increase the danger to the public, and ultimately would enhance public safety."[6]

In ensuing years, a "moratorium on prison construction" position was adopted by more than 26 state and national organizations, including the ACLU's National Prison Project. In recent years, the "moratorium" debate has diminished considerably, partially because the offense characteristics of state, and even local, prisoners have become more serious in nature. This has not been the case for women offenders, however. Women's crimes are still overwhelmingly economic in nature. With women offenders, then, reform proposals from the early- and mid-1970s are still appropriate.

Women Offenders Pose No Public Safety Risk

"I've rarely met a woman offender," a female researcher said recently, "who I would personally feel endangered by." The ACA's policy statement on female offender services emphasizes that "few female offenders pose a risk to society."[7] Moreover, empirical evidence supports the view that imprisoned women pose little threat to public safety.

In a Wisconsin study completed several years ago, for instance, 169 women were observed for two years following their release from the state's women's prison at Taycheedah. The study showed that few women possessed those characteristics—a history of juvenile incarceration, prior incarceration as an adult, or the experience of being released from prison before they were 24—commonly associated with a high risk of criminal behavior. In fact, the study found that women were about 44% less likely than men to commit further criminal activity after their release from prison. Moreover, when women released from prison committed new offenses, they were one-third as likely to commit a serious, person-related offense.[8]

Women Prisoners Are Often Abuse Victims

Increasingly, research suggests that large numbers of female prisoners have a history of being physically and/or sexually abused. A public hearing held in September 1985 at Bedford Hills, the women's maximum-security prison in New York, highlighted the prevalance of domestic and sexual violence in the histories of women prisoners. A 1982 study found that 95% of the women committed to the New York State Department of Correctional Services who reported a history of physical abuse had committed violent crimes, usually against the person who abused them.

"Our life together consisted of a lot of violence and hospital emergency rooms," one woman told the Bedford

[4]Christine Chinlund and Dick Lehr, "Women Alcoholics Get Jail, Not Treatment. Officials Say Law Ordering Special Care Is Not Being Carried Out," *The Boston Globe*, January 18, 1987, p.16.

[5]Christine Chinlund, "Jail for Women Alcoholics Halted," *The Boston Globe*, January 25, 1987, pp.1, 19.

[6]National Council on Crime and Delinquency, "The Nondangerous Offender Should Not Be Imprisoned," *Crime and Delinquency*, 21 (4): 315, October 1975.

[7]American Correctional Association, *Public Policy for Corrections: A Handbook for Decision-Makers*, College Park, MD: ACA, 1986, p.29.

[8]Dennis Wagner, "Women in Prison: How Much Community Risk?", Madison, WI: Wisconsin Department of Health and Social Services, 1986.

Hills hearing. "Once he grabbed me in an elbow choke and with his forearm applied pressure to my throat until I turned purple. I was scared that he would hurt the child I was carrying, so I tried to protect myself. I bit him on his hand until he took his arm from around my neck. This part of my nightmare ended when I was arrested."[9]

The Committee on Domestic Violence and Incarcerated Women, a New York-based coalition of community and criminal justice advocates, recently concluded that "the nature of their crimes and the existence of a very low recidivism rate for those who have committed manslaughter and murder provide substantial evidence that these women and others like them are not a danger to society. The wisdom of imprisoning them at all is certainly questionable. The extremely long sentences of the women who testified (an average maximum sentence of 15 years) raise even more serious questions about the fairness of our criminal justice system."[10]

These women's testimony reveals numerous instances of insensitivity and mistreatment on the part of police, legal and medical authorities with whom they came in contact, prior to the violence which inexorably followed their battering experiences.

Research studies suggest, too, that girls who become involved in the criminal justice system also have a history of physical or sexual abuse. University of Hawaii researcher Meda Chesney-Lind, a national authority on girl delinquents and status offenders, says that a number of studies suggest a consistent pattern of abusive violence against young girls who enter the criminal justice system. A 1974 study found that 37% of "ungovernable" girls were "neglected." A 1977 Washington state study of detained females found that more than 40% had a history of physical and/or sexual abuse while 17% were incest victims. A 1982 Wisconsin study found that 70% of 192 females in the state's juvenile justice system had been injured through physical abuse.[11]

Evidence clearly indicates that women are less likely to be charged with rape, armed robbery or aggravated assault. Additionally, the manslaughter and murder offenses committed by women tend to be against family members or their abusers, and not members of the general public.

Why Are Women Imprisoned?

The Howard League for Penal Reform, a London-based prison reform lobby, released a report last year arguing that most women are inappropriately imprisoned, and that no adequate answer could be found regarding the objectives of women's imprisonment. "What is needed," the report concluded, "is nothing less than action to remove from prison the large numbers of women who, it is agreed, should not be there."[12]

Women's imprisonment has become routinized over the years. States keep building new and larger women's prisons, and, like new prisons for men, they are soon filled and often overcrowded. Despite the fact that nearly all imprisoned women are non-dangerous, property offenders, drug abusers and/or victims of domestic violence, institutional arrangements are regularly chosen over community-based options as a matter of policy and fiscal investment. In the past decade, for instance, two national surveys of institution-based programs for female offenders have been conducted, but no one has conducted a comprehensive national survey of community-based programming for women.[13]

Discrepancies in the imprisonment of men and women in the United States are rooted in the historical development of women's prisons. Prison historian Nicole Hahn Rafter observes that the women's prison system experienced its first rapid expansion in the Progressive Era, a period when correctional reformers first began seeking alternatives to

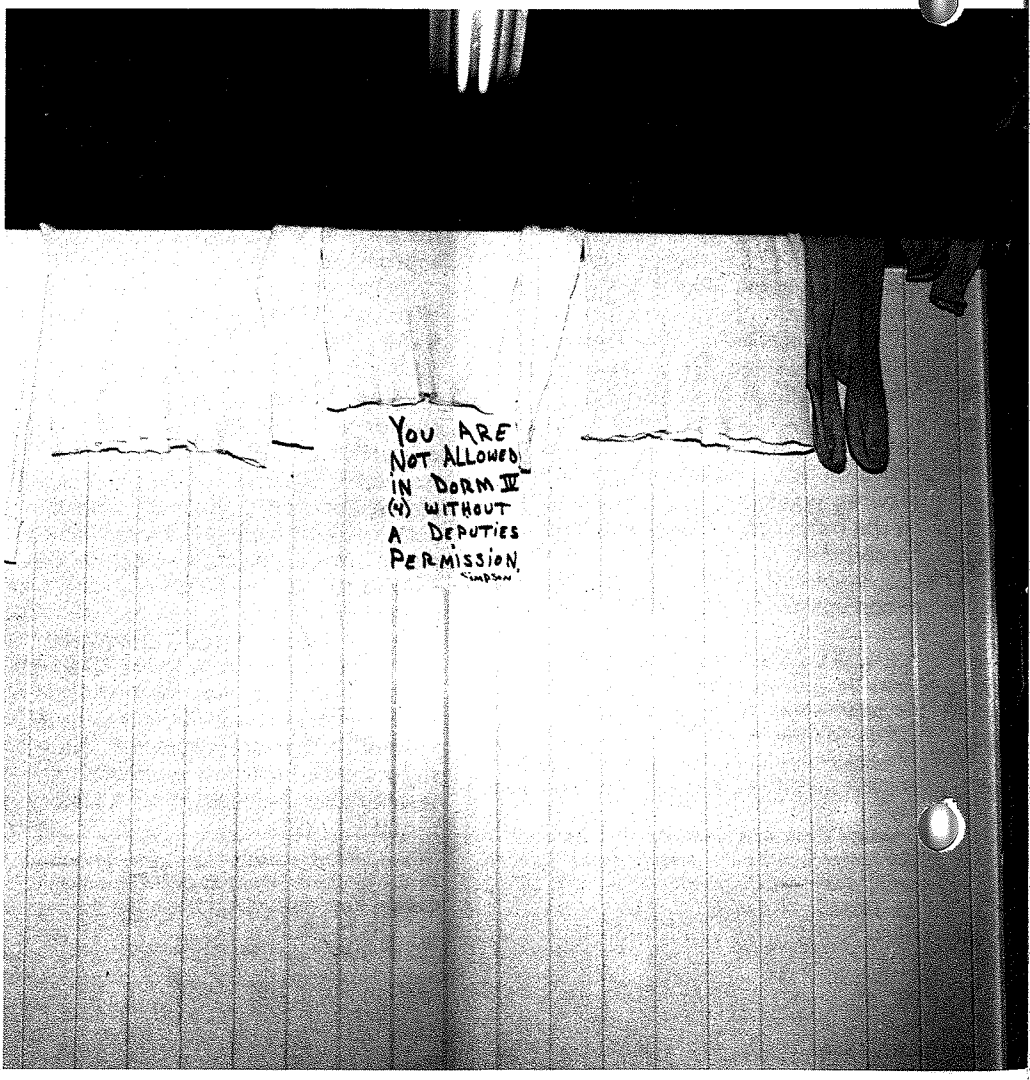


Photo by Ruth Morgan

[9]Linda M. Scarola (reporter), *Hearing on Domestic Violence Held at Bedford Hills Correctional Facility, Bedford Hills, New York, September 26, 1985* (Albany, NY, NYS Governor's Commission on Domestic Violence, 1985); Jody Grossman, "Domestic Violence and Incarcerated Women: Survey Results," Albany, NY: NYS Division of Correctional Services, October 1985; and Louise Bauchard with Mary Kimbrough, *Voices Set Free: Battered Women Speak from Prison* (St. Louis, MO: Women's Self-Help Center, 1986).

[10]*Battered Women and Criminal Justice: The Unjust Treatment of Battered Women in a System Controlled By Men (Final Draft)*, A Report of the Committee on Domestic Violence and Incarcerated Women, February 1987, pp.3-4.

[11]The Baroness Seear and Elaine Player, *Women in the Penal System*, London, UK: The Howard League for Penal Reform, January 1986, p.12.

[13]Lila Austin's *National Directory—Programs for Incarcerated Women* lists private organizations working with women offenders, and mentions a number of programs which are working with women offenders in the community. The directory is published in FCN Working Papers #12, available from Jim Mustin, Family and Corrections Network, P.O. Box 2103, Waynesboro, VA 22980. The directory can also be obtained from Lila Austin, Community Services for Women, 20 West Street, 4th Floor, Boston, MA 02111.

imprisonment in men's prisons. Rafter states that a "huge investment of reformers' energies and of state funds in creation of penal institutions for females—at a time when their already low rates for serious crimes apparently underwent little increase—suggests the very opposite of a search for alternatives to institutionalization."[14]

Challenging Women's Imprisonment

An important first step in reducing the number of women inappropriately imprisoned in the United States is to raise objection to building additional prison cells, when more than adequate supply already exists for those few women who require confinement for their or the public's safety. Fortunately, advocates, agencies and researchers have done this in several instances:

In the late 1970s, the Minnesota Department of Corrections, the state legislature and various women's and community groups raised concerns about the quality of the state's women's prisons. In 1979, the state legislature asked the Department of Corrections to determine the feasibility of renovating the women's prison at Shakopee. The Department of Corrections recommended that the facility was beyond renovation, but rejected various available alternatives to building a new women's prison. Instead, they recommended the construction of a new 108-bed institution. In 1983, $15 million in bonding was approved by the state legislature for this project.

In 1984, the Minnesota Citizens Committee on Crime and Justice issued a feisty report arguing that a growing imbalance was developing between expenditures made for imprisonment and those made for non-incarcerative, community-based programs and penalties. Moreover, they argued that no evidence existed that this imbalance was resulting in additional public safety. The Minnesota Citizens Committee on Crime and Justice then recommended that the state should expand community programming for women, and use existing facilities for those who still require imprisonment.[15]

In 1985, the New York State Department of Correctional Services (DOCS) announced a plan to increase the capacity of the state's maximum-security women's prison at Bedford Hills by 36% (200 beds), at a cost of $4 million. In March 1986, The Campaign for Common Sense in Criminal Justice, a coalition of criminal justice interest groups, issued a detailed report which argued that:

> Many women now in prison do not belong there. If we build more beds now we will not have the proper incentive to change the financially and humanly disastrous course on which we have been embarked for too long. If the beds are there they will be filled. On the other hand, if we choose not to build, we will force ourselves to change our policies, as we must.[16]

Finally, a report on women prisoners in the Nassau County Jail in New York concludes that "our overriding recommendation concerning women offenders is that they would be diverted from the criminal justice system whenever possible. Only a small portion of the women in jail have been convicted of violent offenses. The majority of women do not pose a threat to the safety of the community and alternative forms of punishment such as fines, community service, restitution and intensive probation supervision are feasible for them. The benefits of these alternatives to women, their children, and the community should not be overlooked."[17]

A Constant Concern

Women's imprisonment is a waste of fiscal and human resources. Empirical evidence suggests that women pose little or no public safety risk, whether they are diverted from imprisonment or released from confinement after serving a penal sentence. Moreover, many people across the country have the commitment, imagination and program models necessary for reducing the use of imprisonment for women offenders. Nevertheless, women's imprisonment will continue, unnecessarily, unless money is made available for relevant community programming, and policymakers are willing to make displacing women from imprisonment a constant concern.

Reducing the number of female offenders imprisoned in the United States is an especially suitable place to begin breaking what University of Delaware researchers John Bryne and Donald Yanich have called America's "ideology of incarceration," a "cultural understanding of crime as a basic threat to the survival of society sustained by an institutionalized and bureaucratic commitment to prisons as the only viable means to protect society.

"So long as total institutions are the core of corrections and community-based alternatives are the fringe," Bryne and Yanich argue, "[community-based alternatives] will be required to adapt their goals to the organizational needs of prisons." In this context, they add, "community-based programs will not be trusted by the larger system until and unless they can demonstrate that they do not challenge the principle of incarceration."[18]

Women's imprisonment is a waste of fiscal and human resources. Empirical evidence suggests that women pose little or no public safety risk, whether they are diverted from imprisonment or released from confinement after serving a penal sentence.

Women's imprisonment may be the most appropriate place to challenge the principle of incarceration. Women's imprisonment adds credence to confinement-oriented sentencing policies and contradicts an emerging correctional ideology that scarce penal resources should only be used for society's more dangerous offenders. Women's imprisonment will be reduced only when researchers, citizen advocates, direct service providers, planners and policymakers raise the constant questions—why are so many women imprisoned, and what can be done instead of incarceration? ■

The second part of this article will describe specific options various states are using to reduce the number of imprisoned women.

Russ Immarigeon is the Associate Editor of Criminal Justice Abstracts *and a freelance writer specializing on criminal justice issues.*

[14]Nicole Hahn Rafter, "Gender, Prisons, and Prison History," Social Science History, 9(3), Summer 1985, p.234.

[15]Minnesota Citizens Council on Crime and Justice, "Rethinking the Building of a New 108 Bed State Prison for Women ... And an Idea for Metropolitan Counties," Minnesota, MN: Minnesota Citizens Council for Crime and Justice, January 1984. In spite of this and other recommendations, a new facility opened up in late 1986 with a capacity of 136. It currently houses 123 women.

[16]David Leven, "Needless and Costly Incarceration: The Misguided Plan to Add 200 New Beds at Bedford Hills Correctional Facility," New York, NY: The Campaign for Common Sense in Criminal Justice, March 1986. Unfortunately the first 100 beds of the 200 planned was opened in the fall of 1986, and the Governor's most recent budget recommended funding for an additional 100.

[17]Amy Jalbert, *Holding Patterns: A Report on Women— The Forgotten Offenders in the Nassau County Jail*, Mineola, NY: Nassau Coalition for Safety and Justice, Inc., January 1987, p.43.

[18]John Byrne and Donald Yanich, "The Ideology of Incarceration and the Cooptation of Correctional Reform," in *Criminal Corrections: Ideals and Realities*, edited by Jameson W. Doig, Lexington, MA: D.C. Heath and Co., 1983, p.22.

15 Years of Prison Litigation: What Has It Accomplished?

Alvin J. Bronstein

Has the prison litigation of the past dozen years really made a positive difference in the way prisoners live? Frequently we hear that it has not. In fact, some say that staff morale has deteriorated, inmate violence intensified, and that litigation has increased our capacity to incarcerate.[1] I attempt here to set the record straight.

In assessing the effect of prison litigation, one must keep in mind that it has been accompanied by the most massive prison population explosion ever experienced in the United States.[2] On June 30, 1986, our sentenced prisoner population was 528,945, more than double what it was ten years ago. The current rate of increase of over 10% per annum represents a prison space demand of about 1,000 new beds a week, far in excess of new beds being supplied. Thus, in looking at the impact of litigation on conditions of confinement, we might ask: In light of this enormous population increase, what might prison conditions be today without the litigation of the last decade? The answer would be something out of Dante's *Inferno*.

The National Prison Project will mark its 15th anniversary this year on October 24th in Washington with a day-long series of activities, which will include a symposium followed by dinner and a party. We will bring you more information in the Summer issue.

Effect on Conditions of Confinement

Litigation has resulted in profound and permanent changes in the conditions under which tens of thousands of prisoners must live. Representative changes include the following:

- In Alabama, six prisoners no longer live in a one-man cell and no one sleeps on top of urinal troughs or on the floor. The prisons are no longer the "violent jungles" described by the court, and decent medical care, once non-existent, is now available.
- In Rhode Island, a facility that was an environmental disaster, is permanently closed. The Old Maximum Security prison which was found to be "clearly unfit for human habitation" by the federal court has been completely renovated and is now considered by the inmates to be the most desirable housing in that system. Violence, once an everyday occurrence, is now a thing of the past.
- In Colorado, antiquated and dungeon-like cellblocks have been closed. Violence has been reduced substantially and there have been vital improvements in medical and mental health care.
- In New Mexico, double-celling and overcrowding have been eliminated. The levels of violence are down considerably and there have been major improvements in medical, dental and mental health care.
- In Virginia, the maximum security facility at Mecklenburg was at one time the most brutal prison in the country. Beatings and gassings by guards, once a weekly occurrence, no longer happen.

In every conditions case there have been sound improvements in the areas of basic health and safety. Many of the changes are physical and, therefore, permanent. Cells that now have hot water lines and toilets, where none existed, will always have them. The second means of egress from cellblocks, along with the smoke detection and evacuation systems, will continue to prevent the kind of fire tragedies we have seen in the past. New recreation and program facilities are there to stay.

It is also true, however, that in every case there has been backsliding to some extent, primarily because of population increases unaccompanied by an increased commitment of resources.[3] Prison overcrowding, unlike the neglect which led to the problems in the 1970s, is often out of the control of prison officials themselves, despite their competence and best intentions. If legislatures and courts keep sending them prisoners in greater numbers without correspondingly increasing their resources, there is little that a prison official can do. It has been our experience that a state or local jurisdiction will rarely respond to overcrowding problems in the absence of a court order or consent decree resulting from court action. Government officials are aware of the problem and often know the solutions, but political judgment tells them to do nothing unless forced to by the courts. Then the courts, and not the politicians, can be accused by the public of being soft on criminals.

Prison conditions decrees, whether consented to or court-imposed, are not self-executing. Change is resisted, either actively or passively. In each and every case the implementation stage requires a greater commitment of time and resources than was required to achieve the decree in the first instance.

One often reads or hears academic criticism of "broad scale institutional change by the courts" in the prison area with commentary that it "constitutes a sharp break with traditional court doctrine and action."[4] This is simply not true. Why has there been no comparable criticism of massive federal court intervention in the areas of school desegregation, voting rights, police practices and environmental issues? In October 1986, newspapers reported the beginning of yet another trial in *Brown v. Board of Education*, more than 30 years after the case was filed. The Mississippi reapportionment case, *Connor v. Johnson*, was filed in 1965, and has been to the Supreme Court four times. As a result of *Connor*, the federal court has drawn state legislative boundaries on numerous occasions; it is still an active case today. Criticism of the length and extent of court involvement, like that leveled at prison litigation, is hard to find in these other areas.

Violence

The Texas prison case, *Ruiz v. Estelle*, is often used as an example of how federal court intervention has increased prisoner violence.[5] The Texas case, however, is quite unique in size and complexity. Over the years Texas prison officials created and encouraged the "building tender" system, a system in which powerful prisoners were given authority to impose mayhem, torture and murder on other prisoners as a control mechanism. The officials abdicated their obligation to maintain control. Although this system was always illegal, it was made expressly so in 1973 when the Texas legislature outlawed the use of

[1] See, for example, the *Newsweek* magazine cover story on the Texas prison case (Oct. 6, 1986).

[2] This phenomenon is not unique to the United States as much of Western Europe, Canada and Australia are having similar experiences.

[3] See, "Sweeping New Order in Rhode Island Case Promises Further Relief," *NPP JOURNAL*, Summer 1986, p.5.

[4] *What We Know, Think We Know And Would Like To Know About The Impact Of Court Orders On Prison Conditions And Jail Crowding*, Feeley & Hanson, Committee on Research on Law Enforcement and the Administration of Justice, National Academy of Sciences, October 1986.

[5] The *Newsweek* article last fall on this case is another example of a short-sighted examination of complicated and long-range problems.

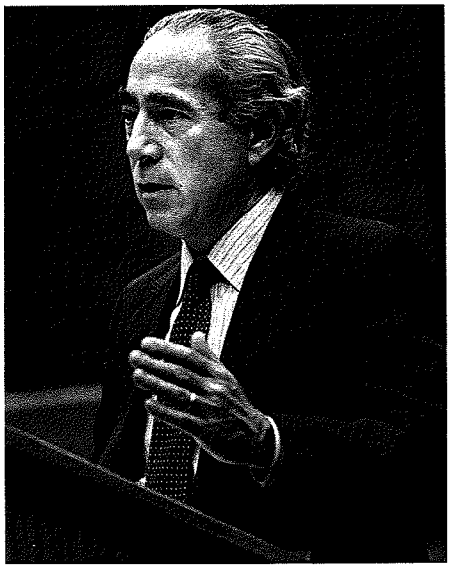
building tenders. Yet eight years later, despite the perjured testimony of more than 100 prison officials, a federal court found the system still in use and enjoined the practice. The authority vacuum that resulted from Texas prison officials' failure to assume control over their own prisons inevitably created much of the violence. Yet today the federal court is blamed for the violence. Prison officials who committed perjury go unpunished. The senior prison officials who created and perpetuated the unlawful building tender system which led to the violence not only go unpunished, they are actually honored for their "achievements" by the American Correctional Association. Prisoners, serving time for their illegal behavior, have no difficulty in recognizing a double standard.

Effect on Use of Imprisonment and Overcrowding

It is difficult to measure the effect of litigation on the use of imprisonment, particularly during a period when there have been greater demands for more and harsher incarcerative sanctions. We are using imprisonment more than ever in this country, driven by demographics, increasing crime rates, the creation of a victims' rights movement, the move to mandatory and determinate sentencing, and the "law and order" rhetoric of most public officials. There is, however, anecdotal evidence that conditions litigation does affect the use of imprisonment:

- After the federal court enjoined the State of Alabama from accepting new prisoners, local judges changed their bail and sentencing practices. The state also changed its good time laws to release prisoners earlier and instituted a large work release program.
- In Rhode Island, bail reform and a large work release program were instituted after the federal court established population limits on each facility.
- In Hawaii, community diversion programs and probation were greatly expanded to comply with court-ordered population reductions.
- A number of states, most recently South Carolina and Tennessee, have enacted prison overcrowding emergency release legislation.

Recent data from the U.S. Department of Justice's Bureau of Justice Statistics reveals that there is strong statistical support for the proposition that court intervention has had a positive impact on the use of imprisonment. Although nationally we experienced a record growth in prison population in the first six months of 1986, the percentage change in prison population was notably less in those states with population



NPP photo.

Prison Project Executive Director Alvin J. Bronstein answers questions about prison litigation.

court orders[6] entered prior to December 31, 1985:

	Percentage change from 12/31/85-6/30/86
United States, total	**5.1**
Rhode Island	1.3
South Dakota	4.0
Wisconsin	−0.1
Alabama	2.8
Kentucky	2.2
Louisiana	2.4
Maryland	3.1
Mississippi	2.2
Tennessee	0.0
Texas	0.6
Virginia	3.0
West Virginia	−5.1
Colorado	0.1
Hawaii	1.5
New Mexico	3.3

Litigation has had a direct and dramatic impact on overcrowding in the prisons which were the subject of litigation. For example, the six institutions involved in the original Alabama litigation had their total population reduced from over 5,000 to just over 3,000. At present there are no overcrowded dormitories nor is there any multiple-celling, and the same is true in almost every prison with a population control order. Furthermore, a reduction in overcrowding always has a positive impact on services and conditions ranging from medical care delivery to idleness and violence.

[6]These orders include requirements to eliminate double- or triple-celling, imposition of population caps, requirements to reduce population over time and outright release.

Effect on Policy

Prison conditions litigation has had an enormous impact on many policymakers during the past ten years and most of it has been positive.

Corrections officials, those who manage jails and prisons, have been forced to examine their own practices and policies. One major result has been a move toward professionalization. There is more and better staff training. The whole movement towards the creation of professional correctional minimum standards is a direct result of litigation and court-imposed standards. There is a great deal of communication and consultation between corrections officials and litigators, and it would be difficult to find a major conference of corrections officials at which a prison conditions litigator was not a speaker.

The same is true for governors and legislators. Litigation, or the threat of it, must be factored into their decision-making. It would be impossible to find a state corrections department budget appropriations submission that does not mention litigation. Without litigation, prison conditions would be the last priority for almost every state official. Prisoners do not vote; most of the voting public does not care whether prisons are being operated in an unconstitutional or even barbaric manner.

Litigation has also been responsible for the creation of new programs. As a result of pressure from court orders, states have been required to create work release, community service, intensive probation, pretrial diversion and a host of other programs. Once created, they become an integral part of the system and, although numbers may fluctuate, the programs go on.

Staff Morale

Although prison staff morale may have been weakened by early court decisions of fifteen years ago, those cases were essentially due process cases. Officers were confronted with new rules and regulations and limitations on their authority to administer punishment arbitrarily. They reacted naturally to giving up some of their power. But the prison conditions cases of the last decade have produced a different result. Prison guards realize that a safer, cleaner and less idle prison is a better place for them to work and, with some uniformity, have quietly praised this kind of litigation.

Development of Case Law and Supreme Court Decisions

Case law has developed fairly quickly in the area of prison conditions.

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It was only ten years ago that U.S. District Court Judge Frank M. Johnson Jr. articulated the "totality of conditions"[7] approach to prison litigation.[8] That concept has now been adopted by most other courts and approved by the Supreme Court.[9] According to this theory, the court, when deciding whether there has been an Eighth Amendment violation and when settling on a remedy, can examine a variety of prison conditions and their effect on one another. This examination may include those conditions that by themselves have no constitutional significance (e.g., idleness).

The progression of prison conditions cases has been significant and important. Decisions today rely on the earlier decisions as precedent. There is now a substantial body of law on prison conditions generally, as well as on separate and discrete conditions.[10] We have even seen a number of state court decisions in prison cases which have relied on the body of federal law developed during the past ten years.

Although the Supreme Court has not departed significantly from the lower courts on general conditions issues (as distinguished from First Amendment or visitation issues where they have rendered terrible decisions), they have continuously sent a disturbing message to the lower federal courts: that the lower federal courts should pay enormous deference to prison administrators and should not intervene unless there is overwhelming evidence of gross constitutional violations. Chief Justice Rhenquist put it succinctly a few years ago in a case where prisoners suffered under overcrowded conditions, stating, "Nobody promised them a rose garden."[11]

The result of the message from the Supreme Court has been a substantial increase in the cost of litigation. The need to develop and present overwhelming evidence, sufficient to counter the security and administrative convenience claims of prison officials, requires more discovery, more depositions, more experts and more lawyers' time. The cost of litigating a prison conditions case has increased almost tenfold over the past ten years.

[7]The totality theory was developed and presented to the court by the National Prison Project.

[8]*Pugh v. Locke*, 406 F.Supp. 318 (M.D. Ala. 1976).

[9]*Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565 (1978); *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392 (1981).

[10]New issues do arise, however. For example, the prevalence of AIDS and AIDS-related conditions in prison has created a whole new set of issues involving mass screening, segregation of groups of prisoners, and medical care.

[11]*Atiyeh v. Capps*, 449 U.S. 1312 (1981).

The degree to which litigation creates change varies from case to case, depending on the vigor of the judge, the availability of state resources, the competence of corrections officials and a host of political issues. By the same token, the effect on states not under suit is impossible to measure. Certainly, most corrections officials do not want to run an unconstitutional prison, and when they hear about a new decision in a neighboring state they are bound to take notice. But taking notice and making change are two different matters. Our experience tells us that without the pressure of litigation, change will not take place, despite the best intentions.

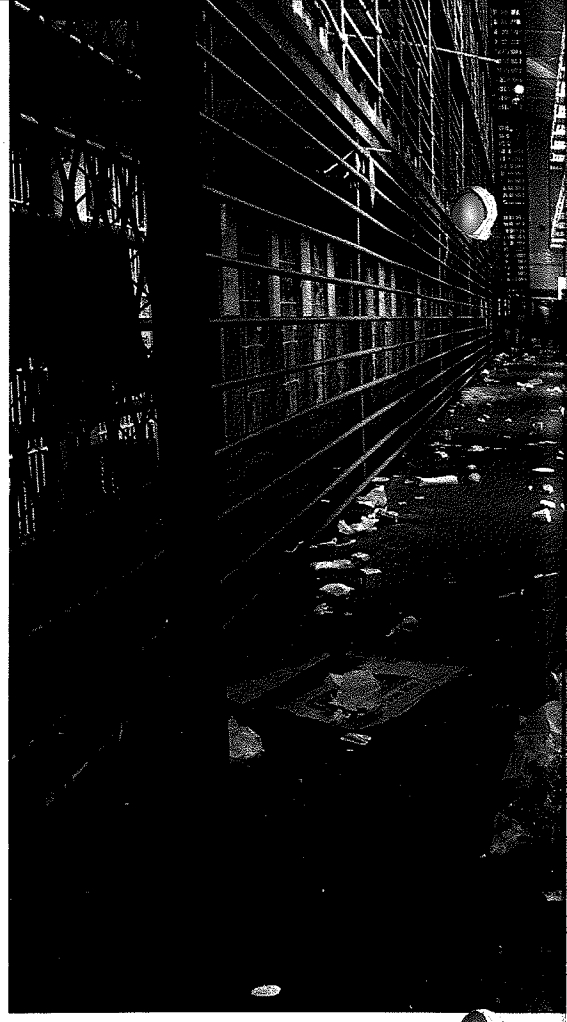
Strategy Changes

Institutional litigation is highly complex, requiring a great deal of expertise. Due in large part to the increasing burden of proof imposed by Supreme Court decisions, there have been a number of changes in litigation strategy over the past few years. The focus of totality suits has narrowed somewhat. The earlier cases dealt with every aspect of a prisoner's life and resulted in long and detailed remedial decrees which were difficult to monitor and caused some resentment on the part of state officials. Today the focus is on four main issues: overcrowding, environmental health and safety, medical and mental health care, and violence. Those are issues which every state official understands, and they are easier to monitor, for example, than the issue of whether a prisoner has access to the commissary three times a week.

Because the more narrowly focused issues are those about which there is little argument, the new strategy has increased the tendency of state officials to negotiate and settle litigation at an earlier stage. This, of course, reduces the cost of litigation for everyone and tends to make implementation simpler and quicker. Going forward with change after a consent decree has been agreed to by all parties differs greatly from continuing in an adversarial relationship.

The Cost of Litigation

Institutional litigation is expensive; implementation even more so. The highly complex litigation requires costly discovery: depositions; surveys; expert tours; expert witness fees; travel; and document reproduction, to name a few. Cases which used to involve deposition costs of $2,500 may now run up bills of $25,000. Experts who used to work for $100-200 a day now charge fees of $400-1,000 a day. The cost of airplane travel has escalated in the last ten years. Yet, these cases cannot be litigated properly without such expenditures.



Without a continuing commitment to implementation there will be no change, yet implementation costs are often higher than the initial costs of obtaining a decree. It goes on longer and frequently involves discovery, experts and a trial on compliance issues. The National Prison Project was recently asked to take over a state prison case in which no compliance work had been done for six years, because the lawyers who brought the case had no funds to pay for compliance. The conditions there, including overcrowding, are probably worse today than they were when the case was "won."

The Future

It is unfortunate, but undeniably true, that the pressure of litigation must continue, with implementation of existing cases and filing of new ones, if we are to operate constitutional prisons in this country. The inertia and the population growth we previously described command that conclusion.

The California prison system today is housing men and women at 175% of capacity (a net growth of almost 200 prisoners a week). Prisoners are sleeping in hallways, chapels and gymnasiums, many of them on the floor. Violence levels have vastly increased; vital services do not exist. Of the 15 major institu-

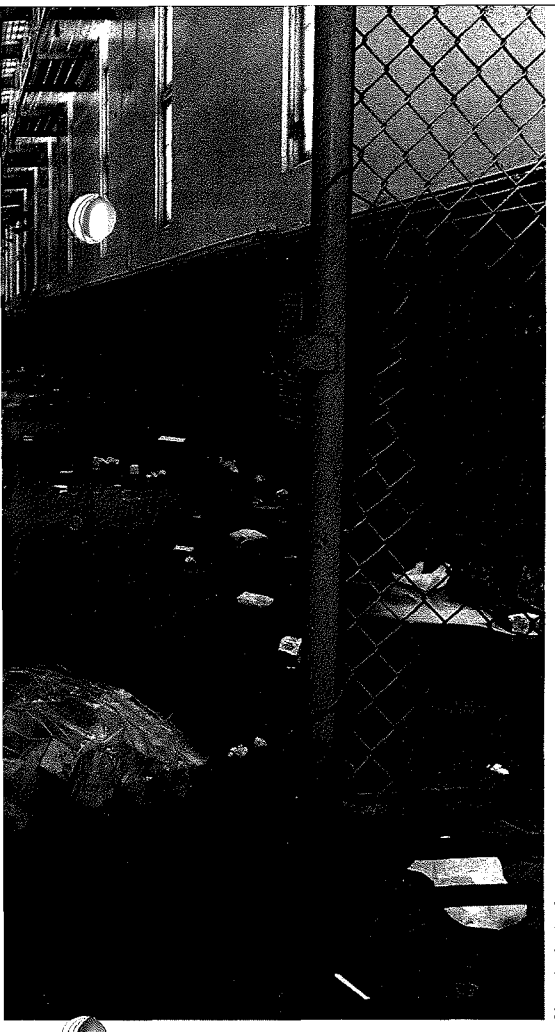


Photo by Ruth Morgan

The cost of litigating a prison conditions case has increased almost tenfold over the past ten years.

tions in California, only one is not grossly overcrowded and that is San Quentin, already under a court order. Although the state was enjoined from double-celling at San Quentin, they are double- and triple-celling at all their other institutions where there are no court orders. When it was suggested that what they were doing at these institutions was unconstitutional, state officials responded, "It is not unconstitutional until a court tells us that it is and we will fight any case brought against us."

Much has been accomplished by litigation in the past decade. Some of the human warehouses and dungeons that have been the shame of our society have been eliminated. Litigation is the force which has pushed America's prisons from the 19th into the 20th century. Much remains to be done in the next five to ten years to continue this pressure and to prevent backward movement. ■

Alvin J. Bronstein is the Executive Director of the National Prison Project.

THE TOMBS, ON REFLECTION

Prison Litigation: Many Years Toward Compliance

Judge Morris E. Lasker

In the fall of 1970 some 2,000 prisoners were housed at the New York City Manhattan House of Detention (better known by its historic sobriquet "The Tombs"), a facility with a rated capacity of approximately 900. The Tombs inmates rioted against overcrowding (sometimes three to a one-man cell), and against a variety of other conditions that have since become the staples of prison litigation. Soon after the riot, the Legal Aid Society of New York brought suit against New York City Commissioner of Correction Paul McGrath, Mayor John Lindsay and Governor Nelson Rockefeller to eliminate those conditions.

As a result of the litigation, the Tombs was closed and went unused for the next nine years. Mayor Lindsay's successor, Abraham Beame, had also been unwilling to meet the court's order to propose a plan to achieve constitutional conditions. Fourteen years after the litigation was filed, the Tombs reopened, entirely rebuilt and housing only 421 men—a model detention center.

The Manhattan House of Detention, however, is only one of about a dozen New York City correctional facilities. The system includes separate detention centers in the Bronx, Brooklyn and Queens (the so-called borough houses), as well as facilities on Rikers Island: the House of Detention for Men (and various annexes), Women's House of Detention, Adolescent Remand Shelter, and the Correctional Facility for Men (which houses convicted misdemeanants). As to each of these facilities a separate suit has been brought challenging the constitutionality of institutional conditions. All have been settled by consent decrees, except one, which is currently on trial.

What are the lessons to be learned from prison litigation? What has this substantial expenditure of funds and energy accomplished? The following informal discussion of these questions deals only with matters already of record or decided and not with any issue presently pending decision.

Changes in Conditions and Practices

Changes in institutional conditions and practices are, after all, the be-all and end-all of prison litigation. It is gratifying, therefore, to report that the conditions in the New York City correctional institutions have quite definitely improved since the dark days of 1970. That is not to say, however, that there is not a long way to go to achieve the objectives and requirements of the consent decrees. With the exception of the Manhattan House of Detention, none of the facilities has been completely rebuilt; compliance in some other cases has been more difficult to achieve because of the age and architecture of the particular structure. A large percentage of the adult male detainees, for example, are housed on Rikers Island in the House of Detention for Men, a 1930s "Jimmy Cagney"-type, three-tiered jail. Compliance with the requirements of the decree is still far from complete although the consent decree was signed in 1979.

Yet to dwell on the need to achieve complete compliance would not give an accurate picture of what has been accomplished. The decree relating to the House of Detention for Men, which is typical of those applying to other institutions, covers an enormous range of subjects and its implementation has achieved a radical improvement in the daily lives of the inmates. Today there are, for example, standards of cleanliness with regard to laundry, personal hygiene, environmental health and food service; rules with regard to confiscation of property, cell searches and body cavity searches, rights to dayroom access, to spending time outside of cells or inside cells, to contact visits by family and friends, to attorney visits to inmates, counsel representation and participation, to communal religious services (even for segregated detainees), to due process in matters of discipline for all detainees including those in high security categories, for moving within the institution, for access to newspapers, law library and recreation. Moreover, the physical condition of the institutions has been greatly improved by limitations on population, improvement of lighting, and control of noise and temperature.

Pros and Cons of Using a Master or Compliance Monitor

The history of prison litigation has taught that post-decree compliance proceedings are the most laborious, time-consuming and expensive part of the process. The seeming endlessness of these proceedings is characteristic of institutional reform cases. Prison litigation, unhappily, is no exception. To avoid the

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prospect of never-ending court participation, the parties and the court in New York are working toward the objective of ultimate court "disengagement," with the assistance of a compliance monitor for the interim period. Designated as the Office of Compliance Consultants (OCC), the office consists of a director, experienced in correction matters but unrelated to the parties, and a small staff of Corrections Department personnel on leave. It is financed by the City. OCC deals with compliance on an item by item basis: making suggestions to the parties, mediating and conciliating between them, and reporting at regular intervals to the court on the particulars of compliance and the rate of progress. In the several years that the monitoring system has been in existence, the OCC has succeeded in every instance in bringing about agreement between the parties as to the terms of compliance. Nevertheless, the obstacles of bureaucracy in so large a city as New York with such a complicated mode of government has made progress on some items slow. The OCC system has, however, proven itself. It has forced the attention of the defendants to the necessity of compliance in detail; it has brought about agreement between the parties as to how compliance should be achieved; it has kept the court informed without interfering with the direct relationship between the court and the parties when direct access is seen as desirable.

Is Institutional Litigation More Difficult Than Other Civil Litigation For the Judge?

The "difficulty" of a case depends on its complexity, the judge's familiarity with the subject matter, the time which the case consumes and the length of the case's life. Measured by this formula prison litigation would be graded fairly difficult, but its chief difficulty, in comparison with other cases, is its protracted life. The New York City litigation, regarded as a unit, has now endured for 17 years, and clearly will not be completed for a while. On the other hand, there are aspects of prison litigation which are much simpler than other types of civil suits: the subject matter is not as difficult to master as, say, patent litigation; the management of prison condition trials is not as tricky as criminal or securities multiple party cases; the motion practice does not compare in volume with that of fiercely fought commercial or anti-trust cases. Moreover, presiding over prison litigation has its own satisfactions, since, when improvements occur, they are tangible, and it is unusual for a judge to be able to see the results of his own work.

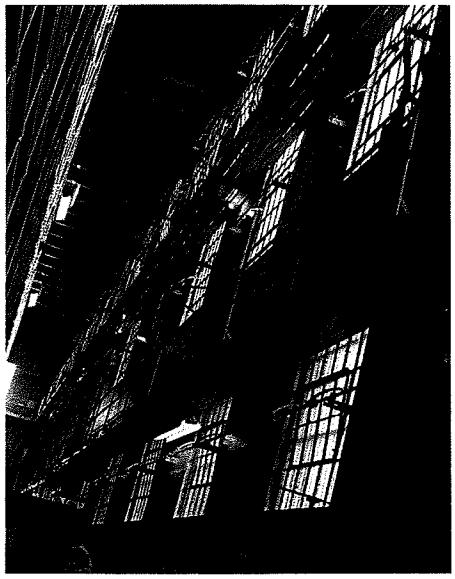

Photo by Ruth Morgan

Conclusion

Reflecting on the history of the litigation in New York and elsewhere in this country and the results accomplished, I am convinced that such litigation has vastly improved the conditions in jails and prisons for the benefit of not only the inmates but society as a whole. Moreover, I believe this view is shared by most knowledgeable corrections officials and even municipal and state executives who have been defendants in such cases. Nor do I doubt the capability of the courts to handle prison and other institutional reform cases. It is hard to believe that if courts are capable of administering the break-up of AT&T, the bankruptcy of the Pennsylvania Railroad, and have been authorized by Congress to preside over the bankruptcy proceedings of municipalities, they are incapable of dealing with such complexities as arise in the administration of custodial institutions.

Nevertheless, while courts have an obligation to make certain that constitutional rights are upheld, they have an equal obligation to plan for disengagement from the direction of institutions as soon as compliance has been reached and can be safely assured for the future. The parties and courts in prison litigation have become so immersed in the litigative process that it is worth reminding ourselves that our objective is not to work at the job forever but to finish it. ■

Morris Lasker is a United States District Judge in the United States District Court for the Southern District of New York. For many years he has presided over the New York City jail conditions cases and has frequently participated in conferences on corrections issues.

Book Review

THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM

By William Wilbanks
Brooks/Cole Publishing Company, Monterey, CA. 1987. 224 pp.

Charles J. Ogletree

In his recently published book, *The Myth of a Racist Criminal Justice System*, 1987, William Wilbanks attempts to develop an argument to support the view that the criminal justice system, contrary to popular belief, is not racist. Wilbanks even characterizes the view that the system is racist as a myth. If a myth exists, it is in Wilbanks' efforts to present evidence to rebut the claim of the criminal justice system as racist.

It is ironic that the publication of Wilbanks' book coincides with the growing tide of racism in our country in the 1980s (witness Howard Beach in New York and Forsyth County in Georgia) as well as the crucial point at which the Supreme Court must take a hard look at substantial evidence indicating the disproportionate representation of blacks subjected to capital punishment in instances where the victims are white. (*McClesky v. Kemp*, No. 84-6811).

Throughout his book, Wilbanks' attempts to minimize the significance of well-documented evidence of racial discrimination in the criminal justice system. For example, he makes the untenable argument that blacks who serve on juries are likely to be overly sympathetic to black defendants without conceding that white jurors would have similar attitudes toward similarly situated white defendants. Further, Wilbanks ignores the actual impact of such jury discrimination: the most disturbing result of this jury discrimination is that blacks are being convicted by all-white juries at alarming rates. Additionally, he attempts to discount the significance of racial violence against the black community by law enforcement officers. He cannot deny the empirical support for racially motivated deaths of blacks by police officers in Memphis, Tennessee. However, he claims that no such evidence exists in New York City. Wilbanks' conclusion that the use of deadly force by police officers in New York City against black suspects is statistically insignificant and cannot be justified. In fact, such a conclusion is disturbing in light of recent reports of police killing of a mentally disturbed black woman (the Bumpers case in New York City) as well as a recent report that six police officers fired 10 shots including six in the head and killed a black suspect who was armed with a

lead pipe. The police officer who killed Ms. Bumpers was recently acquitted by a judge and the police department has also publicly stated that the 10 shots fired at a black suspect in New York were justified. Based on Wilbanks' analysis, neither of these cases would justify a claim of racial discrimination. However, the frequency of police use of deadly force when the suspects are black is strong evidence of such discrimination. These are two examples of Wilbanks' misuse of empirical data and unfortunately could lead to the perpetuation of racial discrimination against blacks who are pending trial along with racial violence against blacks by law enforcement officers. Wilbanks' conclusions about the absence of racism in our criminal justice system are neither persuasive nor accurate.

Wilbanks presents a number of what he describes as "myths" about racism in the criminal justice system, and endeavors to dismantle each "myth." He sets the tone of the book by defining racism and discrimination in such a manner that makes his conclusions more plausible. He then conducts an assessment of racial discrimination by police, prosecutors, and judges, and racial discrimination in prisons.

Police and Racial Discrimination

Two of the chapters in the book are particularly disturbing in their treatment of racial discrimination in the criminal justice system. In Chapter Five ("The Police and Racial Discrimination") and Chapter Six ("Prosecution and Racial Discrimination"), Wilbanks' critiques of empirical studies illustrating racially discriminatory practices by police and discriminatory practices by prosecutors are thin and flawed. Specifically, Wilbanks uses Chapter Five to list five charges of discriminatory police practices that are commonly made, and he then attempts to refute each charge. While he concedes that "the charge of racial discrimination is directed at the police more often than at any other segment of the criminal justice system," he erroneously concludes that the allegations are generally baseless and amount to little more than "myths." For example, Wilbanks notes that arrest rates for blacks for the eight index crimes are substantially higher than that of whites, and that police are deployed in disproportionate numbers in the black community.[1] Accordingly, victims of this racially discriminatory pattern of police deployment, most of whom are black, complain about the disproportionate harassment. Wilbanks challenges this complaint by means of a sweeping generalization that the black community would be the first to complain if police shifted their deployment efforts and spent more time investigating white-collar criminals. He also claims that the status quo should be maintained since "police forces would have to have large numbers of trained accountants, lawyers, and the like to investigate business activities." In essence, Wilbanks cannot dispute the fact that blacks are arrested more than whites at a rate of nearly five to one for the eight index crimes. One salient factor that is conspicuous by its absence is that arrests are made for little more than 10% of the crimes that are committed. Moreover, white suspects also commit significant amounts of street crime. Thus, Wilbanks ignores these critical facts and inappropriately focuses on the disproportionate arrests rates. Given the small number of arrests made in contrast to the large number of crimes committed, the available data unequivocally demonstrates that the police exercise of discretion in deciding who should be arrested is racially discriminatory. Wilbanks attempts, however, to undermine the significance of this discriminatory pattern of arrests by making the bold assertion that the black community would oppose a shift in police deployment efforts that would place more emphasis on arresting white collar criminals. Moreover, he maintains that any effort to focus on white-collar criminals would require police to have so much expertise in other professional areas that such an effort would be futile. In reality, the number of blacks arrested far outweighs the number of persons who are actually convicted. The real concern is not the number of police deployed in the black community, but the inordinate number of arrests that occur based upon race, along with the inconsistency with which blacks are handled within the criminal justice system.

In response to a charge of police discrimination in the use of deadly force, Wilbanks again finds the evidence unpersuasive. He acknowledges the well-documented fact that approximately 60% of the people killed by the police in the United States are black, while blacks represent less than one-eighth (e.g. 12%) of the population in the United States. He also acknowledges the accuracy of a study conducted in Memphis, Tennessee which revealed racial discrimination against blacks in the use of deadly force by police. Wilbanks attempts to dismiss this pattern of racial discrimination by claiming that a possible explanation for high rate of police shootings of blacks is related to the high rate of arrests of blacks for index crimes.

However, the explanation is unpersuasive. What the studies show is undisputed evidence that police arrest blacks in disproportionate numbers and that police use deadly force against blacks at disproportionate rates. Moreover, the discriminatory use of deadly force by police in Memphis, as recounted in a study cited by Wilbanks, was unmistakably confirmed in a recent Supreme Court decision, *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Tennessee v. Garner*, a Memphis police officer fatally wounded an unarmed 15-year old black youth who was 5 feet, 4 inches tall and weighed 100 pounds. At the time of the shooting, the police officer admitted that there was no indication that the youth was armed. Nevertheless, the officer shot him in the back of the head. Both the Supreme Court's decision condemning the use of deadly force in *Tennessee v. Garner*, as well as the earlier studies documenting the racially discriminatory pattern of the use of deadly force by police against blacks in Memphis, came too late to save the life of 15 year-old Edward Garner. In light of such clear evidence of a pattern of racially discriminatory arrests and the use of deadly force against blacks, it is hard to imagine how Wilbanks can conclude that the evidence is "sparse, inconsistent and contradictory." On the contrary, the evidence is overwhelming, clear, and persuasive, and cannot be dismissed in so cavalier a manner.

Prosecution and Racial Discrimination

Wilbanks' evaluation of racially discriminatory prosecution practices is equally disturbing. In Chapter Six, Wilbanks notes, correctly, that most suspects who are detained pretrial are unable to be released due to their inability to raise the necessary bail money. He also acknowledges that the ratio of black pretrial detention is more than five times greater than that of whites. He also correctly notes that pretrial detention has a significant impact on subsequent events in a criminal case, including a greater likelihood of conviction as well as a longer sentence. In attempting to discount the significance of the substantial rates of blacks held in pretrial detention, he observes that "blacks are detained more often than whites because they do not have the bail money, not because they are black." Thus, Wilbanks concludes that pretrial detention is a factor of economic class rather than race. While the assessment that poverty is the most important factor in pretrial detention is superficially appealing, it ignores the documented statistics noted by Wilbanks in an earlier chapter that race is a significant factor in the disproportionate number of blacks who are arrested by police. It is impossible to view uncon-

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[1]The eight index crimes are murder, rape, robbery, aggravated assault, burglary, larceny, auto theft and arson.

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tradicted evidence of disproportionate arrests of blacks by police as well as disproportionate use of deadly force by police against blacks and then to conclude that the criminal justice system is not racist.

Wilbanks does acknowledge the empirical data that supports the claim of racial discrimination in the application of the death penalty, and notes the disproportionate rates at which blacks are convicted in comparison to whites. He claims, however, that no conclusions can be drawn from the figures because other "controls," if applied, might lead one to draw the conclusion that no racial discrimination exists.

Wilbanks also attempts to debunk the contention that prosecutors purposely exclude blacks from serving on juries in cases involving black defendants. Wilbanks asserts that "the evidence for the racial exclusion of blacks from juries and for the impact of this exclusion on the dispositions of black defendants is rather scant with respect to data on 'real' juries." Wilbanks' conclusion is clearly wrong, and flies in the face of substantial litigation revealing the discriminatory use of peremptory challenges by prosecutors to exclude *all* black jurors from jury service in criminal cases against black defendants. He completely ignores the conclusion reached by the Supreme Court in *Batson v. Kentucky*, 106 S.Ct. 1712 (1986), reaffirming a century-old conclusion that "the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposely excluded." 100 S.Ct. at 1716. Moreover, the Supreme Court expressly rejected another contention made by Wilbanks—namely, that prosecutors may be justified in removing black jurors because they are likely to be more favorably disposed toward a black defendant. The Court observed that "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment— that they would be partial to the defendant because of their shared race." *Id.* at 1723. Thus, the Supreme Court noted the racially discriminatory practice of prosecutors striking black jurors, and concluded that it violated the Constitution. Overall, Wilbanks' attempt to disprove racial discrimination in the criminal justice system is "sparse, inconsistent, and contradictory." His efforts to criticize studies that demonstrate racial discrimination are flawed and unpersuasive.

Conclusion

The real benefit of the book is that it contains a considerable amount of reference material summarizing the impact of race on the criminal justice system. The chapters on sentencing and parole are good illustrations of this point in that they contain a substantial amount of information on black imprisonment and the parole system. Additionally, the statistical tables included in the appendix, as well as the extensive bibliography, are useful for future research on these issues. However, these reference materials do not, on balance, alter my view that Wilbanks' overall effort to discount clear evidence of racial discrimination in the criminal justice system is seriously flawed. ■

Charles Ogletree, a partner in the D.C. firm Jessamy Fort & Ogletree, is a visiting professor at Harvard Law School. In addition, Mr. Ogletree is a former Deputy Director of the District of Columbia Public Defender Service.

NIC to Study Jail Suicides

In an average city of 200,000 people, someone will commit suicide every two weeks. For the approximately 200,000 inmates in county jails and police lockups on any given day, however, a suicide occurs at least once a day. *The rate of suicide in jails is 16 times greater than one would expect in a city having a population comparable in size to these jails.* This is just one of many significant findings of the first national study of jail suicides completed in 1981 by the National Center on Institutions and Alternatives for the National Institute of Corrections (NIC), U.S. Department of Justice.

The National Center on Institutions and Alternatives (NCIA), has recently received a grant from NIC to act as coordinator of the Jail Suicide Prevention Information Task Force. In cooperation with Juvenile and Criminal Justice International, Inc. and with assistance from the National Sheriffs' Association, the project will: 1) gather information from each county jail and police lockup on the incidence of jail suicide and related issues, including the replication of NCIA's 1981 National Study of Jail Suicides; 2) conduct regional jail suicide prevention seminars throughout the country; 3) provide technical assistance to states and individual facilities regarding jail suicide prevention, including the dissemination of a periodic newsletter; and 4) develop a model training manual on suicide detection and prevention for use in jails and lockup.

For more information on the project, contact either of the co-directors: Lindsay M. Hayes, National Center on Institutions and Alternatives, 814 North Saint Asaph St., Alexandria, VA 22314/(703) 684-0373, or Joseph R. Rowan, Juvenile and Criminal Justice International, Inc., 381 South Owasso Blvd., Roseville, MN 55113/(612) 481-9644. ■

New Standards for Health Care

New standards for health care services in prisons and jails have been published by the National Commission on Correctional Health Care (NCCHC). The new standards revise those originally developed by the American Medical Association and last published in 1979 (prisons) and 1981 (jails).

The standards are recognized as national measurements of reasonably adequate and accessible medical care for inmates of prisons and jails, and are used in the NCCHC's program accrediting the health care systems of correctional facilities.

Included in the new up-to-date revision are sections on administration, personnel, support services, care and treatment, medical records and medical-legal issues, plus sample forms and instructions on policies and procedures, medication administration and control, standing orders and treatment protocols, receiving screening, and discharge summaries. Also, there are *new* standards on mental health evaluation, infection control, suicide prevention, sexual assault, staffing levels, clinic space, communicable diseases and isolation, and care of the mentally ill and physically or developmentally disabled inmates.

Requests for copies ($15) or for order information should be addressed to the National Commission on Correctional Health Care, Box 3500, 2000 North Racine, Chicago IL 60614/(312) 528-0818). ■

Staff Changes at the Prison Project

After eight years with the National Prison Project, Chief Staff Counsel Steven Ney resigned to become the Director of a state-wide disability rights project in Baltimore, MD. Mary McClymont has also left the Prison Project to join the U.S. Catholic Conference as Legalization Director of Migration and Refugee Services.

We were fortunate to have Claudia Wright return after a year's absence. Claudia was a staff lawyer from 1980 to 1985, and will be resuming work on cases she worked on earlier as well as new cases. Also new on the staff is Julia Cade, a paralegal and public information assistant. She has nine years of similar experience with projects in the South.

Fourth Circuit Upholds Lower Court Order in South Carolina

Betsy Bernat

On November 12, 1986, the United States Court of Appeals for the Fourth Circuit affirmed a district court order in *Nelson v. Leeke* which required the South Carolina Department of Corrections to comply with the population limits agreed to by the parties in a 1985 consent decree.

Nelson v. Leeke was filed in federal court as a class action suit by inmate Gary Nelson in 1981. Nelson charged that overcrowding in the South Carolina state prisons had created perilous conditions which violated inmates' Eighth Amendment rights to be free from cruel and unusual punishment. The inmates have been represented since 1983 by the National Prison Project, the Southern Prisoners' Defense Committee, and attorney Gaston Fairey of Columbia, South Carolina. A settlement was reached by the parties in January 1985, and the court approved a consent decree the following November.

In July 1986 the Department of Corrections argued in district court for a modification of the decree's population requirements, citing as cause an unusually high surge in the inmate population. Their request was turned down by Federal District Court Judge C. Weston Houcke who ordered them to comply with the decree, and, by September 20, to eliminate all beds that did not conform with the decree. (See *NPP JOURNAL*, Fall 1986, p.4, "Court Orders South Carolina to Comply With Decree.") The court provided that a status conference could be held in the fall, if necessary, to give the problem of population increases further consideration.

In order to meet the cap requirement, the department advanced the release dates of 149 non-violent prisoners by an average of 26 days. Furthermore, they transferred prisoners to newly-constructed facilities which provided enough additional space to allow them to achieve compliance with the order.

The Court of Appeals noted that, insofar as the defendants had complied with the order and eliminated all non-conforming beds by September 20, their appeal was "clearly moot." Furthermore, because the district court had provided the option of a status conference to allow the parties to discuss future overcrowding problems, the Court of Appeals maintained that there was "no final order from which to appeal."

The appeals court also affirmed the district court's finding that the defendants had violated the decree by building "temporary" dormitory barracks inside an existing medium security institution. A provision in the *Nelson* consent decree prohibits any "new institution" which is used to shelter medium or maximum security prisoners from employing ward-style housing. The defendants argued that the temporary facilities did not fall under the definition of "institution" and thus were not subject to the decree's provision. The court rejected this argument. However, it did affirm the district court's order allowing the defendants to use these temporary facilities for at least six months. The court feared that the transfer of the 96 prisoners in the barracks back to the older facilities could spark further overcrowding problems in the system. The matter can be raised again in district court when the six-month order expires. ■

Betsy Bernat is editorial assistant for the JOURNAL.

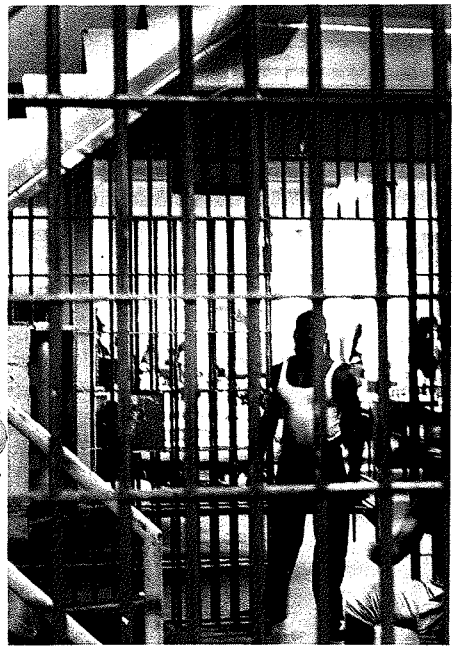

Photo by Spears

No More Quick Options for District of Columbia

Julia Cade

The safety valve of the District of Columbia's correctional system has blown apart from cumulative neglect and ill planning. For years, the D.C. system has operated by sending overflow inmates from four facilities with court-imposed population limits to the three facilities without court-imposed caps (Occoquan I, II and III).

In July of 1986, the effects of the practice of ignoring the increasing inmate population at the Occoquan facilities and the resultant strains on the physical facilities to accommodate the increases became evident in the explosive outbreak by inmates protesting the deplorable living conditions. Fourteen buildings were set afire, including two dormitories that were destroyed. The overtaxed system's immediate new problem was finding living space for 300 displaced inmates.

The National Prison Project went to court following the July disturbance, seeking a preliminary injunction on overcrowding and fire safety issues. The evidentiary hearing was successful, but the court-ordered population caps were stayed pending a trial scheduled for late October.

Fourteen buildings were set afire, including two dormitories that were destroyed.

During the trial the plaintiffs' experts were often uncontroverted by experts for the defense, and testimony from both sides was often in concurrence. In December 1986, the court ruled overwhelmingly for the plaintiffs, noting that even without the overcrowding problem, Occoquan's physical facilities, various services and programs were "at best, substandard" and that "every facet of operation at Occoquan is characterized by systemic deficiencies".

After years of "solving" the population crises at four of the District's court-capped facilities by reassigning inmates to the three Occoquan facilities, the D.C. government has run out of quick options. They have consistently refused to follow the recommendations of outside experts, citizens commissions, and others, that the solution is to reduce the number of non-dangerous offenders who are routinely warehoused in D.C. prisons. At this juncture, the situation can be viewed as either the glass is half empty or the glass is half full: i.e., without its customary procedures, the D.C. government has nowhere to go with the burgeoning inmate problem, or, the current situation provides a unique opportunity to examine and pursue alternatives to long-term incarceration in the overburdened system.

Ed Koren, one of the NPP attorneys on the case, sees several options readily available to the District, with others in easy reach, if the political players are serious about constructive solutions. "Since a consultant discovered that 38% of the D.C. inmate population would be eligible for a minimum security setting such as a halfway house," Koren points out, "the increased use of halfway

—*continued on next page*

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houses and community centers is an easy way to ease the population crunch now." In addition, "the streamlining of the paperwork process within the D.C. parole board is a way to keep the system flowing and to release people in a timely fashion when their sentences are up." For future consideration, Koren adds, "the D.C. government can set up a 'good time' system that would allow early release for good behavior—giving inmates some incentive at the same time building in a constructive safety valve for the correctional system." ■

Julia Cade does paralegal work at the Prison Project and is the public information assistant.

Lack of Resources No Defense for Constitutional Violations

Julia Cade

A federal judge in Albuquerque, New Mexico issued a sweeping order on June 27, 1986, enjoining the Governor of New Mexico and that state's correctional officials from eliminating medical, mental health and security staff positions as a result of budget cuts imposed by the New Mexico Legislature.

United States District Judge Juan G. Burciaga, acting on a motion for a preliminary injunction filed by attorneys for New Mexico prisoners, ordered the state defendants to refrain from eliminating any positions or laying off any employees for budgetary reasons if those positions were previously authorized. He also ordered the defendants to proceed immediately to fill all vacant positions previously authorized by the legislature and to refrain from transferring funds from other areas of the Corrections Department budget which might deprive prisoners of the rights to which they are entitled.

According to Alvin J. Bronstein, Executive Director of the National Prison Project, "This is a most significant decision coming at a time when state corrections department budgets are being threatened by legislative cutbacks all over the country. The Federal Court in New Mexico has reaffirmed the principle that a lack of resources is not a defense to a constitutional violation." Prisoners are represented by Steven Ney of the National Prison Project and local lawyers Mark Donatelli, Sarah Bennett, Robert Rothstein, and Ray Twohig.

The current proceedings arose in the case of *Duran v. Anaya,* in which a broad consent decree was agreed to by the prisoner plaintiffs and state officials in the aftermath of the tragic New Mexico Penitentiary riot in February 1980. Judge Burciaga, after noting that the New Mexico Legislature had cut the Department of Corrections' budget for the fiscal year beginning July 1, 1986, found that these cuts would result in serious violations of the consent decree in the areas of medical, mental health and security staffing. He also pointed out that staff prison officials had warned the legislature about the possible impact of their budget cuts and he cautioned those officials about the possibility of "an eruption of blood and fire" in the prisons. Judge Burciaga went on to say "to the extent of its ability and power, however, this Court will not permit that deadly combination to result from flagrant and transparent violations of the constitutional rights of prisoners in New Mexico's correctional institutions." Citing Supreme Court authority, Judge Burciaga pointed out that a defendant's constitutional obligations may not be avoided for lack of financing and that a federal court's equitable powers are not limited by the fact that "needed equitable remedies implicate state funds."

New developments arose in the case toward the end of 1986 as the parties were facing a hearing on plaintiffs' motions for contempt and further relief, and defendants' cross-motion to vacate or modify the order. In November these divergent counterpoints were narrowed when a partial settlement was reached: the plaintiffs withdrew their motion for contempt; the defendants withdrew their motions to vacate the court order and office of special master, their motion to double-cell most of New Mexico's prisons and their motions to modify the medical care, mental health care, inmate activity and staffing components of the court orders. Additionally, defendants agreed to restore good time to those plaintiff class members who were penalized by defendants' violation of the court order with respect to inmate discipline, maximum security and inmate activity. The defendants also agreed to implement a program of family visitation. In mid-December the parties also reached a partial settlement on outstanding applications for attorneys' fees.

The remainder of the motions were heard by the court in early December: the plaintiffs' motion for supplemental relief due to widespread noncompliance of the order and defendants' motion to modify substantive areas of the order such as classification, discipline, and maximum security and an effort to restrict the monitoring scope of the special master. The court is expected to reach a decision by spring, 1987. ■

For the Record:

To the Editor:

I have read with great interest and gratification the article written in your National Prison Project *JOURNAL* (See, "Oklahoma Prisoner Earns Place in Prisoners' Rights History: The Story of *Battle v. Anderson,*" *NPP JOURNAL,* Winter 1986, p. 1) about the Oklahoma prison litigation. The article is truthful, factual and informative. It explains how the work of the Civil Rights Division of the Justice Department and the attorneys working under the umbrella of the American Civil Liberties Union, all of whom did a skillful and scholarly job, produced evidence and legal authorities that compelled the state of Oklahoma to spend millions of dollars to bring the Oklahoma correctional system out of the 19th Century into the 20th Century.

Because of the poor economic conditions in Oklahoma and the increased rate of criminal convictions, the prisons are terribly overloaded. Notwithstanding this fact, the legislature has been diligent in maintaining medical care, reasonable, proper housing conditions and has passed laws to alleviate the overcrowded conditions.

The author is to be congratulated for her conscientious work on this article.

Sincerely,
Luther Bohanon
Senior United States District Judge
U.S. District Court
Oklahoma

George Kendall was chosen to receive the 1987 Stuart Stiller Memorial Award, given by the Stuart Stiller Memorial Foundation in Washington, D.C. Kendall is the staff attorney for the ACLU's Death Penalty Resource Center for the 11th Circuit in Atlanta, Georgia.

The Stiller Award is "given in memory of Stuart Stiller who, in his lifetime, integrated humanity with professional excellence. For him, compassion, humor and empathy were necessary virtues for those who seek to make a difference through the law. It is bestowed from time to time to honor those in the legal profession who by their actions symbolize those values."

In choosing the recipient of this award, the Board of Directors of the Stiller Foundation looks for "people who do the good work for its own sake, and do it well. This is a way for those people who generally do not receive recognition for their work to be recognized and appreciated. We chose George not only because of his work on death penalty cases, but because he has been able

to get the District of Columbia Bar involved in the national problem of providing counsel for indigent defendants in capital post-conviction cases."

The award was presented at the Eighth Annual Stiller Dinner held on March 15 at the Palm Restaurant in Washington, D.C. ■

The Second National Community Service Symposium will be held in Boston, MA in November 1987. The first Symposium, held last Fall in San Francisco, attracted judges, program administrators, probation officers, researchers, and concerned citizens from all around the country. The Symposium is sponsored by the National Community Service Sentencing Association. For further information, contact Cres Van Keulen, Director of the Community Service Center in San Rafael, CA/(415) 459-2234.

The Third International Conference on Penal Abolition will be held at the University of Montreal, in Montreal, Canada from June 15-19, 1987. The conference will pursue an analysis of current penal policy and practice with a view to raising public consciousness of the failures and injustices of the punitive model and to developing useful abolitionist strategies. For information about registration, contact the office des Droits des Détenu-e-s, Suite 300, 1030 Cherrier, Montreal, Quebec, Canada H2L 1H9.

■ ■ ■

The National Commission on Correctional Health Care has issued a call for papers for its 11th National Conference, to be held at the Palmer House and Towers in Chicago, Illinois on November 5-7, 1987.

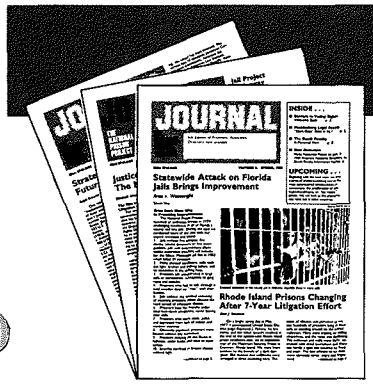
The conference, whose theme is, "The Second Decade: Professionalism and Specialization" will explore increased professionalism among correctional health care providers, improved quality assurance programs, second generation standards, and the specialization of correctional health care.

The National Commission on Correctional Health Care is a not-for-profit organization dedicated to improving health care in the nation's jails, prisons and juvenile confinement facilities.

Co-sponsoring the conference is the American Correctional Health Services Association.

Abstracts not exceeding 200 words should be submitted to the National Commission on Correctional Health Care, 2000 North Racine, Suite 3500, Chicago, IL 60614. For further information, write or call Jodie Manes at (312) 528-0818.

PUBLICATIONS



QTY. COST

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.

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

The National Prison Project Status Report lists by state those presently under court order, or those which have pending litigation either involving the entire state prison system or major institutions within the state. Lists only cases 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. 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.

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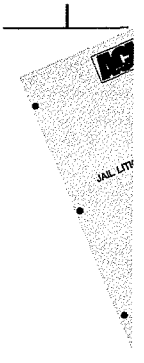
A Primer For Jail Litigators is a detailed manual with practical suggestions for jail litigation. It includes chapters on legal analysis, the use of expert witnesses, class actions, attorneys' fees, enforcement, discovery, defenses' proof, remedies, and many practical suggestions. Relevant case citations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



The **Jail Litigation Status Report** gives a state-by-state listing of cases involving jail conditions in both federal and state courts. The **Report** covers unpublished opinions, consent decrees and cases in progress as well as published decisions. The **Report** is the first nation-wide compilation of litigation involving jails. It will be updated regularly by the National Jail Project. 1st Edition, published September 1985. $15 prepaid from NJP.

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Fill out and send with check payable to

The National Prison Project
1616 P Street, NW
Washington, D.C. 20036

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HIGHLIGHTS

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

Cody v. Hillard—This suit challenges conditions at the South Dakota State Penitentiary and we have favorable decisions from the District Court and the Court of Appeals. In October the Eighth Circuit Court of Appeals granted a rehearing *en banc*, which was argued in January 1987.

Inmates of D.C. Jail v. Jackson—This case challenges conditions, primarily overcrowding, at the D.C. Jail and we have obtained a series of favorable decisions. In February, a hearing was held on our application to find the defendants in contempt of earlier court orders. A decision is expected shortly.

Inmates of Occoquan v. Barry—This lawsuit was filed in August 1986 and challenges conditions at the Occoquan I, II and III facilities at Lorton Reformatory, the District of Columbia's prison in Virginia. Trial was held October 20-29. In December, Judge Green entered an order limiting the population and ordering defendants to develop plans to address deficiencies in fire safety, environmental issues and medical care.

Nelson v. Leeke—In this case involving the entire prison system of South Carolina, the Fourth Circuit Court of Appeals affirmed the district court's order requiring defendants to comply with the population limits by reducing overcrowding and releasing certain prisoners. It also affirmed the finding that defendants had violated the decree by building "temporary" barracks-type housing units.

Palmigiano v. Garrahy—This is the statewide prison conditions case in Rhode Island that previously resulted in a series of favorable decisions. In December, the defendants filed a motion asking that further population reductions scheduled to take place on January 1, 1987 be re-examined. A hearing was scheduled for March 30.

Spear v. Ariyoshi—This case challenges conditions at the major men's and women's prisons in Hawaii and resulted in a consent decree in June 1985. In the light of various compliance problems, a supplemental agreement with new timetables was negotiated and approved by the court in February 1987.

U.S. v. Michigan/Knop v. Johnson—This is a statewide Michigan prison conditions case. In *Knop*, we completed presentation of our case in three days of trial in October. Defendants were scheduled for March 1987. In *U.S. v. Michigan*, compliance hearings were set for January, February and March. ■

AIDS Project

Early this year, the National Prison Project was awarded a one-year grant of $40,000 by the Public Welfare Foundation to support a public education program on AIDS in prison issues. Former NPP staff lawyer Urvashi Vaid has been hired on a part-time basis to direct the project.

During 1987 this special project will:

1. Update and expand the initial 1985 survey conducted by the NPP (*NPP JOURNAL*, Winter 1985);
2. Prepare and distribute a bibliography of AIDS in prison materials;
3. Produce and distribute educational brochures on AIDS issues for prisoners and correctional officers; and
4. Serve as a resource center to provide information and technical assistance to persons seeking information about AIDS issues.

For further information, contact Urvashi Vaid at the National Prison Project, 1616 P Street N.W., Suite 340, Washington, D.C./(202) 331-0500.

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New NPP Status Report Available.
See PUBLICATIONS, p. 15.

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