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Strategies for Future Prison Litigation

Ralph Knowles

One need not be reminded that "institutional litigation" is currently out of favor with the Reagan Administration's Justice Department and with the current Supreme Court of the United States. [See, e.g., *Rhodes v. Chapman,* 432 U.S. 337 (1981); *Youngblood v. Romeo,* ___U.S.___, 102 S.Ct. 2452 (1982); *Pennhurst State School & Hospital v. Halderman,* ___U.S.___, 104 S.Ct. 900 (1984); *Block v. Rutherford,* ___U.S.___, 104 S.Ct. 3227 (1984); *Hudson v. Palmer,* ___U.S.___, 104 S.Ct. 3194 (1984)]. Litigators around the country are facing increasing hostility as they attempt to enforce the Constitution behind the walls of jails, prisons and mental health institutions. That hostility is likely to grow. Consequently, we might all be served well by reflecting on our experiences in prison litigation in the past to determine which tactics and strategies have worked and which have not, so we can put our very best case forward. Anything less will no longer succeed.

The following thoughts assume a "totality of conditions" lawsuit but similar issues must be addressed even in a narrower piece of litigation.[1]

I. INITIATING THE LAWSUIT

A first and crucial consideration is to identify two factors: (1) What are the most needed items of relief for the plaintiffs and, (2) which important items of relief will be the most difficult to get into an order and to then enforce. Once those items are identified, the strategy with the court or negotiations with the defendants can evolve—always maneuvering to assure the inclusion of those items even if others have to be compromised or even left out.

Obviously, various "checklists" are available and should be utilized by litigators to make sure as many factors as possible are being considered in deciding what should be included. Although there is certainly still room for creative thinking, the wheel has been invented. The various lists of standards (American Correctional Association, American Bar Association, American Law Institute, United Nations, National Sheriffs' Association, American Medical Association, American Public Health Association, National Fire Protection Association, state food protection, etc.) should be consulted. We often forget that there are likely to be analogous standards developed outside the institutional setting that may carry even more weight with the courts. For example, the American National Standards Institute, Inc., (1430 Broadway, New York, New York 10018), has approved nearly 8,500 industry standards recognized voluntarily by the various industries in safety areas.

My experience is that the courts give such deference to corrections officials in these cases that the officials honestly do not believe they actually have to comply with the orders—certainly not in a timely fashion. Contempt should be built into the timetable.

Moreover, there is no shortage of prior orders as well as law review and other professional journal articles dealing with the various issues which usually arise. These should certainly be consulted. [See, e.g., Thornberry and Call, "Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects," 35 *Hastings L.J.* 313 (Nov. 1983)].

—*continued on page 7.*

[1]Some experienced litigators are now having second thoughts on whether totality litigation (in the historical sense—attacking all the conditions in a system or institution, as opposed to a totality approach to a specific problem, e.g., conditions in a segregation unit) is the litigation of choice at the moment.

The Legal Implications of Privatization

Alvin J. Bronstein

In the last issue of the *JOURNAL* (Fall 1984), we described the new trend towards private management and operation of jails and prisons and discussed some of our policy concerns. The legal implications of this movement are many and will vary depending upon the particular contractual arrangement, the statutory authority (if any) for private prison operations, a particular set of facts, and differing public entity immunity laws. Differences in state law concepts may dictate different results on the same issue in neighboring states. Therefore, we will attempt to address only some general legal implications based upon Federal statutes and the Constitution.

Public officials who work for state and local governmental agencies can be sued for the violation of a prisoner's rights under 42 U.S.C. §1983 (The Civil Rights Act) because their actions constitute "state action" or are considered to take place "under color of state law." Although the state itself may not be sued under the Civil Rights Act because of the 11th Amendment, the Supreme Court recently held that local governments and their agencies may be sued under the Act for constitutional violations arising from a "policy statement, ordinance, regulation or decision officially adopted and promulgated by that

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body's officers" or even a "custom."[1] And unlike individual governmental employees, a local government is not entitled to the defense of qualified immunity.[2]

It is difficult to imagine a situation in which a private prison owner or operator would not be held suable as acting under color of state law or as a state actor. Both the "public function" and "close nexus" tests articulated in §1983 case law promulgate standards that make this kind of suit particularly applicable in a private prison situation. The persuasiveness of the case law is bolstered by a strong common sense argument that states and local governments cannot contract away their duty to provide constitutional conditions of imprisonment for those whom they arrest, convict, and/or sentence. For "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and are subject to its Constitutional limitations." *Woodall v. Partilla,* 581 F.Supp. 1066, 1076 (N.D. Ill. 1984) [quoting *Evans v. Newton,* 382 U.S. 296, 299 (1966)].

When a private party (as compared to a state employee) is sued for violating the Constitutional rights of a prisoner, the plaintiff, in order to prevail, must show that the deprivation complained of was the result of action taken "under color of state law." Generally, this showing is made when it has been determined that the requirement of "state action", which must be met in order to bring an action under the Fourteenth Amendment, has been fulfilled. *Lugar v. Edmondson Oil Co.,* 102 S.Ct. 2744 (1982). The first inquiry is whether the deprivation resulted from the exercise of a right or privilege having its source in state authority. Clearly, the answer for the private operator who functions under a contract or agreement with the state is yes. The second question is whether those who caused the deprivation were state actors. There the courts have listed different factors which have been used as indicators of state action in the past: the public function test, the state compulsion test, the nexus test, and in some cases, a joint action test.

The public function test provides that if a private entity or person is engaged in the exercise of what are traditionally government functions, their activities are subject to constitutional limitations. The state cannot free itself from constitutional restraints in the

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operation of its traditional government functions by contracting or delegating responsibility to a private entity. And, the private entity, in assuming the role of the state by performing this public function, is subject to the same limitations as the state itself. In other words, the function of operating prisons was "exclusively left to the states in the past" and a private prison operator is considered to be engaging in state action. *Medina v. O'Neill,* U.S.D.C., S.D. Texas, Houston Division, C.A. H-81-2928 (1984).

The state compulsion test can result in state action justifying a claim under §1983 where the state has a clear duty to provide the services in question. Thus in *Lombard v. Shriver Center for Mental Retardation,* 556 F.Supp. 677 (D. Mass. 1980), the court found that the state had an obligation to provide adequate medical care for the mentally retarded and that the private organization providing the service for the state was engaging in state action for the purposes of an action under the Fourteenth Amendment.

In a case quite similar to the situation anticipated in a private prison, a federal court found that a private secondary school for delinquent and emotionally disturbed boys was acting under color of state law because there was "a sufficiently close nexus between the states sending the boys to school and the conduct of the school authorities." *Milonas v. Williams,* 691 F.2d 931 (10th Cir. 1982). Boys were placed at the school through the action of juvenile courts or other state agencies; local school districts placed boys there and paid their tuition; and there was extensive state regulation over the educational and treatment programs at the school. The various state defendants entered into consent decrees and the private defendants were held liable under §1983 for various constitutional violations because they were engaged in state action.

In some cases, courts have held private defendants liable as state actors because they were joint participants with state officials in using a state statute that was procedurally defective under the Fourteenth Amendment. *Lugar v. Edmondson Oil, supra* at 2756.

Because prison operation and management have always been exclusive functions of the state, and the process which leads to imprisonment is the exclusive domain of the state, it is not difficult to fit the private prison operator into the part of state actor. It is doubtful that a private operator could benefit from immunities granted to the government by state law. And, as a result of being sued either directly or by the insurance carrier for the private operator, there seems to be no basis for the idea that a state or local government will be able to avoid liability in civil suits brought by prisoners if they join the privatization movement. ■

Initial research for this article was done by Maggie Wood Hassan, a law student intern.

[1] *Monell v. NYC Dep't. of Social Services,* 436 U.S. 658 (1978).

[2] *Owen v. City of Independence,* 445 U.S. 622 (1980).

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Dramatic Change in Oklahoma Juvenile Justice System

Edward I. Koren

With the May 31, 1984 signing of a consent decree, Federal Judge Ralph J. Thompson, of the Western District of Oklahoma, put one of the final nails into the coffin of the traditional, and counterproductive, juvenile corrections policies and practices in Oklahoma. During the seven year course of the *Terry D. v. Rader* lawsuit which led to the settlement and consent decree, the Oklahoma juvenile system was brought into line with nationally recognized standards for the treatment of juveniles confined to state facilities.

Prior to the filing of the case in 1978, Oklahoma had ignored the trends that swept through juvenile corrections and child care systems in the preceding decade. While other states were emptying their training schools Oklahoma was sending virtually its entire juvenile offender population into institutions. While most states were building smaller institutions closer to the urban areas their offender population came from, Oklahoma continued to send its juvenile population away to remote areas where it was impossible to find qualified staff. While other states were deinstitutionalizing their status offender and deprived and neglected children populations, Oklahoma continued to place non-delinquents in these facilities and even mix these kids with others who had committed criminal acts.

The Oklahoma child care system at this late date was still characterized by abuse and mistreatment beyond even the prevailing norm. These abuses took many forms, from beating, hog-tying (a practice of tying feet and hands behind the back and joining them with a chain), solitary confinement and sexual misconduct, to the incarceration of abused and neglected children, dangerous health and safety conditions and the simple warehousing of youngsters without meeting many of their most basic needs.

Some specifics are in order: **Taft:** Bay Hall, on the North Campus of the State Children's Home located in Taft, Oklahoma, was a two-story dormitory housing about 80 children. It had two solitary confinement cells, one on each floor. The downstairs cell was located near the bathroom and reeked of feces and urine. It had no bed, toilet or furnishings. Numerous windows were broken, others were covered with plywood boards; broken and leaking plumbing fixtures were observed and the stench of excrement and sweat pervaded the building. In the junior boys' dorm upstairs the solitary cell had a heavy metal grating covering the windows. A 10-year old boy was confined there at the time of one attorney's visit for the "crime" of running away.

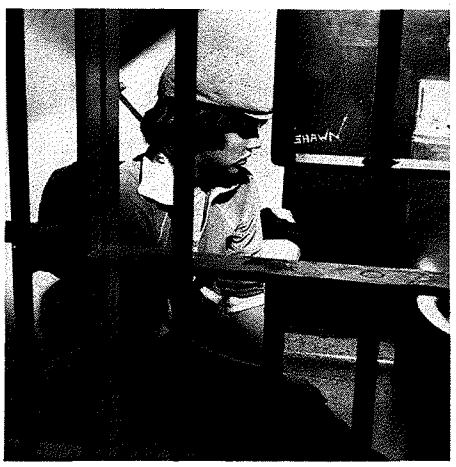

Photo by Dan O'Brien

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On the South Campus of the institution at Taft (a converted mental hospital) attorneys observed and talked to children locked in solitary confinement cells. These cells were also bare of furnishings, toilets and beds; children were stripped to their underwear and given blankets. One child was locked up there for 13 days. In order to go to the bathroom, the children had to pound on heavy metal doors to gain the attention of the staff member on duty who did not always respond.

Whitaker: Despite its characterization as an "open campus", there was very little difference between the operation of the facility at Whitaker and the state training schools for delinquents. Experts referred to Whitaker as "the sickest institution of them all," primarily because the population was made up entirely of non-offenders.

Whitaker was extraordinarily repressive. All children, regardless of their individual treatment needs, were forced to endure a behavior modification point system, where points were given or taken away based on the performances of work chores, behavior and attitude. Restrictions (the childrens' word for punishments) were freely given by staff and resulted in loss of points and other privileges. As a result, few children were able to fully enjoy the privileges that state administrators claimed existed, such as off-campus passes. When too many restrictions were accumulated, children were sent to the segregated unit known as the "limited privilege cottage", where they might stay indefinitely. The level of restriction in the unit was even greater than in the general population.

"General population" children had to have a specific number of points just to go out and sit on the dorm porch. Children who, in frustration, left their dorms and ran around the campus just to get outside, were chased down in vans and placed in segregated confinement. The chasing of AWOL's from the institution was described by state departmental evaluators as a para-military operation, one which the staff seemed to relish greatly. While there was no barbed wire fence around Whitaker, the facility was secure in every other sense of the word.

Helena: At this facility, which housed about 160 boys, the secure detention unit was known as Dodge House. This unit consisted of barren, oppressive isolation cells in which children were known to have been held for more than 100 days. Hog-tying was part of the daily routine at Dodge House. As at Whitaker, boys who managed to escape were run down in vans, and were often stripped and beaten when apprehended.

As a direct result of the *Terry D.* litigation, Oklahoma undertook fundamental and sweeping changes in the structure and direction of its entire child care system. Four major juvenile institutions were closed, including Taft-South Campus, Helena, Boley and Whitaker; the institutionalized population has decreased drastically. Abused and neglected youngsters may no longer be confined in state institutions. Community-based programs have multiplied seven-fold, and comprehensive national child care standards have

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been adopted. Abusive child care practices have been prohibited while institutional programs and conditions have improved somewhat from a few short years ago.

All of this would not have occurred without the litigation effort made by a group of lawyers from several organizations, including the National Prison Project, Legal Aid of Western Oklahoma, and the National Center for Youth Law. It is interesting that much of the change is not attributable directly to the terms of the final 1984 settlement decree itself but to changes that were forced during the seven-year litigation effort. For example, in their initial 1978 complaint, the plaintiffs urged the elimination of unconstitutional conditions of confinement in the system's solitary confinement units. During the prosecution of the lawsuits the state authorities bulldozed the detention cells at the COJTC and Helena facilities. The detention cells at Taft-South and Whitaker were closed; the notorious Bay Hall was also demolished.

But for this lawsuit, comprehensive state legislation would never have seen the light of day. The Oklahoma legislature passed legislation with significant reform provisions only because of its fear of the federal court intervention and supervision which loomed on the horizon, as well as intense adverse local and national attention given to the conditions in the state's institutions. The legislation includes provisions prohibiting corporal punishment in institutional schools, the creation of an Advocate Defender grievance program and a comprehensive legal assistance program for indigent children. Most importantly, the statute establishes a legislative preference for home placement, a prohibition on the placement of non-offenders in state facilities and a requirement for their removal from those institutions. Moreover, under the terms of this enactment juveniles were ordered removed from confinement in the state's local jails by July 1, 1985—a progressive step which the litigation did not expressly request.

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The complex, protracted and sometimes bitter litigation that brought all this about has seen, among other things, two motions for summary judgment, various motions for preliminary relief, extensive discovery by both sides, numerous expert tours, three trips to the United States Court of Appeals, significant changes in the state's policies, practices, and facilities, new juvenile justice legislation and two negotiated settlements. (The federal judge refused to sign a similar 1982 agreement between the parties without legislative approval, which was finally obtained).

Many of the dramatic changes brought on by *Terry D.* are in place; others depend on future action by the authorities. The next step, therefore, requires assurance that the changes already made are permanent and that promises made in good faith to the children of Oklahoma are kept. ■

PART II

Prison Litigation: Making Reform a Reality

Mary E. McClymont

In the last issue of the *JOURNAL* (Fall 1984), we discussed the power of a federal district court to fashion an effective remedy once a constitutional violation had been established. That discussion centered on those remedial devices that were least intrusive and which relied heavily on good faith compliance efforts on the part of defendants. However, the history of the last fifteen years indicates that jail and prison reform is politically unpopular and is not high on the agenda of the responsible local and state authorities. The court may then resort to more intrusive enforcement options to make constitutionally required reform a reality.

1. Contempt

Rule 70 of the Federal Rules of Civil Procedure and 18 U.S.C. §401(3) expressly authorize a federal court "to punish by fine or imprisonment, at its discretion . . ." contempt of its authority including disobedience of an order or decree. Failure to comply with an injunctive order issued by a court of competent jurisdiction is actionable as contempt of court.[1] *Howat v. Kansas,* 258 U.S. 181 (1921).

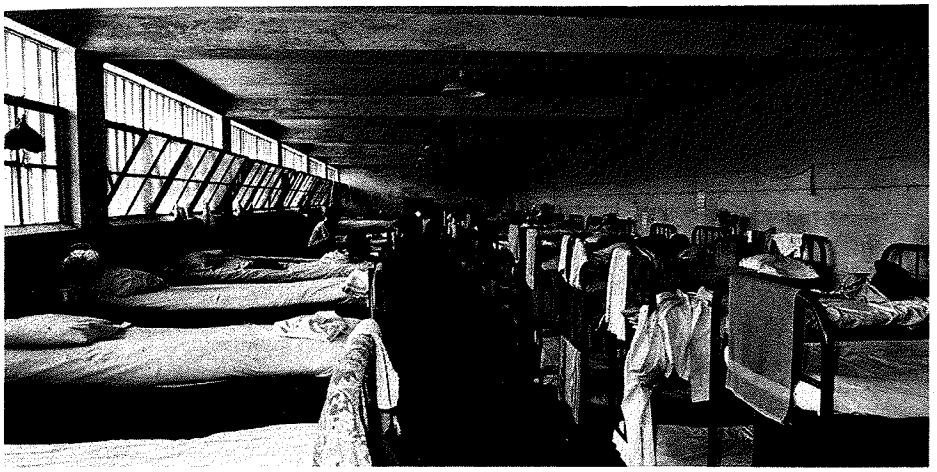
In *Mobile County Jail Inmates v. Purvis,* 551 F.Supp. 92, 96-97 (S.D.Ala. 1982), *aff'd* 703 F.2d 980 (11th Cir. 1983), the court held county officials in contempt for failure to comply with court orders related to unconstitutional jail overcrowding. The court summarized its civil contempt power.

> Broadly speaking, a civil contempt is a failure of a litigant to do something ordered to be done by a court in a civil action . . . *Walling v. Crane,* 158 F.2d 80, 83 (5th Cir. 1946). Civil contempt, where appropriate, serves "to preserve and enforce the rights of private parties to suits, and compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the Court has found them to be entitled . . . ." (citations omitted).

The plaintiffs must prove the contempt by "clear and convincing" evidence. *U.S. v. Rizzo,* 539 F.2d 458, 465 (5th Cir. 1976); *Shakman v. Democratic Organization of Cook County,* 533 F.2d 344, 351 (7th Cir. 1976). As the court stated in *Mobile County Jail Inmates, supra,* 551 F.Supp. at 97, "[w]hile the defendants . . . are not held to 'absolute compliance' with the court's order . . . the court looks to see whether the defendants took 'all the reasonable steps within their power to insure compliance with the orders' . . ." "Wilfulness" is not an element of civil contempt so the defendants' intent is not at issue. *McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 191 (1949). Of course, there must be a specific order against which officials may be found in contempt, e.g., a remedial court order, a consent decree, a court-ordered plan.

Upon a finding of contempt, the officials may be incarcerated or fined. *Newman v. Alabama,* 683 F.2d 1312, 1318 (11th Cir. 1982), *cert. denied,* 103 S.Ct. 1773 (1983) (imprisonment or fine); *Miller v. Carson,* 550 F.Supp. 543 (M.D.Fla. 1982) (fine). In *Palmigiano v. Garrahy, supra,* 448 F.Supp. at 672, and *Mobile County Jail Inmates, supra,* 551 F.Supp. at 97, the court imposed daily fines for each day the defendants were out of compliance. They were able to purge themselves of contempt with resulting revocation of the fines if they achieved compliance by a certain date. The sanction was coercive in nature.

[1] A contempt order may be of three types: coercive, criminal, or compensatory. Coercive contempt is prospective; it seeks to effect future obedience. In contrast, criminal and compensatory contempt are retrospective—they respond to past violations. If a defendant willfully disobeys an injunction, a judge may impose criminal contempt in the form of a fine or imprisonment. The real distinction between civil and criminal contempt is the nature of the relief asked and the purpose of that relief.



NPP photo—Fountain Correction Center, Atmore, Alabama

2. Order for Population Caps/Reduction

This remedy is obviously used primarily for overcrowding violations. A large number of courts in jail and prison cases have ordered population caps or reductions after a hearing. *See, e.g., Wellman v. Faulkner,* 715 F.2d 269 (7th Cir. 1983) (where the court affirmed the district court in ordering a two-stage reduction in population at the prison); *Leeds v. Watson,* 630 F.2d 674 (9th Cir. 1980) (where the court affirmed a jail population cap in light of overcrowding); *Ruiz v. Estelle,* 650 F.2d 555, 570 (5th Cir. 1981), *cert. denied,* 103 S.Ct. 1438 (1983) (the court noting its acceptance of the principle that ". . . a district court in exercising its remedial powers may order a prison's population reduced in order to alleviate unconstitutional conditions"); *Campbell v. Cauthron,* 623 F.2d 503 (8th Cir. 1980) (reversing trial court and ordering limitations on population per cell in Arkansas jail); *Battle v. Anderson,* 564 F.2d 389 (10th Cir. 1977) (affirming trial court order to reduce inmate population at two state penal facilities); *Martinez Rodriguez v. Jimenez,* 537 F.2d 1 (1st Cir. 1976) (denying stay of trial court order capping facilities' population); *Campbell v. McGruder,* 580 F.2d 521 (D.C.Cir. 1978) (remanding to trial court to see if overcrowding in fact occurred with instructions that population cap could be reinstituted and suggesting that evidence in record was sufficient to sustain population cap); *Inmates of Allegheny County Jail v. Wecht,* 565 F.Supp. 1278 (W.D.Pa. 1983); *French v. Owens,* 538 F.Supp. 910 (S.D.Ind. 1982); *Gross v. Tazewell Co. Jail,* 533 F.Supp. 413, 416 (W.D.Va. 1982); *McMurry v. Phelps,* 533 F.Supp. 742 (W.D.La. 1982); and *Jones v. Wittenburg,* 509 F.Supp. 653 (N.D.Ohio 1980).

Recently, the Court of Appeals for the Second Circuit in *Badgley v. Varelas,* 729 F.2d 894 (2nd Cir. 1984), imposed a ban on intake of pre-trial detainees in order to ensure compliance with the population limit which had been imposed by the district court in an order three years earlier. The court believed this to be an appropriate enforcement measure, short of releasing prisoners.

3. Appointment of Receiver

"[W]hen more common equitable remedies prove to be inadequate, a court in equity may impose less common ones such as receiverships to take over temporarily the essential functions of the institutional decision makers to ensure that the remedy is successfully implemented." *Reed v. Rhodes, supra,* 500 F.Supp. at 397 (and citations therein). The court ordered a receiver in this school desegregation case noting that "[t]he fundamental test governing the imposition of a temporary receivership is one of reasonableness under the circumstances," [citing *Morgan v. McDonough,* 540 F.2d 527, 533 (1st Cir. 1976), *cert. denied,* 429 U.S. 1042 (1977)].

Where the "more usual remedies—contempt proceedings and further injunctions—were plainly not very promising [and] . . . inadequate," the courts have been forced to resort to receiverships. *Morgan, supra,* at 533. The *Reed* court elaborated on the circumstances which make compliance unlikely and may justify receivership:

> [r]epeated or continuous failure of the officials to comply with a previously issued decree; a reasonable forecast that the mere continued insistence by the court that these officials perform the decree would lead only to "confrontation and delay"; and a lack of any leadership that could be expected to turn the situation around in a reasonable time. *Reed* at 397.

In *Newman v. Alabama,* 466 F.Supp. 628 (M.D.Ala. 1979), where the Alabama prison system was put into receivership, Judge Frank Johnson noted that after 6 years the Board of Corrections had still not achieved substantial compliance with the court's first orders. The court discussed the "extraordinary circumstances" which made necessary the only alternative to the court: receivership. The court found receivership "the more reasonable and the more promising approach" as opposed to closing the several prison facilities. *Id.* at 635. It found that appointment of a monitor offered little hope of swift compliance in light of all the circumstances.[2]

It should be noted, however, that the court appointed the Governor of Alabama as receiver, on his own petition, in response to the plaintiffs' application. The Governor's petition was supported by the leaders of the Alabama Legislature. It would appear that the federal court chose a seemingly harsh sanction and at the same time one that was politically less intrusive into state affairs.

Finally, in an unreported decision in *Wyatt v. Ireland,* (M.D.Ala. Oct. 25, 1979), Judge Johnson also appointed the Governor of Alabama as receiver of the mental health system, again on his own petition. That case also involved a protracted history of non-compliance by state officials.

4. Closing of Institutions

As a last resort, courts have also ordered the closing of institutions in light of unconstitutional conditions. These cases include the following: *Gates v. Collier,* 548 F.2d 1241 at 1243 (5th Cir. 1977) (noting with approval the district court's action during pendency of appeal of closing prison camps unfit for human habitation and remanding the case to the district court ". . . to continue the implementation of conversion to a constitutionally permissible penal system"); *Dimarzo v. Cahill,* 575 F.2d. 15 (1st Cir. 1978), *cert. denied,* 439 U.S. 927 (1978) (affirming trial court that Massachusetts county jail and house of corrections would be ordered closed if certain mandated changes were not made); *Rhem v. Malcolm,* 507 F.2d 333 (2nd Cir. 1974) (remanding to trial court to enter order to close Manhattan House of Detention unless specified standards are met); *Palmigiano v. Garrahy,* 443 F.Supp. 956 (D.R.I. 1977) (order that population in Rhode Island Adult Correctional Institution be reduced and that maximum security facility be closed by a certain date); *Hamilton v. Landrieu,* 351 F.Supp. 549 (E.D.La. 1972) (order for closing of Orleans Parish Prison by certain date).

5. Release of Prisoners

In *Duran v. Elrod,* 713 F.2d 292, 297-98 (7th Cir. 1983), *cert. denied,*

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[2]*See also* Chayes, *The Role of the Judge in Public Law Litigation,* 89 Harv.L.Rev. 1281, 1303 n.92 (1976).

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104 S.Ct. 1615 (1984), the appellate court upheld the lower court's order to release pre-trial detainees in order to meet an earlier imposed population cap. The appellate court reasoned that there was substantial non-compliance with the year-old consent decree limiting the population. Although county officials had been given the opportunity to develop a workable remedy, they had failed and instead had sought to modify the consent decree. Moreover, the lower court had ordered the releases on a conditional basis, giving the Illinois state courts an opportunity to first specify a different method.

In *Benjamin v. Malcolm,* 75 Civ. 3073 (S.D.N.Y. Nov. 4, 1983), the trial court finally ordered jail inmates released after an extensive effort to enforce compliance through means of a less intrusive nature. The court had earlier suggested a variety of ways to end overcrowding, short of court-ordered release. *Benjamin v. Malcolm,* 564 F.Supp. 668, 670-71 (S.D.N.Y. 1983).

However, the Eleventh Circuit Court of Appeals, in *Newman v. Alabama,* 683 F.2d 1312 (11th Cir. 1982), vacated a district court order releasing prisoners, ruling that the court order was to be enforced first through the contempt power of the court rather than a release order. The court found that plaintiffs did not show the inadequacy of their available legal remedy but instead "sought new and extraordinary injunctive relief that was beyond the scope of the consent decree" (which had set a population limit on state prisoners in the county jails). *Id.* at 1319. The court found that the release order was greater than necessary to remedy the constitutional violation.

> [A] district court in exercising its remedial powers may order a prison's population reduced in order to alleviate unconstitutional conditions, but the details of inmate population reduction should largely be left to prison administration. This is consistent with the policy of minimum intrusion into the affairs of state prison administration that the Supreme Court has articulated for the federal courts. *See Williams v. Edwards,* 547 F.2d 1206, 1212 (5th Cir. 1977). *Id.* at 1320-21 [(quoting *Ruiz v. Estelle,* 650 F.2d 555, 570-71 (5th Cir. 1981)].

As the *Newman* case highlights, the level of intrusiveness upon the state's administration is a paramount concern in selecting the remedy most suitable at any particular stage in achieving compliance with federal court orders in prison and jail litigation. Moreover, the optional remedies briefly discussed above must be tailored closely to the particular constitutional violation. ■

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Racial Disparity

through the demand for sentencing guidelines, and by requesting habeas corpus relief in a challenge to the constitutionality of the sentence imposed. A number of states have developed sentencing guidelines. The information received to date concerning these guidelines, however, indicates that rather than resolving the problem, the sentences for blacks have become even harsher than the sentences for whites accused of a similar crime. This is the reported experience of Maryland (especially in Baltimore) and Minnesota.[10]

Similarly, habeas corpus litigation, to date, has failed to provide a meaningful remedy for this discrimination. The defendants who raised this issue in their petitions for writ of habeas corpus presented studies done in the state or region where they were sentenced which found that people of color received harsher sentences than similarly situated white defendants. The courts' routine denial of this claim is based on the legal argument that in each individual case there was no showing that this particular defendant received a harsher sentence than a similarly situated white defendant.

Appellate court judges are reluctant to grant habeas corpus relief on the basis of discrimination because such a finding would affect not only the particular case before the court, but every similar case in the state.[11]

Judges may also be hesitant to find racial discrimination for fear of tarnishing the "sanctity of the judicial process." Many people believe that judges and jurors are "supposed to," and thus do, set aside any racial prejudices in order to decide the matter before them. If this were really the case, we would not see the pattern of racial discrimination in the criminal justice system generally, and the sentencing process in particular. Conscious and unconscious opinions that people of color are not only inferior, but are less than human,[12] influence those who must decide not only whether someone committed a crime, but what punishment must be given.

Those of us concerned with the eradication of vestiges of slavery, (the social, political, and emotional encumbrances which are a result of conscious, intentional acts of racial injustice) must find a way to prove that sentencing practices are discriminatory. This is especially important given the negative impact imprisonment has on the black family, further undermining its ability to thrive. After the Supreme Court decision in *Pulliam v. Allen,*[13] a civil action brought against judges for prospective relief appears to be a viable approach. *Pulliam* confirms that state judges violating federal constitutional rights may be enjoined by a court.

A statistical study demonstrating racially discriminatory sentencing practices in one particular state would be valuable. The introduction of evidence that people of color receive harsher sentences than their white counterparts can shift the burden to the defendants to show that the differences in sentences were based on considerations other than race. Problems of proof must be thoroughly analyzed, but these problems should not prevent us from proceeding to develop such a suit.

Racial discrimination in both judge and jury sentencing practices suggests that a civil action would be more effective in redressing this systemic racism than a petition for a writ of habeas corpus. An individual habeas corpus victory would set a useful precedent. However, a finding of statewide sentencing discrimination would have even greater impact. Such a victory would force changes in the sentencing practices of judges throughout the state. By its very nature, a holding like this makes ridiculous the notion that only in this particular case did this judge give a harsher sentence to a black defendant than to a white defendant.

Development of a litigation strategy which will address individious discrimination in sentencing practices is necessary if we are to end "the insidious destruction of the human spirit [which] is the essence of both slavery and the worst aspects of contemporary . . . racism."[14] We must demand that racially unjust sentencing be enjoined; sentencing practices must be studied and racially neutral mechanisms developed to guide judges and jurors in the determination of a sentence. Monitoring systems must also be developed to assure that the victory, when achieved, is a lasting one. ■

[10]Washington Post, "Prosecutor Hits Sentencing Rules", June 18, 1984; Testimony of Leslie Green, Minnesota Department of Correction, before the Subcommittee on Criminal Justice, Judiciary Committee, House of Representatives, April 4, 1984.

[11]*Maxwell v. Bishop,* 398 F.2d 147.

[12]This attitude is very much a part of our not so bright history:

> "Good gracious. Anybody hurt?"
> "No'm. Killed a nigger."
> "Well, it's lucky because sometimes people do get hurt." . . .

Mark Twain, *The Adventures of Huckleberry Finn,* 306-7 (New York: Harper and Row Brothers Publishers, 1884).

[13]104 S.Ct. 1970 (1984).

[14]D. Bell, *Racism in American Courts,* p. 165, see note 4.

—continued from page 1.

Litigation Strategies

With the increasing recognition of the importance of including enforcement mechanisms in the original order itself, one should also utilize the various articles by Vincent Nathan and others on what methods work—and why—as checklists for enforcement provisions.[2]

Having consulted and utilized the checklists, however, it is important to remember that in any prison some items are more important and more difficult to achieve under the current state of the law and the facts than others. Lawyers should not be satisfied merely to get some "form language" relief in those areas. Rather, the more difficult the area, the more specific and extensive the relief and the enforcement mechanisms should be. Consultation with the plaintiffs is important throughout the litigation process; it is even more important here. After all, the plaintiffs are the ones who not only know what is most egregiously wrong but how the defendants are likely to subvert—intentionally or not—any form language in an order.

As to the question, "What are the judges looking for at this stage of a case?", I suspect the answer is extremely dependent on the judicial philosophy and eccentricities of the judge. These must be taken into account—along with the views of the Court of Appeals—throughout the process.

A settlement between the parties is the ultimate goal. Most judges will do almost anything to accomplish this end. Many may not have realized that the initial order is only the start of the process, but so be it. The plaintiffs should certainly take into account this propensity of most judges in trying to get the court to push the defendants toward settlement when matters get difficult. Moreover, a settlement is so desirable to most judges that they are usually anxious to approve almost any settlement presented.

I regret to say that if a settlement cannot be reached, most judges will look toward the most limited relief that can be entered against the defendants under the facts presented. In spite of evidence of long-standing constitutional violations, judges tend to accept distorted and inappropriate "deference, comity, federalism, non-intrusive" notions when entering orders. They often ignore the hard realities of what it will take to get a state or locality to follow the law and instead operate on the hope and prayer that a general order without strong enforcement mechanisms will be followed.

[2]E.g., Nathan, "The Use of Masters in Institutional Reform Litigation," 10 *Toledo L.Rev.* 419 (1979).

After finding massive constitutional violations, [Judge Kane] rejected well-briefed, specific, comprehensive remedial proposals of the plaintiffs and, instead, chose the "assume good faith, non-intrusive" approach usually advocated by defendants.

These tendencies make it imperative to educate your court on the history of orders in cases such as these and the necessity to deal forthrightly and forcefully with the problems in the initial order so that the order not only fully addresses the violations to be remedied but is also clear to all involved and can be enforced without interminable future post-judgement litigation.

II. SPECIFICITY OF ORDER SOUGHT

I am radical on this issue. My experience teaches me that litigators for the plaintiffs must fight every minute for extreme specificity although I also believe specificity is normally desirable from the standpoints of all the players: prisoners, administrators, monitors/masters, and the court. Why do I believe that?

First, lawyers for prisoners should never forget for a minute that with rare exceptions you must operate with one truth:

THE LEAST YOU GET FOR YOUR CLIENT ON ANY ISSUE IN THE ORIGINAL ORDER IS THE MOST YOU WILL EVER GET.

From the entry of the first order on, you will be fighting an ongoing and wearing battle with defendants to ignore, subvert, appeal, and modify, or declare "substantial" compliance with its terms. I fear that most judges are so happy to see *any* compliance with *any* of the terms of an order after years of non-compliance with the Constitution that they almost always fall into the "look how far the state has come" *or* "look how much money the state has spent" syndromes. It's as if orders in prison cases involving constitutional rights are not to be taken as seriously as commercial cases.

Second, I think it is important that all parties—and legislators and other public officials for that matter—understand clearly from the beginning what is to be required of them. This prevents frustration on the part of prisoners and staff. Neither side may like what it got, but at least they know what it is. The state and its managers can enter into meaningful planning and budgeting without trying to guess what is going to be required after the next compliance hearing.

Third, you have an order that can be monitored and can be enforced without continual arguments and litigation over the threshold question of what is required by the order.

On the other hand, there are, of course, arguments for having broad principles established by the order which contain flexibility in application to particular situations within the prison or the different prisons affected by the order. The first such contention is usually based upon a feeling that all situations are not best improved by rigid formulae laid out by the courts and the parties. Moreover, the parties and the court cannot foresee all the problems at the time of the order. The establishment of one method of dealing with one problem may adversely affect the ability of the managers to satisfactorily deal with another. Finally, it is said that the defendants who are going to be running the institutions in the long run should be required and allowed to wrestle with how to solve problems and come up with their own methods. Through that process, it is said, the managers will have an investment and pride in what they have done and will be enthusiastic about carrying it out—or at least will not be so hostile toward making needed changes.

No one can really argue with these justifications for non-specificity in orders in the abstract—assuming competent governors, legislators, prison administrators, and guards who are acting in good faith and have the financial and other wherewithal to devise and carry out their own plans to solve the problems. I have yet to see such a situation in the real world.

Among the prison cases I have been involved in are *Ramos v. Lamm*[3] (the Colorado prison case) and *Duran v. Anaya*[4] (the New Mexico prison case). *Ramos* was tried for six weeks after a settlement reached between the plaintiffs and the executive branch of the State of Colorado was rejected by the legislature. *Duran* was settled. Judge John Kane of Colorado is one of the most sensitive and creative judges in the country. After finding massive constitutional violations, he rejected well-briefed, specific, comprehensive remedial proposals of the plaintiffs and, instead, chose the "assume good faith, non-intrusive" approach usually advocated by defendants. He ordered that five simple principles be met, to-wit: safety, health care, productive activity, motility, and

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[3]*Ramos v. Lamm,* 639 F.2d 559 (10th Cir. 1980).
[4]*Duran v. Anaya,* C.A. No. 77-721 JB (Consent Decree Entered July 14, 1980.)

—continued from previous page.

coherence. He then ordered the defendants to come up with plans to meet these principles.

In *Duran,* on the other hand, after seemingly endless negotiating sessions with prisoners and corrections officials at the table with their lawyers, a consent order was entered which was 145 pages long and which at the time was clearly the most specific order that had been entered in such a case.

In *Ramos,* there was immediate litigation over what the order really meant and what would have to be done to meet the terms of the order. That litigation is continuing at this time. Even with the specifics of the *Duran* order, there is still litigation underway asking for modifications—and squabbling over what the order really requires.

Nonetheless, the difference is that in *Duran* it is the defendants who are fighting for modifications, whereas in *Ramos* the plaintiffs have had to fight to establish the principles to begin with. For my money, I still say specifics are the clear choice. If corrections officials and the state are acting in good faith, counsel for the plaintiffs can always review plans that justify modifications and/or give innovative approaches to the problems not contemplated and additional consent orders can be entered to conform to the methods developed by the state.

III. MONITORING AND ENFORCEMENT OF THE ORDER

If the last decade of prison and jail litigation has taught us anything, it is that a substantial effort must be made to get automatic monitoring and enforcement devices into the original order. Otherwise, the almost inevitable sequence of events is that a period of time will go by during which the lawyers for the plaintiffs attend to other business only to find out that the order is not being carried out. That means massive "rediscovery and retrial" of all the issues all over again. Indeed, the compliance "trials" are usually more complex than the original trial. My current view is that there should be the following in all prison or jail orders:

A. The establishment of an independent master/monitor operation paid for with a continuing fund of state money. The operation must be adequately staffed and operated in a manner similar to the ones which have made Vincent Nathan the premier master in the prison world. Orders which only require the state to submit reports on compliance are almost universally a failure and only waste time of state officials who produce reports that are almost always inaccurate and inadequate. This then causes the court not only to rule on the state of compliance but also to challenge the credibility of state officials—not a healthy situation. Moreover, the experiences I have had with "monitoring" operations short of the Nathan models have been frustrating, inefficient, and have not ultimately shortened the litigation or speeded compliance.

If the average defendant in a civil money trial showed the lack of adherence to court orders that state officials do in prison cases, judges would put them in jail.

B. It is also important that the state and corrections officials have reporting responsibilities within the context of the master/monitor operation. This is mainly so that corrections officials and the state will have to deal with the terms of the order themselves and will thus be better able to plan and organize to come into compliance.

C. Finally, sanctions for non-compliance should be built into the order itself. I'm not sure what sanctions work best in the interest of society, but at the least, I think there should be automatic fines imposed for continued non-compliance, with the money to be utilized for the prisoners' benefit beyond what would be provided for them in a constitutional system. In fact, the money should probably go directly to prisoners so as to invoke the ire and get the attention of the taxpayers and corrections officials. My experience is that the courts give such deference to corrections officials in these cases that the officials honestly do not believe they actually have to comply with the orders—certainly not in a timely fashion. Contempt should be built into the timetable. If the average defendant in a civil money trial showed the lack of adherence to court orders that state officials do in prison cases, judges would put them in jail. I also firmly believe, and have seen in Alabama, that the serious threat of automatic releases of prisoners or money to be paid to convicted prisoners makes people sit up and take notice and causes them to become more serious about complying with orders.

After all, the plaintiffs are the ones who not only know what is most egregiously wrong but how the defendants are likely to subvert—intentionally or not—any form language in an order.

IV. INVOLVEMENT OF THE COURT AND STATE OFFICIALS

The desirable and the possible seem to be very different under normal circumstances. Any substantial prison remedial order is going to require serious action from state officials outside the corrections system. My view is that it would be desirable for the governor, legislative leadership, or other relevant high officials to be involved in the settlement discussions as soon as these discussions are reasonably close to completion, so the officials cannot say later that they were blind-sided and use that rationale to resist moving to compliance with the orders.

However, my experience is that governors and legislators normally don't want the political baggage of having approved, by implication or otherwise, any settlement or order that gives substantial benefits—much less attorneys' fees—to prisoners or their lawyers. Some have told me that they would help get money and legislation to help with compliance but did not want to be saddled with prior participation in the discussions leading to an order.

Further, in settlement negotiations, one has to look at the scenario that is going to play out. If involvement of legislators or other state officials is going to mean, as a practical matter, that no settlement can be reached, it may be far better to reach the settlement with the duly authorized corrections officials and deal with the others after the order is signed, sealed, and delivered.

V. CONCLUSION

The above strategy discussion undoubtedly represents a cynical view of judicial enforcement of court orders in the prison domain. I do not intend for a minute for anyone to be unappreciative of the enormous improvements that have been made in most of the prisons of this country *solely* because of judicial intervention. Nonetheless, as the Supreme Court continues to send negative messages to trial judges, it is important to approach such litigation realistically. ■

Ralph Knowles, an experienced civil rights litigator, is currently in private practice in Tuscaloosa, Alabama. He was previously the Associate Director of the National Prison Project. This article is an adaptation of his remarks to a conference of lawyers, judges, academicians, and corrections experts, presented in May, 1984.

Women in Jail: Problems and Needs

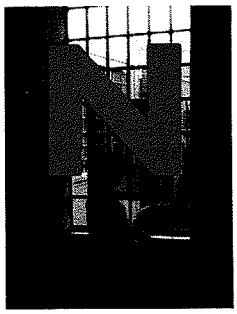

Photo courtesy of the National Coalition for Jail Reform

EARLY half a million women are locked up in America's crowded and deteriorating jails each year. Although many are charged with non-violent offenses and are not a danger to the community, they remain in jail, often without adequate medical care, without services or programs to prepare them to re-enter life as productive citizens, and without hope.

The National Coalition for Jail Reform, in its recently published brochure, *Women in Jail: Special Problems, Different Needs,* calls upon community groups, elected officials, criminal justice personnel and the general public to examine the problems of women in jail and to seek solutions. Here are some of the points made in the brochure:

FACTS ABOUT WOMEN IN JAIL

- 73% of the women in jail are under 30;
- 58% lived on less than $3,000 a year and 92% had less than a $10,000 yearly income;
- 66% were unemployed before their imprisonment;
- 47% have at least one child dependent upon them;
- 58% have less than a 12th grade education;
- 59% have not been found guilty of the crime with which they are charged, but are in jail awaiting trial or arraignment.

PROBLEMS FACED BY WOMEN IN JAIL

Not only do women face the harsh conditions of our overcrowded, understaffed, underfunded and antiquated jails, they are confronted by many problems specific to their gender:

Incarcerated mothers

1. Many women in jail are mothers with dependent children, often either single parents or the sole support of their household. Most jails, however, either do not permit children to visit their mothers in jail or severely restrict those visits; in other jails contact visits, where a mother can hold and play with her child, are denied;

2. While the mother is separated from her children, she is likely to lose custody of them to the state;

3. Even if custody is retained, the reunion of mother and child can be difficult after the emotional and economic strain of the jail experience.

Poverty

Many women commit crimes out of financial desperation, and they cannot afford to post bail.

Programs

Women in jail are often housed under tighter security and more restrictive conditions than are appropriate for their offenses because of limited facilities and resources available for women prisoners.

1. Women generally have less access than male inmates to recreation, education, work release and vocational education programs, when such programs even exist in the jail;

2. When there are occupational training programs in the jail, women may be limited to training in beauty care, sewing, cooking and other traditionally female, low-wage occupations instead of the better paying jobs for which men are trained;

3. Lack of past employment outside the home often means lack of qualifications for a work release program;

4. Fewer community resources are directed toward women leaving jail—fewer halfway houses, employment programs and other vital social services—than toward men.

Medical issues

1. Mood altering drugs are prescribed two to three times more often for women in jail than for men;

2. Lack of gynecological care for jailed women is not only dangerous, but can be fatal. There is seldom special health care for pregnant women, and the use of contraceptive pills is often interrupted because they are unavailable in jail.

These problems do not need to exist. First of all, there are alternatives to the jailing of women. The Coalition, consisting of 40 national organizations including the National Prison Project, the National Sheriffs' Association, the American Bar Association, the American Public Health Association, and the National Urban League, urges an increased use of pretrial diversion and release programs, sentencing alternatives such as probation, restitution and community services, and sentencing reform, particularly for victimless crimes and other minor offenses most common to women offenders.

Along with the use of alternatives to jail, the needs of women in jail must be met. The Coalition's brochure cites several programs which have been successful in meeting those needs.

The Coalition urges community members to talk to sheriffs, jail administrators, district attorneys, judges, and social service agency directors to determine the scope of the problem of women in jail in their communities and to try to seek solutions.

The Coalition's brochure is available by writing to the National Coalition for Jail Reform, 1828 L St., N.W., Suite 1200, Washington, D.C. 20036. ■

National Prison Project Highlights

In this issue of the *JOURNAL* we are beginning the practice of listing the major developments in the Prison Project's litigation program since July 1, 1984. Further details of any of the listed cases may be obtained by writing the Project.

Abbott v. Richardson - This is the national class action which challenged the Federal Bureau of Prisons' policies on censorship of mail and literature. In September we received a disappointing decision rejecting most of our claims and we have filed a notice of appeal.

Akers v. Landers - This case challenged the Virginia Department of Corrections' policy which automatically separates newborn babies from their incarcerated mothers. We initially filed a notice of appeal from an unfavorable ruling in the district court but have withdrawn it following the unfavorable Supreme Court decision in *Block v. Rutherford* (no contact visits for pretrial detainees).

Bobby M. v. Graham - This case challenges conditions and practices at three

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Florida juvenile training schools. We have already obtained a series of favorable orders and agreements. During the summer, 200 children were released from the Okeechobee school as a result of a number of negotiation sessions.

Brown v. Landon - We have been preparing to file a contempt motion for the defendants' failure to comply with the consent decree in this case, which deals with conditions and practices at the Virginia super-maximum security facility. During the summer we began experiencing great difficulty and delays in interviewing our clients and in September we filed a preliminary injunction motion. After an evidentiary hearing, we received an excellent opinion and order granting all the relief we requested on the access to clients issue.

Canterino v. Wilson - This case challenged the totality of conditions at the Kentucky Correctional Institution for Women. After several earlier favorable decisions in August, the court ruled that since defendants had not yet come up with an acceptable plan, the court would order specific relief (e.g., defendants must provide additional vocational education and prison industries programs by January 1, 1985).

Delgado v. Cady - Certain overcrowding issues at the Waupun Correctional Institution in Wisconsin were settled during the summer, after the court's December 1983 decision barring all triple-celling and limiting double-celling. The parties reached agreement and we submitted a proposed order to the court for approval.

Duran v. Anaya - After an inmate suicide, the court held the defendants in contempt for violating the consent decree.

Flittie v. Solem - We received a favorable decision in April 1984 in the South Dakota State Penitentiary case, which required the defendants to submit a plan. The defendants' appeal of that order was dismissed by the Court of Appeals on July 26.

Freeman v. Georgia D.O.R. - This case challenged the involuntary drugging and transfer to mental hospitals without due process of women at the Georgia Women's Correctional Institution. A consent decree was signed in July which settled all the remaining issues.

Garza v. Heckler - In August, we filed a lawsuit challenging a 1983 amendment to the Social Security Act which eliminated convicted felons from old age insurance coverage.

Grubbs v. Bradley - A large step towards compliance with the earlier decision in this Tennessee State Prison case was taken in July with the entry of an order providing for detailed improvements in classification, security, management, sanitation, food services and job programs. The defendants are required to create a minimum of 75 new inmate jobs a month; for any month in which they fall below that figure, they are required to release a number of inmates equal to the difference between 75 and the number of jobs.

Mohler v. P.G. County, Anderson v. P.G. County, Gray/Barger v. P.G. County - The series of damages cases filed in 1983 which concerned brutal assaults and rapes at a Maryland jail was settled for $200,000 early this summer. We will receive our costs and a small share of the fees shortly from the private lawyers who we encouraged to be primarily responsible for the cases.

Nelson v. Leeke - In the statewide conditions case in South Carolina, a set-

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WHEN we saw the cartoon shown above, we thought, "Oh wow. Free advertising!" But what a minimalist approach it took to the wonders NPP performs!

So we thought, why not use it as installment #1 in our very first ad campaign? We could expand on the issue of cold coffee and call it "the Java Campaign", very Madison-Avenue, you know. Hard-nosed; corporate. Dispel those myths that good liberals can't be good businesspersons. And what a perfect opportunity to experiment with wordplay, i.e., "Coffee grounds for filing suit?"

Here's how the plan looks so far.

Bringing In Expert Witnesses. We would no more fail to mention our experts in an ad than Diet Pepsi would forget to mention Nutra-Sweet. So for installment #2, we thought we'd show Alvin Bronstein sitting at a table with two women, each wearing a sign saying, "Expert."

Expert my eye, you think, They look more like a couple of grandmothers. I knew those sky-high expert fees would bring prison litigation to this sad state of affairs. But look again: the experts are none other than those famous coffee-mongers Cora and Mrs. Olson, and Al is asking them, "But what about that mountain grown taste? What about decaf?"

The Class Action Issue. People have the strangest notions about our work. "Oh, you're those people who support luxury hotel accommodations for ax-murderers," they say. Yes, we reply, and don't forget steak on days beginning with a "T", and a VCR in every cell!

Well, let's set at least one thing straight: we wouldn't file a lawsuit because one inmate had been served cold coffee. So installment #3 will show not one, but hundreds of inmates banging their mugs on the table, and they'll be yelling, "We *all* have cold coffee! We *all* demand an ACLU lawyer!"

The U in ACLU is Really for Understanding. If misery loves company, then the ACLU-NPP is all for keeping company with its clients. Why, when we gripe about the office cockroaches, Al merely waves us aside. "I put those roaches there," he claims. "A measure of sympathy for our clients."

Heaven knows the same thing goes for coffee. Installment #4 has Alvin Bronstein sitting at his desk. Surrounding him is his staff: attorneys, secretaries, the whole show. They are not happy people. They are angry and they are shouting. "Our coffee is cold!," they exclaim. "Get us the A.G.'s office!" ■

Chock Full of Nuts

Betsy Bernat

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tlement was reached on virtually all the issues, and the settlement agreement was approved by the state legislature. Approval of funding to implement the settlement is pending.

Palmigiano v. Garrahy - The Rhode Island prison system continued to move closer to full compliance with the various court orders.

Pugh & James v. Britton - We received a disappointing decision from the Court of Appeals in the Alabama prison case which reversed last year's prisoner release orders and contempt citations against the Attorney General and Commissioner of Corrections.

Spear v. Ariyoshi - We filed a lawsuit in September challenging the totality of conditions at the Hawaii Women's Prison and the men's Oahu Community Correctional Center in Honolulu.

Witke v. Crowl - This case challenged the conditions at the Northern Idaho Correctional Institution, a women's facility, on both Eighth Amendment and equal protection grounds, and a final settlement agreement was filed with the court on September 4.

During this period the National Prison Project received $203,694 in attorneys' fees and costs, in the following cases: Duran v. Anaya, Freeman v. Georgia D.O.R., Grubbs v. Bradley, *and* Lovell v. Brennan. *These fees and costs help make up part of the Prison Project budget and enable us to continue our work.* ■

PUBLICATIONS

The National Prison Project JOURNAL, $15/yr. $2/yr. to prisoners. Back issues, $1 ea.

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. 5th edition, published December 1982. Paperback, $15 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.

QTY. COST

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

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

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

QTY. COST

Prisoners' Rights 1979. Course handbooks prepared for the Prisoners' Rights National Training Programs held January-March 1979. Includes articles, legal analyses, and litigation forms. Prepared by the staff of the National Prison Project. Available in paperback. $35 per set, from the Practising Law Institute, 810 Seventh Ave., New York, N.Y. 10019. 2 Vols., 1163 pages. This set, plus **Representing Prisoners** (below), can be purchased for $40.

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

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

QTY. COST

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Vestiges of Slavery: Racism in Sentencing

Adjoa A. Aiyetoro

RACIAL INJUSTICE in the state and federal criminal justice systems has been enjoined by a number of courts.[1] To our knowledge, however, no court in the United States has ever found racial discrimination in the imposition of a sentence, although the prison populations are disproportionately black. According to a 1982 report of the Bureau of Justice Statistics, 45% of those imprisoned in the United States are black. Claims of racial discrimination in sentencing have been raised in an attempt to obtain judicial relief from a sentence thought to be unconstitutional.[2] The courts, although unsympathetic to this claim, have granted relief to some of these individuals based on other grounds, e.g., a finding of arbitrariness in the imposition of the sentence.[3]

The failure to find racial discrimination in sentencing is alarming given the disproportionate representation of minorities in prisons.[4] Racial injustice has been a dominant theme in the United States since the arrival of the Mayflower. Racism has led the attacks upon Native Americans, Chinese, Africans, Hispanics and Japanese; Mount Vernon was built and maintained its grandeur on the backs of African slaves. The use of Africans as chattel slaves led to the only civil war this government has known; racism allowed the gains of that war, documented by Reconstruction, to be all but eradicated.

Our history strongly suggests that all major systems in the United States are infused with the germ of racism. In addition, the results of many studies belie the notion that there is no racism in the sentencing process. The studies indicate that "racial disparity" (a more palliative phrase then either "racism" or "racial discrimination") is a national phenomenon. A statistically significant higher proportion of blacks throughout the South are sentenced to death although their crimes and criminal histories are not markedly different from whites.[5] Twenty-eight percent of the convicted blacks in Virginia received sentences of three years or less (light), while 42% of similarly situated whites received such sentences. Conversely, 35% of blacks received heavy sentences (nine years or more) while only 14% of the whites received heavy sentences. Of blacks in Virginia with felony records, only 19% received light sentences while 38% got heavy ones. Thirty-five percent of the whites with felony records got light sentences and only 22% got heavy ones.[6]

When controlled for other factors, minorities receive sentences which are from one to seven months longer than those received by whites in California, Michigan, and Texas.[7] Likewise, sentences of blacks and native populations in Alaska are from 2 to 8 months longer than similarly situated whites for burglary, larceny, receiving, fraud, forgery and embezzlement. Sentences for blacks are approximately 42 months longer than similarly situated whites for drug offenses.[8] Finally, blacks incarcerated at Walpole Prison in Massachusetts receive a minimum sentence which is typically one year longer than whites.[9]

Those concerned about racial injustice in sentencing have attempted to address the problem in two ways:

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[1]See, e.g., *Whitus v. Georgia,* 385 U.S. 545 (1983) and *Casteneda v. Pastida,* 430 U.S. 482 (1977) (jury panels); *Washington v. Lee,* 263 F.Supp. 327 (M.D. Ala. 1966), *aff'd per curiam,* 390 U.S. 333 (1968) (racial segregation in prison housing).

[2]See, e.g., *Maxwell v. Bishop,* 398 F.2d 138 (8th Cir. 1968); *Britton v. Rogers,* 631 F.2d 572 (8th Cir. 1980); *Johnson v. State of Alaska,* 607 F.2d 944 (Ala. 1980).

[3]See, e.g., *Furman v. Georgia,* 408 U.S. 328 (1972).

[4]See Footnote 1 above. See generally, Bell, *Racism in American Courts: Cause of Black Disruption and Despair,* 61 Cal. Law Review 165 (1973); D.Bell, *Race, Racism and American Law,* Little, Brown and Co., 1972, 1975 Supp.; National Minority Advisory Council on Criminal Justice, *The Inequality of Justice: A Report on Crime and the Administration of Justice in the Minority Community,* (January 1982). See also, A. Leon Higgenbotham, Jr., *In the Matter of Color,* (1978) for an excellent discussion of racism as the founding block of the United States.

[5]Wolfgang and Reidel, "Race, Judicial Discretion and the Death Penalty", 407 *The Annals of American Academy of Political and Social Sci.* 119, 123-124 (1973).

[6]The Richmond Times-Dispatch, "Unequal Justice", a series published October 16-21, 1983. See also, *The Governor's Task Force on Sentencing,* "A Report To the Governor on Criminal Sentencing in Virginia", (December 1973).

[7]Joan Petersilia, *Racial Disparities In the Criminal Justice System,* Prepared for NIC, U.S. Dept. of Justice, xix, June 1983.

[8]Alaska Judicial Council, "Judicial Council Findings Regarding Possible Racial Impact in Sentencing", September 6, 1978. Table A.

[9]The Boston Globe, "Blacks Receive Stiffer Sentences", p. 50, April 4, 1979.

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