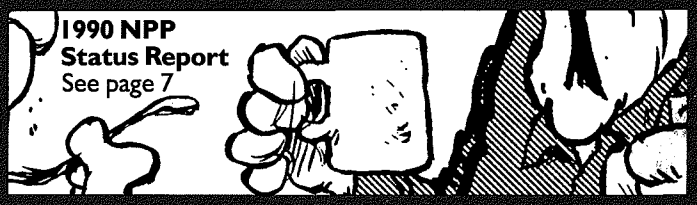
JOURNAL
THE NATIONAL PRISON PROJECT



ISSN 0748-2655 NUMBER 22, WINTER 1990

INSIDE . . .

Support Grows for New Trial

Doubts Raised In Virginia Death Row Prisoner Case

Jan Elvin

Capital punishment: the ultimate, the irrevocable penalty. At least 23 people are believed to have been wrongfully executed in this country since the turn of the century, according to an article published two years ago in the *Stanford Law Review.*

Doubts abound regarding the use of the death penalty, its morality, its constitutionality, and its fairness. But surely there is one thing upon which all people will agree: for the state, operating under "color of law," to take the life of an innocent man or woman, would be a monstrous thing which would ill serve the cause of justice.

In the case of Joseph Michael Giarratano, an innocent man may well be executed, unless the Commonwealth of Virginia reverses its rush towards "finality." Giarratano is now on Virginia's death row, having confessed to a crime he does not remember committing, and to which no physical evidence links him.

Background

Ten years ago Joseph Giarratano, then 22 years old, pleaded guilty to a rape and the double murder of Barbara Kline and her teenage daughter in Norfolk, Virginia. A drug addict and alcoholic, Mr. Giarratano suffered from frequent blackouts, delusions and hallucinations. A victim of serious child abuse, he was addicted to drugs by age 11, and first attempted suicide at age 15.

Joe Giarratano had lived with the Klines for most of January 1979. He moved out around February 1, then visited the home a few nights later. He awakened from a drug and alcohol-induced blackout to discover their dead bodies. Although Giarratano had no memory of having committed the crimes, in his daze and panic he thought he must have, and fled to Jacksonville, Florida.

"While on the bus," he recently recalled, "I remember feeling like I was going out of my mind. By the time I got off the bus in Jacksonville I had decided I must have murdered Toni (Barbara) and Michelle, and turned myself in."

In the following days, Mr. Giarratano gave five separate, contradictory confessions to police. The confessions are divergent even as to matters such as who was killed and why, and are also inconsistent with all of the physical evidence. The state's own psychiatrist testified that Giarratano lacked actual memory of the crime, and had "confabulated," or made up, the details of his confession.

Mr. Giarratano remembers, "They asked me if I had killed Toni and Michelle, and why. Apparently I gave them the same statement that I had given to the Jacksonville officer. They told me that it could not have happened like that. After further questioning, the Norfolk detective told me that Toni had been murdered after Michelle, and that Michelle had been raped; and that my statement to the Jacksonville officer could not be right. . . . After going back and forth several minutes the detective began asking me, 'Could it have hap-

—*continued on next page*

New evidence has been uncovered in 32-year-old Joe Giarratano's case which could prove his innocence, but so far the Attorney General's office in Virginia has refused to grant a new trial.

Photo by Franklin Photography

Jan Elvin is editor of the NPP JOURNAL.

Is Joe Giarratano Innocent?

—continued from front page

pened like this, is this what happened?' And I would say, "Yes." He was committed to a mental hospital while awaiting trial and given large doses of Thorazine. He was maintained on Thorazine throughout the trial and during the first four years of his stay on death row in Virginia.

He twice attempted to hang himself in his hospital detention cell. He waived a trial by jury, and in August of 1979 he was convicted at a bench trial which lasted less than a day. He wanted to be executed.

"I was convinced," says Joe Giarratano, "that I was evil and had to be punished for what I did. I couldn't sleep, I couldn't keep food down and all I wanted to do was die."

"I was convinced that I was evil and had to be punished for what I did."

The Case Against Giarratano

Evidence against him, despite the confessions, was so scant that the state offered him a plea bargain of simple life. He refused—still believing he was guilty—and chose instead to rely on an insanity defense for which he had no evidence, against counsel's advice.

Giarratano's lawyer at trial told the court his client was competent to stand trial, thereby waiving the issue for all future proceedings. The same lawyer failed to object when the prosecution unlawfully used private conversations between Giarratano and psychiatric staff at Central State Hospital against him at trial.

Charlottesville attorney Lloyd Snook took over the case at the post-conviction stage. Snook became increasingly convinced that Giarratano had not been competent in the original proceedings. His client's despair continued unabated over the next several years, and Snook maintained a constant effort to persuade him to keep fighting in the courts. Giarratano was nearly executed in 1980 after firing his lawyer and dropping his appeals; a stay was granted nonetheless. In 1983, he once again demanded that all appeals be dropped, coming within hours of execution before allowing his attorney to file an appeal on his behalf.

It was at this low point that Mr. Giarratano began to receive counseling (from outside the prison) and, as a result, decided to fight for his life. For the first time, he began to reveal the terrible abuse he had suffered as a child, and how drugs and alcohol had become a way to escape from his brutal homelife.

A Phoenix from the Ashes

After a number of years on death

An Outcry for Justice

Here are excerpts from the editorial pages of newspapers all over Virginia, calling for Attorney General Mary Sue Terry to grant a retrial:

Culpeper Star-Exponent

■ *The Culpeper Star-Exponent*: "As a newspaper serving the needs of citizens of this state, it is our responsibility to join this groundswell of support and ask that the Commonwealth of Virginia grant Joe Giarratano a new trial based on all the evidence now available."

Potomac News

■ *The Potomac News*: "It is difficult to believe that anyone could be sure beyond a reasonable doubt that Joseph Giarratano committed the crimes for which he is scheduled to die. . . . Unless Ms. Terry gets to the truth of this matter, the execution of Joseph Giarratano will not be justice—it will be murder."

■ *The Daily Progress*: "The honorable thing for the Commonwealth to do is to quickly move forward with a new trial. The state's loss of face in reversing its rigid position is ludicrously insignificant in comparison to the execution of a possibly innocent man."

■ *Northern Virginia Daily*: "The attorney general's office seems less concerned about justice for Joseph Giarratano than with following its procedures for handling appeals of capital cases."

Richmond Times-Dispatch

■ James J. Kilpatrick, syndicated columnist: "I have read the record in the case of Joe Giarratano, and I don't know. I simply don't know. But I can't see that any useful public purpose would be served by sending him to the chair. . . . I am a neutral observer, not known to be soft on crime, and I am filled with reasonable doubt."

■ Esther and Franklin Schmidt, writing in the "Point of View" Section of *The Charlottesville Daily Progress*, "Justice demands a new and fair trial for Joseph Giarratano. All of the evidence in his case must be considered. It is not too late to avert the execution of an innocent man by procedure." ■

THE
JOURNAL
OF THE
NATIONAL PRISON PROJECT

Editor: Jan Elvin
Editorial Asst.: Betsy Bernat

Alvin J. Bronstein, Executive Director
The National Prison Project of the
American Civil Liberties Union Foundation
1616 P Street, N.W.
Washington, D.C. 20036
(202) 331-0500

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

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

The *JOURNAL* is scheduled for publication quarterly by the National Prison Project. Materials and suggestions are welcome.

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

Innocent?

Giarratano's case has generated a movement of citizens, organizations and members of the press rallying for a new trial. Supporters have set up a billboard and distributed bumperstickers. Thousands of petitions have been signed asking the Attorney General of Virginia to grant Joseph Giarratano a new trial.

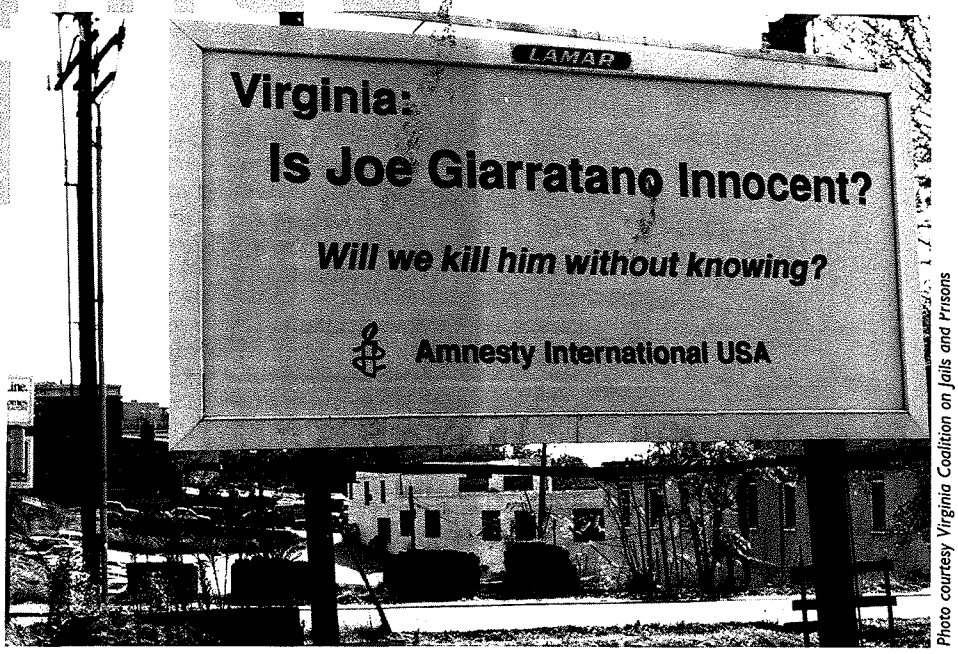


Photo courtesy Virginia Coalition on Jails and Prisons

row, he taught himself law and has filed numerous lawsuits, including *Brown v. Murray*, a case in which the National Prison Project represented prisoners at the Mecklenburg Correctional Center. *Brown* challenged the state of Virginia on the constitutionality of the conditions of confinement in the maximum security facility, including death row. Giarratano served as one of the named plaintiffs in that suit. Elizabeth Alexander, lead attorney for the NPP on the *Brown* case, says, "Joe is a model named plaintiff, invaluable in assisting us in explaining legal options to other prisoners. I'm always impressed with his comprehensive understanding of legal and tactical issues."

Mr. Giarratano has written and filed successful petitions on behalf of several

—*continued on next page*

Photo by Action Photo Co.

Bishop Sullivan

Bishop Walter Sullivan of the Catholic Diocese of Richmond: "I've seen Joe grow and change a lot over the years—he's very caring and concerned for others. There's such a cloud of uncertainty surrounding his trial and conviction that Joe deserves another chance."

Toni V. Bair, regional administrator for the Virginia Department of Corrections, and former warden of the Mecklenburg Correctional Center, where Giarratano is held:

"Joe is exceedingly bright, articulate, charismatic, and he is *always* honest. He is self-taught. You can hardly classify him as a 'typical' inmate. He is capable of saying, 'I respect you but I disagree,' in a rational way. My philosophy has always been to give inmates a rationale for what I do, yet Joe has on occasion been able to convince me to take another route. He acts like an adult. He has been involved in some things I wish he hadn't been—like several escape attempts, but then if I were in his shoes, I am sure I would have tried the same thing. And I have never heard him make threats against, or talk about hurting, anyone on my staff.

"The number one reason the death penalty needs to be abolished, over and above the other reasons, is that we *have*, in this country, put to death innocent people. No way can we justify that. You can't, then, just say, excuse me, I'm sorry I did that. If Joe *is* innocent, to execute him would be a travesty, not only for Virginia, but for the nation. Based on what I have read, what I have been told, there are enough questions about his guilt that I don't see how they can fail to give him a new trial. I hope they look at it again, for all our sakes."

Stephen H. Sachs

Stephen H. Sachs, former attorney general of Maryland, former United States attorney for Maryland, and currently a partner at Wilmer, Cutler & Pickering, became acquainted with Joe Giarratano during his involvement with the *Murray v. Giarratano* case: "I have written a letter to the attorney general of Virginia, Mary Sue Terry, asking her to rethink her position because I believe there is sufficient ambiguity as to his guilt. I say this from the perspective of a former attorney general who has argued, in the past, *for* the constitutionality of Maryland's death penalty.

"Joe is also a remarkable human being," says Sachs. "As odd as it may sound, he is a *good* man. It's just a fact."

Dorothea B. Morefield, a Virginia resident whose son was murdered, along with four co-workers, in a fast-food restaurant in 1976, and whose diplomat husband was held hostage in Iran for 444 days: "Why wasn't it obvious that [Joe] was totally incompetent to stand trial? The system failed—it failed Joe and it failed the two women who died in that apartment. And if Joe Giarratano is executed it will have failed us all. 'Tough on crime' seems to be everyone's favorite slogan. Will Virginia kill Joe Giarratano without knowing if he is innocent? Those who seek the public trust, those who ask us to vote to allow them to lead us MUST answer that question." ■

Is Joe Giarratano Innocent?

Photo by Franklin Photography

"Joe lives his life with integrity," says Gerald T. Zerkin, a Richmond attorney who is defending Giarratano, "in an environment designed to prevent him from doing just that."

—*continued from previous page*

prisoners on death row who had no attorney. His most far-reaching case was *Murray v. Giarratano*, a class action which traveled all the way to the Supreme Court of the United States. In *Giarratano*, he argued that meaningful access to the courts in Virginia required that qualified legal counsel be appointed to represent death row prisoners during post-conviction appeals. Joe Giarratano filed that lawsuit to assist others on death row, including a prisoner who was nearly executed before an attorney was found at the last minute to obtain a stay.

> *"This is a new Joe who's come out of the ashes like a phoenix."*

He has become a student not only of the law, but of literature, justice and human rights. The bookshelf in his cell holds works by Dostoevski, Ghandi, Camus, Aristotle, Goethe, and Strunk & White's *The Elements of Style*.

According to Marie Deans, executive director of the Virginia Coalition on Jails and Prisons, "The man they convicted is long since dead and gone. This is a new Joe who's come out of the ashes like a phoenix. He has so much to offer."

Newly Discovered Evidence

In 1987, Joe's attorneys received a large donation, enabling them to conduct a thorough re-investigation. Since Mr. Giarratano is indigent he previously had no such funds available to him. The re-investigation quickly brought questions to light about the reliability of the sundry confessions. The first four confessions, they learned, were inconsistent with every significant detail of the crime. The fifth confession was made two days later to the Norfolk, Virginia police after they had, by their own testimony, discussed the facts of the case with the accused. On re-examination of available records, autopsy reports, forensic evidence, and interviews with previously unavailable witnesses, the lawyers discovered that:

1. Barbara Kline's stab wounds were typical of a right-handed person assaulting from behind. Giarratano is left-handed and has a documented neurological deficit on his right side.

2. In the autopsy report on the strangulation, the medical examiner first concluded that the cause of Michelle Kline's death was strangulation by ligature. (Ligature requires tying or binding.) Twenty days later he changed his conclusion to allow for a manual strangulation. In all other respects the reports were identical. The only event intervening between medical examiner's two reports was the last confession, in which Mr. Giarratano said he had used his hands. His attorneys now know, from an independent pathologist, that the strangulation was not manual.

3. Spermatozoa found in the rape victim was not identified as that of Mr. Giarratano.

4. Never mentioned at trial were: fingerprints found in the apartment which did not match either the victims' or the accused's; a driver's license found which belonged to another man; and the initial police theory, based on the physical evidence, that the killer was right-handed.

5. A single hair among 10 found near the victim was consistent with that of Mr. Giarratano, but it was not identified as his, nor was it even tested against the victim's own hair (the single hair is hardly significant given that Mr. Giarratano lived in the apartment).

6. There is evidence of fraud in the presentence investigation report. The state relied on Giarratano's mother's description of him and of his childhood, which claimed a history of violence. That has been proven to be false; the real picture reveals that the violence in his life originated from his mother towards him, and his resulting violence towards himself. The prosecution's most damaging documents and exhibits offered at sentencing were either misrepresented by the prosecution or forged by others.

> *Giarratano gave five separate, contradictory confessions to police.*

7. Drops of blood were found on Mr. Giarratano's boots. Crime-scene photos were introduced to the court showing bloody shoe prints, creating the impression that his boots made the prints. The state's forensic expert has stated in a sworn affidavit, however, that tests she performed at the time eliminated that possibility. In addition, the blood on Mr. Giarratano's boot was type O, the same as that of the strangulation victim. Blood from the stabbing victim was never typed; the state claimed that it was too decomposed to be typed. Experts, including the state's own forensic expert, now dispute that claim.

An affidavit from the arresting officer now states that Mr. Giarratano had no blood, bruises, or scratches on him at time of arrest, offering further evidence that the blood on the boots did not come from the crime scene.

8. New evidence demonstrates that Mr. Giarratano was unable to adequately assist his counsel due to his mental incompetence.

9. Evidence strongly suggests the identity of another person who knew the victims well, and who had a history of sexually abusing women (including rape of young girls) as well as other types of violence.

10. A videotape of the crime scene that was introduced into evidence has now disappeared from the court file.

In short, the only probative evidence the Commonwealth had against Joseph Giarratano were the five confessions. As conservative syndicated columnist James J. Kilpatrick pointed out, "Without these the Commonwealth had no case. The confessions were sharply contradictory in important respects, suggesting that the accused yielded to police persuasion."

Current Status

Lawyers for Mr. Giarratano have asked the Virginia attorney general's office to allow them to see the forensic file, the police investigation file, pictures of the crime scene, and a box of physical evidence they have located. Without the Attorney General's approval, they are unable to see any of that material. She has so far refused. It is now known that many items from the crime scene as well as Joe Giarratano's personal belongings were never tested or examined.

Unfortunately, it is very possible that no court will ever consider the merits of Mr. Giarratano's claims of competence, let alone innocence. Virginia, unlike every other death penalty state, does not make exceptions to its contemporaneous objection or other procedural default rules, even in death cases. Such rules prevent issues from being raised which were not raised at the original trial. It is not even clear that Virginia has any procedure by which newly discovered evidence can be presented to a court. The Attorney General consistently relies on these procedural rules to prevent consideration of valid legal claims, and most likely will rely on them to prevent consideration of Mr. Giarratano's claims of innocence and governmental misconduct.

Giarratano's lawyers filed a 30-page Motion for Relief from Judgment detailing all these matters. In the Motion, they stated, "In fact, petitioner has used great diligence in attempting to develop the facts presented herein. Unfortunately, the investigation has required the efforts of private investigators in both Florida and Virginia and the retention of experts to analyze some of that evidence. . . . None of this was possible without substantial financial resources, which were only first available to petitioner for the Norfolk investigation in late October of 1988. Only then could petitioner begin to put together the puzzle, step by step, that has resulted in the discreditation of the entire case against petitioner. The fact that petitioner, had he earlier had the resources presently available to him, might have discovered some of this evidence, does not mean that his Rule 60(b) motion should be denied."

The U.S. District Court denied the Motion, saying that Giarratano's attorneys were guilty of not exercising due diligence, in that they should have found and presented this evidence within a year of the trial.

"At some point," wrote the court, "litigation must end."

In October 1989 the Fourth Circuit Court of Appeals heard oral argument on the habeas corpus and Rule 60(b) claims. Giarratano argued that: 1) he had been incompetent to stand trial, 2) the prosecution's introduction of Giarratano's self-incriminating testimony during the sentencing phase of the trial violated his Fifth Amendment rights, 3) there were not enough aggravating circumstances to sustain a capital sentence and, finally, the "sentencer" wrongfully used mitigating evidence as aggravating evidence. The Court of Appeals upheld the district court's denial of relief on each of these counts, determining that the district court had applied the correct standards of review and had operated within its discretion.

The Pursuit of Justice

Those of us who have come to know Joe Giarratano care for him very much. He is kind, thoughtful, and intelligent.

Mr. Giarratano and his attorneys deserve a chance to present the new evidence in his case. Giarratano has talented and dedicated attorneys who, thanks to the financial support of a German citizen, are taking his case as far as they are able. He now has only the U.S. Supreme Court left in which to seek relief. If denied in the Supreme Court, his execution could be scheduled by early 1990. Then we may never know whether Joseph Giarratano is innocent or guilty. And if we do find out, it may be too late. ■

Editor's Note: If you agree that Joseph Giarratano should be granted a new trial, write to the Virginia officials with the power to do that:

Attorney General Mary Sue Terry
State Capitol Bldg.
Richmond, VA 23219

The Hon. Douglas Wilder
State Capitol
Richmond, VA 23219

It is important to make your views known—now—to Attorney General Terry and Governor Wilder. Time may be running out for Joseph Giarratano.

Can Contract Care Cure Prison Health Ailments?

Elizabeth Alexander

One of the favorite ideas of the Reagan years was that social problems could be solved by turning over public governmental functions to the private enterprise system, and prisons were considered among the prime candidates for privatization. While the vogue for privatization of prisons has somewhat diminished, it has made real inroads in the provision of prison medical services. Indeed, several prison systems, including Alabama, Delaware, Georgia, and Kansas, now have their prison medical care entirely provided by contract with private care providers.

On the one hand, those favoring contracting medical services argue that such services are more likely to provide adequate care than traditional prison health care, which has a dismal reputation and has been isolated from community standards. In addition, contracting medical care has the serendipitous benefit of underlining the separation between medical and custody functions, so that custody staff may be less able to interfere with medical judgment.

On the other hand, privatization of prison medical care raises some of the same issues that are raised by prison privatization generally. Will prisoners' rights to adequate services be compromised by the profit motive? Certainly the experience so far with general prison privatization experiments is not, on the whole, encouraging.[1]

Will prisoners' rights to adequate services be compromised by the profit motive?

Legal Liability

Another concern is that privatization will confuse the issue of legal liability for constitutionally inadequate care. Will both the governmental unit and the private contractor be liable if constitutional rights are violated? Indeed, there is some evidence that at least some of the interest in contracting out medical care has been generated by the hope that the governmental unit could avoid legal liability by so doing. A 1986 study of con-

—*continued on next page*

Elizabeth Alexander is chief staff counsel of the National Prison Project.

[1]See Note, "Inmate Rights and the Privatization of Prisons," 86 *Columbia Law Review* 1475, 1498-1499 (1986); *see also* Levine, "Private Prison Planned on Toxic Waste Site," *NPP JOURNAL*, No. 5, Fall, (1985), p. 10; and Elvin, "Private Prison Plans Dropped by Buckingham," *NPP JOURNAL*, No. 6, Winter, (1985), p. 11.

—continued from previous page
tract medical care in Maryland, commissioned by the Maryland legislature, concluded that the apparent motive for switching to contract medical care was to attempt to avoid state liability for inadequate care. Significantly, the study also severely criticized the performance of the contract health system.[2]

Contract health providers continue to merit close scrutiny.

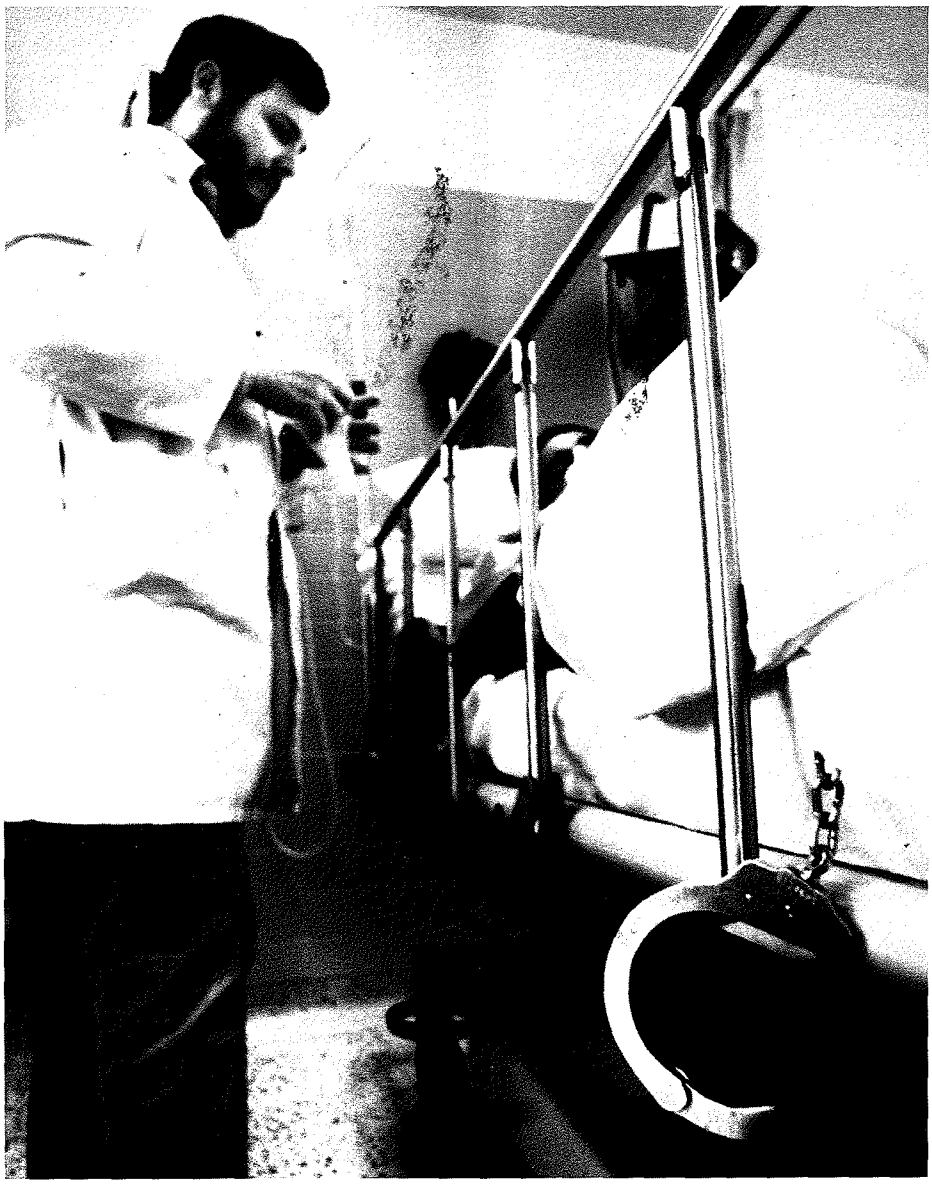
The concern that departments of correction might be persuaded to contract out medical care in order to deprive prisoners of a legal remedy for constitutionally inadequate medical care was substantially alleviated by the Supreme Court decision *West v. Atkins.*[3] In that case, the Supreme Court held that medical care providers, whether direct government employees or operating under contract, are subject to suit in federal court for medical care that fails to meet constitutional standards. *West* is an important case because it removes the temptation for a state or other governmental unit to shift to contract medical care providers for the illegitimate purpose of attempting to avoid legal responsibility for inadequate medical care.

Quality of Care

The resolution of the legal issue in *West* allows a focus on the fundamental issue: Are contractual medical care providers likely to be better or worse than health care programs operated directly by a department of corrections? There is no clear-cut answer to this question, and even those who oppose total privatization of prisons do not issue blanket condemnations of contract medical care for prisoners. For example, the resolution of the American Bar Association supporting a moratorium on prison privatization specifically exempted privatization of specific services, including medical services, offered to prisoners.[4] Similarly, the American Civil Liberties Union's opposition to prison privatization mentions only the "delegation of control and custody of prisoners to private entities."[5]

Some contract medical care providers have been the subject of litigation charging inadequate medical care. The National Prison Project has twice been involved with litigation challenging the quality of the health care provided by state-wide contract providers. In Delaware, the state defendants settled a totality of conditions lawsuit in a consent decree that, among other provisions, provided for major increases in medical staffing and services.[6] In Alabama, the National Prison Project is currently challenging the contract care provider's treatment of HIV-positive prisoners.[7]

However, the term contract care provider encompasses a wide range of organizations. Some of the organizations involved in contract medical care are nonprofit medical groups. For example, Montefiore Hospital, a nonprofit hospital in New York City, provides medical care for the Riker's Island Jail under contract. The medical care is accredited by the Joint Commission on Accreditation of Health Organizations (JCAHO), the same organization that accredits community hospitals. It is virtually the only prison health care program to be so accredited, and the Montefiore program is widely considered among the very best in correctional medicine.



The Dallas Morning News: William Snyder

Contract medical care for prisoners is more widely accepted than other privatization efforts.

Professional Opinions Vary

Beyond the special case of the nonprofit medical care providers who contract for prison or jail health care, Dr. Ronald Shansky, medical director for the Illinois Department of Corrections, identifies three attitudes common among those who favor contracting medical care: 1) a hope that civil service rules and governmental bureaucracies, which

[2]NKC Management, *Evaluation of the State of Maryland's Medical Services Program for Inmates*, (November, 1986), pp. 3-5, 19, 32, 99, 111.
[3]108 S.Ct. 2250 (1988).
[4]See Robbins, *The Legal Dimensions of Private Incarceration*, (American Bar Association, 1988), p. iv.
[5]See Policy Guide of the American Civil Liberties Union, Policy #243, p. 309.
[6]*Dickerson v. Castle*, C.A. No. 10256 (Delaware Chancery Court).
[7]*Harris v. Thigpen*, 87-V-1109-N (M.D. Ala.)

interfere with patient care and often hinder recruitment, can be circumvented by contracting out work; 2) a belief that governmental bureaucracy is intrinsically bad; and 3) a hope that money can be saved by turning to private enterprise.

Dr. Shansky suggests that the first reason is a realistic concern. In some jurisdictions, civil service limits upon salaries for doctors and other skilled medical staff undermine staff recruitment and retention efforts. Dr. Shansky also believes, however, that the assumption that money will be saved is frequently not justified. If costs are reduced, it is because the quality of care has been compromised, not because of intrinsic efficiencies in private medical care providers.

Nancy Dubler, an expert in legal issues related to correctional health care, agrees with Dr. Shansky's analysis. She is particularly troubled because the contract care providers with which she is familiar have been unwilling to open their books for public scrutiny. Without such scrutiny, she is skeptical that profits result from economic efficiencies rather than reductions in the quality and quantity of services. On the other hand, she applauds Dr. Shansky's success in Illinois in offering model health care through a judicious combination of public employee and specific, limited health care contracts. She argues that his success proves that contracts can increase flexibility and can be used to produce quality health care as long as the contract is carefully drawn and monitored.

At the November 1989, National Conference on Correctional Health Care, health care consultant Robert McGuirk also noted both potential advantages and disadvantages from contracting out medical care. He argues that, in fact, in-house medical care is potentially less expensive than contractual medical care, although contracting out medical care can improve risk management. Because contracts for medical care typically provide for increased payments if prisoner populations increase, contract care providers may also be better able to respond to skyrocketing overcrowding than in-house medical programs contained by yearly budgets. At the same time, McGuirk points out that it is critically important to protect against potential corporate instability among potential contractors.

Dr. B.J. Anno, of the Commission on Correctional Health Care, which accredits prison and jail health care facilities, offers another perspective. Approximately one quarter to one third of the facilities that the Commission is requested to evaluate are contract care providers. She believes that this is a significantly higher percentage than the overall percentage of correctional health care provided under contract. This fact tends to support the argument in favor of contract providers because, as Dr. Anno notes, "we tend not to see the bad systems" in the accreditation process. The Commission is neutral on the issue, and she believes that contract care providers are, overall, as good as the other health care providers that the Commission reviews.

But too often, the existence of appropriate policies on paper may not translate into quality health care.

All of this suggests that people interested in quality health care in prisons and jails should not adopt a position of inflexible opposition to contract health care providers. Under the right circumstances, when bureaucratic rigidity would otherwise interfere with the delivery of health care, and when the public entity keeps a close eye on contract provisions and performance, contract health care providers can help produce quality health care.

Safeguards Can Be Built In

McGuirk suggests that if a facility chooses to provide medical care by contract, it is critical that appropriate safeguards be built into the contract. Among other protections, the facility must require the contractor to file a performance bond and to achieve accreditation. In addition, the facility must develop a contract termination strategy and policy, appoint a contract monitor, and limit the contract to a reasonable period of time.

Contract health care providers continue to merit close scrutiny. In comparison to a prison that offers no organized health care, contract providers tend to put basic protocols and organization in place. They generally use only licensed staff, and at least develop a paper plan for the delivery of health care. But too often, the existence of appropriate policies on paper may not translate into quality health care. As happens with traditional prison health care, too often the only criteria for filling physician positions will be that the candidate is licensed and still breathing. No matter how good a contract care system, or any other system, looks on paper, it must be evaluated in practice, particularly as it responds to medically difficult cases, before we can determine that it provides adequate health care. ■

Status Report: State Prisons and The Courts

Compiled by Julia Cade, National Prison Project, January 1990

Forty-one states (plus D.C., Puerto Rico and the Virgin Islands) are under court order or consent decree to limit population and/or improve conditions in either the entire state system or major facilities. (Thirty-three states are under court order or consent decree for overcrowding and conditions while eight states are under court order or consent decree for conditions only). Only five states have never been involved in some type of litigation challenging overcrowding and/or conditions in their prisons. The following list spells out the status of each state's involvement.

*Asterisks indicate states/jurisdictions where the ACLU has been involved in the litigation.

1. **Alabama:*** The entire state prison system was under court order dealing with total conditions and overcrowding. *Pugh v. Locke*, 406 F.Supp. 318 (M.D. Ala. 1976), *aff'd in substance, Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S.Ct. 3057 (1978); Receiver appointed, 466 F.Supp. 628 (M.D. Ala. 1979). The district court entered an order establishing a four-person committee to monitor compliance with previous orders (1/13/83). In December 1984, district court relinquished active supervision after agreement of substantial compliance by the parties. The court dismissed the case in December 1988.

2. **Alaska:*** The entire state prison system is under a consent decree and a court order dealing with overcrowding and total conditions of confinement. *Cleary v. Smith*, No. 3AN-81-5274 (Superior Court for the State of Alaska, 3rd Jud.Dist., March 3, 1986). A partial settlement was obtained in October 1989. The court appointed a monitor for two years as part of the settlement.

3. **Arizona:*** The state penitentiary is being operated under a series of court orders and consent decrees dealing with

—continued on next page

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

—*continued from previous page*

overcrowding, classification, and other conditions. Orders, August 1977-1979, *Harris v. Cardwell*, C.A. No. 75-185 PHX-CAM (D. Ariz.). A special maximum security unit was operating under a consent decree with an appointed monitor. *Black v. Ricketts*, C.A. No. 84-111 PHX-CAM, consent decree, December 12, 1985. The maximum security unit was found to be in full compliance with the consent decree and the case was dismissed in February 1988.

4. **Arkansas:*** The entire state prison system was under court order dealing with total conditions. *Finney v. Arkansas Board of Corrections*, 505 F.2d 194 (8th Cir. 1974). Special Master appointed, *Finney v. Mabry*, 458 F.Supp. 720 (E.D. Ark. 1978); on compliance, 546 F.Supp. 628. After a finding of full compliance, the federal court relinquished jurisdiction in August 1982.

5. **California:*** The state penitentiary at San Quentin is under court order on overcrowding and conditions. *Wilson v. Deukmejian*, #103454 Superior Court, Marin County (Aug. 5, 1983). Order includes requirement that a Special Master be appointed. Decision overturned on appeal. The segregation units at San Quentin, Folsom, Soledad and Deuel are under court order because of overcrowding and conditions. *Toussaint v. Rushen*, 553 F.Supp. 1365, *aff'd in part*, 722 F.2d 1490 (9th Cir. 1984). Also see *Toussaint v. McCarthy*, 597 F.Supp. 1388 (N.D. Cal. 1984), entering permanent relief. Later opinion at 801 F.2d 1080, 40 Cr.L. 2066 (9th Cir. 1986). Two units at Soledad (Central and North) were held to be unconstitutional but the injunction was stayed pending appeal. *In re Daily* and *In re Rock* (Sup. Ct. Monterey). Decision overturned on appeal. The California Men's Colony is under a court order establishing population limits. *Dohner v. McCarthy*, 635 F.Supp. 408 (C.D. Cal. 1985). The California Institute for Men Reception Centers are operating under a settlement agreement providing for improved sanitation, classification, legal access and other conditions. *Boyden v. Rowland*, CV-86-1989-HLH. In addition, there is pending litigation at the California Medical Facility, San Luis Obispo, and the Women's Prison at Frontera.

6. **Colorado:*** The state maximum security penitentiary is under court order on total conditions and overcrowding. *Ramos v. Lamm*, 485 F.Supp. 122 (D. Col. 1979), *aff'd in part and remanded*, 639 F.2d 559 (10th Cir. 9/25/80), *cert. denied*, 101 S.Ct. 1259 (1981), on remand, 520 F.Supp. 1059 (D. Col. 1981). Since the last reported opinion the parties have reached a series of six different consent decrees during the compliance stage. The various decrees were directed toward general conditions and specific areas, such as legal access, double bunking, treatment of HIV prisoners.

7. **Connecticut:*** The Hartford Correctional Center operated by the state is under court order dealing with overcrowding and some conditions. *Lareau v. Manson*, 507 F.Supp. 1177 (D. Conn. 1980), *aff'd*, 651 F.2d 96 (2nd Cir. 1981). Additional facilities under consent decree: Bridgeport Correctional Center, *Mawhinney v. Manson*, #B78-251 (D. Conn. 1982), and New Haven Correctional Center, *Andrews v. Manson*, #N81-20 (D. Conn. 1982), Morgan Street Correctional Center, Union Avenue Correctional Center. There is pending overcrowding litigation at Somers, *Bartkus v. Manson*, Civ. No. H-80-506, and at the Montville Correctional Center, *Foss v. Lopes*. Niantic Women's Prison is under a court order, *West v. Manson*, #H-83-366 (D. Conn. 10/3/84).

8. **Delaware:*** All major Delaware prisons are now under a consent decree

—*continued on page fourteen*

NUMBER 2 WINTER 1990
CASE LAW REPORT
NATIONAL PRISON PROJECT

By John Boston, a staff attorney at the Prisoners' Rights Project, Legal Aid Society of New York

HIGHLIGHTS OF MOST IMPORTANT CASES

Introduction

Despite ten years of Supreme Court decisions favoring prison officials, grossly deficient conditions will still result in massive intervention by federal courts. That is the message of several recent district court decisions.

In *Tillery v. Owens*, 719 F.Supp. 1256 (W.D.Pa. 1989), the court described the State Correctional Institution at Pittsburgh as unconstitutional in "nearly every aspect" and as an "overcrowded, unsanitary, and understaffed fire trap." (1259) It held that double celling in cells of 56 and 39 square feet is unconstitutional, and that even *single* celling in them is unconstitutional for prisoners serving long sentences under conditions that included inadequate ventilation, lighting, sanitation, and showers; lock-in times of 13 to 22 hours a day; inadequate single cells to accommodate inmates with medical, psychological, or emotional problems; and no prospect of improvement without court intervention. Prison officials were directed to devise a plan to replace the substandard housing areas within a reasonable time and meanwhile, to provide enough staff to utilize several tiers that had been left vacant, aggravating crowding elsewhere. The court observed, "This will undoubtedly mean a reduction in SCIP inmates at least during the renovation." (1274)

The court also found that the prison's failure to provide for inmates' physical safety violated the Eighth Amendment. The risk of inmate assault was found unconstitutional, and prison officials displayed deliberate indifference in failing to search inmates leaving the industries building, where weapons were commonly made, to provide adequate staffing (no more than one to 100 in housing areas), and to monitor shower areas, and in permitting different classifications (including protective custody and disciplinary segregation) to shower and exercise together. The court reached this conclusion although the number of official reports of violence was not enormous (69 to 138 assaults and 30 to 65 disciplinary charges for assault a year in a population of 1800); it concluded that the actual number was much larger, with many inmates failing to report assaults at all or telling medical personnel that they had been hurt accidentally or did not know how they were injured. The court also held that there was an unconstitutional risk of fire caused by the absence of fire barriers, fire alarms, stand pipes, smoke alarms, sprinklers, or smoke exhaust systems, combined with the high concentration of combustibles, the large numbers of inmates, and the small numbers of guards at the prison. In the court's view, it need not wait for a "major tragedy caused by fire" to order these conditions remedied.

The court also condemned the prison's inadequate medical care, citing intake physical examinations conducted in three minutes by a physician known among the inmates as "Doctor No Touch"; infirmary rounds that took no more than a minute per patient, involved no inquiry into symptoms, were not recorded and did not include psychiatric patients; "cursory" sick call, or sick call conducted under conditions where "the noise level prevents the doctor from informing himself of the inmates' complaints"; and delays of up to a year in the provision of dental services. The fundamental deficiency in medical care was inadequate staffing, which the court held constituted deliberate indifference in itself. Prison officials were directed to "consider" hiring one full-time physician and three registered nurses immediately, to "retire" the inmate records clerk and replace him with at least one civilian, and to employ a full-time medical director to deal with quality assurance, record-keeping, evaluation of services, protocols, inservice education, and budgetary matters. They were required to provide dermatological and cardiological services. Medications were to be dispensed only by licensed physicians and nurses. Defendants are "expect[ed]" to devise an AIDS protocol. "When prison officials have refused even to recognize that such a problem exists, the court is well within its province to intervene." (1309)

The court found the prison's mental health services equally inadequate, citing evidence of delays in responding to requests for psychiatric consultations, inadequate record-keeping that restricts treatment and follow-up care, the use of professionals' time to do clerical work, and the failure to provide adequate staff. In addition, the defendants' failure to "maintain an environment conducive to treatment of serious mental illness" was unconstitutional. Specifically, the court held that the Constitution requires establishment of a separate unit for the severely mentally ill rather than leaving them in general population; their irrational behavior "increase[s] tension for psychologically normal inmates" and "invites retaliation from impatient and stronger inmates." (1303) The court also condemned psychiatric isolation cells that smelled so bad that it did not inspect them during its tour of the prison; these cells may only be used if food is removed promptly after meals, the inmates are showered "as often as acceptable standards of hygiene dictate" and the cells are washed daily or more often.

The court directed the submission of an overall remedial plan by defendants, but some improvements were required immediately. A monitor is to be appointed at the defendants' expense. The court also observed, in words that will no doubt haunt it later, "Having spent much of the last 13 years dealing with the Allegheny County Jail, we are not inclined to want to supervise SCIP for the next 13 years." (1309)

The orders that are effective immediately are being appealed.

In *Inmates of Occoquan v. Barry*, 717 F.Supp. 854 (D.D.C. 1989), the court adhered to its finding of an Eighth Amendment violation at part of the District of Columbia's Lorton Correctional Complex and directed the defendants to submit a remedial plan. The court cited filthy conditions, defective plumbing, "nonexistent" ventilation, exposed electrical wiring, and multiple fire safety deficiencies. With respect to sanitation, it observed, "No human being should be required to frequent bathrooms with slime oozing down the walls, stalactites hanging from the ceiling, thick soap scum on the walls and floors, and sewer water dripping into toilets." It rejected prison officials' efforts to blame these conditions on inmates' failure to apply "elbow grease." "Without cleaning supplies, proper plumbing maintenance and adequate bathroom facilities, inmates are without recourse." (866-67) In the area of personal safety, the court found that housing protective custody inmates in the same housing areas as punitive segregation inmates violated the Eighth Amendment; it also required documentation of asbestos removal in certain housing units before they are renovated.

Medical and mental health care at Occoquan also were found unconstitutional. The court condemned the failure to reliably screen new inmates for syphilis, tuberculosis, and mental health problems; lack of a follow-up system for inmates with chronic diseases, especially diabetes; delays of months for appointments at specialty clinics; incomplete, lost and disorganized medical records; sick call procedures that permitted Medical Technical Assistants to diagnose and to dispense medications without proper supervision; lack of medical and mental health staffing; and delays in dental treatment. The court also forbade the housing of inmates with mental health problems in the administrative/punitive segregation area.

The court directed prison officials to submit a remedial plan. However, it held that because of prior rulings by the Court of Appeals, it would not impose a population cap, despite its view that overcrowding was the cause of the problems at Occoquan. It did not say what it would do if the problems prove insoluble without a population cap.

Conditions in the grossly overcrowded Fulton County (Georgia) Jail, already subject to a consent judgment, were found to violate the Eighth Amendment in *Fambro v. Fulton County, Ga.*, 713 F.Supp. 1426 (N.D.Ga. 1989). There were 400 people sleeping on the floor, resulting in inadequate surveillance and breakdowns in classification. The court also cited backlogs of intake screening examinations that subjected inmates to a "substantial hazard for the unnecessary transmission of serious or lethal communicable diseases"; three-day waits for medication that placed inmates like diabetics and epileptics "in risk of serious bodily injury or death by the shortcomings of the medical delivery system"; delays of three weeks or more in provision of dental services; disorganized and incomplete medical records; food prepared in unsanitary surroundings; and inmates' "being required to live and sleep in and around seeping sewerage and in

warm dark places which are not regularly and adequately cleaned, lit or ventilated."

This court did not stay its remedial hand. Noting that a population cap had already been set and fines of $10,000 to $40,000 a day for years had already been imposed without success, the Sheriff was directed first to comply with the cap by releasing those held for more than 120 days, then misdemeanants, then felons, in order of length of confinement. The local courts were given a limited veto power over the release of individuals whom they consider particularly inappropriate.

In another county jail case, the court was so appalled by the "dangerous, squalid and scandalous conditions" of confinement that it rejected a proposed settlement because much of the relief would be postponed for two or three months. In *Rogers v. Etowah County*, 717 F.Supp. 778 (N.D.Ala. 1989), the court had conducted a hearing on a motion for a preliminary injunction before the settlement discussions; it directed the defendants to show cause why the proposed settlement (which included a population cap) should not be implemented immediately as an order of the court. In the jail, numerous defective cell locks had been replaced by chains and padlocks that would have to be unlocked by hand in case of fire; there was so little staff that the inmates had to notify jailers of emergencies like suicide attempts or medical problems by banging on pipes; inmates were confined to their cells 24 hours a day; some cells were quadruple bunked with many inmates sleeping on the floor; sanitation, light, heating and ventilation were all grossly deficient.

Clothing

The basic right to clothing has become less basic in two recent Eighth Circuit decisions. In *Green v. Baron*, 879 F.2d 305 (8th Cir. 1989), the plaintiff was committed to a psychiatric facility, apparently because he was deemed incompetent to stand trial. Because he was "argumentative, defiant, and basically ungovernable," he was placed for several weeks in a behavior modification program in which he had to "earn" a blanket, mattress, and hot meals, and was deprived of all clothing except his underwear when he was in his cell.

A jury exonerated the defendant officials but the trial court entered judgment notwithstanding the verdict. In effect, it held that the deprivation of clothing was unconstitutional as a matter of law. The appellate court ruled that the case was not so simple (at 309): "We recognize that generally governmental authorities cannot deny basic human necessities to persons in custody. . . . [T]his court has not adopted an unconditional prohibition against deprivations of necessities. Rather, we consider several factors in determining the constitutionality of deprivations, including the degree and duration of the deprivations, the reason for the deprivations, and other surrounding circumstances."

Here, the court held, making the plaintiff competent to participate in his trial was a legitimate objective. Other "factors" and "surrounding circumstances" included the fact that the defendants had tried all other options first; medical personnel had designed and implemented the program; the plaintiff was not endangered; his cell was kept warm; he was not deprived of bedding for long; he had access to toilet, shower and meals. In addition, at a new trial to be conducted pursuant to the appellate decision, the lower court was told it should admit evidence of the plaintiff's condition before and after the treatment.

In *Rodgers v. Thomas*, 879 F.2d 380 (8th Cir. 1989), there was no pretense of a mental health rationale. The plaintiff was charged with a disciplinary offense and placed in an isolation cell, stripped to his underwear, for five days *before* his disciplinary hearing. The plaintiff "was not a security risk, displayed no suicidal tendency, and had not exhibited uncontrollable behavior," and the deprivation of clothing "served no justifiable penological objective and was a punitive measure." However, the court held that this treatment was not cruel and unusual punishment because the other conditions of confinement were humane and sanitary and the plaintiff "fail[ed] to present evidence of pain." (385)

Publications

A federal appeals court has upheld prison officials' denial to a prisoner of a membership application and a membership bulletin from the North American Man/Boy Love Association. *Harper v. Wallingford*, 877 F.2d 728 (9th Cir. 1989), appears to be the first major application of the Supreme Court's 1989 decision in *Thornburgh v. Abbott* setting constitutional standards for prison literature censorship. The court was careful to note the limits of its holding, stating that "our focus is whether the receipt of NAMBLA material by the petitioner poses a threat of violence, a security threat to the prison, or a threat to another legitimate penological interest. Merely advocating homosexual activity is not a sufficient basis for a ban." (733) In ruling for prison officials, the court cited the superintendent's affidavit stating that the materials in question could lead to violence by and against recipients and could impair the rehabilitation of some prisoners. The plaintiff, by contrast, was "unable to effectively raise an issue of fact about the security threat posed by the material." (The plaintiff was proceeding *pro se* and it appears that his response was perfunctory.)

Similarly, the Fifth Circuit has upheld the denial to a prisoner of *The Satanic Bible, The Satanic Book of Rituals*, and a Satanic medallion. In *McCorkle v. Johnson*, 881 F.2d 993 (11th Cir. 1989), the court did not write its own opinion, merely adopting the district court opinion, which was decided before *Abbott*. The lower court cited "the violence inherent in Satan worship" and "the potential disorder that it might cause within the prison." Satanic rituals involve wrist-slashing, blood-drinking, and cannibalism, not to mention the sacrifice of female virgins (preferably Christian) and the use of candles made from the fat of unbaptized infants.

Prison officials may still be held liable in damages for overly broad restrictions on reading material, according to *Jackson v. Elrod*, 881 F.2d 441 (7th Cir. 1989). In that case, a long-term pre-trial detainee was denied the right to receive hardcover books, even from the publisher, even though he had no other source for literature addressing his alcohol problem, and even though he had offered to accept the books with the covers removed. The court held that this action violated constitutional rights that were clearly established by 1980. It relied on the 1979 Supreme Court decision in *Bell v. Wolfish*, which upheld a restriction on hardcover books only because prisoners were permitted to obtain them from their publishers. At 446: "The broad teachings of *Wolfish* and of *Kincaid [v. Rusk]* are that the courts must be protective of the First Amendment rights of pretrial detainees. Defendants did not balance those rights with its [sic] policy of preventing smuggled contraband." (Citations omitted.)

Disabled

An Arizona federal court has taken a step toward clarifying prison officials' obligations under the federal Rehabilitation Act. In *Bonner v. Arizona Dept. of Corrections*, 714 F.Supp. 420, 425-26 (D.Ariz. 1989), the plaintiff—deaf, mute, and suffering from a progressive vision loss—sought the services of a qualified interpreter, alleging that unskilled inmate interpreters and a telecommunications device provided by the prison did not permit him to communicate adequately. The court held that prison officials were subject to a stiff standard of proof: to show that there was no discrimination, and therefore no Rehabilitation Act violation, they would have to show that the plaintiff could "effectively communicate without the use of a qualified interpreter, and adequate communication is achieved through use of the telecommunications device and inmate interpreters." (423)

The court also ruled in the plaintiff's favor on the question whether the Civil Rights Restoration Act should be applied retroactively. The Civil Rights Restoration Act established the principle that there need be no "nexus" between federal funding and the particular state program in which discrimination is alleged in order to prove a violation of statutes like the Rehabilitation Act. As long as the government agency involved receives *any* federal funds, it is required to avoid discrimination in *all* of its activities, and this principle applies to all cases pending when the Restoration Act was passed.

A federal appeals court has held that a prisoner suffering from a correctable disability is entitled to have it corrected. In effect, the decision means that a "substantial disability" is a serious medical need for purposes of applying the constitutional deliberate indifference standard to prison medical care. The plaintiff in *Johnson v. Bowers*, 884 F.2d 1053 (8th Cir. 1989), sustained a partial disability of his arm in a 1978 stabbing incident. Corrective surgery was recommended in 1980. The court refused to disturb a jury verdict denying damages to the plaintiff, but directed the trial court to enter an injunction requiring the surgery to be done "forthwith." The prison doctor had recommended surgery, the denial of it would result in a permanent handicap, and the *nine-year* delay since the original recommendation suggested deliberate indifference. The court was not impressed by the argument that the surgery was classified medically as "elective." That label "does not abrogate the prison's duty, or power, to promptly provide necessary medical treatment for prisoners. . . . The record indicates that Johnson suffers substantial disability from this injury which occurred in a prison setting. No sufficient reason exists at this time for further delaying surgical correction."

OTHER CASES WORTH NOTING

U.S. SUPREME COURT

Protection from Inmate Assault/Cruel and Unusual Punishment

Dudley v. Stubbs, 489 U.S. ___, 103 L.Ed.2d 230 (1989) (O'Connor, J., dissenting from denial of *certiorari)*. The *Whitley v. Albers* standard of "wanton and sadistic infliction of pain" should have been applied to a case in which prison guards stood by and watched a prisoner being assaulted by a gang of other prisoners since a split-second decision had to be made and a single door stood between armed assailants and the prison arsenal and offices. At 234: "Application of the deliberate indifference standard in a setting like this one essentially renders prison officials strictly liable for putting the security of the prison and the lives of *all* its inhabitants before the physical security of one inmate."

Attorneys' Fees

Texas State Teachers Association v. Garland Independent School District, 489 U.S. ___, 103 L.Ed.2d 866 (1989). At 877: A "prevailing" civil rights plaintiff for attorneys' fees purposes is one who has "succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit'. . . . [T]he plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. . . . Where the plaintiff's success on a legal claim can be characterized as purely technical or de minimis, a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been satisfied."

Municipalities/Protection from Inmate Assault

DeShaney v. Winnebago County Department of Social Services, 489 U.S. ___, 103 L.Ed.2d 249 (1989). At 261: ". . . [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. . . . The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."

Municipalities/Staffing—Training

Canton v. Harris, 489 U.S. ___, 103 L.Ed.2d 412 (1989). At 426-27: "We hold today that the inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. . . . Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as defined by our prior cases—can a city be liable for such a failure under §1983." This standard is met when "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." (427)

Use of Force

Graham v. Connor, 490 U.S. ___, 104 L.Ed.2d 443 (1989). An excessive force claim arising "in the context of an arrest or investigatory stop of a free citizen [is] most properly characterized as one invoking the protections of the Fourth Amendment. . . . Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." (454-55)

At n. 10: the question of whether the Fourth Amendment continues to apply into the period of pre-trial detention is reserved, but it is clear that substantive due process protects detainees from excessive force amounting to punishment. Claims of convicts are to be adjudicated under the Eighth Amendment.

Reasonableness in an excessive force case is an objective inquiry: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." (456) The *Johnson v. Glick* test, "which requires consideration of whether the individual officers acted in 'good faith' or 'maliciously and sadistically for the very purpose of causing harm,' is incompatible with a proper Fourth Amendment analysis."

At 457: "Differing standards under the Fourth and Eighth Amendments are hardly surprising: the terms 'cruel' and 'punishment' clearly suggest some inquiry into subjective state of mind, whereas the term 'unreasonable' does not."

Publications

Thornburgh v. Abbott, 490 U.S. ___, 104 L.Ed.2d 459 (1989). Censorship of publications sent to prisoners is governed by the *Turner v. Safley* "reasonably related" standard rather than the *Procunier v. Martinez* requirement of narrow tailoring. *Procunier* is now limited to outgoing mail sent by prisoners to civilian correspondents. The former distinction between the rights of outsiders and the rights of prisoners is rejected. At 473: "We adopt the Turner standard in this case with confidence that . . . a reasonableness standard is not toothless."

A regulation prohibiting publications that are "determined detrimental to the security, good order, or discipline of the institution or . . . might facilitate criminal activity" is not unconstitutional.

The "all or nothing" rule is upheld because it is reasonable to fear that tearing out rejected portions would create more discontent than censoring the whole publication. The administrative inconvenience of item censorship is also a factor to be considered.

Procedural Due Process—Visiting

Kentucky Department of Corrections v. Thompson, 490 U.S. ___, 104 L.Ed.2d 506 (1989). At 515: "The denial of prison access to a particular visitor 'is well within the terms of confinement ordinarily contemplated by a prison sentence,' . . . and therefore is not independently protected by the Due Process Clause."

At 516: "Stated simply, 'a State creates a protected liberty interest by placing substantive limitations on official discretion.' [Citation omitted.] A State may do this in a number of ways. Neither the drafting of regulations nor their interpretation can be reduced to an exact science. Our past decisions suggest, however, that the most common manner in which a State creates a liberty interest is by establishing 'substantive predicates' to govern official decision-making, . . . and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met."

Statutes of Limitations

Hardin v. Straub, 490 U.S. ___, 104 L.Ed.2d 582 (1989). A state tolling statute that permitted imprisoned persons one year after their release to bring otherwise time-barred actions should have been applied by a federal court under §1983 along with the state limitations period itself. At 588: "Courts thus should not unravel state limitations rules unless their full application would defeat the goals of the federal statute at issue." The Court rejects the lower court's theory that rehabilitative concerns require the quick resolution of disputes.

State Officials and Agencies/Attorneys' Fees and Costs

Missouri v. Jenkins, 491 U.S. ___, 105 L.Ed.2d 229 (1989). §1988 attorneys' fees against states are not barred by the Eleventh Amendment, not just because Congress so intended, but also because the Eleventh Amendment does not apply at all to an award of attorneys' fees ancillary to a grant of prospective relief. Nor does the Eleventh Amendment bar enhancement of a fee award to compensate for delay in payment. The Court rejects the analogy to the bar on interest awards against the federal government absent a waiver of sovereign immunity, which has been applied to bar enhancement of fee awards in cases against federal agencies.

Law clerk and paralegal time should be compensated at market rates if these costs are not already reflected in the attorneys' billing rates.

Law Libraries and Law Books/ Appointment of Counsel/Administrative Segregation—Death Row

Murray v. Giarratano, 492 U.S. ___, 106 L.Ed.2d 1 (1989). Prisoners under death sentence were not entitled to the appointment of counsel to pursue state court postconviction remedies. The district court had found that providing law libraries was not enough because of the limited time those prisoners had to prepare and present their petitions, the complexity of the work, and the emotional effects of a pending death sentence, and had directed actual representation by attorneys.

The Court holds that this is inconsistent with its 1987 holding in *Pennsylvania v. Finley*, which limits *Bounds v. Smith* and not vice versa. Right to counsel questions must be determined by "categorical holdings" and not by "factual" findings that could yield different rules in different states.

The plaintiffs' contention that they are denied adequate and timely access to law libraries can, if true, be remedied "without any need to enlarge the holding of *Bounds*."

This decision leaves in limbo the numerous holdings that for some prisoners (e.g. illiterates) and under some circumstances (e.g. no physical access to the library) a law library is not enough and some trained legal assistance short of actual representation by attorneys is required. *See, e.g., Smith v.*

Bounds, 813 F.2d 1299, 1302 (4th Cir. 1987); *Reutcker v. Dahm*, 707 F.Supp. 1121, 1130 (D.Neb. 1988); *Hadix v. Johnson*, 694 F.Supp. 259, 291-93 (E.D.Mich. 1988).

U.S. COURT OF APPEALS

Religion—Services Within Institution/ Religion—Practices—Diet/ Federal Officials and Prisons

Garza v. Carlson, 877 F.2d 14 (8th Cir. 1989). The prohibition of the Jewish plaintiff, a high-security segregated prisoner, from participating in a *minyan*, did not violate the Constitution.

The plaintiff's rights were not violated by classifying him as a hunger striker rather than a religious faster where he was not actually force-fed. At 17: "In any event, preservation of prisoners' health is certainly a legitimate objective, and prison officials may take reasonable steps to accomplish this goal. Garza's rights under the Constitution were not violated by the *threat* of receiving involuntary nourishment." (Emphasis supplied.)

Access to Courts—Law Libraries and Law Books

Blake v. Berman, 877 F.2d 145 (1st Cir. 1989). A Massachusetts prisoner held in a Kansas federal prison was not denied access to courts by his lack of access to Massachusetts legal materials. The jury verdict is upheld on the ground that the plaintiff had access to assistance from the Kansas Defender Project and the jury could have found that the plaintiff was turned down because he was not specific enough about the nature of his problem. The fact that the Defender Project did not grant every request for assistance did not make it inadequate. At 146: "The law ... does not forbid 'screening,' nor does case law hold, or suggest, that the presence of 'screening' automatically transforms a constitutionally adequate program of legal assistance into a program that fails to pass muster. In our view, everything depends upon the *kind* of screening that is at issue." (Emphasis in original.)

The Defender Project's director said that they screened out frivolous cases and nothing in the record suggests that these decisions were erroneous or not made in good faith.

Pre-Trial Detainees/Correspondence—Non-Legal/Suicide Prevention

United States v. Brown, 878 F.2d 222 (8th Cir. 1989). A jailer did not violate a detainee's rights by seizing (i.e., reading) an outgoing letter. The detainee's repeated references to suicide and a psychiatrist's report to similar effect justified the seizure in the interests of the detainee's safety.

Outgoing mail may be seized based on "reasonable justification"; it is not clear whether this justification must be determined case by case or whether jailers' "legitimate governmental interest in prisoner safety" permits reading of all outgoing mail. The court rejects the notion that mail seizures must be done only pursuant to *written* policy; any "established practice" will do.

Environment/Protection from Harm/Cruel and Unusual Punishment/*Res Judicata*

Wilson v. Lynaugh, 878 F.2d 846 (5th Cir. 1989). The doctrine of *res judicata* required dismissal of a claim that exposure to environmental tobacco smoke violated the Eighth Amendment where the plaintiff had previously filed a similar suit that had been dismissed. New evidence of the dangers of tobacco smoke did not lift the bar of *res judicata*. But this decision does not "foreclos[e] in perpetuity" the plaintiff's ability to litigate this claim. "Changing mores" may eventually permit the matter to be re-examined despite the earlier decision.

Medical Care

Blankenship v. Kerr County, Texas, 878 F.2d 893 (5th Cir. 1989). An allegation that an arrestee known to be an epileptic was placed in an unpadded cell, where he had a seizure and injured himself, stated a deliberate indifference claim; the fact that jail personnel called a doctor for advice did not justify summary judgment.

Pre-Trial Detainees/Qualified Immunity/ Attorney Consultation/Telephones/Law Library and Law Books

Johnson-El v. Schoemehl, 878 F.2d 1043 (8th Cir. 1989). To defeat qualified immunity, it is not necessary for "the specific acts of [prison] officials [to] be particularly proscribed by decisions rendered by this Circuit or another court with direct jurisdiction over the institution." That is because "[p]rison condition litigation has become quite common in the last thirty years. The questions presented are usually similar, and frequently do not involve academic or otherwise inaccessible analysis. For this reason, we are less inclined to feel that the applicable law in this area is a mystery, even to laymen."

A telephone system that allowed one chance to call an attorney every two weeks under excessively noisy conditions and that counted a call as made where the attorney was not reached was "patently inadequate."

One hour twice a week is "obviously inadequate to research most legal claims." (1053) Threats to withdraw law library access in retaliation for filing grievances constituted punishment of detainees; in combination with inadequate access to counsel, it denied due process.

Procedural Due Process—Administrative Segregation/Classification—Administrative Segregation—High Security/Recreation

Knight v. Armontrout, 878 F.2d 1093 (8th Cir. 1989). Missouri regulations governing placement in administrative segregation create a liberty interest. Plaintiffs were not denied due process by the lack of personal appearances at their periodic review.

A thirteen-day deprivation of recreation did not violate the Constitution.

A thirteen-day holdover in punitive segregation did not deny due process where the plaintiffs received substantially the same privileges they would have received in administrative segregation.

Procedural Due Process—Property

Rochon v. Louisiana State Penitentiary Inmate Account, 880 F.2d 845 (5th Cir. 1989). Louisiana law provides that half of prison wages are paid into the prisoner's personal account for discretionary use and the other half is paid into a savings account and can only be disbursed for education, court costs, victim repayment, or the purchase of state or federal bonds, with the remainder turned over on release. The statute is not unconstitutional as applied to a prisoner serving life without parole.

At 846: "Prisoners have no constitutional right to be paid for work performed in prison. ... [The plaintiff] receives incentive wages solely because of the state statutory scheme. Thus, the nature of his property interest in those funds may be defined by the reasonable provisions of that legislation. ... [The] restrictions are reasonably related to the valid goals of rehabilitation, restitution and assessing against inmates at least the partial cost of prosecuting any future litigation." Equal protection was not denied; all prisoners are treated the same.

Religion—Services Within Institution

Siddiqi v. Leak, 880 F.2d 904 (7th Cir. 1989). The Cook County Jail did not offer Muslim services for some period of time because of confusion and disputes about whether the American Muslim Mission or the Muslim Community Center should represent all Muslims. (There were nine recognized Christian groups at the jail. Apparently it did not occur to anyone in power that there could legitimately be two Muslim groups.)

A jury verdict for the defendants on the plaintiffs' First Amendment claim was supported by evidence that the Chaplaincy Council was not biased and by the reasonableness of having a screening mechanism for religious organizations.

Law Libraries and Law Books/Inmate Legal Assistance

Taylor v. List, 880 F.2d 1040 (9th Cir. 1989). The plaintiff had elected to represent himself in a criminal proceeding. This court had earlier held that "the offer of court-appointed counsel satisfies the Government's ... obligation to provide meaningful access to the courts." Here, they distinguish that case away and hold, "[T]he right to self-representation necessarily includes and is premised upon the right of the defendant to prepare a defense." (1047)

Evidence that prison officials not only denied the segregated plaintiff personal access to witnesses and the law library, but also denied him access to the law clerks who were helping him pursuant to a state court order (resulting in his inability to obtain law books), denied the clerks access to witnesses, and prevented a prison psychiatrist from testifying for him created a material issue as to denial of the plaintiff's right to self-representation.

The fact that the plaintiff filed papers in court did not show he had adequate access to law books; his papers were almost completely devoid of case citations.

Unsentenced Prisoners and Convicts Held In Jails/Crowding

In re Clements, 881 F.2d 145 (5th Cir. 1989). County officials, defendants in the jail conditions case *Alberti v. Klevenhagen*, tried to join state officials in *Alberti* because state ready inmates were backed up in the Harris County jail as a result of orders in the state prison conditions case *Ruiz v. Estelle*. The state officials petitioned for *mandamus* to get the third-party complaint transferred to the *Ruiz v. Estelle* court.

Mandamus is granted requiring the transfer to the *Ruiz* judge of "so much of the *remedy* portion" of the third-party action "as seeks to enjoin them to receive or take prisoners into TDC confinement (or to otherwise take action in the operation or management of TDC-operated confinement facilities)." (153) *Mandamus* is denied as to the *Alberti* plaintiffs' request for a jail population cap and other crowding relief and for additional staffing, and is also denied as to the liability phase of the *Alberti* third-party complaint. "Conditions in the Harris County jail are matters within the special knowledge and competence of the *Alberti* court, but not the *Ruiz* court." (153-54)

In deciding the merits, the *Alberti* court will have first to determine whether the jail inmates' rights are being violated, "and then whether, and if so to

what extent and in what respect, the third-party defendants are legally responsible for such violations under 42 U.S.C. §1983." (154) This determination will be affected by the legal status of TDC and its relation to Harris County prisoners but *not* conditions in TDC prisons, the constraints of the *Ruiz* decree or effects on that decree of orders requiring the transfer of inmates.

Statutes of Limitations

Bell v. Cooper, 881 F.2d 257 (6th Cir. 1989). A state statute that tolled the limitations period while the plaintiff was incarcerated should be applied in federal court.

False Imprisonment/Good Time

Bergen v. Spaulding, 881 F.2d 719 (9th Cir. 1989). The plaintiff was held more than 20 days past his good time release date without a hearing. State statutes and court decisions created an entitlement to good time. Where the warden had notified the Board of Prison Terms and Paroles of the proper date but they failed to act, due process was denied.

The delay was related to a disciplinary proceeding in which the plaintiff was cleared that was at first not properly recorded; however, the Board had the correct information in time to act.

Transportation to Courts/*Pro Se* Litigation

Hernandez v. Whiting, 881 F.2d 768 (9th Cir. 1989). At 770: "... [I]mprisonment suspends the plaintiff's usual right to be personally present at judicial proceedings brought by himself or on his behalf." But the district court should not have dismissed the case for failure to prosecute when the plaintiff—known to be incarcerated—did not show up in court for a conference or trial. The trial court should consider "less harsh alternatives," e.g., "a bench trial in the prison, should the parties waive a jury; trial by depositions, despite this approach's weakness on credibility issues; postponement of trial until the prisoner's release, if scheduled to occur within a reasonable time; and compelling the prisoner's presence through an *ad testificandum* writ." (771)

Habeas Corpus

Thomas v. Georgia State Board of Pardons and Paroles, 881 F.2d 1082 (11th Cir. 1989). A complaint that the state parole board engaged in racially and economically discriminatory practices was properly brought under §1983 and need not be pursued via *habeas corpus* after exhaustion of state remedies insofar as it did not challenge the denial of his parole, but the procedure by which parole decisions are made.

Judicial and Prosecutorial Immunity/ Protection from Assault/Municipalities/ False Imprisonment

Thompson v. Duke, 882 F.2d 1180 (7th Cir. 1989). The jailed plaintiff was acquitted of criminal charges but was not given an immediate parole revocation hearing; three days later he was assaulted by another inmate.

Parole officials are protected by absolute quasi-judicial immunity from liability based on their failure to conduct a prompt hearing; scheduling is a judicial rather than an administrative function.

Jail officials had a duty only to determine the facial validity of the warrant under which the plaintiff was held and not to investigate his claims of innocence or to take any action after his acquittal.

The county could not be held liable for inadequate training of employees because the jail and county Department of Corrections are solely under the control of the Sheriff, an independently elected official who answers only to the electorate.

District Courts

Heating and Ventilation/Medical Care—Qualifications of Personnel/Municipalities

Brock v. Warren County, Tenn., 713 F.Supp. 238 (E.D.Tenn. 1989). A prisoner died in jail of heat prostration in an unventilated cell that reached a temperature of 110 degrees during the day. The lack of ventilation had been called to the attention of the sheriff and the County Commission. The Commission had told the sheriff there was no money for jail improvements. Their conduct in housing the decedent in the cell violated the Eighth Amendment, as did their failure to provide even minimal medical training to the jail staff.

Statutes of Limitations

Bianchi v. Kincheloe, 714 F.Supp. 443 (E.D.Wash. 1989). State tolling provisions applicable to prisoners are applicable in federal court §1983 actions. A state tolling statute applicable to prisoners serving life sentences with the possibility of parole is applied by this federal court to a prisoner serving life without parole on equal protection grounds.

Heating and Ventilation/Verbal Abuse

Wright v. Santoro, 714 F.Supp. 665 (S.D.N.Y. 1989). Racial slurs do not violate the Constitution.

The right to adequate heating was not violated where inmates disputed whether the housing unit was too hot or too cold and the Superintendent left it up to the inmate "Honor Committee."

Women/Childbirth and Abortion/Federal Officials and Prisons/Mootness

Gibson v. Matthews, 715 F.Supp. 181 (E.D.Ky. 1989). Individual capacity claims may be pursued against federal officials for the denial of an abortion. However, this plaintiff's Fifth Amendment due process claim was dismissed because she alleged, at most, inadequate medical treatment not sinking to the level of gross negligence. The Eighth Amendment claim failed for the same reason; the doctor used his "professional medical judgment. . . ."

Mental Health Care/Punitive Segregation/ Class Actions/Personal Involvement and Supervisory Liability

Langley v. Coughlin, 715 F.Supp. 522 (S.D.N.Y. 1988), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989). The plaintiffs, punitive segregation inmates at a women's prison, alleged that the placement of mentally ill prisoners in segregation and their subsequent inadequate treatment violates their right to medical care and resulted in conditions of confinement that violated the rights of the non-mentally ill.

The fact that the plaintiffs presented evidence as to only 18 of 250 class members did not justify summary judgment for the other 232 in a class damage action based on segregation unit conditions. Class action treatment was appropriate for damage claims based on conditions of confinement, since the factual questions concerning the conditions and the legal questions of their constitutionality and the defendants' entitlement to qualified immunity predominated over individualized questions of injury. Once conditions are proved, damages can be awarded on a *per diem* basis. Medical care claims are not susceptible to standardized damage awards. However, class treatment was justified by the extensive common fact issues concerning the medical care system, the close relationship of the medical claims to the conditions claims, and the fact that the proof of the individual claims would consist largely of psychiatric expert testimony that could best be managed at a single trial.

Evidence that the presence of mentally deranged inmates subjected the other inmates to noise, filth, fires, assault and the fear of assault, the sight and sound of self-mutilation and other "seeming demented activity" raised a triable question of Eighth Amendment violation.

Evidence that the Commissioner "was aware of the general and continuing problems of mental health care in SHU at Bedford Hills," that he failed to see that care was provided for the chronically mentally ill, and that he was explicitly placed on notice by the filing of this and other lawsuits, precluded summary judgment for the Commissioner. The Deputy Superintendent was not entitled to summary judgment where she was aware of the challenged conditions, had some authority over them, but limited her efforts to one inmate.

Visiting/Temporary Release

Isaraphanich v. Coughlin, 716 F.Supp. 119 (S.D.N.Y. 1989). The denial of temporary release based on an Immigration and Naturalization Service detainer did not deny equal protection because it was rationally related to the danger of escape. The denial of participation in the Family Reunion Program (i.e., trailer visits) did not deny equal protection either because the risk of escape justified a higher security classification that in turn disqualified the plaintiff from the program.

Childbirth and Abortion/Privacy/Visiting/ Federal Officials and Prisons/Injunctive Relief—Preliminary/Exhaustion of Remedies/Women

Berrios-Berrios v. Thornburgh, 716 F.Supp. 987 (E.D.Ky. 1989). The plaintiff was entitled to a preliminary injunction permitting her to breast-feed during regular visiting hours in a visiting room where bottle-feeding was permitted. The government put forth no justification for prohibiting it. She was not entitled to an injunction requiring the prison to arrange for her to express and refrigerate her milk and deliver it to the child's caretaker. In a 1300-inmate women's prison, meeting all such requests would be a "costly and monumental task," would require inspection for contraband, and would subject the defendants to negligence claims in the event of spoilage.

At 99: "Finally, the court must conclude that it will be a very sad day in America when allowing a mother to breast-feed her infant disserves the public interest."

The plaintiff, who sought to breast-feed her newborn child, was not required to exhaust administrative remedies because of the urgency of the claim.

Pre-Trial Detainees/Crowding/ Modification of Judgments

Monmouth County Correctional Institution Inmates v. Lanzaro, 717 F.Supp. 268 (D.N.J. 1989). The court modifies its prior jail population orders to clarify that it never meant to limit individual housing units, but only the overall population, and it never intended to abrogate prior agreements prohibiting double bunking.

An interlocutory order is not subject to the strict Rule 60 standards for modification; the modification need only be "consonant with equity."

Status Report

—*continued from page eight*

filed in state court on issues of overcrowding, totality of conditions and access to the courts. *Dickerson v. Castle*, C.A. No. 10256 (November 22, 1988).

9. **Florida:** The entire state prison system is under court order dealing with overcrowding. *Costello v. Wainwright*, 397 F.Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 and 553 F.2d 506 (5th Cir. 1977). See also 489 F.Supp. 1100 (M.D. Fla. 1980), settlement on overcrowding approved. A Special Master has been appointed. Additional consent decrees have been entered covering health care, food service, urethane mattresses and fire safety. On 12/17/87 a consent decree was entered permanently enjoining the medical care system; it is significant that the state consented to the Eighth Amendment violation.

10. **Georgia:** The state penitentiary at Reidsville is under court order on total conditions and overcrowding. A Special Master was appointed in June 1979. *Guthrie v. Evans*, C.A. No. 3068 (S.D. Ga.). A number of other facilities are under challenge.

11. **Hawaii:*** The men's prison (O.C.C.C.) in Honolulu and the women's prison on Oahu are under court order resulting from a consent decree in a totality of conditions suit. *Spear v. Ariyoshi*, Civ. No. 84-1104 (D. Hawaii). Order entered June 1985 and monitors have been appointed. Consent decree amended in January 1986.

12. **Idaho:*** The women's prison is under a consent decree on conditions. *Witke v. Crowl*, Civ. No. 82-3078 (D. Id.), with an appointed monitor. The men's Idaho Correctional State Institution is under a court order on conditions. *Balla v. Idaho State Bd. of Correction*, 595 F.Supp. 1558 (D. Id. 1984).

13. **Illinois:*** The state penitentiary at Menard is under court order on total conditions and overcrowding. The Special Master was discharged after four years. There has been substantial compliance with the decree; however, the injunction remains in force. *Lightfoot v. Walker*, 486 F.Supp. 504 (S.D. Ill. 2/19/80). The state penitentiary at Pontiac was under a court order enjoining double-celling and dealing with overcrowding. *Smith v. Fairman*, 548 F.Supp. 186 (C.D. Ill. 1981), *rev.*, 690 F.2d 122 (7th Cir. 1982) (no proof of violence or long periods in cell). Litigation is pending at other institutions. There is a pending equal protection case at Dwight Correctional Center, the women's prison. *Moorhead v. Lane*, #86-2020 (C.D. Ill.).

14. **Indiana:*** The state prison at Pendleton was found unconstitutional on total conditions and overcrowding. *French v. Owens*, 538 F.Supp. 910 (S.D. Ind. 1982), *aff'd in pertinent part*, 777 F.2d 1250 (7th Cir. 1985), *cert. denied*, U.S. (1986). The state penitentiary at Michigan City is under a court order on overcrowding and other conditions. *Hendrix v. Faulkner*, 535 F.Supp. 435 (W.D. Ind. 1981), *aff'd sub nom Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 3587 (1984). The state prison at Westville is under consent decree on overcrowding and conditions. *Anderson v. Orr*, C.A. No. S83-0481 (N.D. Ind., case filed 1983, NPP joined 1987). A comprehensive settlement was reached March 31, 1989.

15. **Iowa:** The state penitentiary is under court order on overcrowding and a variety of conditions. *Watson v. Ray*, C.A. No. 78-106-01, 90 F.R.D. 143 (S.D. Ia. 1981).

16. **Kansas:** The state penitentiary is under a consent decree on total conditions. *Arney v. Bennett*, No. 77-3132 (D. Kan. 1980). The case was reopened in January 1988 and culminated in a consent decree in April 1989. Temporary injunctive relief was sought and obtained. Included in the decree is that all the old facilities and any new construction are required to meet ACA and NCHC standards. The mental health issues are being litigated.

17. **Kentucky:*** The state penitentiary and reformatory are under court order by virtue of a consent decree on overcrowding and some conditions. *Kendrick v. Bland*, 541 F.Supp. 21 (W.D. Ky. 1981) (consent decree entered). On appeal, the court of appeals affirmed virtually all of the district court's orders, 740 F.2d 432 (6th Cir. 1984). The women's state prison is under court order on a variety of conditions. *Canterino v. Wilson*, 546 F.Supp. 174 (W.D. Ky. 1982), and 564 F.Supp. 711 (W.D. Ky. 1983).

18. **Louisiana:** The state penitentiary is under court order dealing with overcrowding and a variety of conditions. *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977). In mid-1989 a federal judge *sua sponte* reopened the case and has initiated a state criminal probe into several matters and a Department of Justice probe into medical care. A temporary Special Master has been appointed and has submitted a report. Also, the Fifth Circuit consolidated all jail cases under one federal judge; monthly population reports are submitted to the judge for monitoring.

19. **Maine:*** The state penitentiary was challenged on overcrowding and a variety of conditions. The trial court granted relief only as to restraint cells and otherwise dismissed the complaint. *Lovell v. Brennan*, 566 F.Supp. 672 (D. Maine 1983), *aff'd*, 728 F.2d 560 (1st Cir. 1984).

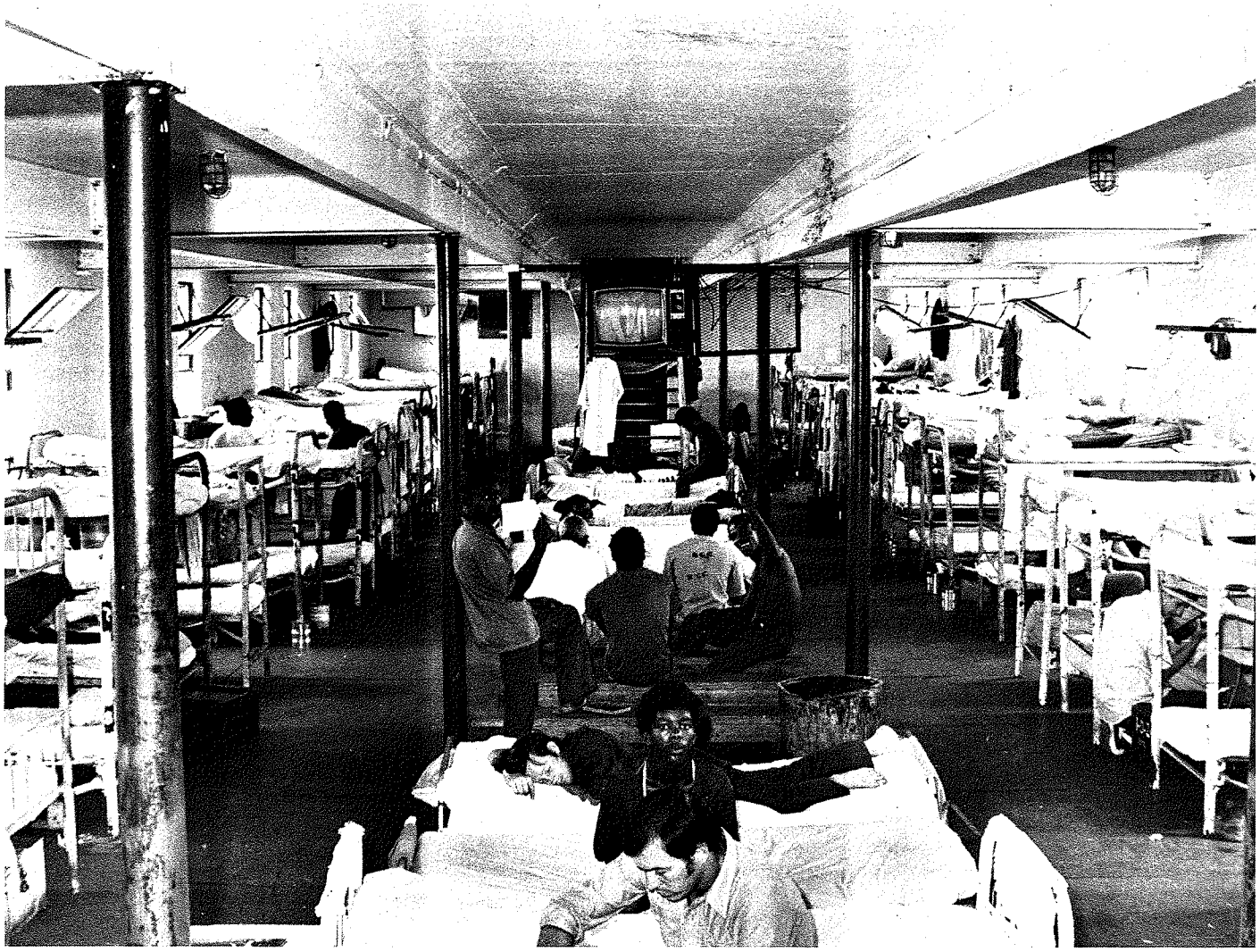
20. **Maryland:*** A medium and the maximum security prisons were both declared unconstitutionally overcrowded. *Johnson v. Levine*, 450 F.Supp. 648 (D. Md. 1978), *Nelson v. Collins*, 455 F.Supp. 727 (D. Md. 1978), *aff'd*, 588 F.2d 1378 (4th Cir. 1978), *on remand*, __ F.Supp. __ (D. Md. 1/5/81), *rev. and remanded*, 659 F.2d 420 (4th Cir. 1981)(*en banc*). A settlement agreement and consent decree were subsequently entered in both cases. *Johnson v. Levine*, now *Johnson v. Galley*, was consolidated with *Washington v. Keller*, now *Washington v. Tinney*, 479 F.Supp. 569 (D. Md. 1979), and another settlement agreement and supplement to the settlement agreement were entered in October 1987 and February 1988, respectively.

21. **Massachusetts:** The maximum security unit at the state prison in Walpole is being challenged on total conditions. *Blake v. Hall*, C.A. 78-3051-T (D. Mass.). A decision for the prison officials was *affirmed in part and reversed in part and remanded*, 668 F.2d 52 (1st Cir. 1981). Consent decrees prohibiting prisoners sleeping on the floor are in effect at MCI Concord, *Jacobs v. Fair*, #86-81758 (Suffolk Co.), and MCI Walpole *Nolan v. Fair*, #84-1360 (Norfolk Co.). These actions were brought in state court.

22. **Michigan:*** The women's prison is under court order. *Glover v. Johnson*, 478 F.Supp. 1075 (E.D. Mich. 1979); further order entered, 510 F.Supp. 1019 (1981). In *Glover*, the Department of Corrections was found in contempt for lack of compliance (9/14/89) and is to be fined $5,000/day if it does not devise a compliance plan by mid-January 1990 regarding educational and vocational programs equal to those offered males. Four men's prisons (Jackson, Marquette, Michigan Reformatory and Riverside) are under consent decree on overcrowding and other conditions, *U.S. v. Michigan*, No. G84-63, and under court order on issues not covered by consent decree in *Knop v. Johnson*, 685 F.Supp. 636 (W.D. Mich. 1988). Part of *Knop* is on appeal. A monitor was appointed. The Central Complex of Jackson is under a consent decree on the same conditions. *Hadix v. Milliken*, C.A. 80-73581 (E.D. Mich. 5/13/85).

23. **Minnesota:** The state has kept overcrowding in abeyance through use of sentencing guidelines which take the number of available prison beds into account. Also, individual facilities and the Department of Corrections have been responsive to the complaints raised by advocates for prisoners.

24. **Mississippi:** The entire state prison system is under court order dealing with overcrowding and total conditions. *Gates v. Collier*, 501 F.2d 1291



(5th Cir. 1974).

25. **Missouri:*** The state penitentiary is under court order on overcrowding and some conditions. *Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979), *on remand*, 27 Cr.L. 2335 (W.D. Mo. 5/23/80). In 1982 a separate order was entered on medical issues.

26. **Montana:** As a sparsely populated state, Montana's prison population has been small. The prison population is now increasing and problems are occurring in the system.

27. **Nebraska:** No cases have been filed dealing with overcrowding; however, there is an equal protection and conditions case involving the Nebraska Center for Women at York. *Klinger v. Nebraska Dept. of Correctional Services*, C.V. 88-L-399.

28. **Nevada:*** The state penitentiary is under court order on overcrowding and total conditions. *Craig v. Hocker*, C.A. No. R-2662 BRT (D. Nev.) (consent decree entered 7/18/80). The new addition to the state penitentiary is under court order on total conditions. *Phillips v. Bryan*, CVR-77-221-ECR (D. Nev.) (consent decree entered July 1983). Both cases have been consolidated with a new consent decree entered May 19, 1988. A monitor has been appointed.

29. **New Hampshire:*** The state penitentiary is under court order dealing with total conditions and overcrowding. *Laaman v. Helgemoe*, 437 F.Supp. 269 (D. N.H. 1977). An action is pending for contempt on certain portions toward the end of the year. Also, the state is seeking to modify the order based on changes in the law.

30. **New Jersey:** For years the state has been able to stave off massive overcrowding in the prisons by mandating that county jails take the overflow from the state system. Most of the 21 county jails are under court order. Now state prisoners are backing up into municipal lock-ups.

31. **New Mexico:*** The entire system is under court order on overcrowding and total conditions. *Duran v. Apodaca*, C.A. No. 77-721-C (D.N.M.) (consent decree entered 8/1/80). Special Master appointed June 1983. The district court's refusal to vacate the consent decree, 678 F.Supp. 839 (D.N.M. 1988), was affirmed by the Tenth Circuit, ___ F.2d ___ (10th Cir. 1989), Nos. 89-2041 and 88-1442.

32. **New York:** While no statewide comprehensive lawsuits have been brought, numerous prison facilities are under court order and injunctive relief has been obtained for the following egregious conditions and practices: medical care (Bedford Hills and Green Haven); dental care (Bedford Hills); fire safety (Bedford Hills); segregation conditions (Green Haven, Sing-Sing, Fishkill, Bedford Hills, Woodbourne and Taconic); protective custody conditions (Green Haven); mental health care for segregation prisoners (Attica, Bedford Hills). Cases are pending at Auburn, Attica, Clinton, Great Meadow, Sing-Sing. Also, major disturbances at Attica (1971) and Sing-Sing (1983) were both related to crowded conditions, lack of programming, and racial hostility, among other things. The New York system has had a phenomenal building program and

—continued on next page

—continued from previous page
has thus far kept one step ahead of massive overcrowding in the prisons. However, many major county jails are under court order for overcrowding, as is the New York City system.

33. **North Carolina:*** In September 1985, a consent judgment was entered covering overcrowding, staffing, programming, and medical services in the 13 units of the state system's South Piedmont area. *Hubert v. Ward*, C-C-80-414-M (W.D.N.C.). Compliance has been reached and the case is in a dormant stage; the court no longer has active supervision. A lawsuit was filed covering conditions and crowding at the Craggy Unit outside of Asheville, N.C. *Epps v. Martin*, A-C-86-162 (W.D.N.C.). Consent decree entered August 1987. A new prison has been completed and Craggy has been closed. Settlement was reached in *Small v. Martin*, 85-987-CRT (E.D.N.C.), in December 1988, covering the remaining 49 road camps on overcrowding and conditions. *Mutz v. Johnson* settled out of court, covering adequacy of mental health at the women's prison. Consent decree in *Stacker v. Stephenson* on overcrowding and general conditions at Caledonia Farm; population cap imposed; emphasis on security issues and reducing violence. Pending cases on overcrowding and conditions at Odom Farm, *Barnet v. Allsbrook*, and Harnett Correctional Center, *Bass v. Stephenson*.

34. **North Dakota:** No cases have been filed dealing with overcrowding or conditions.

35. **Ohio:*** The state prison at Columbus was closed in 1985. *Stewart v. Rhodes*, C.A. No. C-2-78-220 (S.D. Ohio 12/79). The state prison at Mansfield is being operated under a consent decree on various conditions, *Boyd v. Denton*, C.A. 78-1054A (N.D. Ohio 6/83), and the prison should be closed in 1990.

36. **Oklahoma:*** The state penitentiary is under court order on total conditions and the entire state prison system is under court order on overcrowding. *Battle v. Anderson*, 564 F.2d 388 (10th Cir. 1979). The district court's decision to retain jurisdiction to insure continued compliance was upheld, 708 F.2d 1523 (10th Cir. 1983). The district court relinquished jurisdiction in mid-1984 and that decision is on appeal. All original compliance orders are still in effect, although the court has ended active supervision. The facility remains under permanent injunction. This was recently tested, unsuccessfully, when the state asked to vacate or amend the original order so as to renovate closed housing due to overcrowding. The court determined that the order is in effect and would not amend because circumstances have not changed.

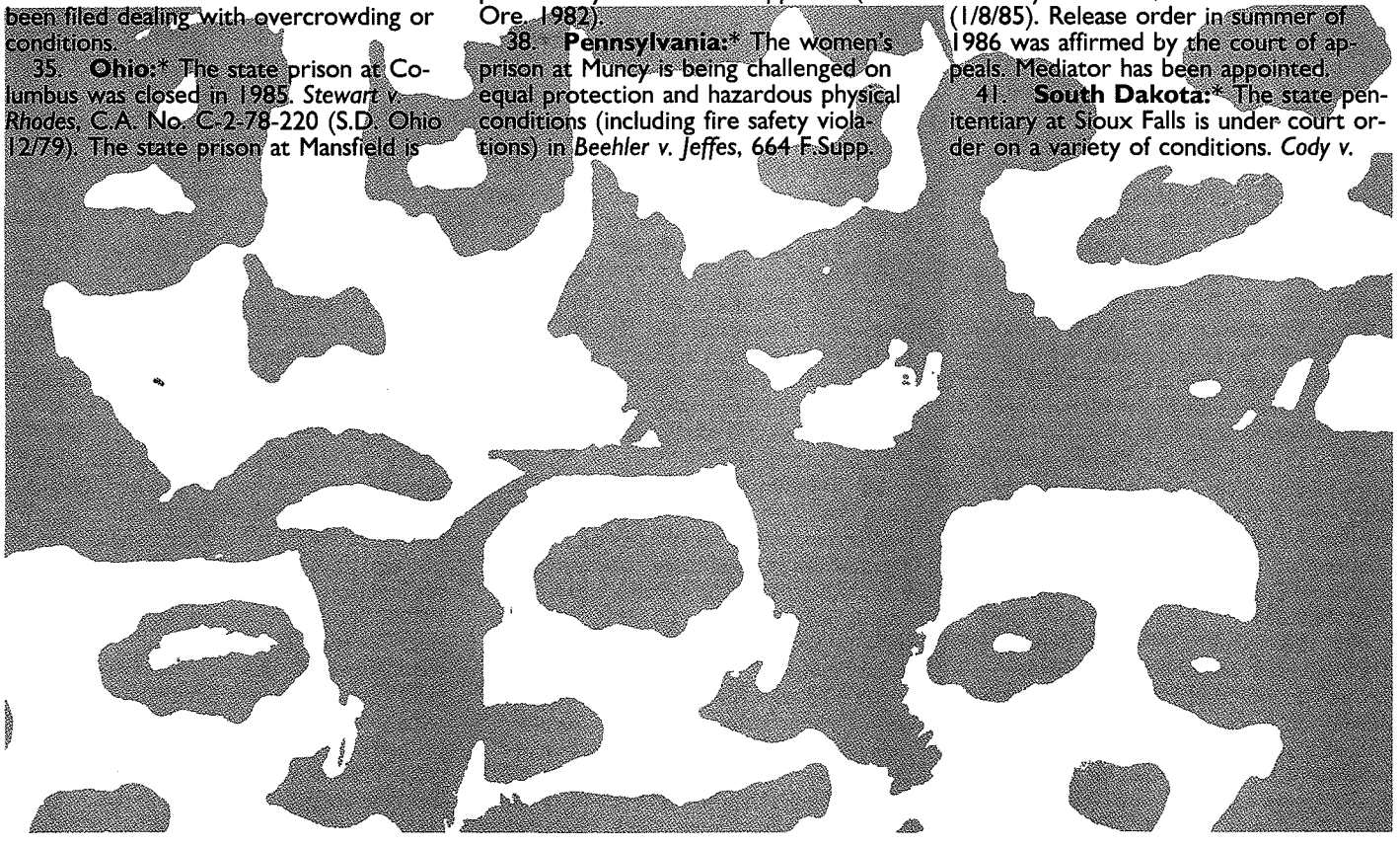
37. **Oregon:** The state penitentiary was under a court order on overcrowding. *Capps v. Atiyeh*, 495 F.Supp. 802 (D. Ore. 1980), appeal pending (9th Cir.), stay granted, 101 S.Ct. 829 (1981). On remand, the district court determined there were no Eighth Amendment violations, but there were constitutional deficiencies in medical care, fire safety, and milk pasteurization process at the prison dairy farm. 559 F.Supp. 894 (D. Ore. 1982).

38. **Pennsylvania:*** The women's prison at Muncy is being challenged on equal protection and hazardous physical conditions (including fire safety violations) in *Beehler v. Jeffes*, 664 F.Supp. 931 (M.D. Pa. 1986). Most of the claims have been settled and voluntarily dismissed; the asbestos claim is pending and plaintiffs are monitoring the abatement schedule. The state prison at Graterford is being challenged on total conditions, *Hassine v. Jeffes*. An appeal is pending on the denial of class claims. The state prison at Pittsburgh is under court order to devise a plan dealing with double-celling; there are also medical and mental health issues. A monitor is to be appointed. *Tillery v. Owens*, ___ F.Supp. ___ (W.D. Pa. 1989).

39. **Rhode Island:*** The entire state system is under court order on overcrowding and total conditions. *Palmigiano v. DiPrete*, 443 F.Supp. 956 (D.R.I. 1977). A Special Master was appointed in September 1977. New population caps were imposed by order in June 1986. Various contempt orders have been entered. The First Circuit affirmed the trial court's opinions and orders of October 21, 1988 (contempt) and April 6, 1989 (sanctions) in all respects on August 21, 1989. The trial court ordered the fines to be used to create a bail fund to release low-bail detainees. *Palmigiano v. DiPrete*, 710 F.Supp. 875 (D.R.I. 1989).

40. **South Carolina:*** The state penitentiary is being challenged on overcrowding and conditions. *Mattison v. So. Car. Bd. of Corrections*, C.A. No. 76-318. The entire prison system is under a consent decree on overcrowding and conditions. *Plyler v. Evatt*, C.A. No. 82-876-O (1/8/85). Release order in summer of 1986 was affirmed by the court of appeals. Mediator has been appointed.

41. **South Dakota:*** The state penitentiary at Sioux Falls is under court order on a variety of conditions. *Cody v.*



Hillard, 599 F.Supp. 1025 (D.S.D. 1984). Overcrowding order reversed on double-celling, 830 F.2d 912 (8th Cir. 1987).

42. **Tennessee:*** The entire system is under court order for overcrowding and conditions. *Grubbs v. Bradley*, 552 F.Supp. 1052 (M.D. Tenn. 1982). Population ordered reduced and a Special Master was appointed (December 1982). Court enjoined new intake because of failure to comply with population reduction orders. Order, 10/25/85. On October 4, 1989, the Sixth Circuit consolidated numerous local jail overcrowding cases regarding the presence of state prisoners in the jails into *Grubbs. Roberts v. Tenn. DOC* and *Carver v. Knox Co. Sheriff*, ___ F.2d ___ (6th Cir. 1989). A Special Master is to be selected to monitor the jails; population caps have been recommended. The Tennessee State Prison in Nashville is under court order to be closed.

43. **Texas:** The entire state prison system has been declared unconstitutional on overcrowding and conditions. *Ruiz v. Estelle*, 503 F.Supp. 1265 (S.D. Tex. 12/10/80), stay granted and denied, 650 F.2d 555 (5th Cir. 1981), stay granted and denied (5th Cir. 1/14/82). A Special Master has been appointed. On appeal, the district court order was *affirmed in part, vacated in part* and *vacated without prejudice* in part for further hearings. 679 F.2d 1115 (5th Cir. 1982). A stipulation was reached and a consent decree entered on the crowding issue in 1985. A contempt order was entered by the district court on December 3, 1986. *Ruiz v. McCotter*, H-78-987-CA (S.D. Tex.). The contempt order was vacated April 27, 1987; no fines had been imposed. During the summer of 1989 private prisons were added as defendants. *Ruiz v. Lynaugh*. Because of overcrowding and backlog into county jails, county jail litigation implicates *Ruiz*; the judges send the cases back and forth. The Special Master's office in Texas is scheduled for termination March 1990.

44. **Utah:** The state penitentiary is being operated under a consent decree on overcrowding and some conditions. *Nielson v. Matheson*, C-76-253 (D. Utah 1979). Prior consent decree had been ignored because it was considered to have no teeth. A new suit challenging double-celling was filed, *Baker v. Deland*. A temporary restraining order regarding double-celling was obtained in June 1989. Soon afterward, contempt proceedings were brought regarding double-celling set for December 1989.

45. **Vermont:** State prison closed in late 1970s. Extensive use of community correctional facilities. Higher security prisoners sent to other states.

46. **Virginia:*** The state prison at Powhatan is under a consent decree dealing with overcrowding and conditions. *Cagle v. Hutto*, 79-0515-R (E.D. Va.). The maximum security prison at Mecklenburg is under court order dealing with various practices and conditions. *Brown v. Hutto*, 81-0853-R (E.D. Va.) (consent decree entered April 1985). The state penitentiary at Richmond was challenged on the totality of conditions. *Shrader v. White*, C.A. No. 82-0247-R (E.D. Va.). Trial court dismissed the complaint in June 1983. The court of appeals *affirmed and remanded in part*, 761 F.2d 975 (4th Cir. 1985). The remand was settled in 1987, covering security issues.

47. **Washington:*** The state reformatory is being challenged on overcrowding and conditions. *Collins v. Rhay*, C.A. No. C-7813-V (W.D. Wash.). The state penitentiary at Walla Walla has been declared unconstitutional on overcrowding and conditions and a Special Master has been appointed. *Hoptowit v. Ray*, C-79-359 (E.D. Wash. 6/23/80), *aff'd in part, rev'd in part, vacated in part and remanded*, 682 F.2d 1237 (9th Cir. 1982). In a later appeal, *Hoptowit v. Spellman*, 753 F.2d 779 (9th Cir. 1985), the court of appeals affirmed the findings of the district court on remand with respect to the conditions of confinement and remanded the case for the entry of an order, which was filed April 10, 1986. Defendants' motion to dissolve the injunction was denied on May 22, 1987.

48. **West Virginia:** The state penitentiary at Moundsville is under court order on overcrowding and conditions. *Crain v. Bordenkircher*, #81-C-320R (Circuit Court, Marshall County 6/21/83). Decision affirmed by West Virginia Supreme Court in 1986. A Special Master has been appointed. The West Virginia Supreme Court ordered the state penitentiary at Moundsville closed by mid-1992. *Crain v. Bordenkircher*, 44 Cr.L. 2374 (W.Va. Sup. Ct. App. 1989). The Huttonsville Correction Center is also under court order with respect to conditions. *Nobles v. Gregory*, #83-C-244 (Randolph Co. Cir. Ct. 2/22/85). Ongoing enforcement proceedings continue.

49. **Wisconsin:*** The state prison at Waupun is under a court order on overcrowding. *Delgado v. Cady*, 576 F.Supp. 1446 (E.D. Wisc. 1983).

50. **Wyoming:*** The state penitentiary was being operated under terms of a stipulation and consent decree. *Bustos v. Herschler*, C.A. No. C76-143-B (D. Wyo.). The federal court relinquished jurisdiction in early 1983 and that prison is now closed.

51. **District of Columbia:*** The District jails are under court order on overcrowding and conditions. *Inmates of D.C. Jail v. Jackson*, 416 F.Supp. 119 (D.D.C. 1976), *Campbell v. McGruder*, 416 F.Supp. 100 and 111 (D.D.C. 1976), *affirmed and remanded*, 580 F.2d 521 (D.C. Cir. 1978). On remand, the court ordered a limit on the period of double-celling and increase in staff, 554 F.Supp. 562 (D.D.C. 1982). In 1985, the district court held conditions at the jail required an order that intake be enjoined. A consent decree requiring reduction in population was entered August 22, 1985. *Inmates of D.C. Jail v. Jackson*, #75-1668 (D.D.C.). Several facilities at the Lorton Complex, the District's prison, are under court order for overcrowding and conditions. There are population caps in place in both the Central Facility and the Maximum Security Facility. *Twelve John Does v. Barry*, #80-2136 (D.D.C.) (Central); *John Doe v. District of Columbia*, #79-1726 (D.D.C.) (Maximum). Contempt orders entered. *Twelve John Does v. District of Columbia*, 855 F.2d 874 (D.C. Cir. 1988). On December 22, 1986, Lorton's medium security Occoquan facilities came under court order and a population cap was imposed. *Inmates of Occoquan v. Barry*, 650 F.Supp. 619 (D.D.C.), *vacated and remanded*, 844 F.2d. 828 (D.C. Cir. 1988), motion for rehearing *en banc* denied, 850 F.2d. 796 (1988) (dissenting opinions and separate statements). Trial on remand in January 1989. Facility found unconstitutional in June 30, 1989 remand opinion and order; defendants ordered to devise a plan to alleviate constitutional violations, 717 F.Supp. 854 (D.D.C. 1989).

52. **Puerto Rico:** The Commonwealth Penitentiary is under court order on overcrowding and conditions. *Martinez-Rodrigues v. Jiminez*, 409 F.Supp. 582 (D.P.R. 1976). The entire Commonwealth prison system is under court order dealing with overcrowding and conditions. *Morales-Feliciano v. Barcelo*, 497 F.Supp. 14 (D.P.R. 1979). A Special Master was appointed in 1986. District court orders of contempt and daily fines have been affirmed by the First Circuit, ___ F.2d ___ (1st Cir. 9/26/89).

53. **Virgin Islands:** Territorial prison is under court order dealing with conditions and overcrowding. *Barnes v. Gov't. of the Virgin Islands*, 415 F.Supp. 1218 (D.V.I. 1976).

Summary

Entire Prison System Under Court Order or Consent Decree

Nine jurisdictions: *Alaska, Florida, Mississippi, *New Mexico, *Rhode Island, *South Carolina, *Tennessee, Texas, Puerto Rico

Major Institution(s) in the State/Jurisdiction Under Court Order or Consent Decree

Thirty-four jurisdictions: *Arizona, *Cali-

—*continued on page twenty*

AIDS UPDATE

Judy Greenspan

State prison systems are re-evaluating their policies on the management and treatment of AIDS in light of new medical developments and an increase in class action lawsuits. A recent telephone survey reveals dramatic shifts in two important areas: segregation of infected prisoners, and mandatory testing for the Human Immunodeficiency Virus (HIV).

States Move Toward Mainstreaming of HIV-infected Prisoners

More states are moving towards the mainstreaming of HIV-positive prisoners into the general prison population. This reversal in policy has come about, administrators say, because of three factors: 1) recently filed lawsuits, 2) the high cost of keeping those prisoners segregated, and 3) updated medical information. In a 1988 survey, the National Prison Project reported that 10 state systems segregated all HIV-positive prisoners. Over the past year, the states of Arizona, South Dakota, Wyoming, and Tennessee have reversed their segregation policies and now mainstream HIV-infected prisoners into the general prison population. Colorado and Georgia are moving in that direction.

In addition, prodded by the recent Connecticut AIDS desegregation settlement in *Smith v. Meacham*, several states which now segregate prisoners with full-blown AIDS, such as Massachusetts, are seriously considering changing their policies.

Lawsuits against departments of correction like the three currently pending in the state of California against the segregation of HIV-positive prisoners, have definitely served as an incentive to mainstream HIV-infected prisoners.

Increase in Mandatory Testing

The most negative and alarming trend regarding AIDS in prison, however, is the increase in the number of states now conducting mandatory testing for HIV. The 1988 NPP survey reported that 12 states tested all prisoners on entry. Our 1989 phone survey indicates that number has risen to 17, and includes Alabama, Colorado, Georgia, Idaho, Iowa, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, North Dakota, Oklahoma, Rhode Island, Utah, West Virginia and Wyoming. The only positive sign here is that even after testing, fewer states segregate those who do test positive.

Judy Greenspan is the AIDS information coordinator at the National Prison Project, and contributes a regular column to the NPP JOURNAL on AIDS.

Studies Show Voluntary Testing More Effective

Health educators who specialize in AIDS in prison continue to support education, counseling and *voluntary* testing as the most enlightened response to HIV infection and AIDS. Two recent studies by corrections and public health officials in Wisconsin and Oregon conclude that given ongoing, quality AIDS education and counseling by trained people (including peer counselors), prisoners who have engaged in high risk behavior, such as unprotected sex and sharing needles, will come forward to be tested. In fact, the Oregon study, "HIV Testing in Prisoners: Is Mandatory Testing Mandatory?" which appeared in the July 1989 issue of the *American Journal of Public Health*, helped defeat a plan in the state legislature for forced HIV testing.

AZT and Pentamidine Still Not Provided in All States

Unfortunately, the recent pronouncement by the U.S. Public Health Service regarding the benefits of early drug therapies and treatment for asymptomatic HIV-infected individuals may encourage other states to initiate mandatory testing programs for their prison population. This would indeed be a step backward for the management of AIDS in prison.

A handful of states, including New York and New Jersey, are considering providing early treatment of AZT and pentamidine to asymptomatic prisoners, while many states search for funds for a more modest AZT treatment program for prisoners with AIDS. A few states, such as Missouri and Maine, do not even provide AZT. Many prisoners from a cross-section of state systems write to the National Prison Project complaining that they have clear signs of opportunistic infections associated with AIDS and are not receiving AZT. Medical and correctional staffs cite cost as the reason for denial of AZT treatments.

A recent article in the September 15, 1989 *Journal of the American Medical Association* states that, nationwide, early treatment will cost an already underfunded health-care system over $5 billion per year. This figure is even considered low by some observers and the article is not optimistic about securing government funding for early treatment and intervention for asymptomatic HIV-positive individuals.

A massive infusion of funds to the state and federal prison systems for early treatment will be necessary. Testing, particularly if it is mandatory, without appropriate counseling and the accessibility of early treatment, can have extremely negative consequences for HIV-infected prisoners.

The National Prison Project's 1990 AIDS in Prison Bibliography *is now available for $5 from our office. It includes an updated legal case list, a resource directory for AIDS educators, and recent policy directives on the management of AIDS and HIV in state prison systems.* ■

FOR THE RECORD

■ Two foundations have awarded generous grants to support the National Prison Project's work in AIDS education and litigation. The Public Welfare Foundation renewed a one-year grant of $40,000 to continue our AIDS education work. It was largely due to their support last year that the Project was able to print the AIDS booklet, *AIDS in Prison: The Facts for Inmates and Officers*, which is available in both English and Spanish (see publications page for more information). Both booklets have been widely distributed and continue to be in demand.

In late October, the Aaron Diamond Foundation awarded the AIDS Project a two-year grant of $50,000. The grant will fund the Project's education and litigation programs and bolster its ability to meet the growing number of requests for information and assistance.

■ *In the Spring 1989* JOURNAL, *editor Jan Elvin explored the reasons behind the decrease in Washington State's prison population. In November, the* JOURNAL *received a letter (also addressed to* Corrections Compendium, *which had reprinted the article) from William C. Collins, co-editor of the* Correctional Law Reporter, *a publication out of Washington State. Mr. Collins' letter brings us up to date:*

As of November 6, the current DOC population was just over 6,500, or within 50 of the Department's defined operating capacity. Just over 400 boarders remained housed in Washington prisons, most of these from the federal system. The number of boarders is decreasing.

In what shocked a number of experi-

enced hands in the Washington prison system, the Governor recently called for the construction of over 2,200 new prison beds by the end of the 1991 biennium and over 3,300 new beds by 1996. So much for excess bed space.

Of additional concern is that the projections the governor was considering were just for increased drug related crime. Washington's political winds appear to be blowing up a storm for sex offenders which probably will culminate in substantial increases in the length of time being served by many persons falling into this category. Thus the projections may actually understate the population increases we can expect absent some dramatic change of direction in criminal justice.

Perhaps the only silver lining on the cloud raised by the Governor's announcement is that the attention of the public and the legislature is being focused on at least one cost of the war on drugs—a massive expenditure in corrections—before our prisons are ready to burst and in time to do something about the projected population increases. Time will tell if this early announcement has any positive effects.

So the good old days of excess capacity and rent-a-cell programs seem to be over in the Pacific Northwest.

—William C. Collins
Co-Editor, *Correctional Law Reporter*

The electronic monitoring photo that ran on page 8 of the Fall 1989 issue of the *NPP JOURNAL* was not credited. The credit should have read: Gregg Rummel/Courtesy NIJ/NCJRS.

PUBLICATIONS

The National Prison Project *JOURNAL,* $25/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. 8th Edition, published December 1988. Paperback, $25 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, $3.00 prepaid from NPP.

QTY. COST

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.

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

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 nationwide compilation of litigation involving jails. 1st Edition, published September 1985. $15 prepaid from NPP.

AIDS in Prison Bibliography lists resources on AIDS in prison that are available from the National Prison Project and other sources, including corrections policies on AIDS, educational materials, medical and legal articles, and recent AIDS studies. $5 prepaid from NPP.

AIDS in Prisons: The Facts for Inmates and Officers is a simply written educational tool for prisoners, corrections staff, and AIDS service providers. The booklet answers in an easy-to-read format commonly asked questions concerning the meaning of AIDS, the medical treatment available, legal rights and responsibilities. Also available in Spanish. Sample copies free. Bulk orders: 100 copies/$25. 500 copies/$100. 1,000 copies/$150 prepaid.

QTY. COST

Fill out and send with check payable to

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

NAME _____

ADDRESS _____

CITY, STATE, ZIP _____

HIGHLIGHTS

The following are major developments in the Prison Project's litigation program since September 1, 1989. Further details of any of the listed cases may be obtained by writing the Project.

Anderson v. Orr—This case challenges conditions in Indiana's Westville Correctional Center. Prison officials appear to be making a good faith effort to comply with the terms of the settlement agreement. Due to continued abusive practices in the psychiatric unit, however, we threatened to bring contempt proceedings, and these practices were then corrected. Local counsel will assume primary responsibility for monitoring compliance in this case.

Dickerson v. Castle—This case challenges conditions and overcrowding in the Delaware prison system. After discovering defendants had failed to comply with the terms of the settlement agreement, plaintiffs' attorneys filed a contempt motion in November on the issues of overcrowding, ventilation and legal access.

Duran v. Carruthers—This is a totality of conditions case against the entire New Mexico state prison system. On September 15, the Tenth Circuit decided in the plaintiffs' favor on defendants' appeal on their motion to modify the terms of the consent decree as well as on appeals from two recent fee awards. The court affirmed both lower court decisions in all respects.

Macer v. DiNisio/Dotson v. Satterfield—The Prison Project and the Maryland ACLU are challenging conditions and practices in two jails on Maryland's Eastern Shore. In *Macer*, which challenges conditions at the Talbot County Jail, counsel reached final agreement on all issues. We are awaiting court approval.

Palmigiano v. DiPrete—This case challenges conditions in the Rhode Island prison system. The defendants continue to be completely out of compliance with various court-ordered population caps and major contempt hearings will be held in the next few months after completion of current discovery efforts.

Spear v. Waihee—This case challenges conditions at two Hawaii facilities. At the request of the Hawaii Senate, and with the Prison Project's assistance, the Governor appointed a special master to oversee the Corrections Department. Kip Kautsky, the appointee, will meet with plaintiffs' counsel and members of the expert panels in *Spear* in early 1990 to discuss their concerns about continuing problems in the Hawaii facilities.

U.S. v. Michigan—This is a state-wide Michigan prison conditions case. On November 3, at the conclusion of a three-day hearing, the judge entered an excellent order on classification.

Status Report —*continued from page seventeen*

fornia, *Colorado, *Connecticut, *Delaware, Georgia, *Hawaii, *Illinois, *Idaho, *Indiana, Iowa, Kansas, *Kentucky, Louisiana, *Maryland, Massachusetts, *Michigan, *Missouri, *Nevada, *New Hampshire, New York, *North Carolina, *Ohio, *Oklahoma, Oregon, *Pennsylvania, *South Dakota, Utah, *Virginia, *Washington, West Virginia, *Wisconsin, *District of Columbia, Virgin Islands

Formerly Under Court Order or Consent Decree-Currently Released from Jurisdiction of the Court
Three jurisdictions: *Alabama, *Arkansas, *Wyoming

Pending Litigation
Nine jurisdictions: *California, *Connecticut, Georgia, Illinois, Massachusetts, Nebraska, *North Carolina, *Pennsylvania, *Utah

Special Masters/Monitors/Mediators Appointed
Twenty-three jurisdictions: *Alabama, *Alaska, *Arizona, *Arkansas, *California, *District of Columbia, Florida, Georgia, *Hawaii, *Idaho, *Illinois, Louisiana, *Michigan, *Nevada, *New Mexico, *Pennsylvania, *Rhode Island, *South Carolina, *Tennessee, Texas, Washington, West Virginia, Puerto Rico

Prison Systems Under Court Order and Cited for Contempt
Eight jurisdictions: *Alabama, *Michigan, Mississippi, *Rhode Island, Texas, Virginia, *District of Columbia, Puerto Rico

Not Involved (to date) in Overcrowding or Conditions Litigation
Five jurisdictions: Minnesota, Montana, New Jersey, North Dakota, Vermont

Note: There is some overlap between the second and fourth categories because in some states where one or more facilities are under court order, others in that state are presently being challenged (e.g., Illinois). ■

National Prison Project
American Civil Liberties Union Foundation
1616 P Street, NW, Suite 340
Washington, D.C. 20036
(202) 331-0500

Nonprofit Org.
U.S. Postage
PAID
Washington, D.C.
Permit No. 5248