THE NATIONAL PRISON PROJECT JOURNAL

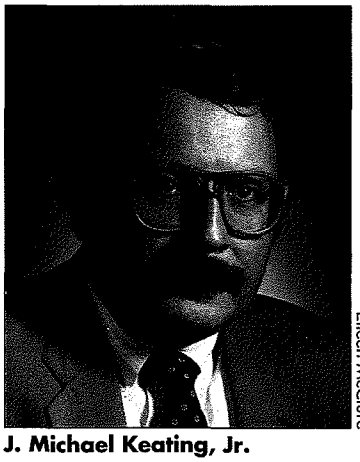
A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
VOL. 5, NO. 4, FALL 1990 • ISSN 0748-2655

How To Work With Special Masters

BY J. MICHAEL KEATING JR.

By mid-1988, there were as many as 14 adult state correctional systems or institutions with court-appointed masters or monitors. Another four masterships were active in state juvenile systems or institutions. While currently accurate counts of jail cases involving masters are unavailable, masters are functioning in jail systems in New York, Los Angeles, Houston and Philadelphia, as well as in dozens of smaller facilities and systems around the country. Masterships are a flourishing by-product of prisoners' rights lawsuits.

My purpose here is not to trace the history and development of the use of correctional masters, but to consider briefly how masters function and how counsel for the plaintiffs in prison and jail cases can relate most effectively with them. Even the briefest survey of the field reveals that there is no model mastership. In the two decades during which correctional masters have operated in the nation's prisons and jails, the shape, size and scope of masterships have varied greatly. Some masters were appointed to help parties negotiate or renegotiate remedial orders; some to referee the collaborative efforts of party-selected experts to define a remedy; others were appointed to review and approve defendants' new policies and procedures; some were named to monitor mandated improvements in a single facility or in a whole system; more recently, others have been appointed to orchestrate releases from badly overcrowded institutions.



Eileen McClure

J. Michael Keating, Jr.

This variety of function is reflected in the organization and structure of masterships, which range from a single part-time individual to a staff of 11 attorneys and investigators. Annual budgets can run anywhere from several thousand dollars to multi-millions. Correctional masters can be former correctional administrators or lawyers, some of them with only limited experience in corrections. Masterships can be brief or interminable. Some judges push assertively for the appointment and involvement of masters, while others are indifferent or downright hostile toward them.

While all of this suggests that generalizations are risky, at best, there is a need to identify and articulate some underlying principles central to the effective functioning of any mastership. The principles listed here are rooted in three basic qualities characteristic of a successful master:

1. Neutrality: In general terms, neutrality dictates that an intervenor shall have no vested interest or stake in any particular outcome. Obviously, a master appointed to ensure the implementation of a judicially imposed remedy has a powerful interest in outcome; meaning that, substantively, there is no such thing as neutrality in a prison or jail mastership. The plaintiffs, having either prevailed on the merits or compelled a consent judgment from the defendants, emerge from the contest with a judicial acknowledgment that conditions are intolerable, as well as a mandate for change. Within the context of a prisoners' rights suit, the master is the court's agent for change.

This means that masters are seen by both defendants and plaintiffs as advocates for reform, and, indirectly, as paladins for the plaintiffs' cause. This may explain why so many masters come from the ranks of correctional administrators, as courts seek to correct the unavoidable substantive imbalance by appointing individuals who cannot be accused of personal bias against the defendants. Appointed former correctional administrators who, typically, are relatively progressive members of their profession quickly become identified, as masters, with the reform of troubled institutions or systems, and their presumed lack of personal bias fades among beleaguered defendants. Distrust is further accelerated when these professional correctional masters turn up as plaintiffs' expert witnesses in other, unrelated cases. These partisan appearances undercut the rationale for the employment of correctional administrators as masters,

INSIDE . . .

and plaintiffs' counsel should avoid damaging the effectiveness of masters by pressing them to make such appearances.

Given the absence of substantive neutrality within the context of a mastership, masters need to work especially hard at the business of appearing personally fair and open-minded to both sides. Plaintiffs' counsel have to be sensitive to this need; they must avoid even unconsciously projecting the image of being fellow conspirators in the master's effort to "get" the defendants. Plaintiffs' counsel must scrupulously maintain an arm's-length posture with the master even while working closely to accomplish identical goals.

The flip side of the need to avoid compromising the master's fragile neutrality is that plaintiffs' counsel cannot vanish from the case after judgment, leaving all aspects of enforcement to the master. Let-down for counsel after a trial on the merits or a successful struggle for a consent decree is natural, and, in some instances, the level of animosity between plaintiffs' attorneys and the defendants can become so searing that temporary non-involvement seems appropriate. The success of effective masters, however, derives most often from their emergence as a rational counterweight to impatient, demanding and aggressive plaintiffs' counsel. The mastership is basically a forum in which parties sort out and accommodate conflicting needs and interests in understanding the remedial order and applying it fully. If the plaintiffs' counsel disappear during this remedial process, the master ends up pushing the interests and needs of prisoners and further damaging already fragile neutrality.

2. Loyalty: In the face of this dubious neutrality, the master must find a firm standard to cling to. That standard is, and must be, the remedial order itself. A master's function is, simply, to help the court and parties interpret, understand and implement the remedial order—no more, no less. The master has no writ to develop perfect correctional policies and systems; he or she is responsible for generating a clear definition of the requirements of the order and seeing that those requirements are applied fully.

Obviously, the meaning of applicable remedial orders is not always easy to discern. Questions about terms, such as "adequate medical care" and "acceptable levels of programming," frequently spark furious debate, but final definitions must be grounded in the terms and spirit of the remedial order, not in the predelictions of the master, the parties, the parties' experts, or even the master's experts.

The master's institutional and personal loyalty belongs to the court and the judge. Judges' expectations of their masters can vary widely. In one case a judge, unhappy with the parties' insistence on the need for a master, ordered his appointee's reports sealed upon filing and never thereafter referred to them. Elsewhere, masters and judges have had daily *ex parte* colloquies on the status of the case. In the latter instances, a master acts truly as the eyes and ears of the court. The master must respect the convictions of the judge in the case; he or she cannot do more than the judge will allow.

Savvy plaintiffs' counsel will keep a finger on the pulse of the relationship between master and judge to determine whether it is better to work closely with the master or to push independently and aggressively in the courtroom. Not surprisingly, masters tend sometimes to exaggerate the closeness of their relationship with the judge, even when there is barely a relationship at all. Therefore, plaintiffs' counsel must be wary and seek other indicators in addition to the master's sometimes self-serving description.

3. Empathy: To be even marginally useful, masters need to lend an empathetic ear to prisoners, staff, administrators and counsel. Particularly early in a mastership, the master can overcome initial perceptions of bias by listening thoughtfully and hard to everyone involved in the case. This is especially critical in dealing with prisoners. Masters must frequently spend many hours in the initial phase of their involvement listening to individuals and groups of prisoners, whether named plaintiffs, other inmate representatives, or randomly selected interviewees, no matter how angry, critical, skeptical or hostile they may be. Similarly, masters must hear out frustrated and angry correctional officers, support staff and administrators. The listening itself must be critical, as well as thoughtful and responsive.

Truth in prisons and jail is an elusive commodity because events must forever be sifted through the pervasive and corrosive distrust that exists between keepers and kept. In troubled institutions (and masters are appointed only in troubled institutions), the levels of distrust can be stratospheric, and prisoners, staff and adminstrators have typically stopped communicating with each other at all.

Plaintiffs' counsel can help newly appointed masters overcome these barriers by identifying candidly truthful prisoners and staff, and by facilitating communications with trusted and trustworthy clients. Prisoners' principal contribution to compliance is information. They know when policies and procedures, promulgated with fanfare, have not been implemented at the operational level. The best way for masters to assess the validity of claimed reforms is to spend lots of time on the tiers and cellblocks talking to prisoners.

Counsel must also get the word to their plaintiff clients that masters are not ombudsmen. Masters gather information and determine compliance with orders; they assess patterns of practice to determine whether systems have incorporated mandated reforms. No system is perfect, people make mistakes, and injustices occur. The master is not a guarantor of operational perfection or

The *NPP JOURNAL* is available on 16mm microfilm, 35mm microfilm and 105mm microfiche from University Microfilms International, 300 North Zeeb Rd., Ann Arbor, MI 48106-1346.

THE NATIONAL PRISON PROJECT JOURNAL

Editor: Jan Elvin
Editorial Asst.: Betsy Bernat

Alvin J. Bronstein, Executive Director
The National Prison Project of the American Civil Liberties Union Foundation
1875 Connecticut Ave., NW, #410
Washington, D.C. 20009
(202) 234-4830 FAX (202) 234-4890

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.

full justice. He or she must focus on systemic issues. While prisoners' individual complaints provide valuable information about patterns of practice, masters cannot resolve these complaints. Not surprisingly, prisoners want help here and now, and plaintiffs' counsel must try to educate their clients about the limits to a master's ability to solve prisoners' personal problems.

There is a rhythm and flow to a mastership. In the aftermath of a trial or a bitter struggle for a consent decree, with denial running strong in the veins of the defendants, the master becomes the focal point for swirling controversy that seems little changed from the straight adversarial clash of litigation. With the passage of time, denial ebbs and defendants almost always come to see the court's intervention as a potent weapon in the hunt for resources. At that point, a tacit and reluctant alliance among plaintiffs, defendants and master frequently emerges, a cooperative phase that requires great flexibility, delicacy and tact particularly on the part of plaintiffs' counsel. The object of this uneasy alliance is always the holder of the purse-strings, and much can be accomplished if the alliance can only manage to wield the carrot and the stick in some sort of fragile unison. These days, such alliances are most often torpedoed by overcrowding, in the face of which the gains of months or years can quickly evaporate.

The remedial phase of a major institutional suit requires extraordinary negotiating skills on the part of plaintiffs' counsel. Counsel must clearly perceive their clients' interests, and work to understand with equal comprehension the defendants' institutional and personal interests, as well as their capabilities and limits. Plaintiffs' counsel must push ceaselessly for the remedy they have earned for their clients, but also be sensitive to the political, economic, and social constraints within which defendants and the court must operate.

In many ways, the remedial stage of a prisoners' rights suit places much more challenging demands on plaintiffs' counsel than does the initial litigation. Just as different basic skills are required, even one's understanding of ordinary civil procedure can be subjected to rude shock. Post-decree enforcement processes sometimes seem to forsake the beaten path to wander through perplexing thickets of procedural irregularities. In a recent Texas hearing held before two sitting federal district court judges, pursuant to an appellate writ of *mandamus* bifurcating elements of state and county relief, the attorney general's representative accused the county of being excessively harsh on criminals. This illustrates nicely both substantive and procedural anomolies that can occur.

Throughout the remedial process, plaintiffs' counsel and the master have much to gain from close collaboration. The substantive agenda of both is fundamentally the same, namely, full implementation of relevant court orders. The success of one is the success of both. The trick is to understand the need for cooperation and to accomplish it without compromising the integrity and independence of the master, for once the defendants perceive that a master is in league with plaintiffs' counsel, the master's effectiveness is wounded, perhaps mortally. ■

J. Michael Keating Jr. is a partner and director of ADR services for the Providence, Rhode Island law firm of Tillinghast, Collins & Graham. He serves as a master to federal district courts in jail and prison cases in Georgia, Massachusetts, Rhode Island and Texas.

Adjoa Aiyetoro: Political Activist

"We're not going to win overnight. You have to fight every day."

BY JAN ELVIN

From time to time the *JOURNAL* profiles a Prison Project staff member. In this issue editor Jan Elvin interviews Adjoa Aiyetoro, an attorney with the Project since 1982. Aiyetoro was appointed associate director for administration in 1990. In addition to her Prison Project work, Aiyetoro is the director of the National Conference of Black Lawyers, and a national board member of the National Alliance Against Racist and Political Oppression.

NPPJ: Adjoa, how did you get interested in becoming a lawyer?

AA: I went to law school because, as a social worker in charge of mental health programs in St. Louis, I was constantly frustrated. I found that a lot of my clients' problems stemmed from fundamental social and economic inequities.

I was always referring people to lawyers and trying to figure out what their rights were. As an advocate, being a social worker was not enough.

I decided I had gone as far as I could there, so I talked to a Black psychiatrist [Dr. Calvin] I worked very closely with and he and I decided that I should go to law school.

NPPJ: What was your first job as a lawyer?

AA: The Department of Justice offered me a position in their honors program, giving me a choice of whatever division or program I wanted to work in. I chose the Special Litigation Section of the Civil Rights Division because of the mental health component. I had no interest in prisoners' rights at that time.

NPPJ: Had you thought about it?

AA: No. My thinking all along was that I didn't want anything to do with criminal law. I didn't want the responsibility of representing a criminal defendant. I wasn't especially sympathetic to people caught up in the criminal justice system. I wasn't unsympathetic, I wasn't one way or the other. My focus had always been mental health. I didn't really see, until I was at Justice, the real interconnection between the rights of the mentally ill and the rights of prisoners. Most of the cases in the civil rights section were prison cases. I couldn't really be in that section and not do them so I began working on prison cases.

NPPJ: How would you describe your current world view and how did it evolve?

AA: I believe there must be fundamental economic and political change in the United States. The problems we see in the criminal justice system and in the social and economic system are all related. The reforms that we struggle for—that I'm very active in struggling for—are really only intermediary steps that we must take because the pain and pressures upon the masses of people are

so great. It would be irresponsible as a political activist, or revolutionary—I view myself as a revolutionary—to take the position that we just need to sit back and watch the system destroy itself and then we can build. Because people are dying. I think we have to attempt to make things better, even if it means patching up a system.

NPPJ: You do believe in working within the existing system?

AA: That's what I'm saying. I work within the system but also outside of it. I work within the system to the extent that I work with the ACLU, which views itself as part of the system. I think it's on the fringe of the system myself, but it views itself as part of it.

I don't think I could ever work for the United States government again.

NPPJ: Why not?

AA: I think the government is and has been historically a tool of repression and oppression of people of color and the poor. I'd almost feel like I was a traitor to work for them at this point. My father has always said: our purpose in life is to serve. That is how I was raised. The only choice I had was to decide how to serve.

NPPJ: Whom are you serving?

AA: My choice is to serve, broadly speaking, oppressed people. I focus largely on Black people, poor people, and people of color. My sister says I've always been a person who disdained a few having and everybody else going without. How can we take this pie and divide it so that everybody can have a piece? Why is it that we can't decide it is important that everyone who is born in this country has a decent education and a place to live and food on their table?

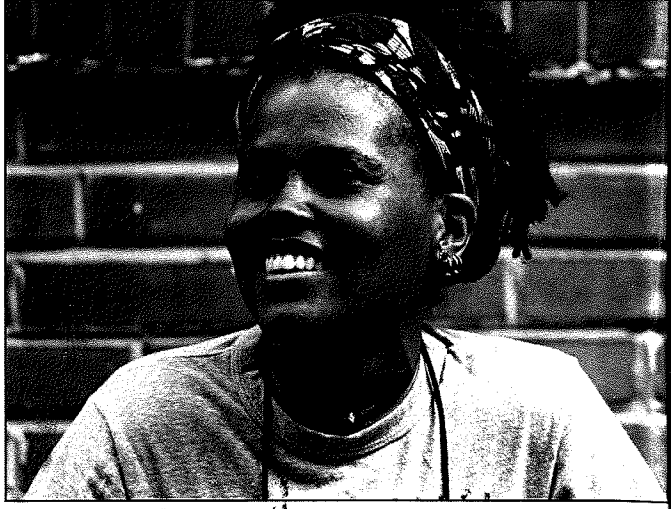
I think what we need to start doing is stop letting George Bush lie about what he knows are the facts in this society. We know that the Black child born in the inner city who makes it to the top is the exception and not the rule.

We know the answers to George Bush and we have to start throwing them out there. Liberals have done a disservice by saying, "this issue is not popular with the people, or the people won't hear it so we won't put our side out." We react. Look at the Dukakis campaign—all reaction. He didn't stand up and say, "Yes, I'm a member of the ACLU. You're doggone right. And this is why I'm a member." What'd he do? He said, "Well, yes I'm a member, but these are the issues I disagree with."

NPPJ: Are there any particular people who have been inspirational in your life?

AA: Dr. Calvin, the psychiatrist I worked with as a social worker, gave me the confidence I needed to believe that I could be whatever I wanted to be. He was a beautiful man—had the most wonderful laugh in the world.

My parents are probably the most important. Even though all of us have these issues with our parents—my parents have always supported me. Even if they were a little slow.



NPP Photo

Adjoa Aiyetoro

We disagree politically on a number of things, especially my father and I. But one of the things I find with them, even in the disagreements—give them a document that shows that their position is not right and mine is right, they change. And that's where I guess I get the faith that I have in the people. Because I think my parents are pretty much middle America.

Margaret Burnham [former judge; former director of National Conference of Black Lawyers] has always been one of my shining examples of the kind of lawyer and person I would want to be. She has used the law to push our movement forward and has not been just "a lawyer" who happens to be involved in activist work.

In terms of lawyering, Lynn Walker. I think that the job at Justice was really the best first job I could get because Walker was in charge of that. She is not just you know, a kind of bourgeois Black person that doesn't really know about the issues. This woman, she's physically beautiful, too—this woman...was like another Dr. Calvin to me. She pushed me forward.

I had a good deal of respect for Maurice Bishop before he was killed and some of the people in his cabinet. I'm impressed with Fidel Castro. I know that may not be the most popular person to list. But I think his revolutionary actions, and I've been to Cuba twice and I've seen what they're doing there for the people, I respect him. And Mandela—both the Mandelas. I wouldn't want to say the Mandelas without saying the people of South Africa because they are really just symbols of the courage and persistence of the people. One of the things we really have to commit ourselves to in our litigation, in our struggle for fundamental changes, is that we're not going to win overnight. You have to fight every day.

Al Bronstein is another Lynn Walker and Dr. Calvin to me. He has allowed me to define myself. He has yet to tell me what to say when I go out to a meeting, or when I speak or represent the Project.

When I started locking my hair, he was one of the first to tell me that he liked it. He has yet to say, "I want you to present yourself a certain way for the office." I think where I am in terms of the confidence I have in myself is because he always believed in me. He would get mad sometimes when I'd come in his office, being insecure, and I'd know he was angry because he showed it. He'd as much as say, "all the attorneys in this office are excellent. How dare you say you're not an excellent attorney." Sometimes I think his anger at my insecurity was what pushed me out of it. It wasn't like "Oh, Adjoa, you shouldn't feel so bad." He was impatient with it—like I wasting his time and mine.

NPPJ: Another thing I'm interested in is your changing your name from Carolyn Burrow to Adjoa Aiyetoro. I assume it has a lot of meaning to you.

AA: I decided right before I went to law school that I was making all these changes—I sat down with Dr. Calvin and decided to go to law school—that's when I changed my name. I wanted a name that reflected the duality of who I was: an African, but also an American.

I was telling this man I worked with at the hospital I wanted to change my name; I went through this whole thing. He said, "Oh, I know your name!" And he gave it to me. Right then. He said: Adjoa Assantua. In hindsight, I don't think it was really all my choice, it was like I was directed. Valerie Simpson sings this song, that asks God: "change my name, I will have to fight my father and my mother, but I'll let you change my name. I may have to fight my friends and my associates, but I will let you change my name." The first name he gave me was Adjoa, which means a female born on Monday [the day I was born]. And

Assantua is, if you remember, the story of how the British came and the men would not fight to save the golden stool. The women fought, led by Queen Assantua. Her name means one who is eloquent and bold. She spoke but she also fought.

I kept my middle name—my father's name. I changed it initially to Adjoa Artis Assantua Burrow, out of compromise because I knew my parents would be upset. So even though this Valerie Simpson song says, "God, change my name," I said, wait, God, don't change it too fast. We got to pull these people along.

NPPJ: Did your parents think it was rejection of them?

AA: Yeah, it was very emotional and painful. Being as headstrong as I am, I just stopped answering to my given name. I could be in the same room with you and you could be looking dead at me and I refused to answer.

When I married my now ex-husband, I decided to take his last name, Aiyetoro, not out of tradition, but because I'd always wanted to have an African last name. I mean, I was courageous, but I wasn't *that* courageous. My parents were very traditional. Of course you would take your husband's last name!

NPPJ: When you go into court, how are you, as a Black woman, treated by judges?

AA: I think that Black people and women are treated differently by judges, so I get both. My first experience in court was with probably one of the best judges for our issues, Judge Justice in Texas. I didn't feel any discrimination or anything from him. He was very supportive. Called me back in his chambers and encouraged me. His treatment of me when I was in the courtroom was almost protective.

Judge Johnstone in Kentucky is another very good judge, and a very nice man. But he is a traditional old country kind of dude. We had these status conferences and he'd come in and you know, he has this huge mouth. He's a big man, big head, big mouth. His face sometimes looked African, even though his skin is white. He's got this big laugh, and he'd come in and say, "GOOD MORNING, GENTLEMEN!" And then we'd go and talk. Well, after he did that a few times, I said to him, "Judge Johnstone, why is it that every time you come in, you say 'Good morning, gentlemen,' and I'm not a gentleman." "OH, ADJOA, HO HO HO!" His big laugh. He stopped. "Good morning, gentlemen and ladies." And he didn't even do it facetiously like some people would do when they make a joke and put you down. And the bigness of his laugh and his smile is how he was.

I had to give a note to a judge once because he would speak to all of the male attorneys by name and say only good morning to me. At first I got upset—this is Magistrate David Lowe in Richmond—because my first thought was, "is it because I'm Black and a woman?" Well, Shawn Moore [NPP co-counsel] was there and he's Black. No other women on the team, and he would always speak to Shawn by name. Then I decided, well, maybe he doesn't know how to pronounce Adjoa Aiyetoro. Maybe because I'm a woman, he could minimize it and think it was no big deal not saying my name. So I wrote my name out on a piece of paper, phonetically, and before we went into court one morning—Shawn almost had a heart attack—I knocked on his door and he said, "Come in." And I went in and I said, "Judge, every morning you say good morning and you name all the men, but you don't name my name. And I finally decided it's because you probably didn't know how to pronounce it. So I wrote it out phonetically for you." And after that, he said it perfectly, no problem.

I have not had any judge who I felt was hostile to me because I was Black or a woman. I have had conflicts, in fact even with a liberal judge, Judge Enslen [U.S. district court judge in Michigan]. Sometimes white liberals make the mistake of thinking they know more about racism than Black folk. And I think that sometimes the conflicts I had with Enslen were because of that. Where he thought he knew more about racism than I did.

NPPJ: In terms of the case?

AA: Yes. I don't think it was because I was Black, but I think white supremacy is a very ingrained thing. He was down in the South, like Al [Bronstein], with the civil rights movement, so I think he really thought that he knew more than I. But it's easy for white people, and especially white liberals, to become paternalistic—and to almost get angry when you won't allow them to define your issues for you.

For the most part, the judges I've been before have been okay. They may not have always agreed with me and I might have thought that some were real reactionaries—I thought Magistrate Lowe was one of those. Although, when I was in the hospital [recovering from a serious accident], he sent me one of the best cards that anybody sent me. It was race-sensitive, about how Hannibal was crying on the mountain, and how he had to go through all of this trouble. It was so inspiring, this man I've been calling a reactionary took the time to find something about a great Black in history to send to me, saying, "Don't give up."

NPPJ: What was your first prison case?

AA: *Ruiz v. Estelle* in Texas in 1978. I put on a number of prisoner witnesses; that was my first responsibility. So I met Bill Turner, all those folks doing prisoners' rights work.

NPPJ: What are some interesting cases you have worked on?

AA: At Justice, a case that was real important to me was *Stewart v. Rhodes*, in which we got a preliminary injunction on race discrimination in the housing of prisoners. Also, the NPP Michigan case, *Knop v. Johnson*, where we got an order on racial harassment, a claim we had not formally made. My plan in putting forth evidence of racial harassment, as the judge called it, was to prove the claims of discrimination in job assignment and disciplinary segregation. The case law said that statistics by themselves are not sufficient, even though we had significant disparities in the numbers of Blacks and whites in disciplinary (Blacks were overwhelmingly represented), or in high status jobs where whites were overwhelmingly represented. You have to show more than that. So we were using the racial slurs, and harassment—

NPPJ: You have to show specific examples?

AA: Right. What the case law says is that for a violation of the Fourteenth Amendment, statistical disparity by itself is not enough. You have to show intent.

We wanted to show racial attitudes of staff in order to support our claim that the disparities we were presenting to the court were indeed based on race discrimination and not some other fluke of conduct on the part of the prisoners or their job skills. While the court found that we had proved a racial harassment claim, it found against us on our other claims.

But the case was really important because it established—hopefully it will stand up in the Sixth Circuit—that there is such a thing as racial harassment of prisoners and that staff have to treat prisoners in a way that doesn't racially demean them.

The most significant case for me in my recent legal and political career was *Baraldini v. U.S.*. It was the first time we consciously took a case, at least since I had been practicing, around political prisoners, that wasn't a political prisoner

issue which came up as a part of the case or that kind of thing.

What we were doing was supporting a person's rights to have radical political views and that fit in with my own perspective on political views. If we don't allow or support their right to have those views, then mine aren't going to be tolerated either.

NPPJ: What's most frustrating about this kind of work?

AA: There's the frustration of being a workaholic who doesn't know when to say no to work. So you're always being overwhelmed and trying to get a handle on that—realizing that the struggles we are engaged in are struggles that predated my existence and will also postdate it.

The other frustration is that change comes so slowly. I'm an action person and I'm frustrated by the rhetoric on our issues as compared to the actual work to make the changes. One thing I really believe has to be done, and we are doing it to some extent here, is to work more on the community level, to spend more time doing the kinds of community forums that the American Friends Service Committee does, probably some ACLU affiliates do.

For example, the ACLU affiliate in Pennsylvania came to us back in January of this year, and wanted our involvement in a state-wide lawsuit after several disturbances there. We knew that much of the resolution of the issues of any lawsuit would be to change criminal justice policy, to start demanding alternatives to incarceration and that you look at your policy and practices around mandatory sentences and drug crimes, and that you really make changes there.

So we decided we would get involved on two fronts, one would be the litigation which Al Bronstein is heading up and coordinating, and the other is the legislative and community aspect of it that I head up and coordinate, working with a coalition of organizations called the Coalition for a Fair and Effective Criminal Justice System. It's made up of the Pennsylvania Prison Society, CURE, the ACLU affiliate chapters, the Coalition Against the Death Penalty, and the National Conference of Black Lawyers.

We want to expand our discussion of how to get criminal justice reform in Pennsylvania: what's the best way to effectively lobby legislators to support positive criminal justice policies and to oppose those policies that are only increasing the problems we see, not only in the prisons but in our communities? ■

U.S. Punishes Political Dissidents

BY DAVID FATHI

In 1978, United States Ambassador to the United Nations Andrew Young stated to the French newspaper *Le Matin* that U.S. prisons held "hundreds, maybe thousands of people I would categorize as political prisoners."[1] The outcry was immediate and deafening; Young was forced to retract his remarks. But he had it right the first time: there were then, and there are now, political prisoners in the United States.

Many Americans find this difficult to believe. As children we are taught that we live in a democracy, where the right to express unorthodox, even unpopular, views is zealously protected. "It's a free country," as the saying goes. And indeed, few would deny that in the United States today there is more latitude to dissent from government orthodoxy than in Iran or Albania. But the U.S. government, like all governments, sets limits on the expression of ideas that are unacceptable to it. And those who exceed these limits can expect to feel the full coercive power of the state.

Unfortunately, ideological witch-hunts are not a thing of the past.

There are at least four ways in which the state can use its law enforcement power to punish political dissidents. The first is simply to prosecute and imprison them under laws which openly and explicitly prohibit the expression of certain forbidden ideas, such as communism or anarchism. The second is to criminalize and severely punish certain nonviolent and symbolic acts because of the political message they convey. These are typically acts which, but for their oppositional political content, would either be perfectly legal, or would be considered minor offenses, such as burning a draft card or an American flag. Third, the state may prosecute dissidents on ostensibly "nonpolitical" charges in retaliation for their political views and activities. For instance, many civil rights workers in the South in the 1960s were falsely charged with various offenses in a deliberate effort by authorities to hinder their work. Finally, those who break the law for political reasons may be selectively prosecuted or punished more harshly than those who violate the same laws from more ordinary motivations, such as a desire for personal gain. In each of these situations, persons are imprisoned or otherwise punished at least in part because of their political views.

Locking up those whose ideas are perceived as threatening to the existing distribution of wealth and power is a long, if not proud, American tradition. During World War I, Socialist Party leader Eugene V. Debs made a speech in Canton, Ohio, denouncing the war and the military draft. He was convicted under the Espionage Act, and sentenced to ten years in prison. Socialists Rose Pastor Stokes and Kate Richards O'Hare were also convicted of obstructing the draft; Stokes, too, received a ten-year prison sentence.[2]

In 1940, Congress enacted the Smith Act,[3] aimed at criminalizing membership in the Communist Party. A total of 141 persons were indicted under the Smith Act; of these, 29 served prison terms.[4] Eleven leaders of the Communist Party were sentenced to prison for "conspiring to teach" prohibited ideas; the Supreme Court affirmed their convictions.[5] In 1961, the Supreme Court also upheld the "membership clause" of the Smith Act, which made membership in any organization that advocated certain ideas (in practice, this meant the Communist Party) punishable by 20 years in prison.[6]

While many believe that such ideological witch-hunts are a thing of the past, this is unfortunately not the case. The McCarran-Walter Act, a Cold War-era statute, still provides for the deportation of aliens who are "members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism," as well as those who have in their possession any literature advocating these doctrines.[7] In January of 1987, six Palestinians and one Kenyan lawfully residing in Los Angeles were arrested and held without bail for three weeks. The charge: membership in or

affiliation with the Popular Front for the Liberation of Palestine, an organization which, the government alleges, advocates the "doctrines of world communism."[8] Government efforts to deport the seven based on their political affiliations continue to this day. American prisons also hold numerous peace activists, many of them religiously-inspired, who have committed symbolic acts of trespass or property damage and received lengthy prison terms. On November 9, 1984, Father Carl Kabat, Father Paul Kabat, Lawrence Cloud-Morgan, and Helen Woodson entered a missile base in Missouri and, as an act of religious witness, damaged various pieces of equipment. They brought with them bread and wine and a book of prayer, hung signs with messages such as "Violence Ends Where Love Begins," and made no attempt to avoid capture. Charged and convicted of sabotage "with intent to injure, interfere with, or obstruct the national defense of the United States," they were sentenced to prison for terms ranging from eight to eighteen years. One dissenting judge noted that the operation of the base had in no way been affected by this act of protest, and that other persons damaging government property usually received probation or short prison terms.[9] Other peace activists have received heavy sentences for such symbolic acts as planting trees or pouring blood at military installations.

Radicals often find themselves the targets of government attempts to imprison them for crimes they did not commit. In the 1950s, the Federal Bureau of Investigation initiated its Counter-Intelligence Program, or COINTELPRO. According to a Senate Select Committee, the purpose of COINTELPRO was to

> *'disrupt' groups and 'neutralize' individuals deemed to be threats to domestic security. The FBI resorted to counterintelligence tactics partly because its chief officials believed that the existing laws could not control the activities of certain dissident groups, and that court decisions had tied the hands of the intelligence community. Whatever opinion one holds about the policies of the targeted groups, many of the tactics employed by the FBI were indisputably degrading to a free society.*[10]

COINTELPRO was first deployed against the Communist Party, but by the late 1960s, its chief targets were so-called "Black Nationalists," particularly the Black Panther Party (BPP). FBI field offices were instructed to develop "imaginative and hard-hitting counter-intelligence measures aimed at crippling the BPP."[11]

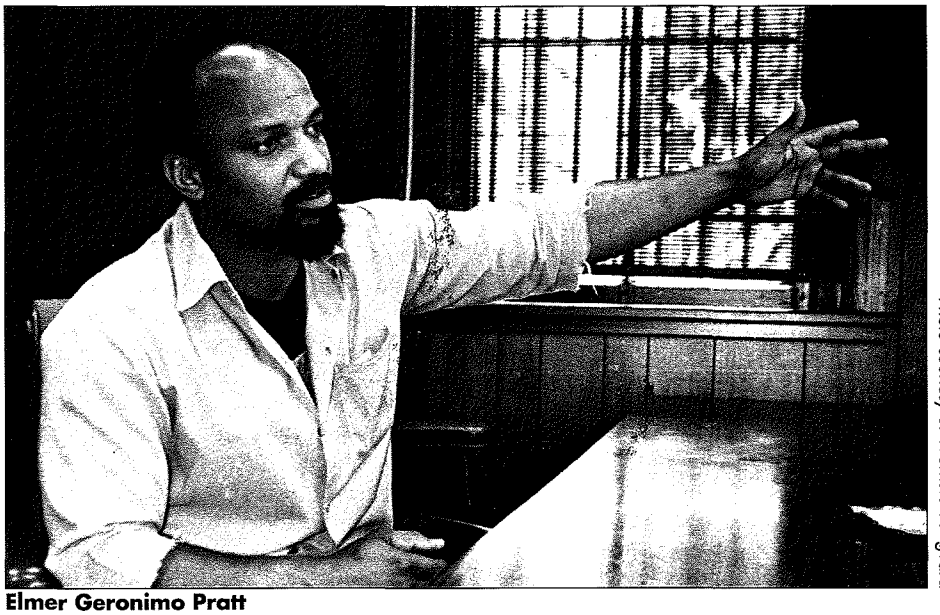


Photo courtesy of Workers Vanguard

Elmer Geronimo Pratt

Elmer "Geronimo" Pratt was a decorated Vietnam veteran when he moved to Los Angeles and began studying at the University of California in 1968. He joined the BPP, and quickly rose to become a leader in the Southern California branch. As such, he was designated a "Key Black Extremist" by COINTELPRO, which launched "Operation Number One" to neutralize him.

In December of 1970, Pratt was arrested for an unsolved murder that had taken place two years previously. The FBI actively collaborated in his prosecution; it planted three informers on Pratt's legal defense team and obtained information relating to trial strategy. The chief prosecution witness was an informer who had met regularly with the FBI for two years, but at the trial, he denied this under oath on the witness stand. Finally, the only eyewitness to the murder had picked out of a lineup a man other than Pratt, but the records relating to this identification were removed by persons unknown. Pratt was convicted of the murder, and sentenced to life imprisonment.

> ***...religiously-inspired peace activists...have committed symbolic acts of trespass or property damage and received lengthy prison terms.***

Amnesty International has stated that "[t]he effect of COINTELPRO has been to destroy confidence in the bona fides of the FBI in all its dealings with Elmer Pratt," and has called for a new trial. In addition, at least one FBI agent who participated in the Los Angeles COINTELPRO has stated his belief that Pratt was framed.[12] Nevertheless, all appeals have been fruitless, and Pratt has been denied parole nine times. He sits today in California's Tehachapi prison, in his nineteenth year of incarceration.

Another probable FBI victim is Leonard Peltier, a Lakota Indian and a leader of the American Indian Movement (AIM), a native American rights organization patterned on the Black Panther Party. On June 26, 1975, two FBI agents were killed in a shootout with AIM members on South Dakota's Pine Ridge Indian Reservation. Peltier and three others were indicted for murder. Peltier fled to Canada; meanwhile, his co-defendants were tried and acquitted on the basis of self-defense. Peltier was extradited from Canada on the strength of evidence which the FBI later admitted it had fabricated for that purpose. In 1977, Peltier was convicted of the murders, and sentenced to two consecutive life terms. Although important ballistics evidence was withheld from the defense at trial, his efforts to overturn his conviction have been unsuccessful. Amnesty International has urged a new trial for Peltier, and over 12 million people, including numerous parliamentarians and Nobel laureates, have called for his

release. Peltier remains imprisoned at the United States Penitentiary in Leavenworth, Kansas.[13]

Finally, dissidents who do violate the law in pursuit of their political objectives may be punished far more harshly than those who engage in the same acts for "non-political" reasons. Beginning in 1980, young American males were required to register for the draft. By 1982, the government reported that 674,000 persons required to register had failed to do so. However, only 13 of these had been indicted. Not surprisingly, the 13 singled out for prosecution had all openly stated their refusal to register as a matter of principle, and in some cases had publicly spoken out and organized against draft registration.[14]

This discriminatory treatment of political dissidents continues after conviction and imprisonment. Susan Rosenberg is a leftist activist who was convicted in 1985 of conspiracy to possess unregistered firearms, unlawful use of false identification, and possession of unregistered destructive devices. She received 58 years in prison, an extraordinarily harsh sentence given that she was not convicted of harming either persons or property. In late 1986, Rosenberg was transferred to a new "High Security Unit" (HSU) at the Lexington Federal Correctional Institution in Kentucky, along with Silvia Baraldini and Alejandrina Torres, two other women convicted of politically-motivated offenses. Women in this unit were isolated from all other prisoners, and subjected to 24-hour camera surveillance, exclusion from prison programs, restriction of correspondence and visiting, and constant strip-searches. In 1988 the women, represented by attorneys from the National Prison Project, Mary O'Melveny of New York, the Center for Constitutional Rights, and the People's Law Office, brought suit before federal Judge Barrington Parker in Washington, D.C.. Judge Parker ruled that they were being punished not for the offenses they were convicted of, but for their political views. The government "specifically punish[es] Baraldini and Rosenberg for their 'radical' political beliefs and their alleged associations with 'revolutionary' political organizations....Baraldini and Rosenberg have been singled out for advocating ideas disagreeable to the government."[15] Amnesty International has denounced the HSU as "deliberately and gratuitously oppressive," and stated that "the conditions of confinement and the transfer of prisoners to the HSU on the basis of their political beliefs constitute 'cruel, unusual and degrading' treatment in contravention of Article 5 of the Universal Declaration of Human Rights."[16]

The government of the United States routinely chastises other nations for imprisoning or otherwise punishing political dissidents. This concern for human rights is admirable; unfortunately, the United States itself is far from having a clean slate on this score. Here, as everywhere else, dissent comes with a price tag, and many people in America's prisons are paying that price today. ■

David Fathi is a staff attorney with the National Prison Project.

---

[1]TIME, July 24, 1978, p.27.

[2]The Supreme Court unanimously affirmed Debs' conviction and sentence. *Debs v. United States*, 249 U.S. 211 (1919).

[3]18 U.S. sec. 2385.

[4]E.L. Barrett and W. Cohen, *Constitutional Law* (Mineola, New York: Foundation Press, 6th ed. 1981), p. 1137.

[5]*Dennis v. United States*, 341 U.S. 494 (1951).

[6]*Scales v. United States*, 367 U.S. 203 (1961).

[7]8 U.S.C. sec. 1251(a)(6).

[8]*American-Arab Anti-Discrimination Committee v. Meese*, 714 F.Supp. 1060, 1063 (C.D.Cal. 1989).

[9]*United States v. Kabat*, 797 F.2d 580 (8th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987).

[10]*Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities* (Church Committee Report), April 1976, vol. II, p. 10.

[11]Church Committee Report, vol. III, p. 188.

[12]Amnesty International, *United States of America: The Case of Elmer "Geronimo" Pratt.* AI Index AMR 51/27/88 (London: May 1988).

[13]Amnesty International Report 1990, United States of America, p. 252; Amnesty International Report 1988, United States of America, p. 139.

[14]*Wayte v. United States*, 470 U.S. 598, 604-606 (1985).

[15]*Baraldini v. Meese*, 691 F.Supp. 432, 448 (D.D.C. 1988). In 1989, the United States Court of Appeals vacated Judge Parker's decision. *Baraldini v. Thornburgh*, 884 F.2d 615 (D.C. Cir. 1989).

[16]Amnesty International, *United States of America: The High Security Unit, Lexington Federal Prison, Kentucky (Summary)*, AI Index AMR 51/34/88 (London: 1988).

FOR THE RECORD

■ On 9/30/90 the *New York Times* reported that a federal district judge—a Reagan appointee—had announced his resignation because he believes the federal sentencing guidelines are too harsh.

Judge J. Lawrence Irving said, "If I remain on the bench I have no choice but to follow the law. I just can't, in good conscience, continue to do this."

He cited as an example a 19-year-old man charged with possession of and intent to distribute cocaine. Judge Irving said that under the old law, a judge gave the man a split sentence: six months in prison with five years' probation. The offender knew if he violated probation he would have to return to prison to serve out the rest of his sentence.

"He did his six months, and after that he remained free of drugs—we know this because of regular testing," the judge said. "He completed his education, got married, had a child and became a productive, tax-paying member of society."

In contrast, had the young man been sentenced under the current sentencing guidelines, he would have been sentenced to 20 years in prison with no possibility of parole.

■ If the majority of New York State's drug users and dealers are white, why do much larger numbers of African-Americans and Latinos wind up in prison? This is the question raised by *Imprisoned Generation*, a new report by the Correctional Association of New York and the New York State Coalition for Criminal Justice. The report finds that young African-American men are over 23 times more likely to be incarcerated in New York, and young Latino men 11 times more likely, than young white men. This disparity stems largely from police concentrating their drug enforcement efforts on low-income minority communities. Yet, while the state has increased its corrections budget, it has cut key social and economic programs. The report notes, "The State recently authorized the Urban Development Corporation, originally established to create housing for poor people, to issue $2.1 billion in bonds for new prison construction—housing for poor people of an altogether different kind." *Imprisoned Generation* (28 pages) is available for $5 from the Correctional Association of New York, 135 East 15th St., New York, NY 10003, 212/254-5700.

THE NATIONAL PRISON PROJECT JOURNAL

Case Law Report

A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
VOL. 5, NO.4, FALL 1990 • ISSN 0748-2655

BY JOHN BOSTON

Highlights of Most Important Cases

Remedies/Crowding

Federal district courts retain wide discretion to remedy unconstitutional overcrowding, according to the federal Court of Appeals for the Third Circuit, which upheld the district judge's order banning double-celling at the State Correctional Institution at Pittsburgh. *Tillery v. Owens*, 907 F.2d 418 (3d Cir. 1990). The appeals court cited the trial judge's "detailed and meticulous" findings about overcrowding, understaffing, and deficiencies in health care, sanitation, plumbing, ventilation and other prison conditions, and agreed that double celling under those conditions was unconstitutional. It rejected prison officials' argument that double celling is acceptable unless it is shown to *cause* the other problems; it is enough that double celling is "unbearable" in conjunction with them. The court disagreed with *Cody v. Hillard*, 830 F.2d 912 (8th Cir. 1987) (en banc), *cert. denied*, 485 U.S. 906 (1988), which stated that such a causal relationship must be proved to support crowding relief, describing *Cody*'s view as inconsistent with the "totality of circumstances" analysis dictated by the Supreme Court in *Rhodes v. Chapman*.

Nor did the *Tillery* court agree that population limits are a disfavored remedy and that courts must address other conditions of confinement in preference to acting against crowding. *See Inmates of Occoquan v. Barry*, 844 F.2d 828 (D.C.Cir. 1988). Rather, the court observed, "The district court is entitled to require immediate correction of those conditions that it finds to contribute most significantly to the constitutional violations identified and that it determines can be most readily remedied." 907 F.2d at 418.

A similar argument received shorter shrift in *Fisher v. Koehler*, 902 F.2d 2 (2d Cir. 1990) (per curiam). In that case, the district court had specifically found that overcrowding was a cause of excessive levels of violence in one of the New York City jails on Rikers Island. After extensive remedial proceedings, it entered an order containing a population cap, but delayed its implementation for a year to give jail authorities a chance to show that they could control violence without a crowding limit. On appeal, the defendants argued that even the threat of a population cap was an abuse of the court's remedial discretion. The court held that all the defendants' arguments "border on the frivolous."

The Third Circuit has also upheld the power of a district court to enforce population limits with monetary fines. In *Inmates of the Allegheny County Jail v. Wecht*, 901 F.2d 1191 (3d Cir. 1990), the appeals court held that the district court properly imposed prospective fines of $25,000 for any month in which a court-ordered population cap was exceeded and $100 for each inmate released in an effort to meet the population cap. The defendants argued that it was impossible for them to comply with the court's order limiting population because they were faced with conflicting state court orders remanding particular defendants to jail. The court rejected this defense because the situation was ultimately of the defendants' own making, given their long-standing failure to comply with prior court orders requiring the county to provide adequate, constitutional jail space.

This power is not without limits, however. In *Mercer v. Mitchell*, 908 F.2d 763 (11th Cir. 1990), the district court had entered an order providing for fines of $100 per day per prisoner in excess of a previously entered population cap. Subsequently it assessed fines consistent with its order without making an explicit finding of contempt and without giving the county a chance to show cause why it should not be held in contempt. The appeals court held that those accused of violating a court order must *always* have an opportunity to show that they actually complied or that compliance was excused for some reason, such as the "impossibility" defense.

The court added that if prison officials show that they can safely accommodate more inmates than the population cap calls for, the court should modify the population cap rather than hold the officials in contempt. This is a controversial point in federal jurisprudence and there is much contrary authority. *See, e.g., Badgley v. Varelas*, 729 F.2d 894, 899 (2d Cir. 1984) (existence of a consent judgment capping population obviated the need to reach the constitutional claims); *Inmates of the Suffolk County Jail v. Kearney*, 734 F.Supp. 561, 565 (D.Mass. 1990) (permitting modification based on a subsequent show of constitutionality would "undermine and discourage settlement efforts in institutional cases").

Religion (Free Exercise)

Prisoners' claims concerning the free exercise of religion continue to divide the federal courts. The Supreme Court's decision in *O'Lone v. Shabazz*, which applied a standard of reasonableness to prison officials' restrictions on religious exercise, clearly cut back on prisoners' religious rights. But the question "how far?" remains a matter of dispute, and the dispute is over the proper method of evaluating prison officials' justifications.

The issue has been stated most explicitly by the Seventh Circuit in *Hunafa v. Murphy*, 907 F.2d 46 (7th Cir. 1990). Judge Posner "assum[ed] that the question whether a challenged regulation strikes a proper balance between the prisoner's right to practice his religion and the needs of the penal system is one of fact. Read literally, the articulation of the standard [of *O'Lone*] could be thought to make the question one of law, requiring...only a determination that a rational basis for the regulation can be conjectured." But, he concluded, the *O'Lone* Court's repeated references to the transcript of an evidentiary hearing supports the view that the question is one of fact. 907 F.2d at 48. Under Judge Posner's view, it follows that a court may—indeed, must—assess the logic, sincerity, and substantiality of prison officials' justifications, rather than simply accept them at face value.

In *Hunafa*, a Muslim inmate in segregation complained that they were served pork two or three times a week. They received a non-pork substitute of soup and bread in addition, but the pork was left on the trays, creating a risk of contamination and leading the plaintiff to miss several meals a week as a result. The district court in *Hunafa* had granted summary judgment for the prison officials, but the court of appeals reversed. It held that defendants'

concern with the inconvenience of making up eleven separate trays with no pork seemed "trivial." Their concern that special treatment for these Muslims would cause "hostility" to "ripple throughout the prison" was "implausible, though not impossible." Their argument that mess hall workers, knowing whom the trays were for, would try to smuggle contraband in the trays, was "plausible, though still speculative." In any case, these benefits "must be weighed against the cost to the inmate of having to give up several meals a week in order to avoid defilement," and the record was insufficient for the court to "estimate the magnitude" of the prison officials' concerns.

The Ninth Circuit engaged in the same kind of reasoning in *Swift v. Lewis*, 901 F.2d 730 (9th Cir. 1990). The plaintiffs were Christians who adhere to the "Vow of the Nazarite," which prohibits cutting the hair and beard. Prison rules forbade beards and long hair, with exemptions for Sikhs and Native Americans; prison officials refused to extend the exemption to the Christians. Here, too, the trial court had granted summary judgment to the prison officials, but the court of appeals reversed, holding that the defendants had not provided sufficient justification for their policy. Although they cited the usual interest in identification of inmates,[1] prevention of sanitary problems, reducing guard-inmate contact during body searches, and reducing "homosexual attractiveness," they presented no evidence that these asserted interests were the actual reasons for the policy. Nor did they show that any of these interests justified disparate treatment of adherents of different religions.

The Eighth Circuit was equally critical of prison officials' justifications in *Salaam v. Lockhart*, 905 F.2d 1168 (8th Cir. 1990), which required them to deliver mail addressed to inmates in their Muslim names and to permit prisoners to add those names to their clothing. The court found defendants' reasons for refusing to recognize Muslim names generally illogical and without evidentiary support. It weighed in the plaintiff's favor the fact that state law permits judicial name changes for prisoners as long as the committed name is retained in prison records. It also rejected prison officials' speculation that some inmates might become unreasonably confrontational over their names.

By contrast, less than a month later, the same court in *Iron Eyes v. Henry*, 907 F.2d 810 (8th Cir. 1990), upheld a hair length restriction as applied to a Native American prisoner. The court held that the regulation was reasonable because it served prison officials' interests in preventing the concealment of contraband and avoiding confusion in prisoner identification. The court accepted the argument that long hair on prisoners would require more and longer searches, which would generate more risk and animosity between staff and inmates, even though the same kind of speculation had been rejected in *Salaam*.

Medical Care

Courts continue to disagree about the line between deliberate indifference and malpractice in medical care cases. In *Brown v. Borough of Chambersburg*, 903 F.2d 274 (3d Cir. 1990), the plaintiff complained to the jail doctor about pain in his ribs. The doctor diagnosed a bruise after looking at him but not touching him. He later proved to have two broken ribs. After a jury ruled against the plaintiff, the court held his claim frivolous and awarded attorneys' fees against him, observing, "While the distinction between deliberate indifference and malpractice can be subtle, it is well established that as long as a physician exercises professional judgment his behavior will not violate a prisoner's constitutional rights."

The Second Circuit, in *Liscio v. Warren*, 901 F.2d 274 (2d Cir. 1990), took a different approach. There, the jailed plaintiff told the booking officer he was undergoing heroin withdrawal but did not mention his alcohol abuse. The jail doctor examined him but did not inquire into the possibility of alcohol withdrawal, even though alcohol withdrawal is frequent in jail and more often fatal than heroin withdrawal, and even though the doctor was on notice that the plaintiff was a "poor historian" of his condition. The appeals court reversed the district court's grant of summary judgment for the defendants, holding that these facts and the plaintiff's expert's conclusion that the doctor had "severely mismanaged" the plaintiff's case could support a finding of deliberate indifference.

The difference between the two courts' approaches is that in *Brown*, the court construes "professional judgment" simply as a judgment made by a professional. There is no inquiry into the manner in which the judgment was made or on what it was based, and the failure to perform the most basic and necessary physical examination is given no significance. In *Liscio*, by contrast, the court asks whether the doctor actually had any basis on which to make a judgment, and concludes, in effect, that a doctor's judgment made without obtaining necessary information is simply not entitled to the deference normally given professional judgment under the deliberate indifference standard. In *Liscio*, failing to ask the necessary questions amounted to deliberate indifference.

Use of Force

The Fifth Circuit federal Court of Appeals has joined other federal courts in making it more difficult for prisoners to recover for misuse of force by prison staff. In *Huguet v. Barnett*, 900 F.2d 838 (5th Cir. 1990), the court held that in any Eighth Amendment force case the plaintiff must prove

1. a significant injury, which
2. resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was
3. objectively unreasonable, and
4. the action constituted an unnecessary and wanton infliction of pain.

Only after the first three elements are proven does the analysis shift to the fourth, which deals with the officer's state of mind and inquires whether force was used in "a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." The quoted language is cited from the Supreme Court's decision addressing a prison disturbance in *Whitley v. Albers*. The Fifth Circuit has thus joined several other circuits in applying the *Whitley* "malicious and sadistic" test to all prison use of force cases, even those that deal with a single inmate and not a riot or disturbance. (*See* Mark Lopez and David Fathi, "The Lost Meaning of *Whitley v. Albers*," *NPP JOURNAL*, Summer 1990.) The court went out of its way to stress the burden on the plaintiff: "No matter how significant the injury, how far in excess of the need, and how unreasonable, if the officer's action did not constitute a wanton infliction of pain, the plaintiff's claim must fail."

The first three elements are taken verbatim from the Fourth Amendment use of force standard adopted by the Fifth Circuit in *Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989) (*en banc*). In *Johnson*, seven of the sixteen judges concurred in the result but severely criticized both the "significant injury" requirement and the "directly and only" causation standard, stating that "these added restrictions...are imposed by *ipse dixit* without so much as a citation of authority or a statement of reasons for imposing them." They pointed out that there was no basis in the Fourth Amendment for the "significant injury" requirement. The causation requirement is also unprecedented: "a § 1983 plaintiff ordinarily need prove only cause in fact and proximate or legal cause, not *sole* causation." (Emphasis in original.)

In *Huguet*, likewise, the court cited no authority and gave no explanation for adopting these elements in an entirely different legal context, although they are as questionable under the Eighth Amendment as under the Fourth. As to injury, the Sixth Circuit declared in a recent use of force case

that "a prisoner alleging an eighth amendment violation need not prove that he suffered a serious physical injury, rather he must demonstrate that the infliction of pain was unnecessary and wanton." *McHenry v. Chadwick*, 896 F.2d 184 (6th Cir. 1990). That position is consistent with the history of Eighth Amendment adjudication, which provides ample authority that non-injurious actions in or out of prison may be cruel and unusual. *See, e.g., Robinson v. California*, 370 U.S. 660 (1962) (incarceration for status of drug addiction); *Trop v. Dulles*, 356 U.S. 86 (1958) (deprivation of citizenship).

Meanwhile, the Fourth Circuit may be moving in the opposite direction from the Fifth, having vacated its opinion in *Miller v. Leathers*. In that case, a three-judge panel of the court not only held that *Whitley v. Albers* governed all use of force cases, but also affirmed the dismissal of a case in which a guard had broken a handcuffed prisoner's arm with a riot stick after the prisoner refused an order and insulted the guard's mother. The *Miller* court, in authorizing such injurious force on a restrained inmate whose misconduct was primarily verbal, went to an extreme of deference to low-level prison personnel that is probably unique in federal jurisprudence. The panel decision will now be reviewed by the entire ten-judge appeals court. 885 F.2d 151 (4th Cir.), *vacated and rehearing in banc ordered*, 893 F.2d 57 (4th Cir. 1989).

[1]This interest was addressed in *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990), *petition for certiorari filed*, 59 U.S.Law Week 3259 (August 16, 1990), by the expedient of having an intake photograph taken with the hair pulled back, and a new photograph taken whenever prison officials believed that the inmate's appearance had significantly changed.

Other Cases Worth Noting

U.S. COURT OF APPEALS

Heating and Ventilation/Mental Health Care/Crowding/Cruel and Unusual Punishment

Wilson v. Seiter, 893 F.2d 861 (6th Cir. 1990). Excessive exposure to heat may violate the Eighth Amendment, but occasional exposure to 95-degree temperatures does not.

Housing mentally ill inmates in dormitories with others does not violate the Eighth Amendment absent evidence of violence.

Double bunking in dormitories providing about 50 square feet per inmate of living space does not violate the Eighth Amendment where the plaintiffs had access to substantial recreation facilities during the day.

Summary judgment was properly granted to defendants on plaintiffs' other claims (unsanitary eating conditions, inadequate heating, commingling of physically ill inmates, inadequate ventilation, excessive noise and insect infestation) because their affidavits establishing "affirmative efforts to maintain habitable conditions" demonstrate a lack of "obduracy and wantonness." (866) At most, plaintiffs allege negligence. In short, prisoners' Eighth Amendment rights are explicitly measured in this case by the intentions of prison officials and not by the actual conditions of confinement. (Ed. Note: The Supreme Court granted *certiorari* in this case on October 2, 1990.)

Psychotropic Medication/Federal Officials and Prisons

United States v. Watson, 893 F.2d 970 (8th Cir. 1990). Federal prisoners who have been shown to have a mental disease or defect for which treatment is required and have been committed to a psychiatric facility have a qualified right to refuse psychotropic medication; one case is remanded for a determination whether the prisoner can function adequately (i.e., without posing a danger to self or others) without medication. As to the other, at 982:

> *If the government shows that it cannot control a mentally ill prisoner in the general population, due process does not require it to provide the least restrictive treatment modality.... Rather, we hold that psychotropic drugs may be constitutionally administered to a mentally ill federal prisoner whenever, in the exercise of professional judgment, such an action is deemed necessary to remove that prisoner from seclusion and to prevent the prisoner from endangering himself or others.*

Whether the holding as to the first prisoner survives *Washington v. Harper* is not clear. In *Harper*, the Supreme Court pretended that a prisoner had to be "dangerous" or that his condition was "likely to cause harm" to be medicated under the state standard; in reality, the standard it upheld permitted medication if the prisoner posed a likelihood of serious harm to self, others or property, *or* was "gravely disabled."

Suicide Prevention/Pre-Trial Detainees/Damages/Qualified Immunity

Lewis v. Parish of Terrebone, 894 F.2d 142 (5th Cir. 1990). The decedent was placed in solitary confinement after an escape attempt; he committed suicide; the psychiatrist's report warning of the danger of suicide and recommending close observation sat unopened until after he was dead.

Evidence that the warden knew the decedent had said he wanted to die, that he had said he had taken an overdose of pills, that a psychiatric examination had been ordered and performed, and that the decedent had been placed in solitary confinement supported a finding of deliberate indifference. (The court does not mention the failure to look at the psychiatric report for some reason.)

The sheriff was not entitled to qualified immunity; the "constitutional duty to protect a prisoner prone to suicide from self-destruction" is clearly established.

The trial court properly excluded expert testimony about the decedent's future wage loss in the absence of any evidence that the decedent had a work history to support the calculation.

The evidence supporting liability also justified an award of punitive damages, which the jury made in the amount of the decedent's funeral costs. The amount is upheld in the absence of an objection from plaintiff's counsel. The awards of zero compensatory damages to widow and children are not "shocking" where there was little evidence of the extent of their emotional loss.

Protection from Inmate Assault/Negligence, Deliberate Indifference and Intent

Santiago v. Lane, 894 F.2d 218 (7th Cir. 1990). The plaintiff was assaulted at Stateville in "death alley" by gang members, whom he later identified, and was transferred to avoid retaliation, but defendants never notified officials at the receiving prison of his need for protection against gang retaliation. He informed his counselor of his history but nonetheless was sent to "the toughest house at Menard" despite his excellent record; he was robbed and threatened, and his request for reassignment was not acted on promptly. He was then assaulted again.

Defendants were entitled to summary judgment as to the "death alley" attack; although he alleged that the area was "dangerously concealed" and there had been other attacks there, there was no evidence of any *prior* attacks there.

Prison officials' failure to develop policies or procedures for notification of receiving prisons of the danger to prisoners transferred for safety reasons raised a factual issue precluding summary judgment for the defendants. "[I]f 'the need for more or different [action] is so obvious, and the inadequacy so likely to result in the violation of constitutional rights...the policy-makers...can reasonably be said to have been deliberately indifferent to the need.'" (223, *quoting Canton v. Harris*).

At n. 2: The district court had noted an

apparent inconsistency in Seventh Circuit definitions of deliberate indifference ("gross negligence" vs. "criminal recklessness"). This panel uses the latter standard, noting that it has been cited with approval by the Supreme Court.

Procedural Due Process—Visiting

Taylor v. Armontrout, 894 F.2d 961 (8th Cir. 1989). The plaintiff's son rode his motorcycle from Florida to Missouri to visit him and was refused for no reason that is explained in the opinion.

A liberty interest was created by a Missouri prison regulation that provided, "Visiting lists shall be approved by the institution head or designate in accordance with the individual inmate need and personal choice. Those persons whose names appear on the inmate's visiting list *shall* be allowed to visit." (557; emphasis supplied) This rule is different from that in *Kentucky Dept. of Corrections v. Thompson*, which enumerated the circumstances under which visits "may" be denied. (As the dissent in *Thompson* pointed out, this reasoning contradicts *Hewitt v. Helms*.)

This opinion supersedes that of 888 F.2d 555 (8th Cir. 1989) but the changes are technical.

Protection from Inmate Assault/ Medical Care—Access to Medical Personnel, Serious Medical Needs/ Deliberate Indifference

Brown v. Hughes, 894 F.2d 1533 (11th Cir. 1990). The plaintiff spoke to a jail sergeant about a "racial problem" in his multi-occupant cell; the sergeant told him he would have to see the captain; the plaintiff went back to his cell and was attacked. His foot was broken and there was a four-hour delay in providing medical attention, by which time his foot was too swollen to be placed in a cast.

Defendants were entitled to summary judgment on the assault claim since the plaintiff "did not say that he had been threatened, or that a fight was imminent, or that he feared an attack, nor is there evidence that racial tensions in the jail frequently resulted in violence," and the plaintiff returned to his cell voluntarily. (1537)

The delay in medical treatment presented a factual question barring summary judgment. At 1538: "When prison guards ignore without explanation a prisoner's serious medical condition that is known or obvious to them, the trier of fact may infer deliberate indifference.... [A]n unexplained delay of hours in treating a serious injury states a prima facie case of deliberate indifference." At n. 4: "Evidence of recent traumatic injury...has generally been sufficient to demonstrate a serious medical need."

Confiscation and Destruction of Legal Materials

Gregory v. Nunn, 895 F.2d 413 (7th Cir. 1990). The plaintiff's allegation that prison officials had accepted and lost materials essential to his pursuit of post-conviction relief stated a claim for denial of access to courts, even if the materials were not as "irreplaceable" as he believed. The court suggests that a higher standard of care may be required of prison officials when they deal with prisoners' legal materials.

Protection from Assault/Negligence, Deliberate Indifference and Intent

Redman v. City of San Diego, 896 F.2d 362 (9th Cir. 1990). The plaintiff was raped by his cellmate and complained to his friends outside, who telephoned the jail and was told it wasn't operating a "baby-sitting service." A guard asked the plaintiff if he had any problems, within the view of the rapist and other inmates, and he said no because he feared retaliation. He was then raped four more times by the same inmate and others.

The district court properly granted a directed verdict for the city absent any evidence that jail personnel acted pursuant to policy in confining the plaintiff with his rapist and responding as they did to the phone call.

Detainees must show deliberate indifference to recover for a violation of the right to personal security; gross negligence or recklessness are not sufficient. A directed verdict for the individual defendants was proper. Although a jury could have found negligence in the jail's "ineffective and perfunctory" investigation, there was no evidence of deliberate indifference even though the rapist had a history of sexual coercion and the plaintiff had initially been placed in the "young and tender" unit.

Medical Care—Deliberate Indifference

Miltier v. Beorn, 896 F.2d 848 (4th Cir. 1990). The decedent had a history of heart disease. The prison system's chief physician failed to ensure that a recommended transfer to a cardiology unit was carried out. A contract physician concluded that he "doubted" heart disease but conducted no tests of any value in detecting it; despite her continuing symptoms of heart disease, he transferred her back to general population. Four months later, she was brought to the clinic with severe chest pains. The contract doctor ordered a tranquilizer over the telephone and observation until another doctor arrived that evening. She died that afternoon.

Deliberate indifference could be inferred from the referring physician's failure to follow up on the recommendation of transfer to a cardiac unit; the chief physician's failure to ensure that the recommendation, once approved, was carried out; and the contract physician's failure to conduct tests relevant to heart disease even when there was no non-cardiac explanation for the decedent's symptoms.

At 853: "Failure to respond to an inmate's known medical needs raises an inference that there was deliberate indifference to those needs." Evidence that decedent lost consciousness, fell and was left unattended by nurses supported a deliberate indifference claim against them.

Protection from Inmate Assault

Wilks v. Young, 897 F.2d 896 (7th Cir. 1990). A jury instruction provided that the defendant must have known of the substantial risk that violence would occur was erroneous. A proper instruction would add that liability can be found based on "objective knowledge," i.e., if the danger "would be apparent to a reasonable person in [the defendant's] position." (898)

Suicide Prevention

Belcher v. Oliver, 898 F.2d 32 (4th Cir. 1990). The decedent was arrested for public intoxication and hazardous driving and hanged himself in jail with his belt. The defendants did not remove his shoelaces and belt although it was their normal procedure to do so.

Defendants were entitled to summary judgment. At 34-35: "The general right of pretrial detainees to receive basic medical care does not place upon jail officials the responsibility to screen every detainee for suicidal tendencies." The decedent showed no evidence of such tendencies although he was "singing, clapping his hands and humming." The failure to remove his shoelaces and belt was at most negligent.

Mental Health Care/Equal Protection

Fetterusso v. State of New York, 898 F.2d 322 (2d Cir. 1990). State statutes provide that persons acquitted of criminal charges by reason of mental illness and committed based on dangerous mental disorders must pay the costs of their incarceration. They do not require payment of others incarcerated pursuant to criminal court order (those being evaluated for fitness to stand trial, those deemed incompetent to stand trial, and prisoners in need of mental health care). Civilly committed persons must also pay for their care.

Since mental health acquittees are released into the general population when their mental health is restored, the statutory distinction "rationally serves the goal of shifting the cost of psychiatric services to those...who would have remained outside the reach of the criminal justice system but for their combined

present mental illness and dangerousness." (327)

Procedural Due Process—Disciplinary Proceedings

Mason v. Sargent, 898 F.2d 679 (8th Cir. 1990). The plaintiff was convicted of a contraband offense based on the presence of the contraband in his locker despite his defense that it was put there by another inmate who shared a locker and who admitted ownership of the contraband in a written statement to the disciplinary committee. The court holds that there was "some evidence" to support the conviction without saying what that evidence was and exactly what conclusion the evidence supported.

Exhaustion of Remedies/Personal Property

Johnpoll v. Thornburgh, 898 F.2d 849 (2d Cir. 1990). Federal prisoners' complaints about the improper use of the Inmate Financial Responsibility Program must be pursued through the Bureau of Prisons' administrative remedy process. The plaintiff's argument that collecting civil judgments (e.g. back rent owed to a landlord) is unrelated to imprisonment is rejected, since making prisoners pay their debts serves rehabilitative purposes.

Administrative remedies must be pursued "except to the extent that the administrative procedures are incompetent to provide redress, for example, to redress a challenge to the constitutional validity of a statute or regulation." (851) A claim of improper application of the statutory scheme is redressable by prison officials and must be exhausted. Economic loss generally does not constitute "irreparable injury" that might excuse exhaustion of administrative remedies.

Administrative authorities are not competent to address constitutional challenges to regulations, and no useful purpose would be served by administrative fact-finding. But the plaintiff's likelihood of success makes preliminary injunctive relief inappropriate. The regulation serves valid rehabilitative interests and is within the Bureau of Prisons' statutory authority. The program is not punitive but rehabilitative.

Use of Force/Damages

Ismail v. Cohen, 899 F.2d 183 (2d Cir. 1990). The plaintiff was struck from behind and knocked down by a police officer, sustaining two displaced vertebrae, a cracked rib and serious head trauma, and was then prosecuted on false criminal charges. A jury award of $650,000 and punitive damages of $150,000 was reasonable.

Evidence of a *subsequent* incident of excessive force by the defendant officer was admissible under Fed.R.Ev. 404(b) as evidence of "pattern, intent, absence of mistake, etc."

AIDS

Gomez v. United States, 899 F.2d 1124 (11th Cir. 1990). A prisoner with AIDS should not have been released on bail pending consideration of his habeas corpus petition because he would not have been entitled to release if he prevailed on the petition. Although the district court had found that the plaintiff was not receiving adequate medical care, "relief of an Eighth Amendment violation does not include release from confinement." (1126) The question is not whether petitioner's current care is adequate, but whether the Bureau of Prisons can provide adequate treatment anywhere, and adequate AIDS treatment can be and is being provided in the Springfield federal medical center.

Searches—Person

Nitcher v. Cline, 899 F.2d 1543 (8th Cir. 1990). A claim of an x-ray search that was ordered by security officials without medical authorization was not frivolous. The failure to inquire into the plaintiff's medical history to consider the possible cumulative effect of x-rays, to get a doctor's order, to have medical personnel present, and to record the x-ray in his chart evidence deliberate indifference.

The search may also have violated the Fourth Amendment. A "generalized penological interest in searching inmates for contraband" is not sufficient justification; reasonable suspicion that an inmate is secreting contraband is required, and prison officials must show that less invasive means would not detect the contraband. The manner of search is also important. Here, the x-ray was performed by an inmate technician without medical personnel present and with no medical history taken.

Medical Care—Standards of Liability—Deliberate Indifference/Medical Care—Denial of Ordered Care

Wood v. Housewright, 900 F.2d 1332 (9th Cir. 1990). The plaintiff was admitted to prison with two pins in his shoulder and his arm in a sling. A guard confiscated the sling and a few days later one of the pins broke. A doctor prescribed medication and recommended an orthopedic consult. A month later, nothing had happened, he complained again, and a week later got more medication and another orthopedic referral. Two weeks later (about seven weeks after the pin broke), the pin was removed. The chief cause of the delays and initial confiscation of the sling was the failure to provide the plaintiff's medical records promptly.

The plaintiff's medical care may have been negligent but was not deliberately indifferent, though the lack of records and confiscation of the sling were "apparently inexcusable." The plaintiff "was given medical care at the prison that addressed his needs." (1334) Delay must cause "substantial harm" to violate the Eighth Amendment.

Protection from Inmate Assault

Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1990). A convicted but unsentenced prisoner should be treated as a convict whose rights are governed by the Eighth Amendment and not as a detainee.

Deliberate indifference, and not the *Whitley* "malicious and sadistic" standard, governs this inmate-on-inmate murder case that did not arise from a prison disturbance.

The municipality could be found deliberately indifferent under *Canton* based on its policies of (1) not locking down the prisoners at night, (2) not maintaining control of wire brooms, (3) not separating crime partners but allowing them to commingle, and (4) having only one officer with multiple duties to supervise the jail. (The decedent was murdered by his accomplices using part of a wire broom.) In so holding, the court notes the weakness of the evidence on jail authorities' notice of the specific danger to the decedent, and of prior assaults and murders in the jail.

Remedies/Judicial Disengagement/Consent Judgments

Halderman v. Pennhurst State School and Hospital, 901 F.2d 311 (3d Cir. 1990). This court has not decided whether courts have "inherent jurisdiction to enforce settlement agreements in cases that were once properly before them." However, the district court retains jurisdiction of a settlement agreement that is explicitly adopted by the court as an order. A dispute over the meaning of a "sunset clause" in the consent judgment is to be resolved by contract principles. The cessation of "active jurisdiction" means that "the district court would cease 'hands on' control over the matter and simply resort to the usual continuing jurisdiction that courts routinely exercise over their injunctions." (320) "Active jurisdiction" means "active supervision."

State officials could be in noncompliance with consent judgment provisions where the judgment clearly placed an obligation on them, even if local or state law placed the obligation elsewhere. State officials were in substantial noncompliance with a "monitoring" obligation where they did not also take enforcement steps, beyond persuasion, to correct violations revealed by its monitoring.

Use of Force

Wisniewski v. Kennard, 901 F.2d 1276 (5th Cir. 1990). The plaintiff alleged that upon his recapture after an escape, a deputy sheriff handcuffed him, put his revolver in plaintiff's

mouth and threatened to blow his head off, and twice punched him in the stomach. As a result he was frightened and has suffered bad dreams. These injuries are not "significant" within the meaning of *Johnson v. Morel* and do not state a constitutional claim.

U.S. DISTRICT COURT

Emergency/Management, Safety and Security—Operations/ Classification/ Religion—Services Within Institution Equal Protection

Ra Chaka v. Franzen, 727 F.Supp. 454 (N.D.Ill. 1989). Prison officials locked down the prison during an emergency, classified the inmates as "aggressive and predatory," "normal-situational," and "passive-dependent," separated them into different units, and implemented a "unit management" plan designed to keep the groups from mixing. They denied requests for inter-unit Jumu'ah services but authorized separate services in different housing units.

Plaintiff's injunctive claim was moot because the prison had instituted the services he sought.

The restriction on services is upheld, since it was rationally related to security, there were alternative means for religious exercise, doing what plaintiff wanted would have been contrary to the purpose of the unit management system, and there was no ready alternative.

The First Amendment "does not require an equal apportionment, or identical opportunities" for all religious groups, but prison officials must provide minority faiths "a 'reasonable opportunity' comparable to fellow prisoners who adhere to conventional religious precepts." (460) The failure to provide Muslims a precisely equal portion of the budget did not violate equal protection.

Correspondence—Legal and Official/ Negligence, Deliberate Indifference and Intent

Faulkner v. McLocklin, 727 F.Supp. 486 (N.D.Ind. 1989). Defendants violated the Constitution when they opened outside the addressee's presence letters to a detainee from the Indiana Civil Liberties Union, a legal services program, and the Senate Committee on Agriculture, Nutrition and Forestry. "[I]t seems to be settled" that mail from elected officials or government agencies "is entitled to the same protection as mail from attorneys," since it "touches upon the inmate's First Amendment right to petition the government for redress of grievances." (490)

Prison officials can adopt regulations requiring legal mail to be marked in a particular way and then open any non-conforming items outside the addressee's presence. Absent such regulations, letters from legal organizations cannot be opened.

Attorneys' Fees and Costs

Meriwether v. Coughlin, 727 F.Supp. 823 (S.D.N.Y. 1989). In a prison damage case prosecuted by a large New York City firm, fees are awarded at rates up to $290 an hour in 1989; the firm's rates are characterized as "in the low end of the spectrum of those charged by large established New York firms . . . [but] in the high range of rates charged by attorneys of reasonably comparable skill in recent prisoners' rights litigation." (830) The attorney who got up to $290 an hour is a 1974 law graduate; a 1976 graduate got $230; a 1982 graduate got $175; and a 1987 graduate got $130 (nn. 14-15).

The total award for this complex case that was resolved in a lengthy jury trial is $419,000 for the district court proceedings and $105,000 for appellate work.

AIDS/Privacy/Procedural Due Process— Administrative Segregation/Equal Protection/Temporary Release

Harris v. Thigpen, 727 F.Supp. 1564 (M.D.Ala. 1990). Mandatory HIV testing of prisoners does not violate the Fourth Amendment.

Prisoners have no privacy rights. The right to privacy is a right to be left alone, and prisoners cannot be left alone because they committed crimes. Prisoners are analogized to those who have "made their privacy a matter of public interest" and thereby waived their privacy.

The isolation of HIV-infected inmates does not deny equal protection. At 1572: "It appears to this Court that the Plaintiffs in this case selfishly assert their rights to expose other inmates to their problems independent of any right of the other inmates to be protected from what is admitted to be a dread fatal disease...."

The failure to provide a hearing before segregating an HIV-positive inmate does not deny due process. At 1572-73: "The purpose of a hearing is to allow the authority to show reasons why the infringement should be imposed on the offended party. Where the [HIV] tests have demonstrated that the offended party is a carrier of a serious disease or is reasonably thought to be a carrier of a serious disease, the reason for the confinement is apparent, and there is no occasion for a hearing."

Denial of access to temporary release and other prison programs did not deny equal protection.

The Rehabilitation Act is not violated by defendants' practices because plaintiffs are not "otherwise qualified" and a significant risk of transmission would remain after "reasonable accommodations." (1583)

Suicide Prevention/Negligence, Deliberate Indifference, and Intent

Simmons v. City of Philadelphia, 728 F.Supp. 352 (E.D.Pa. 1990). A public intoxication arrestee hanged himself in jail with his shoelaces. Evidence that the decedent fit the psychological profile of a suicide risk, he was placed in an isolated cell but should have been observed at all times, the city police officers had no suicide prevention training, that there had been 20 suicides in city lock-ups in five years as well as attempted suicides, and that the head of psychiatry in the city jails had warned defendants to do something about it, supported municipal liability under the deliberate indifference standard.

Class Actions—Certification of Classes Justiciability—Mootness

Goetz v. Crosson, 728 F.Supp. 995 (S.D.N.Y. 1990). In a case challenging practices concerning the appointment of psychiatrists to assist respondents in mental health retention hearings, the court applies the *Sosna* relation back doctrine where the named plaintiff's claim was mooted after the filing of a class certification motion. "Of particular concern is the potential ability of the defendant to purposefully moot the named plaintiffs' claims" otherwise. (1000) Moreover, the "constant existence of a class of persons suffering the deprivation" supports class certification.

Environment/Federal Officials and Prisons

Caldwell v. Quinlan, 729 F.Supp. 4 (D.D.C. 1990). Complaints of occasional exposure to second-hand tobacco smoke did not state a constitutional claim; the plaintiff was not entitled to a completely smoke-free environment.

AIDS

Doe V. Borough of Barrington, 729 F.Supp. 376 (D.N.J. 1990). Disclosure of a person's medical condition, especially exposure to or infection with HIV, is disclosure of a "personal matter" in violation of the constitutionally protected right to privacy. Such disclosure violates the rights of family members as well as of the infected person. The government must show a compelling interest to justify disclosing such information.

Law Libraries and Law Books/ Protective Custody

Watson v. Norris, 729 F.Supp. 581 (M.D.Tenn. 1989).

Protective custody inmates could not go to the law library but had to depend on a cell delivery system and the assistance of "official" jailhouse lawyers; the latter had sole discretion whether to assist a particular inmate. "As a

matter of law, such a situation is obviously unsatisfactory." (586) The plaintiff was entitled to summary judgment on the inadequacy of court access, and defendants were "enjoined from enforcing [their] policies" and directed to come up with a proposed plan within 30 days.

Crowding/Classification/Protection from Inmate Assault

Vazquez v. Carver, 729 F.Supp. 1063 (E.D.Pa. 1989). Defendants are enjoined to reduce a county jail population from 420 to 310 (the maximum number of permanent beds in the jail) over a period of 45 days. The court cites the facts that in double cells, a third inmate was placed on a mattress on the floor, and lock-in times are long; that other inmates are placed in improvised housing in non-housing areas with limited access to bathrooms; and that the use of program areas for housing severely limits available space for all inmates during lock-out time in concluding that plaintiffs are denied adequate shelter. The court also finds that crowding has "increased the potential for inmate violence, and that several recent assaults may be directly attributable to the present conditions...." (1067-68). The court also finds that the risk of violence is increased by the intermingling of general population and segregation inmates, also made necessary by crowding.

Publications/Social and Political Expression/ Classification—Race

Thomas v. U.S. Secretary of Defense, 730 F.Supp. 362 (D.Kan. 1990). White inmates at the U.S. Disciplinary Barracks were forbidden to receive publications of the White Aryan Resistance and similar organizations under a regulation prohibiting material that "communicates information designed to encourage prisoners to disrupt the institution by strikes, riots, racial or religious hatred." The regulation is not unconstitutional on its face. The court notes that "[w]itnesses were able to point to particular portions in each publication which could legitimately raise concerns regarding the potential for racial or religious confrontation" and concludes that defendants "made a conscientious review" of the material. (365)

The plaintiffs were denied the right to form a "European Heritage Club" for white inmates even though black and Hispanic inmates were permitted to form such organizations. Prison officials reasonably concluded that the latter organizations "provide cultural support for certain inmates and assist in inmate rehabilitation and are beneficial to mental health," and the court defers to their conclusion that the European Heritage Group "would not assist in any of these areas." (366) This racial discrimination claim is upheld under the "reasonableness" test. (The court could have relied on prison officials' testimony that they thought the plaintiffs wanted to start a racist organization and not a study group, which would probably have met the higher standard of review applied to racial distinctions.)

Environment

Doughty v. Board of County Commissioners for County of Weld, Colo., 731 F.Supp. 423 (D.Colo. 1989). The application to a jail of a county-wide ban on smoking in public buildings did not violate the Constitution. The policy is not "punishment" because it is reasonably related to the legitimate purposes of protecting the rights and health of non-smokers, eliminating fire hazards, and providing for a clean living environment. The evidence showed that designated smoking areas are not a practical solution because the jail's ventilation system is not adequate to evacuate cigarette smoke. Segregation of smokers from non-smokers is not practical because it would interfere with other principles of classification.

Sanitation/Medical Care—Access to Medical Personnel, Medication, Special Diets

Kyle v. Allen, 732 F.Supp. 1157 (S.D.Fla. 1990).

Allegations of overflowing toilets, spoiled food on the floors, denial of permission to clean plaintiff's cell, blood on the walls, no ventilation, and bad odors stated a constitutional claim.

Allegations that the plaintiff was not promptly taken to a doctor, was given medication without an examination and was threatened when he refused to take it, and that he did not receive the proper diet for his ulcers, stated constitutional claims.

Visiting/Equal Protection

Doe v. Sparks, 733 F.Supp. 227 (W.D.Pa. 1990). Prison policy limited visiting to members of the immediate family and "common law spouses or boy/girlfriend," excluding "boy/girlfriends" of the same sex. Visiting was noncontact only.

Under the federal constitution viewed in isolation, gays can have no equal protection rights because their conduct enjoys no substantive protection. However, in Pennsylvania, where the prohibition of consensual homosexual conduct had been ruled to violate the state constitution, equal protection requires a rational relationship to a legitimate end for such distinctions. One rational purpose of the policy was to avoid identification and exploitation of gay inmates. The other rational purpose was to discourage homosexual activity in the jail.

Religion—Practices—Beards, Hair, Dress/Religion—Outside Organizations, Services Within Institution

Young v. Lane, 733 F.Supp. 1205 (N.D.Ill. 1990). Prison officials' allegation that some Jewish plaintiffs had been seen eating non-kosher food did not mean that they were insincere in their beliefs.

A ban on wearing yarmulkes except inside the cell and at religious services was unconstitutional. Defendants' concerns for the hiding of contraband and the display of gang affiliation were irrational, since inmates could wear baseball caps (available in several colors) any time, and there was no evidence of security problems before 1987, when the ban was instituted.

The failure to reimburse Jewish rabbis for travel expenses, while other religious leaders were reimbursed, was unconstitutional.

The ban on inmate-led religious services was not unconstitutional because of the possibility of religious disputes and the use of religious services for gang meetings. However, it would be a "satisfactory alternative" and "less restrictive" to let the services go forward with a staff person present. This requirement is included in the remedy ordered.

Modification of Judgments/Crowding

Inmates of the Suffolk County Jail v. Kearney, 734 F.Supp. 561 (D.Mass. 1990). This case was brought in 1971 and resolved in 1979 with a consent judgment requiring a new jail with single occupancy cells, subsequently modified to accommodate a state court order to make the jail larger. The sheriff moved for modification again to permit double-celling, based on "new and unforeseen" population growth and changes in the law regarding double-celling.

The modification is denied. Population increases are neither new nor unforeseen, having been an ongoing problem throughout the litigation. *Bell v. Wolfish*, decided a week after the consent judgment was entered, "did not directly overrule any legal interpretation on which the 1979 consent decree was based." (564)

The court notes that the First Circuit has adhered to the "grievous wrong/new and unforeseen conditions" test of *Swift*. However, even if it were to apply the more flexible standard of other circuits (i.e., the *Willowbrook* standard), the modification would be inappropriate, because it "would violate one of the primary purposes of the decree": to meet agreed-upon standards including a separate cell for each detainee, always an important element of the relief. Even if the proposed modifications would comply with the Constitution, there is no basis for modification. At 565:

To permit relief on this basis would make settlements in cases of this type worth very little. It would undermine and discourage settlement efforts in institutional cases if a defendant were permitted to return to court when terms earlier agreed to became more burdensome than expected. It is the very certainty and finality of a consent decree approved by a court that induces participation in it.

Personal Involvement and Supervisory Liability/Use of Force

Murray v. Koehler, 734 F.Supp. 605 (S.D.N.Y. 1990). The jail warden was dismissed from the plaintiff's use of force case; the plaintiff then sought to file an amended complaint naming him again. He alleged that the warden was immediately notified of the incident leading to his beating and that he took no action to ensure plaintiff's safety or adherence by the officers to departmental rules, regulations or procedures, "notwithstanding the Warden's knowledge that officers in the facility have 'a high record of physical abuse or excessive use of force...against inmates, after an inmate has been in an altercation with officers.'" (606) Those allegations state a claim against the Warden on a deliberate indifference theory.

AIDS

Welch v. Sheriff, Lubbock County, Tex., 734 F.Supp. 765 (N.D.Tex. 1990). Jail officials did not violate the plaintiff's rights by housing him in the same cell as an apparently HIV positive inmate. At 768: "Exposing inmates to communicable disease may violate their constitutional rights." But there is no evidence of any activities that could have posed a serious risk of AIDS transmission between the plaintiff and the other prisoner.

Searches—Person—Prisoners/Administrative Segregation/Damages/Jury Instructions/Qualified Immunity

Wetmore v. Gardner, 735 F.Supp. 974 (E.D.Wash. 1990). Prison officials subjected every inmate transferred to an "Intensive Management Unit" to a digital rectal cavity probe search without cause. Prisoners alleged they were routinely taunted by search and escort officers, e.g., "Today, you meet Mr. Big Finger." The prisoners were chained during the search and it was done in full view of numerous officers and sometimes a video camera. No contraband was ever found in the searches. A jury found defendants liable and awarded $1.00 in damages against several defendants. Defendants were not entitled to qualified immunity, since it was clearly established that such intrusive searches required a rational relationship to a legitimate penological purpose.

Index to Articles

Note: In Spring 1990, the *NPP JOURNAL* began using a volume-numbering system. In the index below, articles from issues prior to Spring 1990 list issue and page numbers only (i.e., 3/2). Articles from the Spring 1990 issue onward list volume, issue and page numbers (i.e., Vol. 5/2/6).

Book Review

BY JOSEPH GIARRATANO

***Last Rights: Thirteen Fatal Encounters with the State's Justice*, by Joseph B. Ingle; with forward by William Styron, Abingdon Press, Nashville, TN. ($21.95)**

Southern Coalition on Jails and Prisons

Rev. Joseph Ingle and Willie Lawrence Adams. Photo taken May 9, 1984, the day before Adams' brother James was executed in Florida.

In *Last Rights*, the Rev. Joe Ingle walks the reader through his personal journey into the death houses of the South. Ingle, a United Church of Christ minister, has served as the director of the Southern Coalition on Jails and Prisons since 1974. In that capacity he has made it his life's work to visit every death row in the South and befriend many men and women facing execution.

His powerful book probes beyond the statistics, rhetoric and other masks used to justify and legitimize the violence of capital punishment, and takes a personal look at the death penalty process.

Through the eyes of the author the reader meets 12 men and one woman who have been executed by the state in the name of justice. In the central narratives the reader also encounters the families of the condemned and other personalities: wardens, guards, lawyers, governors, and activists. Ingle's unique perspective of having been a participant draws the reader, often painfully, into the events surrounding the legalized killing of people he came to know as friends.

Last Rights fills a void in public information about those who, under color of law, we condemn to death. Having known Joe Ingle (who has been twice nominated for the Nobel Peace Prize) for several years, having known two of the men executed (Frank Coppola and Morris Mason); and being under sentence of death myself, I found it hard not to be overwhelmed by the real dramas so vividly exhibited in this book. As I read the account of the execution of John Evans, I had to put the book down for a time. Once able to read again, I began to wonder what Thomas Jefferson or James Madison would have thought about this brutal 1983 execution:

The electric chair malfunctioned, a strap burned off his leg, and it took fifteen minutes to kill him....A moment later, as spark and flame crackled around Evan's head and shaven, razor-nicked leg, white smoke seeped from beneath the veil and curled from his head and leg....Two doctors filed out of the witness room to examine the body and pronounce Evans dead....Evans' chest rose against the straps the first time. It rose evenly once, twice, maybe again....When the second charge subsided, the doctors reexamined Evans and again it was clear they found a pulsating heart....the third charge was administered.

Or thought of the state of Virginia:

... trying to electrocute a manchild, Morris Mason, age 32, who had an I.Q. of 66 and was diagnosed paranoid schizophrenic. The evaluation was not in question....The state of Virginia was seeking to kill a man who, when rational, had the mentality of the lowest 3 percent of the population in the United States....At one point Morris looked up and asked: 'What does it mean to die?'....We sat outside the cell, the minutes slipping away. Marie held Morris's hand. He asked about death again. Before we could answer, his expression brightened, and he said: 'Does it mean I get to order anything I want for breakfast?'....Across the street, a cheering mob of seventy-five to one hundred people were chanting 'Fry the nigger' and 'Kill the coon.' When the official word came that Morris had been killed, this ghoulish gathering filled the summer's night air with a cheer.

Last Rights is more than a book about condemned criminals. In its honesty of emotion it transcends the stereotypes. Through the author the reader experiences man's compassion and cruelty. Rev. Ingle is more than itinerant pastor and friend to those condemned to die and to their families. His voice and message speak to society at large:

One might argue that Holocaust victims, slaves, and Native Americans were innocent and that the victims of capital punishment, criminals, are guilty. This is obviously true, but this argument misses the central issue of the state assuming the authority to take human life. The state has engineered a legal mechanism against life itself....After all, was a slave less of a human being because the law decreed him chattel? Was a Native American less than human because the state defined him in such a manner that made it legal to take his land? Or was a victim of the Holocaust less of a human being because the Third Reich decreed him subhuman? Is a murderer less of a human being because the state objectifies him in order to kill him?....The state lawfully took life in each category of victims listed above because it gives itself the authority to do so, but the essential humanity of each person remains. The state is engaged in mere legal artifice to accomplish its objective.

After finishing *Last Rights*, I truly began to wonder about the concept of "inalienable" rights: Joe Ingle's journey underscores the radical, self-evident truth, "...that all men are created equal; that they are endowed by their Creator with certain inalienable rights: that among these are *life*..."

Last Rights is an essential book that should be circulated widely in every school and town library. ■

Joseph Giarratano is on Death Row in Virginia.

BY JUDY GREENSPAN

National Commission on AIDS Holds First Hearing on AIDS in Prison

In December 1989 the National Commission on AIDS delivered its report to President Bush outlining the extent of the crisis caused by the AIDS epidemic and calling for sweeping and prompt solutions. The report faulted federal and state governments for failing to rise to the challenge of fighting AIDS and failing to bring together the forces needed for the fight. Commission members dedicated themselves to bringing the "missing players to the table" through meetings and hearings. One such historic hearing was held in New York City on August 17, 1990.

The public hearing was entitled "HIV Infection and AIDS in Correctional Facilities." Testimony presented by health educators, prisoners, lawyers, women's advocates, judges and medical experts drew national attention to the critical problems created by the AIDS epidemic in prisons and jails.

June Osborn, dean of the School of Public Health at the University of Michigan and author of several articles on HIV disease, chaired the session. Mark Lopez, a staff lawyer with the ACLU National Prison Project began by testifying, "In the United States, we imprison far too much and our sentences are far too long. Racial and economic discrimination are widespread. Many prison terms are served in degrading, brutalizing conditions."

"People with AIDS should not have to die in prison," stated Dr. Robert Cohen, former medical director at Rikers Island, the New York City jail complex, and now medical director of the AIDS Center of St. Vincent's Hospital in Manhattan. Cohen spoke about the "appalling" medical care given HIV-infected prisoners from Connecticut to Alabama, and urged the Commission to advocate early release for prisoners with AIDS and other terminal illnesses.

A panel of attorneys and medical doctors detailed abuses faced by HIV-positive prisoners, such as lack of confidentiality, poor-to-nonexistent medical care, mandatory HIV testing and segregation.

According to Alexa Freeman, a lawyer with the National Prison Project, Alabama represents one of the worst cases in care and management of HIV disease in its prisons by forcibly testing for HIV, segregating all those testing HIV-positive, denying HIV-positive prisoners access to vocational training and most prison employment, and providing no confidentiality for prisoners. The NPP is involved in the appeals process of a class action lawsuit contesting many of these policies.

German V. Maisonet, M.D., Chief of HIV Services at California's Vacaville medical facility, testified that he was hired to upgrade the facility's medical care as a result of the successful settlement of *Gates v. Deukmejian* (a class action challenging medical care at Vacaville). A pilot program is underway to change California's policy of segregating HIV-positive prisoners.

Catherine Hanssens reported that New Jersey's Department of Corrections estimates between 30-50% of the prison population is HIV-infected. Hanssens explained that in New Jersey, "those who progress to AIDS are automatically segregated in the 'Special Medical Unit.'" Not an infirmary, the unit is an involuntary administrative segregation housing area.

Michael Wiseman of the Prisoners' Rights Project of the Legal Aid Society of New York presented testimony about the lawsuit filed on behalf of HIV-infected prisoners in New York State. To prepare for the lawsuit, Wiseman described "heartwrenching" visits to New York prisons: "[T]he horror of living in prison with a fatal disease and of having little or only rationed access to doctors, treatments, information and counseling, and with no hope for an early release despite one in debilitated condition." Health educators believe that as many as 40-60% of New York State prisoners may be HIV-infected.

Brenda Smith, representing the National Women's Law Center, said there was an urgent need for both comprehensive treatment and support for imprisoned women with AIDS and education of women prisoners to reduce the risk of contracting HIV. "Although women comprise only 9% of those infected with AIDS, they are the fastest-growing population to be affected, especially women of color, particularly Black, Latin and Native American women," said Smith. Corrections administrators are not responding quickly enough with education and programming, she added.

Marilyn Rivera, co-founder of ACE (AIDS Counseling and Education) at Bedford Hills Correctional Facility in New York State, described ACE as a peer education and counseling program; it is a success model that should be adopted by prisons and jails throughout the country.

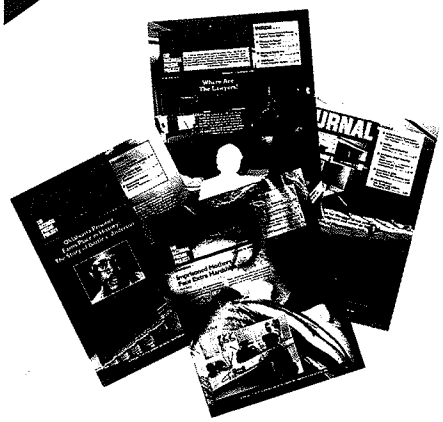
A thick packet of letters, articles and testimony by prisoners with HIV disease and prisoners active in AIDS education programs was presented by Judy Greenspan, AIDS Information Co-ordinator of the National Prison Project. She documented abuse and mistreatment of prisoners with AIDS. Greenspan also alerted the Commission to the case of Gregory Smith, an HIV-positive prisoner in New Jersey who was convicted of attempted murder and sentenced to 25 years for allegedly biting a correctional officer. Greenspan stated that this case and over a dozen others like it epitomize fear and ignorance about AIDS.

The two-day focus on AIDS and prison issues by the Commission received broad media attention and should provide the blueprint for a more enlightened, compassionate and comprehensive federal response to a serious medical epidemic. ■

Judy Greenspan is the AIDS Information Coordinator for the National Prison Project, and contributes a regular column to the NPP JOURNAL.

THE NATIONAL PRISON PROJECT

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, AIDS, family support, and ex-offender aid. 9th Edition, published September 1990. Paperback, $30 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 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. (Note: This is not a "jailhouse lawyers" manual.) $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.

_____ **1990 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/

QTY. COST

Fill out and send with check payable to:

The National Prison Project
1875 Connecticut Ave, NW, #410
Washington, D.C. 20009

Name _____

Address _____

City, State, Zip _____

THE NATIONAL PRISON PROJECT

Highlights

The following are major developments in the Prison Project's litigation program since July 1, 1990. Further details of any of the listed cases may be obtained by writing the Project.

Brown v. McKernan—In early October, 1990, we filed suit challenging overcrowding and conditions for protective custody and administrative segregation prisoners at the Maine State Prison.

Congdon v. Murray—On September 21, 1990, we filed a lawsuit on behalf of prisoners in the Virginia State Penitentiary challenging unconstitutional conditions. Prison officials have promised to close the antiquated facility at least twice in the last two years. We filed the case when our numerous requests to remedy conditions failed to produce a response from officials.

Dickerson v. Castle—This case challenges conditions in the Delaware prison system. On July 16, oral argument was heard on plaintiffs' motion for contempt which was filed upon discovery of additional overcrowding at one of the prisons.

Harris v. Thigpen—This case challenges the AIDS testing and segregation policies of the Alabama Department of Corrections. In September, we filed our appeal brief with the Eleventh Circuit Court of Appeals.

Inmates of Occoquan v. Barry—This case challenges conditions at the District of Columbia's Occoquan prison facilities. We have settled the issue of attorneys' fees and expenses for $750,000 and are now attempting to obtain compliance with the court's orders.

Lecclier v. Bayh—At the end of June 1990, we filed a suit challenging overcrowding and conditions at the Indiana Reception and Diagnostic Center.

Palmigiano v. DiPrete—This case challenges conditions in the Rhode Island prison system. The district court has entered a series of orders modifying and refining its order of May 22 which directed defendants to meet population requirements, pay money to a bail fund, and implement medical and environmental remedies. The court also ordered defendants to provide blocks of good time to certain prisoners in order to meet population caps. Since then, the population at the two facilities has been greatly reduced.

Thomas v. Kidd—This case challenges conditions and overcrowding in the Mecklenburg County Jail (N.C.). Defendants attempted to postpone litigation by presenting plans for a building program that could take years to implement. Plaintiffs submitted a settlement proposal and filed for a preliminary injunction. The court has scheduled a hearing in November 1990.

U.S. v. Michigan/Knop v. Johnson—This is a statewide Michigan prison conditions case. On June 29, the Sixth Circuit issued a stay on the district court's classification and contempt orders. On September 19, the parties argued the merits of a number of consolidated appeals, and a major compliance hearing was held October 10-12, 1990.

Washington v. Tinney/Johnson v. Galley—This case challenges conditions and overcrowding at two Maryland state prisons. In response to a significant increase in the prison population in 1989, plaintiffs in July 1990 filed a motion to hold defendants in contempt of the settlement agreement.

Wilson v. Seiter—On behalf of a prisoner of Ohio's Hocking Correctional Facility, we filed a petition for writ of *certiorari* with the Supreme Court in May. The petition argued that the Sixth Circuit decision, which found in favor of corrections officials, applied a standard which conflicts with the standard applied by other circuits for Eighth Amendment violations. The Supreme Court granted *certiorari* on October 1.

National Prison Project
American Civil Liberties Union Foundation
1875 Connecticut Ave., NW, #410
Washington, D.C. 20009
(202) 234-4830