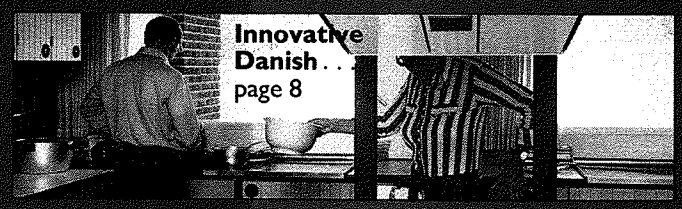
JOURNAL
THE NATIONAL PRISON PROJECT



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INSIDE . . .

This issue begins a two-part series on AIDS in prison. Starting on this page are the results of a state-by-state survey and, on page five, concerns about potential for abuse in current AIDS testing.

NPP Gathers the Facts on AIDS in Prison

Urvashi Vaid

In early September of 1985, the National Prison Project initiated a survey of corrections departments around the country to determine the incidence of Acquired Immune Deficiency Syndrome (AIDS) in the nation's prisons. This article, the first of a series, reports on the results of the survey. The second article will appear in the Spring 1986 issue of the *JOURNAL* and will focus on the legal and political dimensions of the occurrence of AIDS in prison. The results of the survey are summarized on page four.

Methodology

A four-page questionnaire was developed to gather some basic factual information about AIDS in prison. The survey was co-authored by Urvashi Vaid and Dr. Ron Sable, assistant medical director for the Cook County Jail in Chicago. Dr. Sable also works with AIDS patients at the Cook County Hospital. He has been active in training correctional health care providers to develop an appropriate institutional response to AIDS.

The survey sought information in five general areas: epidemeological data; screening and medical care; institutional operations; and staff and inmate education. Specifically, data on the number of cases of AIDS and AIDS Related Complex (ARC) was sought by risk group, age, race and sex. The survey asked about procedures for intake screening for AIDS, the use of the HTLV-III antibody test, and general policies on the medical care and handling of diagnosed AIDS patients. Questions also covered the segregation of persons with AIDS and ARC, as well as their access to basic institutional programs. Finally, the survey sought information on the educational efforts of the departments, along with information about inmate and staff reaction.

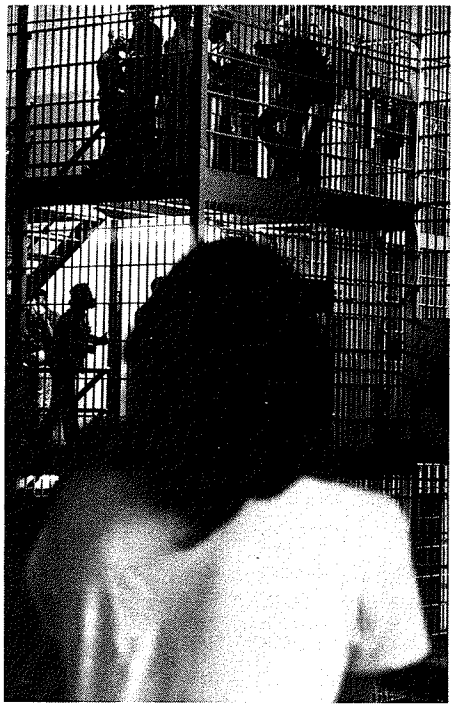


Photo by Bill Powers Courtesy Frost Publishing Group

The survey was sent to the medical directors of all 50 state departments of corrections, as well as to the appropriate administrators of correctional institutions in the District of Columbia, Puerto Rico, the Virgin Islands and Guam. Twenty-six written surveys were returned. Follow-up phone calls to obtain basic statistical and factual information yielded 22 additional responses.[1] Two states (Maryland and Ohio) and the District of Columbia did not respond in any fashion. The statistical information reported on these states was gathered informally through press accounts and is marked as such.

The survey was developed in order to gather basic statistical information and to get a sense of how corrections departments are responding to this medical crisis, and to share this information with the many people and agencies who are concerned about this serious problem. It was not designed to obtain detailed information about particular systems, nor to anticipate all possible scenarios encountered in correctional settings. Protocols and policies on AIDS were requested and those obtained are available to the reader from the NPP.

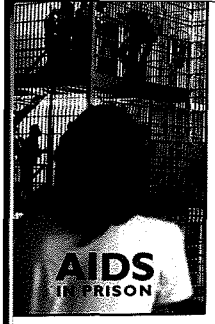
Discussion

Information about the number of cases of AIDS gathered from all 50 states reveals that there have been 420 cases of AIDS diagnosed in the nation's prisons.[2] Since responses to the survey were obtained over a two and one-half month period (September to November, 1985), the precise number of cases reported will have changed overall as well as in particular states. The 420 figure reflects the number of cases diag-

—continued on next page

[1]Responses obtained solely by phone are indicated with a (*) on the chart.

[2]The number of cases of AIDS in the nation's jails is not reflected in this figure. A whole different range of problems is presented when considering jail inmates, many of whom are incarcerated for short periods of time.



"Prison systems around the country are striving to develop a balanced institutional response to this medical crisis."

nosed to date, and does not identify the number of persons with AIDS who are presently incarcerated. More than half of these 420 prisoners have died. It was difficult to determine the exact number of prisoners with AIDS who have died because some states did not provide the information, and in some instances, prisoners with AIDS may have died after release.

The 420 cases have been distributed among 24 states. Four states with no diagnosed AIDS cases reported that they had individuals who have tested positive on the HTLV-III antibody test, while 22 reported no cases at the time of the survey. The overwhelming majority of the 420 cases diagnosed to date (85%) have been found in the New York, New Jersey and Florida systems.

Although the survey sought data on the age, race, sex and risk group identity of prisoners with AIDS, the responses obtained were incomplete and therefore unreportable. The data received on the race of prisoners with AIDS indicates that black and Hispanic prisoners are heavily represented. Nationally, people of color account for over 39% of all the reported cases, as of November 11, 1985. The results obtained did indicate that intravenous (IV) drug users form the largest group of prison inmates with AIDS. According to the Assistant Commissioner for Health Services for the New York State Department of Correction, Dr. Raymond Broaddus, over 95% of the 231 prisoners with AIDS in New York were intravenous drug users.

Three major areas were generally explored in the survey: the identification and diagnosis of persons with AIDS and ARC; the medical and institutional treatment of prisoners with AIDS, ARC and of those prisoners with a positive antibody test; and the development and use of educational materials related to AIDS.

Only sixteen states reported the use of some form of intake screening specifically aimed at identifying persons at risk for AIDS or those with AIDS-associated symptoms. Screening methods used included complete physicals, complete blood count (CBC), skin tests to measure immune competence, and detailed questionnaires to identify members of high-risk groups. No state reported sole reliance on the Enzyme Linked Immuni-Sorbent Assay (ELISA) test, which measures the presence of antibodies to the HTLV-III virus, as a diagnostic tool. However, 60% (29) of the 48 states which responded to the survey indicated that they use the ELISA test in some fashion. Five others are developing policies governing its use. The most common usage was a means to confirm the diagnosis of AIDS where other symptoms were present. The second most typical usage of the test was on a case by case basis, as determined by the medical staff. New York and New Jersey do not use the ELISA test at all.

Some of the problems with using the HTLV-III test as a diagnostic tool are discussed in this issue of the *JOURNAL* by Dr. Robert Cohen, the medical director for Rikers Island Jail in New York City. The test was designed to protect the blood supply from possibly infected blood. The test was not designed to diagnose which persons who test positive for the antibody will develop the disease. The test cannot distinguish individuals who are carriers of the virus from those who have been exposed to it. In addition, the ELISA test when used on its own results in an extremely high number of false positives. The test also results in a high number of false negatives; in other words, individuals who test negative to the HTLV-III antibody have gone on to develop the disease.

Despite these fundamental problems with the HTLV-III antibody test, and without even discussing the additional problems posed by the need for confidentiality of test results or the discriminatory treatment of persons based on their test results,[3] prisoners and corrections professionals around the country are calling for a greatly expanded use of the test under the mistaken assumption that it somehow diagnoses AIDS. Two inmates in Alabama recently sued to obtain such testing. Inmates without AIDS in New York sought, among other things, to compel the state to examine all inmates and staff to insure that the disease had not spread.[4] The corrections officers' union in Michigan is seeking use of the HTLV-III test on all state inmates, while corrections officials in D.C. may seek the early release of a prisoner with AIDS on the grounds that they do not have the resources to properly treat him. So far only one state, Nevada, has used the test on a mass basis, to determine the antibody status of all inmates in the system, as well as of all new admissions. No information is available regarding what the state plans to do with persons testing positive or on the confidentiality of test results. However, Missouri also plans to use the test to screen all new admissions, and proposals to perform mandatory screening have been made in Delaware and Pennsylvania.

The use of the test to create more restrictive, indefinite housing for persons on the sole basis of their exposure to the HTLV-III virus poses massive legal and administrative problems. For one, there is no medical basis to justify such segregation on the basis of seropositivity. AIDS is not spread through casual contact, but only through the exchange of bodily fluids during sex or by the

[3]These issues will be addressed in Part 2 of this series.

[4]*LaRocca v. Dalsheim,* 467 NYS 2d 302, 120 Misc. 2d 697 (1983). The suit also sought to prevent the formation of a single prison where prisoners with AIDS were housed. The court denied injunctive relief.

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

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medium of contaminated blood transmitted through needles. There is no evidence that the HTLV-III virus is airborne, exchanged through kissing, shaking hands or any other non-sexual interaction. The virus has not been isolated in human feces. Finally, only a small percentage of those testing positive on the ELISA go on to develop AIDS.[5] Indefinite confinement on the basis of antibody status alone would thus pose serious due process and Eighth Amendment problems. An additional logistical problem must be considered in reviewing any proposal to isolate all antibody positive persons. Leading medical experts estimate that between 1 to 2 million people in the U.S. have been exposed to the HTLV-III virus.[6] New York State estimates that over 60% of the approximately 36,000 inmates in its system have been needle-users.[7] Even if it were medically and legally defensible to segregate prisoners on the basis of antibody status alone, it would be physically impossible, given the overcrowded condition of most prison systems, to isolate such a large number of prison inmates, without the construction of new facilities designed solely to accomplish such isolation.

Photo by Bill Powers Courtesy Frost Publishing Group

Segregation on the basis of a confirmed diagnosis of AIDS is the policy of 20 of the 42 states from whom information on this point was obtained (48%). Seven (17%) others are in the process of developing a policy and two (5%) indicated that they decide to segregate on a case by case basis. Only three states, Louisiana, Michigan and Minnesota, noted that they do not formally segregate prisoners with AIDS; while two others noted that they had been segregating prisoners with AIDS, but were planning to stop. Most states reported that persons with AIDS who are actively fighting an infection are sent to an outside hospital. Some reported that they house individuals in prison infirmaries.

The segregation of prisoners with AIDS has been justified primarily on the grounds that AIDS patients need to be protected from infections they might catch in general population, and from the wrath of other prisoners. The segregation of prisoners with AIDS has been challenged on constitutional grounds in one lawsuit to date, *Cordero v. Coughlin,* 607 F.Supp. 9 (S.D. N.Y. 1984). The prisoners argued that defendants' policy of segregating them resulted in a lack of social, rehabilitative and recreational activities which violated their First, Eighth and Fourteenth Amendment rights. The court rejected the Equal Protection claim after finding that the state had a legitimate objective ". . . to protect both victims and other prisoners from the tensions and harm that could result from the fears of other inmates." The court held, in part, that "[C]ertainly the separation of these inmates . . . bears a rational relation to this objective, at least until some better system is developed, and it is undisputed that defendants are changing their programs as they work to improve their ability to cope with the needs of prisoners with AIDS." *Id.,* at 10.

The court rejected the Fourteenth Amendment liberty interest claim on the basis of *Jewitt v. Helms,* 459 U.S. 460 (1983), and rejected the Eighth Amendment claim on the basis that no showing had been made that plaintiffs were denied adequate food, clothing, shelter, sanitation, medical care and safety. *Id.,* at 11. The court also rejected the First Amendment claim on the basis of *Jones v. North Carolina Prisoners Labor Union, Inc.,* 433 U.S. 119 (1977) and denied the claims raised under New York state law based on *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89 (1984).

The *Cordero* case makes it clear that while prisoners with AIDS who seek to remain in general population have an uphill fight, they could successfully challenge their confinement in such a status if conditions are violative of the Eighth Amendment. In other words, segregation of prisoners with AIDS must involve more than placement in an isolation cell for 24-hours a day. Comprehensive and detailed information about the conditions under which people with AIDS are confined was not sought in the survey. However, information concerning prisoners' access to visitation, law library, exercise, correspondence and vocational and educational programs was sought. Ten states provided information on these areas.[8] All ten allow some visitation with the AIDS patient; only one does not provide access to a law library or to exercise (Virginia); and three do not allow access to vocational and educational programs (Pennsylvania, South Carolina, Virginia). It should also be noted that at least one action seeking better medical treatment is being brought on behalf of prisoners with AIDS.[9]

The survey revealed that a significant number of states (20%—8 out of 40) from whom information was obtained isolate prisoners with the condition described as AIDS-Related Complex (ARC). Ten states (25%) have not had any diagnosed ARC cases, while 9 (23%) states reported they do not, or do not plan to, isolate persons with ARC. These states include Florida and New York. Of the eight who stated they do not segregate ARC patients, four segregate prisoners with AIDS. Seven states reported they are developing policies with regard to segregation and six reported that they do so on a case by case basis.

Ironically, the survey revealed that no consistent definition of AIDS Related Complex is used across the country. Of the 46 states from whom information

—continued on page 5.

[5]"Update: Acquisition of AIDS in the San Francisco Cohort Study, 1978-1985" *Morbidity and Mortality Weekly Report,* vol. 34, no. 38, p. 573, 1985.
[6]Cohen, Robert L., "AIDS: The Impending Quarantine," Health/PAC bulletin, p. 1, 1985.
[7]Conversation with Raymond Broaddus, 11/18/85.
[8]California, Connecticut, Illinois, Maine, Michigan, New York, North Carolina, Pennsylvania, South Carolina, Virginia.
[9]This action is being brought by a private attorney and Prisoners Legal Services of New York. Further details will be reported in the second article of this series.

	Date First AIDS Case Identified in System	Total Number of AIDS Cases in System Statewide to Date	Total Deaths from AIDS	Total Cases of ARC At Present	Use of ELISA (HTLV-III Antibody Test)							Are There Any Protocols for the Handling of Prisoners with AIDS?	Are (or will) prisoners With AIDS (be) Segregated From the General Population?	Are (or will) prisoners With ARC (be) Segregated From the General Population?	Have Security Staff Received Any Special AIDS Training?	Have the Medical/Nursing Staff Received Any Special AIDS Training?	Have Any Brochures, Handouts, Guidelines on AIDS Been Developed for Staff or Inmates?
					Used	In Plasma Program	On High Risk Groups	On Symptomatic Individuals To Confirm Diagnosis	To Screen All Admissions	On All Inmates	Western Blot Used to Confirm						
Alabama*	0	P	0	0	C				C	C	Y	C	Y	U	U	U	Y
Alaska*	0	0	0	0				B				S	U	U	U	U	U
Arizona*	1/85	1	0	3		Y		B			Y	S	Y	Y	U	U	U
Arkansas	0	P	0	0		Y					Y	C	N/A	N/A	N	D	C
California	7/84	14	6	10				B				Y	Y	Y	Y	Y	Y
Colorado*	0	0	0	0				B	C	C		S	U	U	U	U	U
Connecticut	1984	7	3	12	Y							Y	Y	B	Y	Y	Y
Delaware*	3/85	1	1	0			B	B	C	C		C	Y	Y	U	U	U
D.C.	No answer yet																
Florida	1982	31**	7	K				Y				Y	Y	K	U	U	Y
Georgia	7/84	6**	2	6				Y				Y	Y	Y	Y	Y	Y
Hawaii*	0	0	0	0	C	C						C	C	C	C	C	C
Idaho	0	0	0	0			Y					N	N/A	N/A	Y	Y	Y
Illinois	11/84	1	1	1		N						Y	D	N	Y	Y	Y
Indiana*	10/85	2	0	0					Y			Y	E/I	U	Y	Y	U
Iowa*	U	0	0	0		Y		Y				U	N	U	Y	Y	N
Kansas	0	0	0	0		N						C	C	C	C	C	C
Kentucky*	5/84	1	0	1					Y			Y	Y/I	N/A	U	U	Y
Louisiana*	10/85	1	0	1			Y		Y			N	N	N	U	U	U
Maine	9/85	1	0	1					Y			Y	Y	Y	Y	Y	Y
Maryland**	U	0**															
Massachusetts	U	3	1	U		N						S	Y/I	N	U	U	Y
Michigan	8/84	2	1	1		N						Y	N	N	Y	Y	Y
Minnesota	0	0	0	0					Y			Y	N	N	Y	Y	Y
Mississippi	0	0	0	0		N						S	N/A	N/A	U	Y	Y
Missouri	9/85	P	0	K		Y		Y	D			Y	Y	Y/I	N	Y	Y
Montana	0	0	0	0	B							D	D	N/A	D	Y	Y
Nebraska*	U	0	0	0						D/C		C	U	U	U	U	U
Nevada*	0	P	0	0					Y	Y	Y	D	C	C	U	U	U
New Hampshire*	10/85	1[A]	1	1	U							Y	B	B	U	U	U
New Jersey*	1981	94	66	20	N							Y	U	B	U	U	U
New Mexico	0	0	0	0	C			D				C	C	C	D	D	Y
New York*	11/81	231	U	38	N							Y	Y	B	Y	Y	Y
North Carolina*	U	3	1	U				Y				C	D	U	U	U	Y
North Dakota	0	0	0	0	B							Y	U	U	Y	Y	Y
Ohio**	U	2**	U	U													
Oklahoma*	1985	0	0	2				Y				S	D	Y/I	U	U	U
Oregon*	0	P	0	1				Y				Y	E	E	U	U	U
Pennsylvania	10/84	4	0	2				Y				Y	Y	N	Y	Y	Y
Rhode Island*	U	1	1	3				Y				Y	B	B	U	U	U
South Carolina	U	2	1	6				Y				Y	Y	B	Y	Y	Y
South Dakota*	0	0	0	0	N							N	N/A	N/A	U	U	U
Tennessee	0	0	0	0				B				C	C	C	N	N	N
Texas	8/83	9	4	U	Y							Y	Y	Y	Y	Y	Y
Utah	0	0	0	0	N							N	N/A	N/A	N	N	N
Vermont	0	0	0	0	N							N	N/A	N/A	N	N	N
Virginia	1/85	2	1	3	N							Y	Y	N	Y	Y	Y
Washington	0	0	0	0	N							C	C	C	Y	Y	Y
West Virginia	0	0	0	0				Y				C	Y	Y	N	N	N
Wisconsin	0	0	0	1	C		C	C				C	C	C	Y	Y	Y
Wyoming	0	0	0	0	N							N	N/A	N/A	N	N	N

—continued from page 3.
on this point was obtained, 35% (14) use no definition of ARC. Five percent (2) do not identify prisoners with ARC in any way. Only 20% (8) cited the Centers for Disease Control's definition as the one they use. The CDC defines ARC as the existence of any two clinical and two laboratory abnormalities from two separate lists of symptoms and tests which they have created. Another 20% identified ARC as a pre-AIDS condition marked by the presence of symptoms alone, while another 23% (9) defined ARC as being a positive HTLV-III test with some AIDS-associated symptoms.

The final area surveyed was the development of training and educational materials on AIDS for staff and inmates. As the chart indicates, information was not obtained from all 48 responders on these points. However, the data gathered clearly reveals that the majority of corrections departments have developed training seminars for medical and security staff, and have distributed educational materials to inmates. The process of education is perhaps the key ingredient to the corrections community's response to the AIDS crisis. The educational brochures and fact-sheets gathered through the survey were reviewed and, while found to be technically accurate, varied greatly with respect to their specificity and their perspective. Prison systems concerned with needle-use as well as consensual and non-consensual sexual activity inside prisons must continue to develop and improve educational materials which specifically and vividly impress upon both inmates and staff the risks associated with certain behaviors. Information which discusses in detail the risk of sharing needles, defines casual contact concretely in the context of the prison environment and tackles tough questions about safe and unsafe sexual practices was not found among the educational materials received.

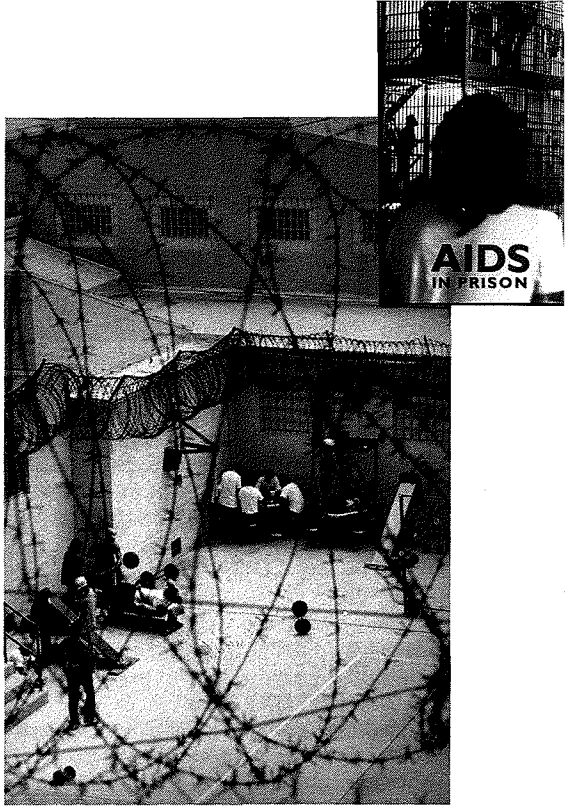
KEY

***Telephone response obtained**
****Information obtained from press reports**
A = case not confirmed but highly suspected to be AIDS
B = determined on a case by case basis
C = in the process of developing policy
D = no, but plan to
E = have been, but may not in the future
I = housed in infirmary or hospital
K = the ARC classification is not recognized by the system
N = No
N/A = not applicable
P = have individuals with positive HTLV-3 antibody tests, but not confirmed AIDS diagnosis
S = same protocol(s) used as for other infectious diseases
U = information unavailable

Conclusion

The diagnosis of AIDS among prison inmates has caused enormous concern among inmates, correctional officers and prison administrators. Although such concern is understandable given the serious nature of the disease, it is important to remember that while approximately 420 persons with AIDS have been diagnosed in the nation's prisons, there were over 452,372 prisoners incarcerated in state correctional systems, as of the middle of 1985.[10] Assuming that half of the 420 prisoners with AIDS have died, the approximately 200 cases of AIDS in prison represent less than .001% of the total national prison population in state correctional systems. Prison systems around the country are striving to develop a balanced institutional response to this medical crisis. National organizations such as the National Institute of Corrections (NIC) and the American Correctional Association are also working on the issue and will be releasing an "Issues and Practices Document" on AIDS in prison in early 1986. The next article in this series will discuss more specifically the legal, administrative and political problems that the incidence of AIDS in prison poses. ■

[10]Bureau of Justice Statistics, Mid-Year Report on Prisoners, 1985.



Courtesy Frost Publishing Group

This survey would not have been possible without the research and organizational skill of NPP law student intern Katy Baird, nor without the input and assistance of NPP law clerk Laurie Solomon.

Medical Expert Views Potential for Abuse in AIDS Screening

Robert L. Cohen, M.D.

At the present time there is no test for AIDS. The antibody test which is available, known as the ELISA test, was designed to screen donated blood for presence of antibodies to the HTLV-III virus, which is thought to cause AIDS.

The first published report of the virus now thought to be the cause of AIDS came from Barre-Sinoussi, et al., of France in 1983.[1] They called it Lymphadenopathy Associated Virus (LAV). In 1984, Dr. Robert Gallo of the National Cancer Institute reported finding the AIDS virus, which he labelled HTLV-III.[2] Dr. Gallo's prior research involved the rival causes of certain cancers, in the course of which he had identified a virus causing a human cancer and named it HTLV-I. Although LAV and HTLV-III seem to be identical and LAV was described 18 months earlier, Margaret Heckler, then Secretary of HHS, credited Gallo with the "discovery" of the AIDS virus.

The thesis that this virus is the causative agent of AIDS rests on several pieces of evidence. First, LAV/HTLV-III appears to be a new agent, not previously seen in the United States or Europe. Second, it specifically infects certain kinds of T-Cells and damages them, creating the T-Cell defect characteristic of patients with AIDS. Third, the virus is found in most patients with AIDS and has been found in asymptomatic individuals who have donated blood to individuals who later developed AIDS.

—continued on next page

[1]Barre-Sinoussi, F.; Chermann, J.; Rey, F., et al., "The Multiple Isolation of a T-Lymphotropic Retrovirus From a Patient At Risk for Acquired Immune Deficiency Syndrome," *Science*, Vol. 220:868-871, 1983.

[2]Gallo, R.C.; Salahuddin, S.Z.; Popovic, M., et al., "Frequent Detection and Isolation of Cytopathic Retroviruses From Patients With AIDS Or Risk of AIDS." *Science*, Vol 224:500-503, 1984.

"At the present time there is no test for AIDS."

The official position of the Centers for Disease Control and the National Institutes of Health is that LAV/HTLV-III causes AIDS, and it does appear probable that most, though not all, individuals who have AIDS have been exposed to it. However the majority of individuals who have antibodies directed against LAV/HTLV-III do not have AIDS as defined by the CDC.

Dr. Gallo developed a simple assay for measuring the presence of antibody to the LAV/HLTV-III virus, using a technique called Enzyme Linked ImmuniSorbent Assay (ELISA). This test is now available as a commercially produced kit manufactured by several drug companies. Although this method is widely used, it gives false positive results with disturbing frequency. In two studies involving screening of donated blood during the period March through June in 1985 the following results were obtained:

1. In the first study, conducted by the FDA, an initial positive ELISA result was found in 9,629 out of 1,128,166 units of blood tested.

2. Of those 9,629 initially testing positive, 2,831 were found to be positive when the ELISA test was repeated. Thus 29% of those initially testing positive remained positive on further testing.

3. In another study conducted by 1,593,969 units of donated blood, repeated ELISA testing was positive for 3,209 units. When a sample of 2,552 of these repeatedly positive units was tested by the Western Blot test, a confirmatory test for presence of antibody to the LAV/HTLV-III antibody, 587 were labeled positive. Thus only 23% of those repeated testing positive were confirmed to actually be positive.

4. Combining the results of these two studies we see that a positive ELISA test when repeated is positive only 29% of the time, and that these repeatedly positive tests can be confirmed only 23% of the time. Out of 1,000 tests 290 would be positive on repeated ELISA testing, and 23% of these 290, or 67 would be confirmed as positive by the Western Blot test. Therefore 923, or 92% would be labeled falsely positive by a single ELISA test.

These studies of volunteer blood donors tested a population with a low prevalence of positive antibody. For the ELISA, as for other laboratory tests, the lower the prevalence of individuals with antibody present in the sample being tested, the higher the number of false positive tests. At the present time the prevalence of AIDS and of antibody to LAV/HTLV-III among prisoners is very low in most states, and false positive tests would be common if performed. Although a Western Blot test for confirmation could be performed on repeated positive ELISA tests, this test is at the present expensive and not completely reliable.[3]

The ELISA test not only has many false positive results, it also has false negative ones. In a study of 96 patients with AIDS, ARC, or at risk for AIDS, four had no detectable antibody to LAV/HTLV-III even though LAV/HLTV-III virus was grown from their blood.[4] This represents a detection failure rate greater than four percent among people who could potentially transmit the disease. At this rate, among the one to two million people exposed to date, 40,000-80,000 would escape detection.

The presence of antibody to HTLV-III does not provide that the HLTV—III virus is present; it just means that exposure has occurred. Additionally, more than two thirds of individuals who have been exposed to the HLTV-III virus show no evidence of AIDS or any AIDS related disease. There would be no difference in the treatment that any individual would receive based upon the results of this test. If virus were present then the individual has the potential to transmit the disease.

For these reasons, HTLV-III antibody testing should not be performed in prisons or jails. The diagnosis of AIDS or AIDS Related Complex is made by clinical evaluation, not by this test. We have found on Rikers Island that a combination of the White Blood Cell (WBC) count which is less than 3500 and an anergy screen which is negative to 4 antigens does identify individuals who have severely depressed T-cell ratios.

AIDS is not casually transmitted; it can only be spread in a jail or prison through sexual intimacy or sharing of needles. There is no reason to segregate inmates based upon the results of this test. Because intravenous drug use is a common experience for inmates prior to their incarceration, targeted educational efforts about the spread of AIDS through sharing of syringes can be very productive for this population. Similarly, education about safe practices should be provided to all inmates. Since consensual homosexual sex occurs in prisons and jails, just as it does everywhere in our society, condoms should be provided to help prevent the spread of AIDS within correctional facilities. ■

Dr. Cohen is the Director of the Montifiore Rikers Island Health Services in New York City.

[3] "Blood Banks Give HTLV-III Test Positive Appraisal at Five Months," JAMA, Vol. 254, No. 13, p. 1681.

[4] Salahuddin, S.Z., Markham, P.D.; Redfield, R.R., et al., "HTLV-III in Symptom-Free Seronegative Persons," *Lancet*, p. 1418-1420, 1984.

Expert Negotiation Brings New Approach to Prison Litigation in Hawaii

Ted Janger

The details of the Hawaii settlement and consent decree were reported in the Fall 1985 JOURNAL, "Hard Fought Settlement Reached in Hawaii Case," 5 NPP JOURNAL at 3.

When a legislature or bureaucracy fails to meet its Eighth Amendment obligations, it falls to the judiciary to determine the scope and meaning of the words "cruel and unusual punishment," and to formulate a remedy. Fiss, *The Forms of Justice,* 93 Harv. L.Rev. 1 (1978); Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy,* 91 Yale L.J. 635 (1982). That judges are well qualified to determine the meaning of constitutional values has deep roots within our jurisprudence, but once constitutional liability has been established, remedying the deficiency is often a process which carries judges well outside their accustomed role as settlers of disputes. Chayes, *The Role of the Judge in Public Law Litigation,* 89 Harv. L. Rev. 1281 (1976). As a result, prison reform litigation is sometimes criticized for turning judges into prison wardens.

Expert negotiation was developed as a child of necessity.

During the early years of prison litigation this criticism carried some weight. When the novel issues of liability for conditions of confinement first reach the courts, the judge and parties are forced to pick their way through previously

uncharted territory. But as judges, the plaintiffs' bar and the defendants' bar have become more sophisticated, new techniques have developed which have helped to narrow the gap between right and reality, while allowing judges to remain more comfortable within their judicial role.

The technique of expert negotiation, used by the National Prison Project and the State of Hawaii to settle the litigation in the case of *Spear v. Ariyoshi,* is one of the most promising of these techniques, and one that highlights the fact that prison litigation has entered a new stage in its history.

The Hawaii Decree

Expert negotiation was developed as a child of necessity. In Hawaii, as trial approached, the parties began settlement negotiations with respect to conditions at the Oahu Community Correctional Center and the Hawaii Women's Correctional Facility. Both were severely overcrowded and suffered from deficiencies in environmental conditions, medical services, security staffing,

. . . expert negotiation eliminates the adversarial nature of the process and replaces it with one of mutual persuasion.

training and classification. With only three days remaining before the scheduled trial date, there simply was not enough time to draft a detailed consent decree. Instead, the parties chose to deal with the immediate population problem, agreeing to set up panels to investigate remaining concerns. Each panel included one expert proposed by the plaintiffs, one by the defendants and a member of the Department of Corrections. The panels had 90 days to develop a final plan for remedying the deficiencies in their subject area, referring any disputes to a mediator agreed to by both of the parties.

The settlement has worked well. The state has met population reduction deadlines; the outlines of the plans were determined within the 90-day deadline, and the plans will be submitted to the court for approval. Moreover, the parties have retained the right to object to any portions of the plans developed by the experts which do not satisfy constitutional requirements or the provisions of the decree.

Advantages

This novel method of settlement has a number of practical advantages, some of which inhere the settlement generally, while others are specific to this form of expert-negotiated, or arbitrated, settlement. Judges are understandably reluctant to define the constitutional minimum for a given situation. As a result, judges will often find liability and then resort to threats or broad outlines rather than detailing specific methods for reaching those goals. This was the technique used consistently by Judge Henley in the *Holt* litigation in Arkansas. Spiller, *After Decision: Implementation of Judicial Decrees in Correctional Settings* (1976). Settlement, on the other hand, is negotiated with constitutional minima in the background, but the terms of the settlement do not define the constitutional minima. As a result, the parties are free to negotiate relief down to the last detail. Settlement decrees are thus often more subtle and more finely tuned to the situation. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation,* 1983 U.Ill. L.Rev. 579, 584 (1983). In the face of a more detailed decree, compliance is easier to monitor. Moreover, the judge is left with the less controversial task of determining whether the parties have lived up to the terms of their agreement, not whether they have violated the Constitution.

Settlement by expert negotiation shares these benefits of settlement generally, but carries them one step further. By dropping the lawyers and the judge out of the decree formation process at an earlier stage, expert negotiation eliminates the adversarial nature of the process, and replaces it with one of mutual persuasion. The prison official must convince the experts that he is doing as much as possible to improve the situation, while the experts cannot recommend a solution that goes beyond what the prison official considers feasible. As a result, the prison administrator is exposed to authoritative opinion, and can use that knowledge in order to devise remedies to the problems within his own system. The result is that the cooperation of key prison administrators is maintained. This is particularly important in institutional reform litigation, where the primary goal is to create change within the institution.

The fact that this technique has only recently become a viable option indicates a shift in the nature of prison litigation. It can be seen by comparing the shifting roles of the judge and experts in early cases to more recent ones. In the early cases the key issue was to determine whether, and under what circumstances, liability existed for prison conditions. The role of the expert was to educate the judge: to tell him whether conditions in a given prison were cruel and unusual. *See Pugh v. Locke,* 406 F.Supp. 318, 322 (M.D. Ala. 1976). The judge was the center of the process. It was his job to determine liability and to fashion relief.

As the case law developed, establishing a basis for liability, prison administrators began adopting nationally recognized standards (although these standards did not themselves define constitutional minima). The developing case law, combined with these professional standards, made it easier for judges to determine whether a given practice fell so far below the level of accepted conduct as to constitute cruel and unusual punishment. The judge became less important to the process as his role shifted from one of making law to one

The technique of expert negotiation . . . is one of the most promising of these techniques, and one that highlights the fact that prison litigation has entered a new stage in its history.

of finding facts. The law began to settle around certain clear standards. Possibilities for settlement increased when defendants began to see that conditions within their institutions violated professional standards, which were clearly attainable and could form the basis for discussion. Thus, in this second phase the experts became more important; they were consulted when deciding whether or not to bring suit, when formulating the decree, and in monitoring compliance.

In Hawaii, prison litigation entered a third phase. Expert involvement has reached a new peak. The parties have chosen to delegate their positions as negotiators to the experts. The fact that both parties were willing to agree to this process of expert negotiation is simply a confirmation of the trend toward settlement. While plaintiffs recognized that an institution managed in conformity with professional standards may meet constitutional minima, defendants acknowledged that compliance with professional standards was part of the obligation of the state to its prisoners.

Legitimacy

It is possible to argue that settlements of this type signify a failure of the parties to press the interests of their clients. Such criticism is misplaced, at least in the prison context. (This is especially true since the parties retain the ability to argue to the court that certain expert-negotiated provisions do not satisfy their clients' needs.) The primary reasons for requiring parties to go to trial are to guarantee the development

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of the law, to protect unrepresented interests, and to insure that the judge has sufficient expertise to insure that he will be able to evaluate later conflicts over compliance when they inevitably arise. None of these interests are present in the prison context. The law is well understood. The class of inmates in a prison is unitary with respect to its interest in improved prison conditions. It is not as important that the judge develop familiarity with the conflict in the first instance since there is an accumulated body of judicial expertise already in place with respect to judicial administration of prisons. The same role can be filled by an actor who already has that experience. With this in mind, parties should avail themselves of the advantages of direct discussion between acknowledged experts and an official of the prison system.

The Hawaii decree may be a model for speedier, less costly prison litigation resolutions and, most important, the carrying out of a state's obligation to house prisoners in constitutional prisons. ■

Ted Janger is a second year student at the University of Chicago School of Law and worked as a summer intern at the Prison Project.

Denmark's Radical Approach to Super-Max Yields Success

This is the fourth in our series on the proliferation of the supermaximum security prison. (See "Super-Max Prisons Have Potential for 'Unnecessary Pain and Suffering'," 4 JOURNAL at 1; "Oak Park Heights Sets High Super-Max Standards," 4 JOURNAL at 3; "Bureau Continues Totalitarian Measures at Marion," 5 JOURNAL at 8.) Mr. Andersen served as a consultant to the planners of the Oak Park Heights facility in Minnesota.

Erik Andersen

Ringe, a Danish "closed" prison, is the counterpart to the American maximum security penitentiary. The prison opened in January 1976, designed to accommodate 90 inmates* (male and female) under the age of 25, for whom detention in an open prison was deemed unsuitable (i.e., serious drug offenders or prisoners with escape records from less secure facilities). By Danish standards, this prison was designed for a difficult population.

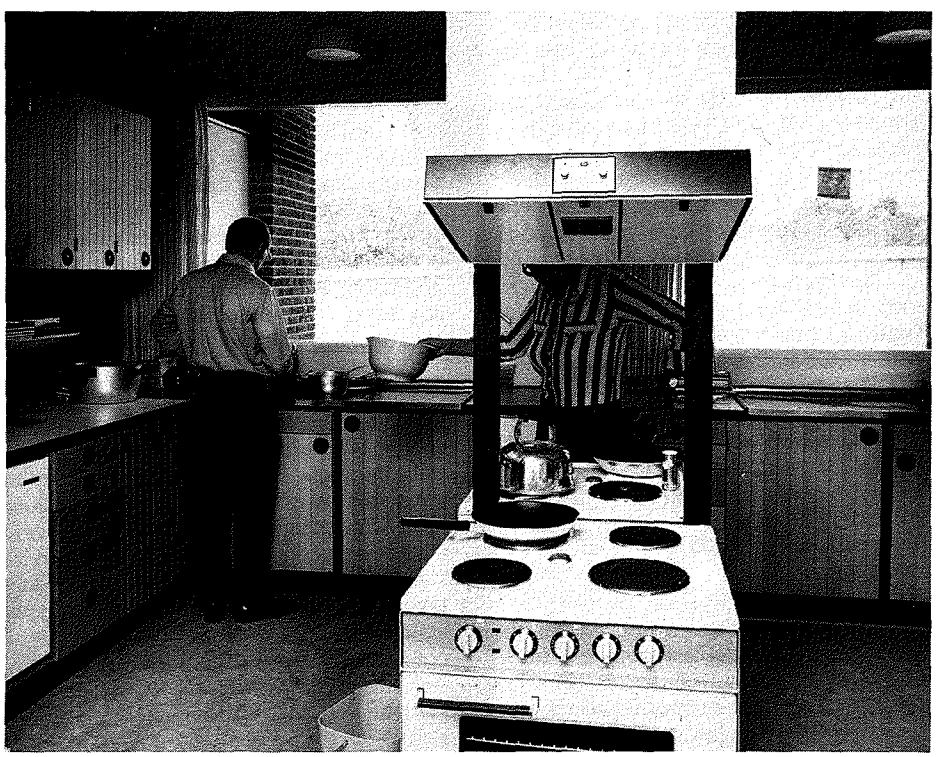
The prison employs a total of 73 people, 50 of whom are standard officers. With 90 inmates, the staff-inmate ratio is .8:1. It has an electronic security system and is surrounded by a 16-foot high security wall.

Since the beginning at Ringe, we placed great responsibility on the inmates and their officers. This is surely Ringe's most radical and far-reaching innovation.

Ringe is very different from its counterparts in the United States, even beyond the fact that the facility is small, co-ed and has a high staff-to-inmate ratio. One major difference is found in the staff structure. To concentrate on the many and varied jobs in the prison, and to eliminate divisions and tensions between treatment and security staff, we have developed a non-traditional staff structure. Instead of dividing the basic staff into categories of security and programming, we formed a single group called "standard" officers who have professional skills but are able to perform all of the duties required in prison activities. These include security work, instruction in prison work programs, service as guards in wings, transport duties, and to a certain degree welfare officer duties as well. Unlike most other Danish prisons, officers at Ringe do not wear uniforms. The prison staff is divided into six groups, each serving a specific residence-wing. Each group carries out the duties required for their wing, and shares other duties with the other five groups. There is no duty roster in the normal sense; each group organizes its own duty roster on the basis of an adapted flexible time schedule which is controlled by the micro-computer of the prison. During the planning stage for Ringe, we decided that there would be two primary criteria for the standard officer staff. One was that they could never have worked in a prison before (to eliminate people with traditional and pre-conceived ideas about prison) and the other that they be trained carpenters or cabinet workers. As this was to be a work prison, the latter was essential.

One of the most important things I have found in my many years in Danish prison work was that even though we expected inmates to be able to return to normal society, everything we had been doing for them left them as unprepared for normal life as possible. Thus, since the beginning at Ringe, we placed

Inmates at Ringe prepare their meals in group kitchens.



Photos by Gunvor Jorgsholm, Copyright by pressehuset

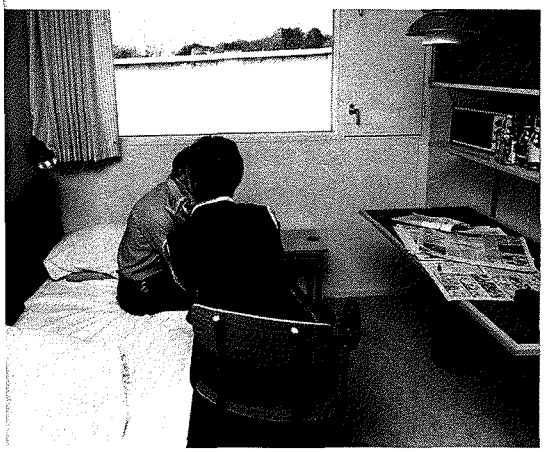
*American readers must change their mindsets about prisons when reading this article. A facility for 90 prisoners is not considered small in Scandanavia where many new prisons are designed to hold approximately 40 persons.

great responsibility on the inmates and their officers. This is surely Ringe's most radical and far-reaching innovation.

Ringe is set up on a "functional unit" model whereby it is divided into six living sections, each with its own group of standard officers. All decisions concerning inmates are made at "section" meetings held by the standard officers of each section every two weeks, assisted by the welfare supervisor and one of the senior officers. The standard officer is important here also. He or she, for in all the wings two of the officers are female, is the person who knows the inmate best, and when necessary, helps solve any social problems that arise.

Our intention is to give prisoners the greatest possible degree of influence over their own affairs, through performance of their social duties, and in everyday routine - practical matters like use of their private property, preparation of food, and payment of wages and money for food in cash. In five of the six wings, men and women inmates live next door to each other. In principle, inmates are expected to manage their own social responsibilities and overcome their own problems as they would in the free world. If necessary they can obtain the help of the standard officer on duty in their wing. If the situation requires special knowlege of welfare or other regulations, the standard officer can obtain the assistance of a welfare officer.

The prison has no central kitchen and prisoners prepare their own food. To this end a kitchen has been provided on each block, and with the meal payments made (35 Dkr. daily [equiv. = approximately $4.50]), prisoners can buy the foodstuffs they need in a shop set up in the area originally intended to be a central kitchen. The shop is operated by a local food store. Prisoners form small cooking groups; the organization of this is left entirely to them. Meal payments and wages are paid once weekly to prisoners in cash. Payment is made in a bank-room provided for by a local bank which agreed to operate this service.



Men and women prisoners at Ringe living in the same housing unit may visit freely. Inmates have the keys to their own cells.

Women prisoners are allowed to keep their children under two years old . . . where it is in the best interest of the mother and the child for them not to be separated.

In the prison, co-education has become part of the natural daily routine. In the five wings where men and women live together the atmosphere has become more natural, less sterile and artificial than a "normal" prison.

We provide three types of employment for prisoners. The carpenters' shop employs 35 inmates who make high quality furniture; the assembly shop employs 15-20 inmates. This unit manufactures a wide range of products from mailbag bases to electronic components such as battery chargers for hearing aids. The prison's third working unit is a mobile cleaning team which employs the latest equipment and keeps all common rooms and facilities clean. The team is comprised of 5-7 inmates, a few more in the summertime because it also looks after the outdoor facilities. Two groups of six specially selected inmates work outside the prison in the company of standard officers. One group is building a fishing-boat and the other is engaged in landscape preservation. Inmates are paid according to group piece-rates but at the same time have the opportunity to earn a bonus every time they learn how to operate a machine, for instance, or master certain working processes.

Of course the inmates can be visited by their relatives or by others with whom it is important for them to keep in contact. They have the right to two 1-hour visits a week but a visit will normally last three or four hours. Visits take place individually in special rooms and they are normally unsupervised, including visits by persons of the opposite sex. As in all other Danish prisons, conjugal visits are allowed at Ringe. Only if there is a substantial suspicion that a visit will be abused will it be controlled by an officer present in the room. Because many of the prisoners are drug addicts, the abuse will consist of smuggling drugs, so the inmates are always thoroughly searched after a visit. There is a special area in the prison infirmary where women prisoners are allowed to keep their children under two years old in cases where I decide it is in the best interest of mother and child for them not be be separated.

Many maximum security prisons operate with the belief that prisoners will behave badly and therefore must be treated harshly with their every movement controlled. At Ringe, we believe that prisoners will behave decently if treated decently and with a minimum of control. The experience at Ringe has been a positive one thus far. Inmates and standard officers alike respond positively to the humane and flexible environment and there have never been any great troubles or problems. One of our hopes and expectations is that other Danish prisons and prisons elsewhere will learn and benefit from our experience. ■

Erik Andersen is governor (Warden) of the state prison in Ringe, Denmark, and has held positions as head of education, deputy governor, and governor at several other Danish prisons. From 1973 to 1974, he was head of the prison officers' training school in Copenhagen; from 1974 to 1976, he headed the Ringe Prison planning committee.

Special Masters Aid in Compliance Efforts

Susan Sturm

This article is based in part on discussions held at a conference in May of 1985 held by the Edna McConnell Clark Foundation on the Role of Special Masters in Implementing Prison Decrees.

Over the past decade, courts and litigants have increasingly turned to special masters to aid in achieving compliance with court orders involving unconstitutional prison conditions. Experience has shown that a court's declaration that the conditions of a prison violate the Constitution and must be changed does not, in and of itself, bring about the required reforms. In fact, the problems that plague unconstitutional prisons and jails are complex and, in some cases, deeply entrenched. The process of achieving constitutional prison conditions often founders without sustained intervention by a neutral, authoritative representative of the

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court—hence the need for the special master.

Special masters are relatively new to prison litigation. Ten years ago, prison masters were few and far between. Now, masters have been appointed "in over 20 jail cases around the country, in another dozen state institutions and in the entire correctional systems of Cook County, Illinois, New York City, and the states of Rhode Island, Oklahoma and Texas."[1]

The use of masters is not without controversy. Although there is a consensus among prison litigators that a master's appointment is necessary to achieve compliance with a prison decree, many prison administrators and state officials oppose the appointment of masters as an unwarranted judicial intrusion in the administration of the prison. Some judges and legal scholars have raised concerns about the potential threat to the legitimacy of the courts posed by the special master's broad mandate. These concerns must be addressed in formulating both the justification for appointing masters and the definition of their role if masters are to continue to be an effective means of achieving compliance with prison decrees.

What Is a Special Master?

A special master is an official appointed by the court to aid in the development and/or implementation of a court order mandating changes in prison or jail conditions.[2] Some masters are appointed after a finding of liability, to aid in the development of a remedial order by fashioning the remedy independently or by mediating between the parties to achieve a negotiated order. Others are appointed later in the process to aid in implementing the court's order. In these cases, the master's formal role is likely to consist of observing and reporting to the court on the defendants' progress toward compliance, holding hearings, and making recommendations to the court concerning standards for compliance and interpretations of the order. In addition, masters may be called upon to mediate disputes that arise among the parties in the course of implementation, to facilitate communication among the absent defendants whose cooperation is necessary to achieve compliance, and to provide expert assistance to the parties in developing and implementing programs.

Appointment of a Special Master.

The circumstances under which it is appropriate to appoint a master vary depending on a number of factors, including the stage of the lawsuit, the subject of the suit, the judge's view of his role, the degree of involvement of counsel, the history of the litigation, the politics of the prison, the position of the defendants and the role and power of the master.[3] One scenario justifying the appointment of a special master was described aptly by Judge Justice: where there is a finding of liability and a showing of intransigence on the part of the defendants, the appointment of a master is appropriate.[4] Sometimes, testimony of key defendants during the hearings on the issue of liability demonstrate to the court that the defendants are incapable of maintaining constitutional prisons. Some officials reveal in their testimony that they are satisfied with prison conditions which violate the Constitution, and are thus simply unwilling to take the

Linda Singer, a Washington attorney, is the special master in Powell v. Ward, *a New York prison disciplinary case.*

steps necessary to bring the prison into compliance.[5] Certainly, in cases where a court order has been in effect for years and the prison conditions continue to violate the Constitution, appointment of a master is justified.

Judicial intervention under these circumstances is constitutionally mandated. Issuance of a court order alone, without some mechanism for enforcing it, is unlikely to enable the court to fulfill its mandate to provide a remedy to inmates. Where defendants are unable or unwilling to enforce a court order, the most effective master may be one with broad powers and a limited role. A master with unlimited access to records, staff and the facility, and the power to hold hearings and issue reports can perform the critical role of establishing a correct and credible factual record that provides a common starting point for the compliance process.[6] Also, by maintaining a presence in the prison, the master is a constant reminder of the specter of the federal court, and may be able to create a powerful incentive to comply with the court order—getting rid of the master.

Demonstrated inability or unwillingness to reform prison conditions is not the only basis for appointing a master. Masters may play a critical role in developing an order that is clear, workable, and acceptable to the parties. Obviously, the order provides the blueprint for the entire implementation process. Many of the problems that arise in the course of implementation result from ambiguous or impractical provisions in the court order. Regardless of whether the defendants have demonstrated the willingness and capability to undertake compliance, a master may be extremely helpful in formulating the terms of the order. If the parties are able to reach agreement on at least some of the terms of the order, this negotiation process may set the tenor for compliance.[7]

Of course, the process of formulating a decree may accentuate the differences between the parties in attitudes and expectations with respect to compliance, and result in a degree of hostility toward the master, who must arbitrate these differences to achieve a result. For this reason, one master has suggested that if a master is to be involved in both development and implementation of the order, it may be appropriate to consider appointing two different people to serve these roles.[8]

Masters may also be effective in achieving compliance through consent decrees, providing the necessary liaison between officials whose cooperation is essential to aspects of the court order. Also, masters can save substantial time and resources by avoiding costly discovery and formal proceedings that often accompany compliance. Moreover, where the parties consent, masters are able to minimize the impact of the adversary process, which has a tendency to polarize the parties and intensify the confrontational atmosphere of the prison. Participation of a master often results in the infusion of resources and attention to the particular system, and enables the parties to compensate for any inadequacies in the court order

[1]Michael Keating, Proposal for a Monograph on Court Appointed Masters, p.7.

[2]For a comprehensive discussion of the role of masters, see Vincent M. Nathan, "The Use of Masters in Institutional Reform Litigation", 10 U. of Tol. Law Rev. 419 (1979).

[3]Remarks of Michael Keating, Clark Foundation Conference.

[4]Remarks of Judge William Wayne Justice, Clark Foundation Conference.

[5]Remarks of Allen Breed, May 3, 1985, Clark Foundation Conference.

[6]Remarks of Vincent Nathan, Clark Foundation Conference.

[7]Remarks by Linda Singer in a telephone conversation of November 14, 1985. Ms. Singer also pointed out that in fact, the decree shifts the power balance, giving the defendants the incentive to negotiate.

[8]Remarks of Allen Breed, Clark Foundation Conference.

without having to return to court for formal proceedings. Because the master may, under these circumstances, act as a catalyst for change required by the consent decree, his involvement may expedite compliance even where defendants have agreed to implement changes in the prison system.

Defendants are likely to resist the appointment of a master as part of a settlement. Masters are often associated with failure on the part of the prison system or inability of its administration to run a decent prison. Also, administrators are interested in minimizing the involvement of the federal court.

One response to defendants' reluctance to involve a master is to change the name. For example, in New York City the parties agreed to the formation of the Office of Compliance Consultants as part of a negotiated decree. Resistance may also be diminished if they are made aware that masters may be more sensitive to the defendants' concerns about security and cost than plaintiffs' counsel, and may in fact end up being less disruptive to the management of the system than aggressive plaintiffs' counsel. Also, masters have been successful in obtaining resources and expertise necessary to achieve compliance.

Structuring the Master's Role: Basic Principles

Several principles have emerged from the experience of masters over the last decade. It is crucial that the master have the support of the judge who appoints him, regardless of the circumstances of his appointment. The master's power and authority derives solely from the court. Unless the court understands and supports the appointment of a master, the master's effectiveness will be limited, at best.[9]

To be successful, a master must also have sufficient power to enable him to perform his duties effectively. As Ralph Knowles stated, it is worse to have an ineffectual master than no master at all. A compliance panel charged with general oversight duties with no real authority creates the illusion that something is being done when, in fact, the situation remains the same.

[9]Remarks of Ralph Knowles and Allen Breed, Clark Foundation Conference.

It is just as important, however, for the parties and the court to recognize and make explicit the limits of the master's power.[10] Experienced masters have reiterated that it is crucial that masters have no power to participate in the day-to-day decisions in the prison or to administer directly. Masters also emphasize that they should not become involved in the budgetary process. Some courts have even placed such limitations on the master's role in the order of reference to alleviate defendants' fears. Moreover, masters cannot effectively play the role of mediator or advisor without the consent of the parties. By defining the master's formal role as largely one of fact-finding and reporting to the court, courts may reduce defendants' resistance to the master's involvement and alleviate at least some of the concerns about its legitimacy.[11]

Experience has shown that concerns about a master's legitimacy have a direct

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[10]Remarks of Vincent Nathan, Allen Breed and Michael Keating, Clark Foundation Conference.

[11]Remarks of Allen Breed, Clark Foundation Conference.

Private Prison Plans Dropped by Buckingham

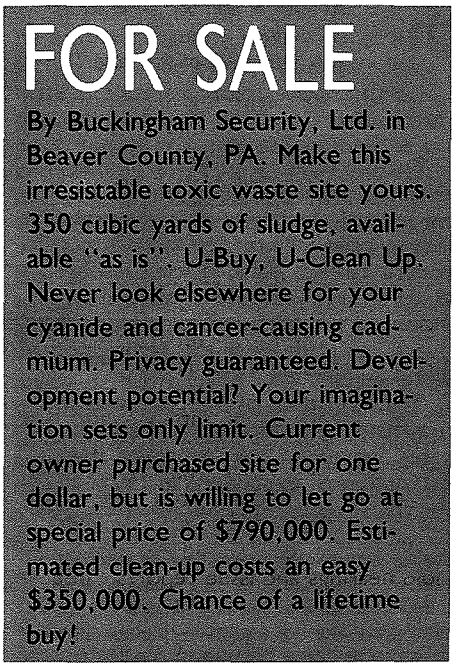
Jan Elvin

In the last issue of the *JOURNAL*, we reported that Buckingham Security Ltd., a private corrections firm, was making plans to build a private prison on a toxic waste site in Beaver County, Pennsylvania.

They have since abandoned those plans and are attempting to sell the land, which they purchased for one dollar, for $790,000.

The maximum security prison was to house 716 protective custody inmates from various states. Buckingham's plans, however, were placed in jeopardy by the threat of a moratorium bill in the Pennsylvania legislature, which would have put on hold any construction or operation of private prisons for one year while questions concerning their use could be answered. The bill has since been amended to incorporate a bill licensing privately managed, minimum security, short-term facilities. At present, there is no procedure for licensing a private prison, such as the one Buckingham has in mind, in the state.

According to Sue Frietsche of the Pennsylvania Civil Liberties Union, Pennsylvania legislators were put off more by the idea of the state being used as a "dumping ground for other states' prisoners," than by the idea of a prison built on a hazardous waste site.



The threatened moratorium bill had a chilling effect on Buckingham's ability to get financing for the protective custody facility, and that is probably the main reason behind the firm's decision to back off. "We cannot afford to continually spend additional funds on this project while there remains a threat of a moratorium on private prison construction or while no positive legislation is passed which constructively regulates private prisons," said Joseph Fenton, Executive Vice President of Buckingham, in a letter to a supporter of the building project.

In addition, a study released in early October by the Legislative Budget and Finance Committee of the Pennsylvania General Assembly identified a host of potential problems associated with privatization, including: government liability for private entrepreneurs' actions; lack of legal provisions for emergencies such as riots, escapes, and bankruptcies; possible misuse of the profit motive; lessening of public accountability; lack of established relationships with other parts of the criminal justice system; potential creation of a private monopoly; and the problem of the use of deadly force and firearms by private prison guards.

News reports indicate that Buckingham is now trying to open the protective custody institution in Idaho after they sell the Beaver County property. According to Barry Steinhardt, Executive Director of the Pennsylvania ACLU, "the political climate in Pennsylvania is such that they could never get a license now."

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bearing on his effectiveness. The master must be able to define and maintain a position of neutrality in order to function effectively.[12] In the past, masters have sometimes carried out their responsibilities in the absence of any clear guidelines as to how to proceed, what to achieve and what to avoid. This absence of a clear mandate can lead to unrealistic expectations and mixed signals among inmates and prison officials alike. For this reason, masters now recognize the importance of defining carefully, in the order of reference, a master's duties, responsibilities, powers and limitations.

Although there is no consensus as to whether a master should be a lawyer, corrections expert, mediator, or some combination thereof, one essential qualification is that he or she be perceived as a highly respected member of his or her profession. The integrity and competence of the master must be beyond dispute.

It is also important to recognize that the process of change involved in achieving compliance, particularly in an institution as complex and politicized as a prison, requires time. A master is not a magician; it is reasonable to expect that the compliance process will begin with resistance to the court and the master, and will give way to a determination to comply with the court order, at least so that the mastership will end.[13]

Throughout the compliance process and beyond, it remains the defendants' responsibility to achieve and maintain compliance. Masters cannot and should not undertake that role. At the same time, it makes sense to build into a court order a means for enabling defendants to monitor their own activity and to institutionalize changes in the prison or jail.[14] Hopefully, at some point in the process a master will no longer be necessary to maintain a constitutional prison. ■

Susan Sturm is an attorney associated with the New York firm of Teitelbaum & Hiller. She has worked for a special master, has written articles on the subject, and is a consultant to the Edna McConnell Clark Foundation on these issues.

[12]Remarks of Michael Keating, Clark Foundation Conference.

[13]Remarks of William Nagle, Clark Foundation Conference.

[14]Alvin Bronstein has suggested five essential components to institutionalize change in prisons and jails: (1) ongoing training of staff; (2) written policies; (3) internal compliance mechanisms; (4) ongoing reporting mechanisms to the court; and (5) education of the staff about what the order requires and how the prison administration plans to comply. Remarks of Alvin Bronstein, Clark Foundation Conference.

Judicial System Inconsistent In Doling Out Death

Stephen B. Bright

When the Supreme Court struck down the capital punishment statutes in existence in 1972, Justice Thurgood Marshall hailed the decision as "a major milestone in the long road up from barbarism."[1] However, the pause at the milestone was only temporary.

The death penalty, unique in its pain, its finality and its enormity, has returned as a form of punishment in the United States. In many respects, it exists today as it did before 1972: it is meted out primarily in the South in a random and racially discriminatory fashion against the poor.

Today's executions in many states draw crowds of proponents of capital punishment to cheer the executioner on. Coverage of the ritual surrounding a state's first execution usually rivals that of a football game.

But the business of killing people remains a primitive, grisly one. It took five jolts of electricity over the course of seventeen minutes for Indiana to electrocute William Vandiver on October 16, 1985. His was one of several prolonged and tortured executions that have taken place since the resumption of capital punishment.[2]

The execution of Vandiver was the forty-ninth execution since the United States Supreme Court approved the resumption of executions in 1976. It was the seventeenth execution this year. Twenty-one people were killed by the states in 1984. Thirty-seven states now have the death penalty and over 1500 persons are on death rows throughout the country.

This is more than twice the number of people that were on death row in 1972 when the Supreme Court in *Furman v. Georgia* found that the death penalty as inflicted up until that time violated the constitutional protection against cruel and unusual punishment. Different justices found the penalty cruel and unusual for different reasons, but their opinions demonstrated the inglorious role the death penalty has played in the history of this country's attempt to deal with crime.

Justice William O. Douglas found the death penalty unusual because of its discriminatory impact on black people and the poor. Justice Marshall pointed out that of the 3,859 persons executed after the Justice Department began keeping statistics in 1930, 2,066 were black and 1,751 were white. Of the 455 persons executed for rape, 405 were black.[3] Both Justice Marshall and Justice William Brennan found the penalty excessive and inconsistent with evolving standards of decency that mark the progress of a maturing society. They continue to adhere to that view today.

Justices Potter Stewart and Byron White found the death penalty unusual because it was so infrequent and random in application. Justice Stewart wrote that the death penalty was cruel and unusual "in the same way that being struck by lightning is cruel and unusual."[4]

Within months of *Furman*, a number of states passed new capital punishment laws. In 1976 the Supreme Court upheld the laws of Florida, Georgia and Texas on the assumption that their new death penalty laws would prevent the arbitrariness as well as racial and economic disparity in the imposition of the death penalty.[5]

The new laws were to meet this objective by limiting the death penalty to those cases where the sentencer found one or more aggravating factors.[6] However, most states include in their aggravating factors frequently encountered felony murder situations, such as homicides occurring in a robbery or burglary, and a "catchall" aggravating circum-

[1]*Furman v. Georgia*, 408 U.S. 238, 371 (1972), quoting Ramsey Clark, *Crime in America*, 336 (1970).

[2]See for example the descriptions of electrocutions in *Glass v. Louisiana*, ____ U.S. ____, 85 L.Ed.2d 514, 516-525 (1985) (Brennan, J., dissenting the denial of certiorari). Electrocutions, described by Justice Brennan as "the contemporary technological equivalent of burning people at the stake", *id.* at 525, is the method of execution used by the most states, 18. A description of death by lethal gas appears in *Gray v. Mississippi*, 710 F.2d 1048, 1057-1061 (5th Cir. 1983).

[3]408 U.S. at 364.

[4]408 U.S. at 309.

[5]*Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976).

[6]A variation is the Texas statute approved by the Court in *Jurek v. Texas*, which defines capital homicides as five specified situations of murder and then provides that upon a conviction of capital murder the jury is to answer certain questions at the sentencing phase before death can be imposed.

stance that applies to virtually any murder. For example, Florida and many states provide for the death penalty if the murder is "heinous, atrocious, or cruel," Fla. Stat. 921.141 (5)(h), while Georgia and others provide for death if the murder is "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery". Off. Code. Ga. Ann. 17-10-30 (b)(7).

These broad provisions give prosecutors and local juries vast discretion in seeking or imposing death. The decision to seek death is committed completely to the discretion of the local prosecutor in most states. Some prosecutors may seek death routinely in all murder cases, while others may not seek it at all. Thus, in Georgia, which has had its present death penalty statute since 1973, the death penalty has been imposed in only one third of the state's counties. One small rural judicial circuit with a population of 100,000 has imposed more death sentences than the circuit which includes Atlanta and has a population of 600,000.

Such discretion has contributed to the reemergence of the same patterns that existed up until 1972.

The majority of those on death row are in the South, the part of the country that, historically, has utilized the death penalty most often. Of the 49 executions which have occurred since 1976, all but four have been in the South. All four executions outside the South were suicide executions in which the condemned person gave up his appeals and asked the state to kill him.

Florida, which had the most people on death row at the time of the Supreme Court's decision in 1972, has the most today, over 200. It has killed the most people, 13. Georgia, historically the nation's leading executioner, ranks second to Florida in the number of persons per 100,000 population sentenced to death, with over 100 persons on its death row. Texas and California also have over 100 people on their death rows.

Race continues to be a prominent factor in who is killed. Georgia, which executed 337 black persons and only 75 whites between 1924 and 1972, has killed five blacks and one white since 1976. The most exhaustive study done on death sentencing in America concluded that the odds that a defendant will be sentenced to death in Georgia are four times higher if the victim is white than if the victim is black.[7] This

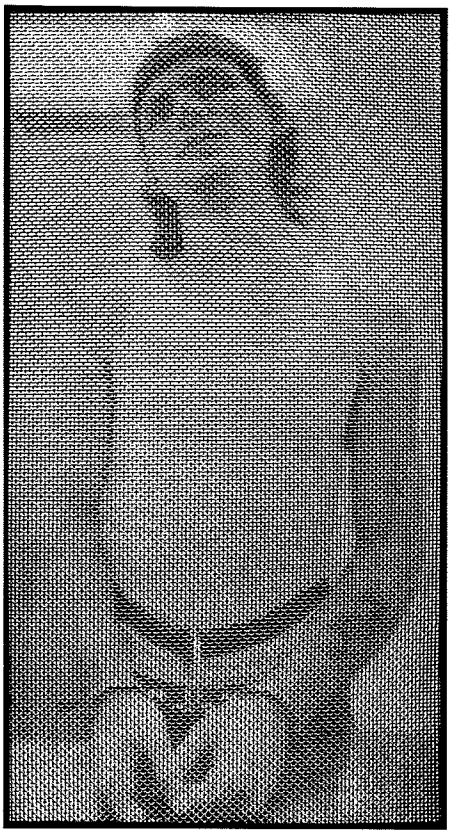


Photo by Ted Jackson, Times Picayune

finding reflects the racial attitudes of many Georgia prosecutors and juries in seeking and imposing the death penalty in the case of a person accused of killing a prominent white person, but not in the case of a defendant charged with killing a black person.

In addition to the importance of the race of the defendant and race of the victim, the race of who decides punishment is a critical factor which often determines life or death. Minorities and poor people are underrepresented in the composition of jury pools in many communities. Prosecutors routinely use all of their peremptory challenges to exclude all blacks from the jury.[8] The result is that all-white juries often decide whether a black person accused of killing a white person will live or die.

Similarly, poverty continues to be a major determinant of who is sentenced to death. Supreme Court Justice William O. Douglas observed in 1972 that "one searches in vain for the execution of any member of the affluent strata of this society."[9] Today is no different; virtually all of those condemned to die are poor.

For the poor person charged with a capital offense in the deep South, the major consequence of poverty is legal representation at trial by a court-appointed lawyer. There are still many states which do not have public defender systems and provide only minimal compensation to lawyers who defend poor people accused of crimes. For example, in Mississippi the most a court-appointed lawyer can be paid is $1000. For a lawyer who recently spent 400 hours in defense of his client and was paid that amount, his compensation was a mere $2.50 per hour.

In addition, defending persons in capital cases is often bad for a lawyer's business in a small community. Thus, it is not unusual for capital cases to be defended by inexperienced or incompetent counsel who cannot find any work other than court-appointed cases. Nor is it unusual for court-appointed lawyers to let the jury know that they are representing the defendant only because they had to do so.

As a result, many defendants receive only perfunctory representation at their trials. Tom Wicker, Associate Editor of *The New York Times,* has observed that "something near a pattern of inadequate or incompetent legal representation can be found in death penalty cases, particularly in the South, particularly for the poor and uneducated persons."

Justice Thurgood Marshall pointed out recently how the complexity of capital punishment litigation and the lack of expertise of most counsel in death cases can have fatal consequences for the person facing death:

> *Often trial counsel simply are unfamiliar with the special rules that apply in capital cases. . . . Though acting in good faith, they inevitably make very serious mistakes. Thus, in cases I have read, counsel have been unaware that certain death penalty issues are pending before the appellate courts and that the claims should be preserved; that certain findings by a jury might preclude imposition of the death penalty; or that a separate sentencing phase will follow a conviction. The federal reports are filled with stories of counsel who presented* no *evidence in mitigation of their client's sentences because they did not know what to offer or how to offer it, or had not read the state's sentencing statute. I kid you not, precisely that has happened time and again.*[10]

—*continued on next page*

[7]The study is discussed in the various opinions in *McCleskey v. Zant,* 753 F.2d 877 (11th Cir. 1985) (en banc), in which a majority of the Court of Appeals for the Eleventh Circuit rejected a challenge to the arbitrariness and racial discrimination in the administration of the death penalty in Georgia. A petition for certiorari on behalf of McCleskey is pending in the Supreme Court.

[8]This practice is allowed by the Supreme Court's decision in *Swain v. Alabama,* 380 U.S. 202 (1965). The Court has granted certiorari to reconsider *Swain* in *Batson v. Kentucky, cert. granted,* ____ U.S. ____, 37 Cr.L.Rptr. 4034, 4047 (1985).

[9]*Furman v. Georgia,* 408 U.S. 251-52.

[10]Remarks of Justice Thurgood Marshall at Judicial Conference of United States Court of Appeals for the Second Circuit, Sept. 6, 1985. For

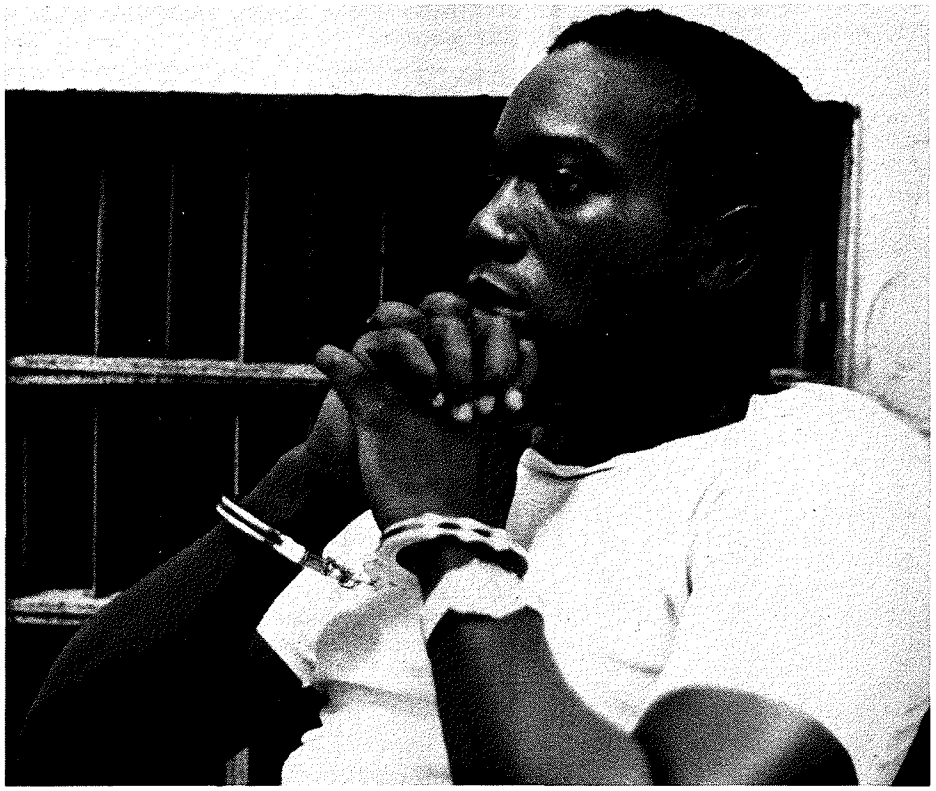


Photo by Judson Orrick

The condemned sometimes come within days of execution without counsel.

Unfortunately, many instances of attorney inadequacy are not corrected by reviewing courts. James David Raulerson was executed by the State of Florida in January even though his attorney confessed his ineffectiveness in an exceptionally brief closing argument and failed to make any plea for the jury to spare his client's life. He did not even tell the jury that Raulerson was married and had a child; that his stepfather had died in his arms after being shot several years earlier; that he had maintained regular employment for a number of years before the tragedy involving the stepfather; or a number of other mitigating factors about Mr. Raulerson.

In showing how the death penalty had been randomly applied, Justice Douglas in *Furman* pointed to an instance where one person was saved from electrocution because his attorney made timely objection to the jury selection system while another person was sent to his death by a jury selected in precisely the same manner because his lawyer did not raise the issue.[11] Exactly the same thing occurred in the case of the first person executed in Georgia, John Eldon Smith. As described by Judge Joseph Hatchett of the U.S. Court of Appeals for the Eleventh Circuit:

> *[Smith's codefendant] Machetti, the mastermind of this murder, has had her conviction overturned, has had a new trial and has received a life sentence. This court overturned her first conviction because in the county where the trial was held, women were unconstitutionally underrepresented in the jury pool . . . . Her lawyers timely raised this constitutional objection. They won; she lives.*
>
> *John Eldon Smith was tried in the same county, by a jury drawn from the same unconstitutionally composed jury pool, but because his lawyers did not timely raise the unconstitutionality of the jury pool, he faces death by electrocution. His lawyers waived the jury issue.*

Smith v. Kemp, 715 F.2d 1459, 1476 (1983). Judge Hatchett found Georgia's first execution to present "a classic example of how arbitrarily this penalty is imposed."

Although defending a poor person accused of a capital crime is bad for a lawyer's business, *prosecuting* a celebrated murder case is still good for one's political career. Thus, it is not unusual to encounter the most base forms of demagoguery in capital trials. A number of states have prosecutors whose political identity is the death penalty and who routinely seek death in murder cases. These prosecutors often give closing arguments that are more appropriate for a lynch mob than a jury.[12]

Death sentences are reviewed by the state supreme court, where in most states the justices, like the trial judges, are elected. Perhaps for that reason, many of these courts have shown remarkably little interest in the most basic violations of due process and lack of effective representation.

As a result, those sentenced to death must seek remedies for fundamental constitutional violations in the federal courts by filing petitions for writs of habeas corpus. However, many states provide lawyers to poor people sentenced to die only at trial and on direct appeal to the state supreme court, leaving it to the condemned to find lawyers to prepare a petition for certiorari to the Supreme Court or a petition for a writ of habeas corpus.

Finding lawyers for the condemned has become increasingly difficult as the number of persons on death row has grown. Many are represented by lawyers on a volunteer basis or by overburdened lawyers from public interest legal projects.

As the difficulty in providing lawyers continues to grow, some condemned persons come within days of execution without counsel to represent them in post-conviction proceedings. When this happens there is a strong possibility that, when a lawyer is found at the last minute, in the rush to learn about the client and the case, issues will be missed, essential fact investigation will not take place and a person entitled to relief may eventually be executed.

On the other hand, if counsel can be obtained before any crisis develops, papers can be carefully prepared based on full investigation and research and litigation will commence in an orderly fashion. Thus, whether a condemned person obtains relief from an unconstitutional conviction or sentence may depend on the availability of volunteer counsel. Once again, whether the condemned lives or dies may be a matter of chance.

Those who populate death rows throughout the nation are not necessarily the worst offenders, but the poorest, the most limited, and most powerless. Many have serious mental problems that are not adequately evaluated or diagnosed.

examples of the type of representation described by Justice Marshall, see, e.g., *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985); *King v. Strickland*, 748 F.2d 1462, 1463-64 (11th Cir. 1985); *Douglas v. Wainwright*, 739 F.2d 531 (1984); *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984); *Young v. Zant*, 677, F.2d 792, 798 (11th Cir. 1982); *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982).

[11] *Furman v. Georgia*, 408 U.S. at 256 n.21.

[12] See, e.g., the closing argument set out to Judge Clark's dissent in *Brooks v. Kemp*, 762 F.2d 1383, 1444-1449 (11th Cir. 1985). The Supreme Court held that a misleading closing argument about appellate review required that a death sentence be set aside in *Caldwell v. Mississippi*, 472 U.S. ____, 86 L.Ed.2d 231 (1985), last term.

Some are innocent. Jerry Banks spent five years on Georgia's death row before his innocence was established and he was released. Earl Charles spent over three years on Georgia's death row before it was established that he was in Tampa, Florida at the time the crime occurred in Savannah, Georgia.

Thirty-two were juveniles at the time of the offense for which they were sentenced to death. Three were 15, seven were 16 and 22 were 17. Charles Rumbaugh, executed by Texas last September, was 17 at the time of his crime.

What the experimentation with killing since 1972 has taught us is what the Supreme Court said a year before it decided *Furman,* that to identify "those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express those characteristics in language that can be fairly understood and applied by sentencing authority, appear to be tasks beyond present human ability."[13]

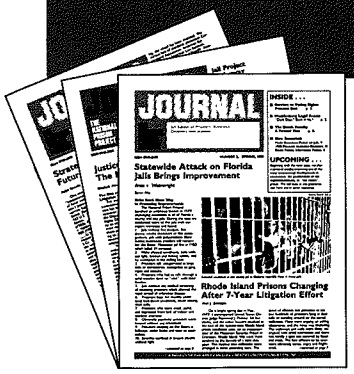
In sentencing hundreds of people to death since 1972, the states have still not overcome centuries of racial prejudice, the disparity between justice for the rich and the poor, the political motives of many prosecutors, and the differences between communities even within the same state. As a result, it has not been possible for those who are asked to decide life and death to put aside the passions of the moment and attempt to understand a person of another economic stratum, another race, and another upbringing.

In such proceedings, a handful of people are randomly selected to die for the 25,000 homicides committed each year in this country. This is not a solution to the problem of crime and violence in our society. It is simply criminal justice quackery. ■

Steve Bright is the Director of the Southern Prisoners' Defense Committee, Inc. in Atlanta, Georgia. SPDC represents persons throughout the South who are sentenced to death, and also engages in civil rights actions affecting conditions in prisons and jails in the South.

[13] *McGautha v. California,* 402 U.S. 183, 204 (1970).

PUBLICATIONS



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

The Prisoners' Assistance Directory, the result of a national survey, identifies and describes various organizations and agencies that provide assistance to prisoners. Lists national, state, and local organizations and sources of assistance including legal, library, medical, educational, employment and financial aid. 6th edition, published January 1985. Paperback, $15 prepaid from NPP.

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

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

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

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

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

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

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HIGHLIGHTS

The following are major developments in the Prison Project's litigation program since July 15, 1985. Further details of any of the listed cases may be obtained by writing the Project.

Black v. Ricketts - This case challenges conditions of confinement in the Administrative Segregation Unit of the Arizona State Prison in Florence. Allen Breed was appointed compliance monitor to oversee the comprehensive settlement agreement approved by the court in June.

Brown v. Sielaff - This case challenged conditions and practices at the supermaximum security prison (Mecklenburg Correctional Center) in Virginia. In July, the court approved the settlement agreement which abolished the prison's behavior modification program and which affected a wide range of conditions and practices.

Bush v. Viterna - This case challenges conditions at all jails in Texas. We received a disappointing district court decision dismissing the case on jurisdictional grounds. We have filed an appeal with the Court of Appeals.

Canterino v. Wilson - This case successfully challenged conditions and practices at the Kentucky Correctional Institution for Women. In September we received a first payment on our award of attorneys' fees.

Cody v. Hillard - This case challenges a variety of conditions at the South Dakota State Penitentiary. The state recently appealed that part of the previously attained favorable decision which prohibited double-celling.

Duran v. Anaya - This is a state-wide prison conditions case in New Mexico. The defendants filed a motion to modify the maximum security provisions of the consent decree, and we have filed a motion to hold the defendants in contempt for non-compliance with various portions of the decree. Settlement negotiations have been held on a regular basis.

Grubbs v. Norris - This case successfully challenged conditions in the entire Tennessee prison system. In October, after a finding of non-compliance with earlier population reduction orders, the court enjoined the state from allowing any new prisoners into the state prison system except under special circumstances.

Inmates of D.C. Jail v. Jackson - This case challenges conditions of confinement of pre-trial and sentenced prisoners at the D.C. Jail. In July the court held the jail to be unconstitutionally overcrowded and ordered a ban on intake of new inmates unless the population was reduced by 900. In August the defendants dropped their appeal and signed a consent order agreeing to reduce population.

Nelson v. Leeke - This case challenges conditions in the major South Carolina prisons. A settlement reached with the state was finally approved by the court in November.

Palmigiano v. Garrahy - This case challenges conditions in the entire Rhode Island prison system. The special master recently filed a report indicating severe overcrowding at two of the facilities. An evidentiary hearing was held in mid-December.

Spear v. Ariyoshi - This action challenges conditions of confinement at two Hawaii prisons. The compliance plans required by the recent settlement agreement were filed in October and the defendants have maintained the agreed population reduction schedule.

Terry D. v. Rader - This action challenges conditions in six juvenile institutions in Oklahoma. In September the court entered an order awarding us attorneys' fees and the defendants have announced their intention to appeal.

During this period the National Prison Project received $601,869 in attorneys' fees and costs in various cases. These fees and costs help make up part of the Prison Project budget and enable us to continue our work.

VOTING RIGHTS

In the Spring 1985 issue of the *JOURNAL* we reported that 26 states now have some form of automatic restoration of the right to vote upon release or completion of parole and probation. New Jersey should have been included on that list and was not. According to T. Gary Mitchell, Director of the New Jersey Department of the Public Advocate, the prohibition denying a right to vote in New Jersey excludes only those inmates who are serving a sentence or are on parole or probation as a result of a conviction for an indictable offense.

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