JOURNAL

THE NATIONAL PRISON PROJECT

DC Jail Crisis . . . See p. 8

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INSIDE . . .

In the Fall, we are raising the annual subscription rate for the *JOURNAL* to $20. A *JOURNAL* subscription will remain $2 for prisoners.

Recent Federal Court Orders Spur Tennessee Toward Prison Reforms

Gordon Bonnyman

For decades the conventional political wisdom in Tennessee dictated that there was no political constituency for prison reform. Although voters could always be counted on to support longer prison sentences, they were indifferent or even hostile to improving prison conditions. The resultant neglect produced squalor, waste and violence throughout the prison system.

A federal court has recently turned conventional wisdom on its head, creating a powerful political constituency for prison reform almost overnight. Improvement in conditions has already been dramatic, and continued reform is promised. These developments offer an encouraging example of the progress made possible by the careful and well-timed intervention of a federal court committed to the rule of law and the vindication of prisoner's rights under the Constitution.

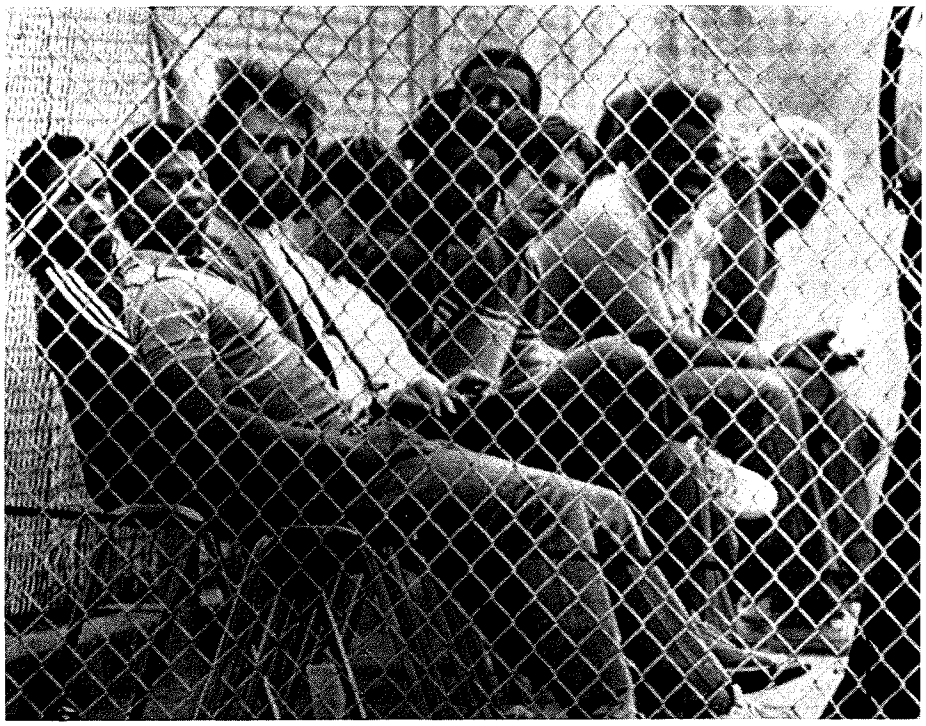
In only three months, the increase wiped out the gains in population reduction that had been made over a period of more than a year.

The recent legal and political developments are the result of court battles waged by the National Prison Project and Tennessee co-counsel for more than ten years. In the fall of 1975 we filed a class action in state court on behalf of Tennessee inmates. The prisoners' claims in that case were based not only on the Eighth Amendment's prohibition of "cruel and unusual punishment," but also on Tennessee's unique state constitutional guarantee of "safe and comfortable prisons" and the "humane treatment of prisoners." After five years of litigation and early successes in the trial court, the case came to an inconclusive end when Tennessee's Supreme Court refused to rule on the merits of the case, leaving the hot potato of prison reform to the federal court.

Throughout the course of the state court proceedings, Tennessee, like almost every other state, was confronted with steadily worsening overcrowding of its prisons. Such overcrowding resulted from the stiff sentencing policies adopted by state courts and lawmakers in reaction to increases in the crime rate in the 1960s and 1970s. Like most other states, Tennessee responded to the overcrowding crisis by attempting to "outbuild" the population trend. The state initiated an ambitious prison construction program, which was particularly costly in light of the fact that Tennessee's per capita income is among the lowest in the country. Between 1973 and 1983, the prisoner population jumped from 3,000 to 7,000, and the number of major prisons also more than doubled, from

—continued on page 11

Tennessee prisoners wait for cells to be found for them at one of the reception centers.



A/P World Wide Photos.

Letter to the Editor

In the Winter 1985 issue we published an article by Susan Sturm entitled, "Special Masters Aid in Compliance Efforts." The following letter is in response to that article.

Dear Ms. Sturm:

This letter is prompted by your article in the Winter 1985 issue of the National Prison Project *JOURNAL* regarding the role of Special Masters in implementing prison decrees. Because of your leadership role in this area, I thought it might be appropriate to bring to your attention the experience of one state which appears to contradict one of your conclusions.

In the article, you state:

"The master must be able to define and maintain a position of neutrality in order to function effectively. 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 order of reference, a master's duties, responsibilities, powers and limitations."

In 1982, a U.S. District Court declared unconstitutional major portions of the Tennessee prison system. *Grubbs v. Bradley,* 552 F.Supp. 1052 (M.D. Tenn. 1982). The initial opinion of the court called for the appointment of a Special Master, and, in doing so, set out in general terms the parameters of the Special Master's role. 552 F.Supp. at 1131. Actual selection and appointment of a Special Master did not occur until three months later, by which time a decision had been made by the state not to appeal the original decision. The order of reference, which was entered on November 12, 1982, read in its entirety as follows:

"It is ordered that Patrick McManus be and he is hereby appointed the Special Master in accordance with a memorandum and order of this court entered on August 11, 1982. He will carry out the provisions of the order and will be compensated at the rate of $50 per hour. He will make one report to the Court when the terms and conditions of the memorandum and order are complied with. These cases are retired."

Thus, the order of reference was on the one hand very vague and on the other hand fraught with quite serious implications for the state. The court in essence was telling the state that it would have to make its peace with the Special Master, to whom the court was, in effect, entrusting the implementation of the decree. While the Special Master's powers were explicitly circumscribed in the original decision of August 11, 1982, he implicitly was given very broad powers in the subsequent order of reference.

The ambiguity of the Special Master's role has, I think, been an asset to the parties and the court in their efforts to resolve the litigation. The Tennessee prison system has been wracked with violence and riots since the court's initial decision and the appointment of the Special Master, and we are still years from achieving a constitutional system which would justify the closing of the case. Nonetheless, there has been very substantial progress to date, with reason to believe that we will someday be able to achieve a system which does more than simply meet constitutional minima. While "the jury is still out" on the Tennessee experience, there is reason to preliminarily judge the experience with "mastering" here as being a success.

Although the *Grubbs* court's approach to defining the Special Master's role in ambiguous terms appears to have worked well in Tennessee, I would hesitate to be prescriptive about using the same approach in all other cases. The political climate, as well as the personal histories, temperaments, and personal and professional relationships of the various players all tended to create a context which made the court's approach particularly appropriate.

I tend to think that the same ambiguous definition of the Special Master's responsibilities might be similarly desirable in some other, but by no means all, cases.

I do not want to imply that the course of the litigation since the entry of the original order has been tranquil or uncontroversial. On the contrary, it has been characterized by a great deal of political and legal controversy, contempt proceedings, and the imposition of an unprecedented injunction against admissions into the prison system, pending resolution of the overcrowding crises. At the same time, substantial progress has been made through hard bargaining and the negotiation of consent decrees. The Special Master has been able to modify his role as appropriate to respond to these varying conditions and crises. That he has managed to do so while maintaining his neutrality is attested to by the fact that state officials concurred in Mr. McManus' appointment as Special Master in 1985 in a separate lawsuit dealing with conditions of confinement on Tennessee's death row.

I hope that this information is helpful to you and to others at the national level who are analyzing the experience of "mastering" around the country in an effort to identify which approaches are the most effective in different cases.

Sincerely,
Gordon Bonnyman

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

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

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

Muslims in Prison Seek Religious Recognition

Nkechi Taifa-Caldwell

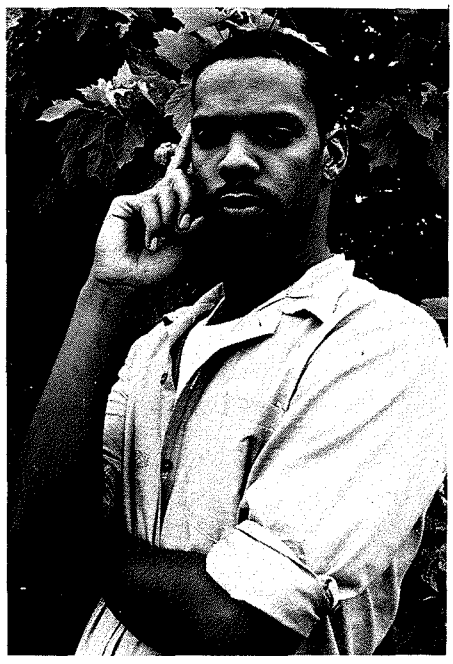
In the past, we have seen great resistance to official recognition of the practice of certain non-Christian religions within America's prisons. This resistance has often stemmed from the cultural prejudices of prison administrators, under the guise of security concerns. In the 1960s the courts began to carefully scrutinize how those regulations and practices infringed upon the right of inmates to practice the religion of their choice. Prison administrators across the country have begun to recognize, albeit reluctantly, that certain groups, particularly Black inmates, possess legitimate religious interests and modes of expression.

Since the 1960s, thousands of Black prisoners have embraced Islam as their faith, and many of its most prolific ministers have spent time in prison. A 1960 address by slain Nation of Islam (NOI) minister Malcolm X, described the achievements of Nation of Islam leader Elijah Muhammad, in converting the imprisoned:

"He has taken men who were thieves, who broke the law—men who were in prison—and reformed them so that no more do they steal, no more do they commit crimes against the government. I should like to think that this government would thank Mr. Muhammad for doing what it has failed to do toward rehabilitating men who have been classed as hardened criminals. The psychologists and the penologists—all the sociologists—admit that crime is on the increase, in prison and out. Yet when the Black Man who is a hardened criminal hears the teachings of Mr. Muhammad, immediately he makes an aboutface. Where the warden couldn't straighten him out through solitary confinement, as soon as he became a Muslim, he begins to become a model prisoner right in that institution, far more than whites or so-called Negroes who confess Christianity."[1]

Contrary to "thanking Mr. Muhammad," as Minister Malcolm suggested, many prison administrators responded to the rapid embrace of Islam under the direction of the Nation of Islam by claiming that it was not a religion, and that its converts were protected by none of the constitutional rights enjoyed by followers of the more conventional religions.

At the same time, mass hysteria was being generated against the Nation of Islam (popularly known as "Black Muslims") in the larger society. Through the Freedom of Information Act, we now have evidence that the Federal Bureau of Investigation used every "dirty trick" at its disposal to attempt to misdirect and disrupt the Black liberation movement in general, and the Nation of Islam in particular. The FBI targeted not only the Nation of Islam for attack, but also



Anthony Coleman, Lorton Photography Workshop

such groups as the NAACP, the Black Panther Party, the National Urban League, the Republic of New Afrika, the Southern Christian Leadership Council, and the Student Nonviolent Coordinating Committee. The stated goals of the FBI's program, code-named COINTELPRO, were to prevent the coalition of Black nationalist groups, prevent the rise of a Messiah who could unify and electrify the movement, pinpoint potential troublemakers and neutralize them, prevent groups and leaders from gaining respectability, and prevent the growth of these organizations, especially among the young.[2]

A bulletin emanating from the Chicago FBI office in 1969 illustrates just one of countless examples:

"Over the years considerable thought has been given, and action taken with bureau approval, relating to methods through which the NOI could be discredited in the eyes of the general Black populace . . . ."[3]

Nation of Islam pronouncements equating whites with "devils," advocating a separate territory for Blacks, and maintaining a highly disciplined paramilitary force were more than enough to send chills up the spines of those who, consciously or unconsciously, felt threatened by this reinvigorated attempt within segments of the Black community to blend spirituality, racial pride and identity into a cohesive force.

Interpretations of Islam and its holy text, the Koran or Qu'ran, vary, and such distinctions likewise manifest inside prison walls. The societal fears and governmental efforts to discredit the Islamic faith, however, demonstrate the obstacles that those who have embraced the Islamic faith have struggled with in their arduous battle with prison officials, simply for recognition of their religion.

Since the 1960s, thousands of Black prisoners have embraced Islam as their faith, and many of its most prolific ministers have spent time in prison.

In addition to the Nation of Islam, other Muslim groups such as the American Muslim Mission, Moorish Science Temple of America, Sunni Muslims, Melanic Muslims, Shiite Muslims, and Al-Islam also have adherents in prisons, and all have been engaged in court battles for recognition of their religious faiths.

Religious Rights in Prison

The argument over the constitutionally protected rights of Muslims in prison has focused on the following: the right to a religious diet, the recognition of religious names, and the controversy over pat frisks by female guards. These and many other issues have been addressed by the courts, and the decisions have generally sought to balance the inmates' right to religious freedom with prison officials' concern for security and discipline.

The Right to a Religious Diet

The Islamic religion prohibits the consumption of pork, and requires the observance of the religious holiday of

—continued on next page.

[1] Address by Malcolm X, Boston University Human Relations Center, February 15, 1960, reprinted in *The Black Muslims in America,* C. Eric Lincoln.

[2] "Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans," Washington: U.S. Government Printing Office, 1976, pp. 21-22.

[3] SAC Chicago, "Counterintelligence Program, Black Nationalist Hate Groups Racial Intelligence (Nation of Islam)," Chicago: January 22, 1969, pp. 1-5.

—continued from previous page.
Ramadan. In celebrating Ramadan, followers are to refrain from eating during the daylight hours, and are to consume only ritually significant foods after sunset and before sunrise. The dietary requirements of Muslim prisoners have often led to conflict between prisoners and corrections officials. Because of its low cost, pork and its by-products frequently appear on prison menus, sometimes to the extent that an adequate non-pork diet is unavailable. Furthermore, prison officials assert that the widespread use of pork as a seasoning makes it difficult to isolate pork-free dishes.

Although prison administrators generally defend these policies on the grounds of cost, convenience and security, courts have upheld many of the dietary requirements of the religion. The District of Columbia Circuit, for example, held that inmates in the D.C. Jail had a valid claim against Jail administrators since their request for a minimum of one full-course pork-free meal per day had been denied. The court held that the use of pork as a seasoning could be reduced, non-pork substitutes for main dishes could be provided, menus showing pork content could be posted in advance, and pork dishes could be more evenly dispersed throughout the meal cycle.[4]

Similarly, another court emphasized:

"[T]he state has little affirmative interest in what kind of food prisoners eat; and it is of no great problem to prepare alternative diets. The rule presumably would be different if the prisoner's religion mandated him to eat the tongues of hummingbirds and drink the milk of paradise."[5]

Once the inmate rejects the pork items, if the regular menu can provide a nutritionally adequate non-pork diet, then he is required to accept it. The Food Services department must identify any items which might contain pork.[6] Muslim prisoners have also established the right not to handle pork as part of their work assignments.[7]

Courts, however, have placed some restrictions upon the Islamic prisoner's right to adhere to the dietary tenets of the religion. Utensils used in preparation of non-pork meals need not be segregated from pork items as long as they are sufficiently cleaned before being used to cook food consumed by those who do not eat pork.[8]

In *Walker v. Blackwell,* 411 F.2d 23 (5th Cir. 1969), several Muslims alleged that their First and Fifth Amendment rights had been violated since prison administrators refused to provide them with a special diet and special feeding hours during the observance of Ramadan, which lasts 30 days. The prison officials had been providing Jewish inmates with one special meal each year during Passover. The Fifth Circuit, however, held that a special diet lasting 30 days, instead of just one, could not be provided because of the added cost of preparation, and the additional "security problem" created by assigning security staff to move the Muslims during the night hours. These factors served to outweigh "whatever constitutional deprivations petitioners may claim."[9]

Recognition of Religious Names

A prisoner's need for cultural and religious identity has compelled many to adopt another name. A look at the case law reveals, however, that many prison administrators have required Muslim inmates to use religiously offensive, non-Muslim names, under the threat of punishment or the withdrawal of privileges (such as access to the law library, sick call, visits, food and clothing).[10]

. . . [W]e now have evidence that the [FBI] used every "dirty trick" at its disposal to attempt to misdirect and disrupt the Black liberation movement . . .

The courts have held that prisoners who have adopted Muslim names are entitled to First Amendment protection as an integral part of their faith and religious practices, and that they are entitled to use these names, absent a compelling state interest, without the threat of punishment or the withdrawal of privileges.[11] In *Masjid v. Keve,* the district court disagreed with the defendants' assertion that the Muslims' resistance to use of their previous names was socially, rather than religiously based.[12]

"While it is true that plaintiffs view those names as insulting for reasons which could be described as historic or social, it does not follow that their animosity towards those names is without a religious base. Plaintiffs regard their old names as having their genesis in the institution of slavery, but . . . they also regard those names as representatives of a spiritual identity they no longer have."[13]

Thus, courts have held that absent an important objective and a policy reasonably tailored to the achievement of that objective, a state may not punish a prisoner for failing to acknowledge a particular name; nor may he be punished for failing to perform a task where to do so would involve the acknowledgement of a religiously offensive name. The courts, however, have determined that this reasoning does not mean that prisoners are entitled to disregard orders with impunity whenever a staff member fails to use the Muslim name. The holdings only denote that a prisoner may not be disciplined for his refusal to *acknowledge* his non-Muslim name.[14] Prison officials cannot be mandated to address a prisoner by a religious name, and they need not change the person's prison records to reflect the new name.[15]

Pat Searches

Pat searches upon Muslim males by female guards present a most intriguing dilemma for those who uphold the recognition of religious rights for prisoners while advocating the equal employment rights of women. In juxtaposing two cases which have addressed the issue, we find contrasting arguments, both embodying substantial merit.

First, in *Madyun v. Franzen,* 704 F.2d 954 (7th Cir. 1983), the court stressed that there was "substantial interest" in having its female officers perform pat searches on nonconsenting Muslim inmates. The court reasoned:

"Clearly frisk searches are an integral part of prison security and an important part of a prison guard's duties. If women are not allowed to perform these limited searches—or can perform them only on women inmates—the utility of women prison guards would be significantly diminished . . . . [T]he state is obligated under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §200e(h) (1976) and Supp. Iv (1980), to avoid discriminating on the basis of sex in the employment of guards. [Quoting

[4] See, *Barnett v. Rogers,* 410 F.2d 995, 1002-03 (D.C.Cir. 1969).
[5] See, *Walsh v. Louisiana High School Athletic Association,* 428 F.Supp. 1261, 1268 (1977).
[6] See, *Battle v. Anderson,* 376 F.Supp. 402 (E.D.Okla. 1974); *X. (Bryant) v. Carlson,* 363 F.Supp. 928 (E.D.Ill. 1973); *Barnes v. Virgin Islands,* 415 F.Supp. 1218 (D.V.I. 1976).
[7] See, *Chapman v. Pickett,* 586 F.2d 22, 26 (7th Cir. 1978), *following remand,* 491 F.Supp. 967 (C.D. Ill. 1980); *Kenner v. Phelps,* 605 F.2d 850 (5th Cir. 1979).
[8] See, *Masjid Muhammad-D.C.C. v Keve,* 479 F.Supp. 1311 (D.Del.1979).
[9] *Walker, supra,* at 25-26; *Cochran v. Sielaff,* 405 F.Supp. 1126 (S.D.Ill. 1976).
[10] Azeez *v. Fairman,* 604 F.Supp. 357, 364 (C.D.Ill. 1985); *Masjid Muhammad, supra.*
[11] Azeez, *supra,* 604 F.Supp. at 365; *Masjid, supra,* 479 F.Supp. 1324; *Akbar v. Conney,* 634 F.2d 339, 340 (6th Cir. 1980) (per curiam).
[12] *Masjid, supra,* 479 F.Supp. at 1323.
[13] *Id.* at 1323.
[14] *Id.* at 1325; Azeez, *supra,* at 364.
[15] *Barrett v. Commonwealth of Virginia,* 689 F.2d 498 (4th Cir. 1982); *Imam Ali Abdullah Abda v. Connery,* 634 F.2d 339 (6th Cir. 1980).

Smith v. Fairman, 678 F.2d at 54, the court continued] 'If a state is required to hire women as guards in its male prisons, it reasonably seems to follow that it must be allowed to utilize female guards to the fullest extent possible.' "[16]

Thus, the court held that the provision of adequate prison security and equal opportunity for women to serve as prison guards were important enough state interests to allow frisk searches of male prisoners by female guards.

The second case, *Rivera v. Smith,* 742 N.E.2d 1015 (N.Y. 1984), however, held that there was no legitimate security interest and a minimum of frustration of employment opportunity to justify pat frisks by female guards. In *Rivera,* testimony was presented at trial by William Gohlman, a professor of Islamic history, about the importance to Muslims of preserving their bodily dignity.

"[T]he Qu'ran forbids a Muslim from revealing his genitals to or having them touched by a member of the opposite sex other than his spouse. According to Gohlman, the Qu'ran is the 'direct, literal word of God, is the foundation of all Islamic law and cannot be controverted in any way.' Gohlman testified that for a Muslim to have his body touched, even with clothing on, by a member of the opposite sex would be absolutely prohibited, shameful and a very great sin. He futher indicated that this prohibition is listed in the Qu'ran among its major tenets and is put on the same level as prayer, alms giving and the other pillars of Islam, the basis of Islamic religion."[17]

Under the circumstances of the case, *Rivera* found that no legitimate security objectives were advanced by the use of female prison guards to frisk male Muslim prisoners and that the state's interest in affording women equal opportunity to serve as correctional officers did not compel a different result.[18]

The objectives of upholding the dignity of Muslim prisoners and preserving the equal opportunity for women are both admirable, and the dilemma of the clash between the two will most likely be the subject of future litigation.

Conclusion

No doubt, much of the opposition by prison officials to the recognition of religious rights for Muslim prisoners in the past had roots in the public hysteria and smear campaign generated against the Nation of Islam in the larger society. Prison officials often raised exaggerated concerns for security, discipline or administration in opposing any attempt by Muslim groups to practice their religion. Depsite this, some of those prejudices have given way to the recognition that rights valued by other religious entities apply equally to adherents of the Islamic faith in general, and the more controversial Nation of Islam in particular. This is the result of massive First Amendment litigation emcompassing a wide variety of issues. The propagation of these issues, regardless of whether relief has been obtained, has been an attempt by Islamic prisoners to validate their existence in the face of what once appeared to be an essentially homogeneous cultural and religious environment, and to gain at least a modicum of respect and recognition from other prisoners and the administration. Additionally, the raising of such issues has served to garner the much needed pride and dignity so instrumental to success in the rehabilitative process. ■

Katy Baird, former law student intern at NPP, also contributed to this article.

[16] *Madyun,* 704 F.2d 954, 960 (7th Cir. 1983).

[17] *Rivera,* 742 N.E.2d at 1017.

[18] *Id.* at 1021.

Sweeping New Order in Rhode Island Case Promises Further Relief

Alvin J. Bronstein

On May 12, 1986, the United States District Court in Rhode Island issued another in a long series of opinions in the Rhode Island State Prison case finding two of the facilities unconstitutionally overcrowded. In a sweeping order, the court set population caps on each facility and directed the state to develop plans to remedy serious current problems with idleness, environmental health and safety, and medical and mental health care.

A little over one year ago we described the progress that had been made in the Rhode Island prison system (NPP *JOURNAL,* Spring 1985), and concluded that story saying ". . . seven years of judicial involvement in this state's prison system have made a difference." We also mentioned a concern about future overcrowding and that the court had created new timetables and a reporting mechanism to insure that conditions in the various facilities did not fall below constitutional requirements because of population pressures. By late 1985, the overcrowding at the Medium Security Facility (Medium) and the Intake Service Center (ISC)[1] had become quite severe and the federal court was once again asked by the National Prison Project to intervene.

[1] Rhode Island has no jails. All pre-trial detainees are in state custody and are housed in the ISC.

History of the Case

After an extended trial in August 1977, the United States District Court in Rhode Island issued an opinion finding the entire state prison system unconstitutional because of gross Eighth Amendment violations, and issued an extensive remedial order.[2] Among other things, the order set forth detailed requirements for inmate housing, environmental health and safety conditions, inmate activity, and medical and mental health care. The order also required the state to house pre-trial detainees separate from sentenced prisoners and appointed a Special Master to oversee and monitor compliance. By 1984, many of the facilities had come into compliance and the court relieved the Master of his duties but expressed concern about the rising population and its potential impact.

On November 19, 1984, after a series of hearings, the court entered an order which set forth further compliance requirements and reporting and compliance deadlines, particularly with respect to inmate programming, medical and mental health services, and inmate housing space at Medium and the ISC.

On June 24, 1985, the court reactivated the Special Master to conduct an assessment of the state's success in meeting the terms of the November 19, 1984 order. On July 22, 1985, the Special Master filed his Findings And Recommendations which *inter alia* found that the defendants had not complied with certain important provisions of the November 19, 1984 order and that although they had the plans and resources to comply with some of those provisions, they clearly were unable to do so under the current compliance deadlines.

On September 17, 1985, a status conference was held in chambers. The court considered the Findings And Recommendations of the Special Master and heard from the parties about the current state of overcrowding and idleness at the Medium Security facility and the Intake Service Center. The court determined that an evidentiary hearing

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[2] *Palmigiano v. Garrahy,* 443 F.Supp. 956 (D.R.I. 1977).

—continued from previous page.

was necessary at the earliest possible time to examine these issues and to determine whether further remedial relief was required to protect the constitutional rights of the plaintiffs as set forth in the earlier decrees of the court. An order was then entered setting the matter for trial beginning December 16, 1985, and stating:

"The Court will take evidence on the current state of overcrowding and idleness at the Medium Security Facility, including its protective custody population, and the Intake Service Center and the impact of said conditions on the basic housing, health, environmental and safety standards which the defendants are required to meet under the prior orders of the Court."

Between September and December of 1985, extensive discovery was conducted and experts in the fields of corrections, environmental health and safety, medical and mental health care toured the facilities and reviewed documents. Depositions were taken of the state's experts; pre-trial stipulations and briefs were prepared and filed with the court.

Photo courtesy Rhode Island Department of Corrections.

"Old Max" as it looked in May of 1978. As a result of over seven years of National Prison Project litigation, conditions such as this have been eliminated.

The December 1985 Trial

The evidence at the three-day trial clearly demonstrated two things: the defendants were not in compliance with the prior orders of the court; and the overcrowding at the two facilities had a serious and adverse impact on the basic housing, programming, health, environmental and safety standards which the defendants were required to meet under those orders. Every essential fact was not controverted by the defendants and much of the testimony of plaintiffs' experts was corroborated by the defendants' experts.

The Medium Security Facility, which consists primarily of dormitories with two small cellblocks, has a rated capacity of 180 inmates. Under prior court orders, which established population limits for each dormitory, the capacity was 222 inmates. At the time of the trial, the population was close to 270 inmates, with the most severe overcrowding in the protective custody dormitory where the population was at 190% of the rated capacity and 160% of the limit established by the court.

The overcrowding was even more severe at the ISC, where the 168 cells are each designed to hold one inmate. The actual population had exceeded the design capacity by increasing percentages for the four years since the facility opened in 1982. By November 1, 1985, the population reached 347, over 200% of the design capacity. Each of the cells had been refurnished with two metal bunks, one on top of another, and beginning in July 1985, as many as 39 cells on one day were triple occupancy—the third inmate was required to sleep on a mattress on the floor. That arrangement left so little floor space that the two inmates on the bunks had to step on the third inmate or his mattress in order to get to the open toilet in the cell. The detainees spent 19 to 20 hours a day in their cells because of the lack of adequate day room and recreation space and were required to eat their meals in their cells. Many of them were detained for very long periods of time under these conditions.

The plaintiffs' experts testified that the overcrowding created tension, causing security problems and violence. They noted the high level of assaults, particularly at the ISC. All of the experts agreed that the defendants were wholly out of compliance with the very specific provisions of the court's order on programming and that the serious problem of idleness was even greater now because of the current overcrowding. At Medium there were only 160 assigned jobs for a population of over 260 and half of these jobs were porter assignments which barely occupied one hour a day. This was compounded by completely inadequate educational and vocational training opportunities for the numbers of men housed in the facility.

At the ISC, the previous court orders required the defendants to provide meaningful programming for detainees, especially for those whose stay at the facility exceeded 45 days. The evidence clearly demonstrated that there was even more idleness at this facility than at Medium. At a time when the population was over 300, there were only 82 assigned jobs, of which 57 were porter assignments. On a particular day in October 1985, there were 136 inmates who had been incarcerated at the ISC for 45 days or longer and there were only 30 non-porter jobs available. There were no educational or vocational training programs and recreation was practically nonexistent because of the numbers of inmates and lack of space.

The environmental health experts testified that the defendants were clearly out of compliance with the court's prior orders and that the overcrowding at both facilities had a negative impact on public health and safety. They found specific violations in fire safety, plumbing, rodent infestation, electrical wiring, ventilation, sanitation, physical deterioration in housing and kitchen areas. They discovered a complete breakdown of the Central Kitchen which provides bulk food for the entire prison system. In addition, the maintenance staff and its' ability to do either preventive or repair work had been overwhelmed as a result of the problems caused by the overcrowding.

Similarly, the medical and mental health care experts found that the defendants were wholly out of compliance with earlier court orders and that the current overcrowding detrimentally affected their ability to provide adequate basic medical and mental health care

services. They testified that serious medical needs of inmates were not being adequately addressed and medical and mental health care services fell below minimally accepted standards of care. Among other things, they found: deficiencies in initial medical screening and physical examinations; a significant backlog of inmates waiting long periods of time for their intake physical exam; serious shortages of physician, dental, mental health, pharmacy, clerical and nursing staff; inadequate emergency care and equipment; inadequate training of staff; inadequate policies, procedures, protocols and data collection; inadequate housing, assessment and treatment of mentally disturbed and suicidal inmates; and inadequate sick call system and follow-up procedures.

At the conclusion of the trial, we made an oral motion asking the court to immediately enjoin the triple-celling at the ISC in light of the uncontroverted testimony that this practice deprived detainees of the minimum civilized measure of life's necessities, violated all prior orders of the court, and violated the Fourteenth Amendment Due Process rights of pre-trial detainees. The court granted the motion, subsequently entering a written order to that effect and directing the parties to file post-trial briefs while taking the rest of the case under advisement.

Legal Issues

Two separate legal arguments were made by the NPP. Because all of the existing orders of the court are final judgments and no motions to modify these orders were made by the defendants, we first argued that these orders are the law of the case and that the defendants are precluded from relitigating any of these issues. As in *Hutto v. Finney,* 437 U.S. 678 (1978), the court here could look to see if past constitutional violations had been remedied, examine the conditions as a whole, while having ample authority to fashion a remedy going beyond earlier orders to bring an ongoing present violation to a halt.

Second, we argued that the two Supreme Court decisions dealing with prison and jail overcrowding that have been decided since the original 1977 decision in this case should not change the outcome. In *Bell v. Wolfish,* 441 U.S. 520 (1979), dealing with detainees, and *Rhodes v. Chapman,* 452 U.S. 337 (1981), involving sentenced prisoners, the Supreme Court held that overcrowding *per se* (in both cases double-celling in new facilities designed for single occupancy) was not unconstitutional. The decisions in those cases are limited to the facts of those cases where the court found that the overcrowding had no impact on environmental health and safety, idleness or medical care. Thus, unlike the present situation in Rhode Island, there was no evidence that the conditions deprived inmates of the minimal civilized measure of life's necessities.

The Outcome

We acknowledged that the court had demonstrated remarkable patience as it continually granted deadline extensions to the defendants and permitted them to run their prison system with a minimum of judicial intervention. However, we believed that the time had come for the court to preserve the integrity of its prior orders and prevent ongoing constitutional deprivations to the plaintiffs.

We asked the court to impose timely population limits on both facilities, with phased reductions, and to enjoin the defendants from exceeding those limits at the end of the relevant time periods. In addition, we asked that the defendants be required to develop specific and timely plans for remedying the various deficiencies in programming, environmental health and safety, and medical and mental health care and that these plans be fully implemented within certain periods of time.

Finally, we asked that the Special Master be directed to conduct semi-annual inspections and to prepare reports indicating the defendants' compliance with each provision of the remedial order and defendants' plans. In conducting those inspections, we asked that the Master retain the services of experts in the relevant fields to assist him, as appropriate, in evaluating compliance.

The May 12, 1986 opinion and order of the court completely sustained our position and granted all the relief we requested. It set population caps on Medium at 222 and the ISC at 168, with all cells required to be single occupancy and directed the defendants to achieve those limits within three and six months respectively. The court also ordered the defendants within 60 days to develop plans for curing the constitutional inadequacies in programming, environmental health and safety, and medical and mental health care, and gave them 120 days to come into compliance. Finally, the Special Master was directed to inspect and report on compliance quarterly and was given the authority to retain experts to assist him.

The Lesson To Be Learned

There are a number of lessons to be learned from the long and difficult history of this case. Prison overcrowding, unlike the neglect which led to the problems in the 1970s, is often not capable of being controlled by prison officials themselves, despite their competence and best intentions. If the legislatures and the courts keep sending them prisoners in increasing numbers without correspondingly increasing their resources, there is little that a prison official can do. It has been our experience that a state or local jurisdiction will rarely respond to overcrowding problems in the absence of a court order or consent decree resulting from court action. They are aware of the problem, often know the solutions, but their political judgment tells them to do nothing unless forced to by the courts. The courts, and not the politicians, can then be accused of being soft on criminals.

This story illustrates the need in prison conditions litigation for eternal vigilance by counsel for the plaintiffs and the continued involvement of the court. ■

Supreme Court Briefs

Mark Tushnet

So far in the 1985-86 term the Supreme Court has decided four cases involving the rights of prisoners. Although lawyers will not find it difficult to work around the Court's denial of prisoners' claims in the first three cases, the decisions will make it harder for prisoners who represent themselves to get trials in federal court on claims that their rights have been violated. These decisions also send a signal to the lower federal courts, already being increasingly staffed by Reagan appointees, that they need not listen to prisoners' claims with too much sympathy. The fourth case, which eliminated a defense available to prison officials in certain cases, was the only one at all favorable to prisoners.

Daniels v. Williams, _____ U.S. (1986), 38 Cr.L. 3082 (1/22/86), and *Davidson v. Cannon,* _____ U.S. _____ (1986), 38 Cr.L. 3087 (1/22/86), were decided on the same day because the Court thought that they raised the same legal issue. The question the Court addressed was whether someone's constitutional rights are violated when a state official negligently does something that results in taking away a person's property or liberty, thereby creating a cause of action under the Federal Civil Rights Act. *Daniels* was an ordinary slip and fall case, which happened to arise in a prison. Daniels was an inmate in a city jail who slipped on a pillow that a deputy

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had negligently left on the stairs. The Court unanimously agreed that Daniels' constitutional rights had been violated because, according to the majority opinion by Justice Rehnquist, negligent acts by state officials are not the sort of thing that the due process clause of the Fourteenth Amendment was designed to guard against. He said that it would "trivialize the centuries-old principle" to hold that injury caused by negligent conduct violated the Constitution.

The Court's analysis may be difficult to reconcile with the language of the Fourteenth Amendment—after all, before the accident Daniels had something (his health) that he didn't have after it, so it looks like he has been deprived of something, and the question would seem to be whether the state had followed the appropriate procedures (due process) in putting Daniels in that position. But on the facts of the *Daniels* case, it is hard to see that a special injustice was done to Daniels that demands a remedy based on the Constitution.

The facts in *Davidson* are more troubling. Davidson was a prisoner in the New Jersey State Prison who had been threatened by another prisoner. He sent a note to the prison officials reporting the threat. The note was sent to the appropriate official who received it but did not read it or take any other action. Two days later the other prisoner attacked Davidson with a fork, breaking Davidson's nose and inflicting other injuries. The Court relied on *Daniels* and held that, because Davidson alleged only that the prison officials had negligently failed to act in response to his note, his constitutional rights were not violated. Justices Brennan, Blackmun, and Marshall, who concurred in *Daniels* dissented here, arguing that Davidson had alleged recklessness by the prison officials, not mere negligence. Justice Blackmun argued in addition that because the state, by placing him in prison, had deprived Davidson of the ability to defend himself, it owed him a special duty to respond to threats against his safety. The dissent pointed out that recklessness or deliberate indifference was all that a prisoner needed to prove that denial of essential medical care violated the Eighth Amendment ban on cruel and unusual punishment, and that the Due Process Clause provides broader protection than the Eighth Amendment.

The Court was sharply divided 5-4 six weeks later in *Whitley v. Albers,* 54 U.S.L.W. 4236 (3/4/86), which arose from a prison "riot" in Oregon. Albers had attempted to protect some elderly prisoners from tear gas. Prison guards began their assault on the cell block while Albers was attempting to return to his cell, and get out of their way. In the confusion, the guards shot Albers in the knee. Justice O'Connor's opinion for the Court held that, where guards were attempting to resolve a prison disturbance by taking security measures, the guards should not be liable for the injuries they inflict unless they used unnecessary force to inflict pain wantonly. Justice O'Connor emphasized the deference the courts should give to actions taken in response to riotous inmates. The opinion then went on to assess the facts, and concluded that Albers had not provided sufficient evidence from which a finding of wanton infliction of pain could be made. The dissenters, in an opinion by Justice Marshall, disagreed with some of Justice O'Connor's formulations of the relevant standard, but did not fundamentally disagree with the approach she took to the constitutional question. But they did challenge the Court's assessment of the facts that Albers had proved.

It has always been quite difficult to recover damages from prison officials in circumstances like those in *Albers*. Nor need any of the cases prevent trials from occurring where attorneys allege the appropriate degree of recklessness or wantonness. The disagreements between the Justices over the interpretations of the facts in *Davidson* and *Albers* show that careful attorneys should be able to construct their claims so that the cases will proceed beyond the earliest, pleading stages. The effects on *pro se* litigants, who cannot be expected to be so careful, will be more serious.

In *Cleavinger v. Saxner and Cain,* _____ U.S. _____ (1985), 54 U.S.L.W. 4048 (12/10/85), the Court held that prison officials who are members of a disciplinary hearing committee are entitled to a qualified immunity defense, rather than absolute immunity, when sued by prisoners for their actions as committee members. If the Court had granted absolute immunity to hearing officers, such as that given to judges, they would have been immune from damage suits by prisoners under the Civil Rights Act. Under qualified immunity, a prisoner can recover damages from a hearing officer if it can be proven that officers knew or should have known that they were engaged in constitutionally prohibited activity.

Perhaps most important out of all these cases is the lack of sympathy with which the Court read the records in *Davidson* and *Albers*. It will undoubtedly encourage Reagan's appointees to the federal district courts to be similarly unsympathetic to prisoners' claims. ■

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D.C. Pushes Panic Button in Jail Population Crisis

Steven Ney

The District of Columbia's prison crisis continues. Recent developments highlight the chaos both inside the prisons and outside in the larger political arena where the issues are being fought.

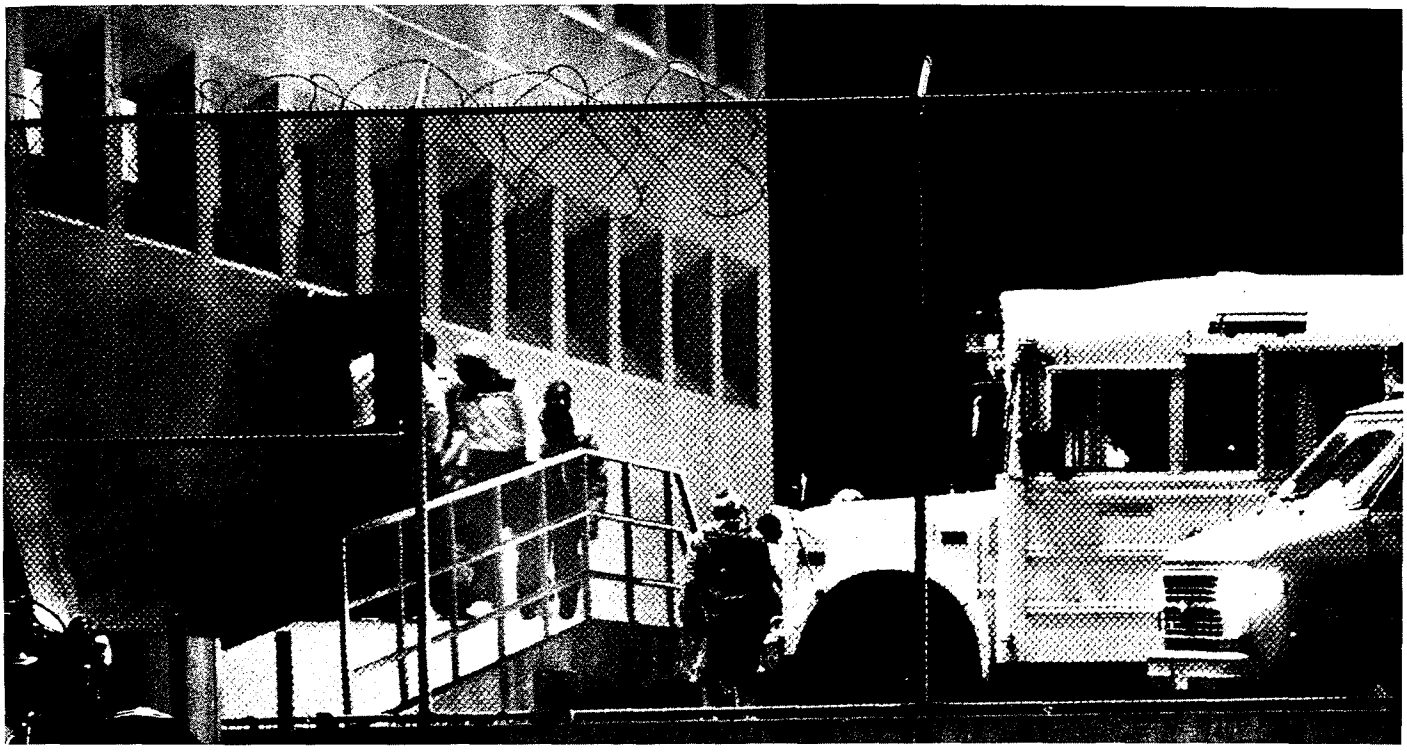
In July 1985, Federal Judge William Bryant imposed a permanent population cap on the D.C. Jail at 1,694. (See *JOURNAL* issue No. 5, Fall 1985). To meet that cap the District entered into a temporary agreement with the federal government providing that all newly sentenced prisoners in the District would be sent into the federal prison system. Utilizing that agreement the District was able to reduce the Jail population from a high of 2,600 to approximately 1,600 by late 1985. By March 1986, the Federal Bureau of Prisons had taken approximately 700 D.C. prisoners. A total of 2,400 D.C. prisoners are now in the federal system. These prisoners were sent hundreds and even thousands of miles from home; additional prisoners were jammed into halfway houses and into existing facilities at Lorton, Virginia.

The federal government, however, exacted a high price from the District for this temporary assistance: a commitment from D.C. Mayor Marion Barry to build yet another 700-800 bed prison in the District. Although the federal government offered to pick up the initial construction cost, the far greater long-run cost of operating the prison would fall on the District's residents.

With the District already the prison capital of the country (with 1,100 per 100,000, the nation's highest incarceration rate for any state or city), the new prison would add one more facility for caging black men (and perhaps women[1]).

[1]At the present time all women serving sentences of more than one year are being sent into the federal prison system from their homes in the District, a result which has been harshly criticized but seems impervious to change, despite lawsuits and recommendations from the U.S. Congress. "Hearings on the Female Offender—1979-80," House Judiciary's Subcommittee on Courts, Civil Liberties, and the Administration of Justice. See *also Cosgrove v. Smith,* 697 F.2d 1125, 1126-7 (D.C.Cir. 1983).

Darrel Ellis - The Washington Post



Inmates arriving in buses were prevented from entering the D.C. Jail for nearly three hours late one night in March 1986. Their presence would have forced the Jail over the court-imposed population ceiling.

In January 1986, the federal government terminated the agreement and refused to take additional District prisoners into the federal system. Thus began the real crisis within the District of Columbia as prisoners filled up all of D.C.'s facilities not already under court order.

The Mayor hoped that his commitment to build a new prison would convince the federal government to reinstate its agreement to accept D.C. prisoners. It would also ensure smooth sailing for the Mayor's budget before Senator Arlen Specter, Chairman of the District of Columbia Appropriations Subcommittee. But, as of this writing, no such arrangement had occurred.

Because most of the District's prisons are under court order - the Jail, the Central and Maximum Security Facilities and Youth Centers I and II - the only remaining institutions available for secure incarceration were the prisons at Occoquan I, II and III in Virginia.

Each of those three prisons were designed to hold a total of approximately 1,000 prisoners in open dormitories. By the end of April 1986, the Occoquan prisons were holding close to 1,500, about 50% over capacity. Reports from inmates and newspaper accounts indicate that there is a high level of tension and violence, and deplorable living conditions.[2]

During February and March the District engaged in a frantic effort to come up with additional prison space. On several occasions the District even kept prisoners confined on buses outside the Jail for periods of up to 10 hours.

In March, under the cover of darkness, the Corrections Department tried to transform an abandoned, dilapidated police station located in the midst of a gentrified residential neighborhood on Capitol Hill into a vest-pocket jail. The facility had been condemned by the District's Fire Marshal as a firetrap, and was totally unsuitable for housing. Finally, faced with community opposition, lawsuits, and political pressure, the District dropped the plan.

The District also sent busloads of prisoners to a private prison in Pennsylvania. That effort too was thwarted when the Attorney General of Pennsylvania sued to enjoin the transfer, and a state judge ordered the buses turned around and sent back to the District of Columbia.

Finally, at the end of March the District created about 60 extra spaces for weekend prisoners by converting an abandoned cellblock in the basement of the old D.C. Superior Court into a makeshift jail.

In the eight months since the court's 1985 order, the District has failed to implement the alternatives to incarceration agreed upon in a stipulation signed by the Mayor and approved by the federal court in an effort to stave off the ban on intake of additional prisoners.

Reports filed with the District of Columbia indicate that the District:

1. failed to increase half-way house capacity despite a commitment to add 400 additional beds;
2. failed to make timely parole decisions before an inmate's parole eligibility date; as a result inmates were being incarcerated past their eligibility dates, increasing the overcrowding;
3. failed to take any effective action to lobby on behalf of the Emergency Overcrowding Powers Act;
4. failed to implement in any substantial way a Third Party Custody Program;
5. failed to classify the inmate population to determine which prisoners needed secure confinement and which could be placed in community-based programs; the expert hired by the District of Columbia indicated that their own data were incomplete, inaccurate and inconsistently collected.

Because of the combination of the District's failure to implement basic alternatives to prisons which they had agreed to, the shut off of the federal reservoir known as the Bureau of Prisons (itself approximately 45% over capacity), and the continued aggressive prosecution of drug cases by the U.S. Attorney's office, the rate of incarceration in the District is continuing to climb. And this persists despite a downward trend in reported crime in the District for the third straight year.

The District still has no short-term

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[2]NPP is investigating these facilities, at inmate request, for possible court action.

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or long-term solution in sight. The Mayor has committed his administration to building another prison in order to foster a positive relationship with Senator Specter's Appropriations Subcommittee, and with the Justice Department, which might help the Mayor out temporarily by taking additional prisoners into the federal system. The building approach will not work and the Mayor knows it. His own Correctional Facility Study Commission told him in January 1986, that if a new jail or prison were built it would be filled up in a matter of months, or perhaps one year. The Mayor knows from bitter experience that building another jail will not work. During the last six years his administration has built 2,000 additional beds at Lorton; yet, the system is still massively overcrowded.

Meanwhile, the problems continue to fester. On April 28, 1986, a riot erupted in Youth Center I at Lorton. The inmates ransacked portions of the administration building and burned down a wing of the school building. Only shotgun-wielding guards could restore a semblance of order after shooting and injuring 11 inmates, one seriously.

In March, Mayor Barry was held in contempt of court for failing to comply with a long-standing court order at Lorton's Central Facility and the federal court threatened the appointment of a Special Master.

This seemingly never-ending saga of the D.C. prison crisis will continue until the District does some meaningful long-range planning and decides once and for all how many prisoners it must have, until it regards imprisonment as the last choice rather than the first, and until it comes up with a comprehensive approach to this complex problem. The simple, but certainly not cheap, answer of more prisons has again been shown to be a bankrupt approach. Perhaps we will learn the next time around. ■

Hold Your Nose!
NPP Examines the Diet Loaf

Betsy Bernat

There seems to be a new trend emerging in the kitchens of America's prisons. Seems a prison just can't hold its head up anymore unless it bakes a diet loaf for its administrative segregation prisoners.

We first encountered the loaf at Arizona State Prison. Former NPP attorney Claudia Wright described it as a "mass of chopped foods . . . compressed, shaped into loaves, frozen, then microwaved and presented as a meal . . . ." Attorney Urvashi Vaid, who tasted it, described it as "simply awful." Inmates were served the diet loaf three times a day for seven days as punishment.

I was intrigued. Why a diet loaf? I wondered. I know nutritionists have long recommended that we eat three square meals a day, but is this what they meant? After all, if you're going to get literal, what about a prisoner's need for a well-balanced meal? Would it tie in somehow with the Scales of Justice? Should the supper fit the crime? Exactly what roll would Justice serve here? (None, to inmates on the loaf plan.)

Then it hit me. There was a theme here! Tell me, due to inadequate programming, what do most prisoners do all day? Why, they *loaf!* Those clever chefs. No doubt they also serve chili on chilly days. Nothing like a little kitchen humor.

Let's take a closer look at the loaf. Of course, our nutrition expert Judy Wilson already did, and described it as "a gray-brown color and lumpy in texture" with "an offensive odor." But I mean let's *really* scrutinize it. I for one see nothing but the brightest of futures for it. My prediction? The diet loaf will be America's next big food trend.

You read it here first. Forget the grilled tuna; say so long to tortellini. The loaf is a no-muss, no-fuss meal; it freezes beautifully, and heats up in a jiffy. You can eat it out of your hand, and, if you cook it too long, you can use it as a doorstop. Can you say the same thing about that messy pan of jambalaya you made last week?

Creative cooks, take note! Diet loaves have been known to contain everything from ground swiss steak to lime gelatin—*in the same loaf!*

And what a boon it will be for the frozen food industry. Can you imagine the ads? "Diet loaf. It isn't just for prisoners anymore." Or, "A jug of wine, a diet loaf and thee."

Get "The Frugal Gourmet" on the phone. Do you have a little leftover diet loaf? Chop it up and throw it into your next batch! What could be more economical?

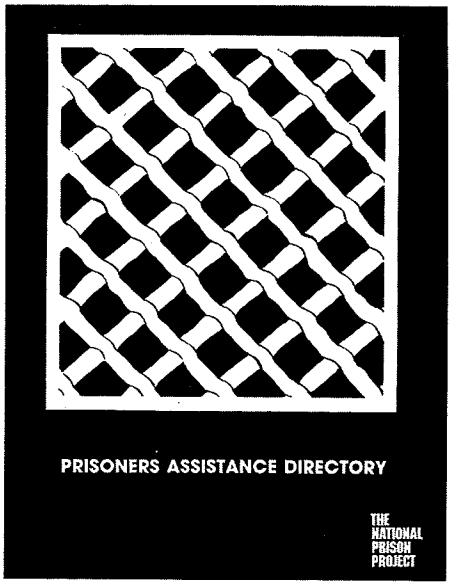
I'm mad with the possibilities. The loaf is so versatile! So adaptable! So—so rectangular!

Nutritionist Wilson, who felt no fondness for the loaf, remarked that from the loaf ingredients could be made "a meal of bean soup, fried liver, beef with mashed potatoes, cabbage, and pudding."

True, but think of all those dirty dishes. The diet loaf dirties no more than one bowl and one pan.

Of course there is one drawback to the loaf. In fact, perhaps it could be called more than a drawback. It seems that prisoners aren't eating it. To quote them, it's "smelly" and "tastes bad." Our nutrition expert found it "extremely unappealing. I could not bring myself to sample it, as I was fearful of becoming ill." Not a promising start for the diet loaf industry. And bear in mind, prisoners are fed the loaf 21 meals in a row. One prisoner refused to eat it and lost 15 pounds.

Perhaps we should send the diet loaf back from whence it came (like to the mulch pile?). Let's dirty a few more pans and get back to serving regular meals to inmates. ■



7th Edition of Prisoners' Assistance Directory now available. See p.15.

TENN. REFORMS

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five to 11. Yet the new facilities were overcrowded almost as soon as they opened, and the crisis intensified. After having increased the prison budget by nearly 250% in only six years, the state was worse off than when its building program started. Moreover, the rate of growth in prison population had yet to reach its peak, since several years would pass before the consequences of stiffer sentencing laws enacted in the early 1970s were fully felt. By 1985, the Sorcerer's Apprentice of harsher sentencing and parole policies was producing a net annual growth of 1,200 inmates per year, an increase which would have required the state to bring on line a new major prison every five months, indefinitely into the future.

. . . the theme sounded by state officials was punitive, rather than reformist.

Throughout the course of the state court litigation, the federal court had abstained from considering prisoners' complaints regarding institutional conditions. As soon as it became clear that the state judiciary was unwilling to grapple with the problem, however, the federal court responded promptly and forcefully. The U.S. District Court in Nashville accepted jurisdiction of a number of *pro se* complaints filed by prisoners and appointed to represent them the same counsel as those who had handled the state court litigation. In the summer of 1982, after considering tens of thousands of pages of testimony and documentary evidence, the court issued a 168-page opinion declaring unconstitutional 10 of the state's 11 prisons. *Grubbs v. Bradley,* 552 F.Supp. 1052 (M.D.Tenn. 1982). The court did not attempt to formulate its own remedy, showing the same restraint and the same hopes for responsible state leadership which had previously led it to abstain during the pendency of state proceedings. Instead, the court directed Governor Lamar Alexander and Tennessee Department of Corrections officials to submit a plan within six months for the correction of the constitutional deficiencies outlined in the court's ruling. The court also called for a Special Master to oversee review of the state's plan. After negotiations between the parties, the court approved the appointment of Patrick McManus, a former administrator of prison systems in Minnesota and Kansas, as Special Master.

In January 1983, amid much political fanfare, the state unveiled a "Correctional Plan for the '80s" that purported to respond to the court's mandate. Acting on the traditional political perception that prison reform offers no political dividends, the theme sounded by state officials was punitive, rather than reformist. More political rhetoric than substance, the plan promised to "put convicts to work." But the court subsequently found, and events confirmed, that the plan only worsened already widespread idleness and violence in the prison system, by cutting out almost all of the existing meager educational programs. Because of that and other serious defects the court ultimately rejected the defendants' plan.

Meanwhile, the overcrowding crisis worsened. In October 1983, after lengthy, intense negotiations, and mediation by the Special Master, state officials proposed a timetable for the gradual reduction of inmate populations at the most seriously overcrowded institutions. The court issued an order ratifying the state's plan with minor modifications. The order required a reduction of a net of 50 inmates per month, until a total net reduction of approximately 1,200 prisoners had been achieved. The state chose to enact an Emergency Powers Act (EPA) similar to that legislated in several other states, accelerating the parole eligibility dates of a limited pool of prisoners.

Although the population reduction program temporarily eased the overcrowding crisis, it still left unresolved the many other pervasive constitutional deficiencies which the Governor's plan had failed to address. In July 1984, again following intensive negotiations overseen by the Special Master, the court entered an order to which the defendants had tacitly consented, pressured by their fear of the court's reaction to the state's previous political posturing and footdragging. Under the 1984 order, the state was required to hire outside experts to evaluate the system and make recommendations regarding the formulation of an appropriate remedial plan. The evaluators' recommendations were to be implemented by the state, unless it could show that they were not reasonably related to the accomplishment of their objectives, or unless the state could come up with equally timely alternatives that would be more cost-effective. The parties reached agreement regarding the selection of experts to be hired, and these evaluators spent nearly a year developing exhaustive reports and recommendations, which were finally filed in July 1985.

The population problem (presumably solved by the court's October 1983 order of a timetable for phased population reductions at each of the prisons) flared into crisis again. For more than a year, the population had declined as the state implemented the court's timetable. By the spring of 1985, however, the pool of potential releases under the Emergency Powers Act had been exhausted. Since the state had never addressed the sentencing laws which had caused the higher incarceration rates, once the EPA was exhausted population again began to balloon out of control. In only three months the increase wiped out the gains in population reduction that had been made over a period of more than a year. Crowding was again becoming critical, particularly at several of the state's most troubled institutions.

During this stressful time, there was a change in judicial personnel. Judge L. Clure Morton, who had resided over the case, went into semi-retirement, and the case was reassigned to Judge Thomas A. Higgins, a recent Reagan appointee to the District Court bench. Confronted with rapidly worsening prison conditions and a request by the state that it be relieved from the terms of the October 1983 court order, Judge Higgins quickly mastered the voluminous record in the case. In June 1985, he granted the state a temporary breather by extending the population reduction timetable. However, he tightened the terms of the Special Master's oversight of the state's compliance and signaled clearly that he would not tolerate further deviations from the court's orders.

Then, with a single stroke, the court remedied the situation in the intake facilities and radically altered the political climate.

Coming quickly on the heels of the order, riots broke out at six of the state's institutions during a two-day period in early July. The riots left one prisoner dead and caused millions of dollars in damage. The Governor announced that he would call the legislature into special session in November on the prison crisis. Prison officials proposed that the legislature fund a corrective plan which would have ignored many of the outside evaluators' most critical recommendations, and which would have sidestepped the need for long-term reform of state sentencing and release eligibility laws.

Against this political backdrop, conditions in the prisons continued to worsen, aggravated by the damage done during the July riots. The situation was particularly grave at the state's three reception centers, where unclassified inmates were crammed together, unsupervised, in makeshift dormitories. This greatly increased the number of rapes and the general level of violence

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In September, the plaintiffs filed a new request with the court for immediate relief from these conditions. At the same time the state reported to the court that it was simply unable to control the population by any means, and would therefore be forced to violate the court's new deadline established in June (when the court had granted the state's request for an extension of time).

In spite of the crisis, a consensus in favor of reform appeared nowhere on the political horizon. The Governor's proposals, if adopted, would have committed the state to continued noncompliance with the court's orders, and many legislative leaders expressed a determination to openly defy the court.

Improvement in conditions has been dramatic, and continued reform is promised.

Then, with a single stroke, the court remedied the situation in the intake facilities and radically altered the political climate. Ruling from the bench on October 23, 1985, at a hearing on the plaintiffs' request for immediate relief, the court enjoined the state from admitting any new prisoners into the system, effective immediately. The injunction was to remain in effect until the population of the intake facilities was reduced to constitutionally mandated limits. On the other hand, the court continued the pressure on the state to reform itself, by reaffirming the earlier deadline requiring reduction of the other prisons' populations to acceptable limits by December 31.

Although the court's actions prompted some public and official resentment, there was widespread awareness that the state had brought the crisis upon itself by failing to set its own house in order. Most important, the action galvanized local judges, prosecutors, jailers and police officials into a powerful lobby for prison reform. The court's action put a cork in the prison bottleneck, backing up the rest of the state's criminal justice system. Population pressures on local jail and detention facilities forced the release on recognizance of many defendants and delayed trials which might have resulted in the imposition of a prison sentence.

When the special session of the legislature convened in early November, movement toward reform was spurred by these pressures from local officials. The specter of more court-imposed sanctions, should the state fail to meet the December 31 deadline for further population reduction, provided greater pressure. Guided to a great extent by a well-staffed and well-led Special Committee on Corrections, the month-long session proved to be extremely productive. A new overcrowding safety valve was enacted to replace the bankrupt Emergency Powers Act. Legislators passed a bill directing the closing of the troubled 19th-century Tennessee State Prison and ordering its replacement with two new prisons. Efforts to turn over part or all of the prison system to a private corporation were rejected.

The Governor revised his remedial plan to conform with the recommendations of the court's evaluators. The legislature funded the plan with an additional first-year appropriation of $55 million. The state created a sentencing commission to study existing sentencing laws and make recommendations for their overhaul, a major step toward long-term population stability.

Inevitably, the court's order has resulted in some jail overcrowding at the local level. To a surprising extent, however, the criminal justice system has responded to the shutdown of prison intake by diverting would-be jail inmates to pre-trial release or probation programs. The state succeeded in meeting the deadline and is now slowly beginning to reopen intake at the prisons. Although the worst of the overcrowding has been corrected, pervasive constitutional deficiencies remain.

In spite of these continuing problems, there is now a political, as well as judicial, mandate for reform for Tennessee's prison system, for the first time since the convict leasing system was abolished nearly a century ago. At a time when many question the propriety or effectiveness of judicial intervention in such cases, the Tennessee experience is an encouraging example of what can be accomplished when a court, balancing restraint with resolve, makes it clear to a state that the Constitution *shall* be obeyed. ■

Gordon Bonnyman is a senior attorney with Legal Services of Nashville and Middle Tennessee and has been a lead attorney in the Tennessee prison case since its inception in 1976.

An Expert Reflects on the Changing Face of Prison Litigation

John Conrad

Prison litigation, as conducted by the National Prison Project*, has changed the landscape of American penology beyond the recognition of an old-timer like myself. I have been proud to be an occasional small cog in the process that has brought to an end many of the most disgraceful features of the American criminal justice system as it was managed in 1947, when I began my penological career, and for many years thereafter. What I have to say in these reflections should not be construed as adverse criticism of Al Bronstein, his staff, and their influence. We all have a debt of gratitude to them. The Project's work is a good cause for faith in the legal profession, the survival of altruism, and the continuing benefits of the Bill of Rights.

Nevertheless, there is a lot more to be done, and I think the National Prison Project must get on with doing it. It was one thing to clean up the prisons of Alabama, one of the most enjoyable reforms I have ever witnessed. It is quite another to think through and agitate for the creation of a penal system that makes sense in late 20th century America. In what follows, I want to use the Alabama reforms as a case study with a fairly happy ending, and then to consider the implications for future prison litigation. I shall conclude with a warning about some dismal omens on the horizon which suggest a role for prison litigation in the public advocacy of common sense in penology.

*Editor's note: While other groups and individuals around the country are litigating prison cases, the NPP is the only group engaged in systematic challenges to prison conditions on a national scale.

The Alabama Case

My introduction to the National Prison Project occurred in August 1975, when Al Bronstein invited me to be an expert witness in the case which was then designated *James v. Wallace*, now more generally known as *Pugh v. Locke*. It was my first experience as an expert, and to this day I am still nonplussed about my role in that case. The conditions prevailing in the overcrowded Alabama prisons have been described else-

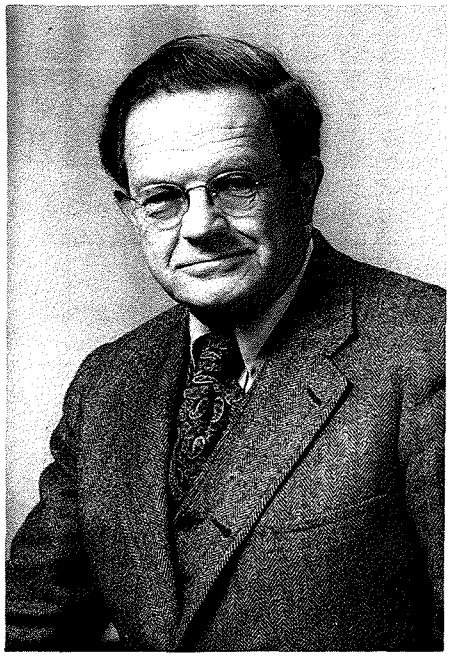
where and frequently, they were shown on national television, and they still challenge belief. The indifference and incompetence of an undermanned and untrained staff shocked me almost as much as the filth, the vermin, the prevailing idleness, and, most of all, the grotesque crowding of three or four prisoners into spaces where only one should be. Some prisoners were assigned to spaces where no one should be. (Memorable example: the mattresses installed over the banks of urinals in the North Dorm of Mount Meigs.) Prisoners who failed to report on time for a work detail were assigned to the infamous "doghouse," a special unventilated, unlighted facility in which eight men were packed into one cell. On the other hand, there was no supervision in the dormitories, which housed as many as 250, or in cellblocks, in which the locks were inoperative, thereby removing all restraint on opportunities for sexual assault and other predations.

This was the bottom. In my time, no prison conditions in this country approached this level of unintended depravity.

What kind of expertise is needed to pronounce on the unacceptability of such conditions? Ted Gordon, a public health expert, discovered bed-bugs in the clothing room, roaches in the kitchen, weevils in the flour, and rats everywhere. Such findings require an expert who knows where to look. Some of these fauna I could see for myself, but Gordon knew more about their hiding places than I will ever know. No judge, certainly not the redoubtable Judge Frank Johnson, who presided over *James v. Wallace,* would ignore expertise such as this.

But what expertise is needed to find unacceptable the packing of 250 men in a 50-man dormitory, for 24 hours a day? Or the jamming of 150 men into 50 cells that had been designed for single occupancy? I toured these places, testified on what I had seen, and was gratified later on to learn that my testimony had established the unacceptability of these obviously unacceptable conditions. But any layman capable of counting numbers into the hundreds and pacing off the length and breadth of a dormitory could have done as well as I.

In its wan attempt to defend the indefensible, the State of Alabama put no restrictions on my movements or observations. I could go anywhere, talk to anyone, and examine any records I wanted to see. That is the way it should be, but state attorney generals now think they have learned a thing or two to put people like me in a more difficult position. Expert witnesses cannot be kept out of prison, but their move-



John Conrad

ments, observations, and inquiries can be closely monitored by an accompanying lawyer from the attorney general's office. The court order authorizing the expert's visit can be drafted to restrict observation to specified places and activities, and to require that no questions be asked of members of the staff, even in the presence of the attorneys.

The benefits to the state of these boundaries on inquiry are certainly imaginary. The expert can only guess the nature of the problems confronting the prison warden and will have no idea how or whether the warden and his staff plan to tackle them.

But what expertise is needed to find unacceptable the packing of 250 men in a 50-man dormitory, for 24 hours a day?

The plaintiffs won the Alabama case. Judge Johnson laid down a comprehensive court order detailing changes that had to be made to bring the Alabama prisons into conformity with the Eighth Amendment of the Constitution. That order was appealed and modified in part, but movement toward reform began. It is still going on.

This is not the place to recite the well known history of the Alabama reforms. What I want to do now is to outline a perspective on them from which the prison litigator and future expert witnesses can learn. In 1975, none of us saw what the long run should be. In the short run, it was easy to agree that the Alabama prisons had to be drastically changed. The "doghouse" at the Draper prison was demolished right after Judge Johnson issued his decree. The aged and infirm prisoners at the institution were removed from the dangerous firetrap in which they had been confined. Most important, the decree required that the population of the Alabama prisons could not exceed their rated capacities, as established in a report submitted to the court.

Overcrowding came to an end, but the felonious conduct of some Alabamians did not. The courts continued to find men and women guilty of serious offenses, but on conviction they had to be placed on waiting lists for admission to the state prisons. While waiting, they were held in the county jails, which were certainly no more salubrious than the prisons had been and which were becoming equally overcrowded.

Meanwhile, under the supervision of a citizens' committee appointed by Judge Johnson and, with the realization that the federal court's jurisdiction would not end until the prisons were in full compliance with the court's order, progress was being made. Dilapidated old prisons were renovated, programs and industries were installed, and professional staff developed.

In 1980 I was invited to revisit the Alabama prisons. I was pleasantly astonished by the changes that had been made in a fairly short time. The louts who passed for prison guards and higher officials in 1975 had been replaced by reasonably alert and obviously trained men and women; several good vocational programs were in operation; some real live psychologists were on duty; and wardens and associate wardens had some administrative talent. No one would want to do time in an Alabama prison, but one would not expect to be continuously terrified.

There was a nasty problem which attracted the attention of John Carroll, attorney for the prisoner plaintiffs, and the concern of Judge Robert Varner, successor to Judge Johnson on the Federal District bench. This was the continued backlog of prisoners waiting in the county jails for admission to the state prisons. They accumulated to a peak of about 2,000 and it was becoming obvious that the awful conditions that had prevailed in the prisons had been shifted to the jails. In December 1982, Judge Varner issued a decree that this backlog be wiped out. To make sure that it would be done, he appointed an "implementation committee," consisting of M.R. Nachman and Ralph I. Knowles, two Alabama lawyers who had been deeply involved in the original restruc-

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turing of the Department of Corrections; Dr. George Beto, Professor of Criminal Justice at the Sam Houston State University in Texas; and myself, at that time a Visiting Fellow at the National Institute of Justice in Washington. Our committee has been in existence ever since. Two developments have eliminated the backlog of prisoners in the county jails. Three large new prisons have been built, all of them close to state of the art. That unfortunate necessity was imposed by the continuing rate of commitments. We may deplore the number of Alabamians who are sent to prison for property crimes, and the number who are sent to serve life terms without possibility of parole, but if the citizens require such severity in the administration of justice, new prisons there must be.

In my time, no prison conditions in this country approached this level of unintended depravity.

Fortunately, necessity may be the mother of invention as well as of prison construction. Making use of a convenient ambiguity in the state law, Commissioner Freddie Smith designed and put into effect a new program of early release for property offenders. Under its provision, prisoners might be released within six months of the original release date to take part in a program called Supervised Intensive Restitution (SIR). They would be employed full time, accept daily visitation from a parole officer, pay any restitution that had been ordered by the court, and pay an appropriate monthly fee for the privilege of their early release. The program has been under some influential attack by a politically ambitious attorney general, but it now seems to be safe and accommodates several hundred selected convicts at any given time.

No state will preen itself on the excellence of its prisons, but the Alabama prisons are now a lot more decent and progressive than the prisons of a number of much more affluent states I have visited in the course of my career as an "expert."

The Role of the Expert

I now want to see what lessons we can draw from this experience. First, consider the nature of penological expertise. If experts are to be summoned for the litigation, their experience must be comprehensive enough to know what is wrong and to enable them to be authoritative on what can be done and what ought to be done. That means that they must know such principles as how many officers should be on duty during a watch, what they should be doing, where they should be stationed and how they should be trained and supervised. Or how a classification system should be organized and conducted. Or what kinds of programs should be installed in the administrative and protective segregation units.

The aged and infirm prisoners . . . were removed from the dangerous firetrap in which they had been confined.

There are general principles governing these matters and many others, any of which have to be adapted for ancient and obsolete structures which are still in use as well as for the spanking new prisons designed for effective architectural control. The experts should be familiar with the various standards for prison management, such as those established by the American Correctional Association, the Department of Justice, and the American Bar Association. They should not be expected to know everything. I don't know any prison officials who would qualify as sanitarians, nor should anyone like me be expected to pronounce on the adequacy of the medical services. Prison experts are needed to say what ought to be done and whether it is being done by the management of the prison in litigation.

No expert should take the witness stand without a thorough tour of the prison about which he or she is to testify. I urge litigators not to compromise on this matter even when negotiating a consent decree or court order. If the sole issue is the quality of life in the Hole, the expert must see the rest of the prison to have any basis for discussing possible changes. The tour should allow for freedom to talk with officials about their perception of problems and what should be done about them. When conditions are as dreadful as they were in Alabama in 1975, then the court needs to know whether there is any potential for progressive change if the officials on duty are to remain in charge.

Statewide Perspective Needed

That brings me to another problem that has bothered me in my attempts to play the expert. Nearly all prisons in this country are now units in a system of prisons. For example, a couple of years ago I was asked to be an expert witness in litigation brought against the warden of San Quentin—in a sense my alma mater, where my penological career began. Violence was endemic, the place was grossly overcrowded, and a list of serious complaints had been drawn up by the prisoners. Conditions were about as alleged, but what could be done? The California prisons were all overcrowded—and still are. The court's order to make a drastic reduction in the San Quentin population relieved the terrible local situation, but shifted the overcrowding to another prison outside the jurisdiction of the court.

It may be necessary to solve some prison problems piecemeal, but surely consideration should be given to the consequences for the whole system. In the case of California, the solution to almost any local prison problem will have repercussions throughout the prison circuit, and, sometimes, outside it. The dilemma for the Department of Corrections, the litigators, the experts, and the court, is excruciating. Before the case comes to trial, conferences should take place to clarify feasible alternatives to the conditions which constitute the gravamen of the litigation.

Successful prison litigation states the problem but does not solve it.

We have come a long way from the almost Manichean state of affairs that confronted Judge Johnson in 1975. At that time, experts were hardly needed to establish the inequity of Alabama prison conditions. We still need the NPP and other prison litigators maybe as never before, but they need more and better experts to conduct litigation that will contribute to human penology.

Successful prison litigation states the problem but does not solve it. The court usually retains jurisdiction until it is satisfied that the necessary changes have been made, but it cannot make the changes itself. That must be done by the system's administrators, usually supervised by a Special Master or a monitor. This arrangement inevitably causes a lot of pain. There is a division of authority, and in a prison with all the ambiguities of authority in a three tier set of roles, the authority of the Special Master may be a fourth and confusing factor in the power system. Both the warden's staff and the guards have authority, and the Master provides a new upward channel through which grievances can and do flow.

Under these circumstances it is essential that from the outset roles be defined as clearly as possible. The Special Master should be limited to the supervision of only those changes that the court has prescribed. He or she should abstain from any other intervention in the system although useful recommendations should be welcomed by both sides. If these understandings can be effected from the beginning, problems

can be solved. If not, the changes the court has ordered will drag on for years, and will be carried out in an atmosphere of resistance, if not outright hostility.

Comments on the Future of Litigation

At the outset, I said that the omens for continued prison improvement are not good. Prison sentences are longer, parole boards are becoming more cautious about release, costs of prison construction are rising, programs that reduce prisoner idleness are being eliminated or drastically pruned, and there seems to be much less public concern about the condition of our prisons.

There are signs that the federal courts are losing patience with prisoners' class-action lawsuits. The dramatic abuses that were brought into court in Alabama and Texas, for example, are under correction. The less striking inequities can be consigned to the attention of administrators, prisoner grievance systems, or to the ombudsman, if any.

Does this mean that litigation is about to go out of fashion? I certainly hope not. The National Prison Project has accumulated a practical expertise of its own that the nation needs, perhaps as never before. Who else really knows how to move a reluctant system into change? Who else knows what changes are possible?

Many needed changes are beyond the direct power of the courts to bring about. If new prisons must be built, the legislatures must vote the appropriations. If terms are too long, causing unnecessary crowding, the legislatures must modify penal codes. If parole policies are unduly restrictive, pressures must be brought to bear for them to loosen up. And if an innovation like Alabama's SIR program will reduce crowding, administrators will have to prepare public opinion, organize the program, train the employees who will carry it out, and protect it from foolish decision-making. The National Prison Project and other litigators can do none

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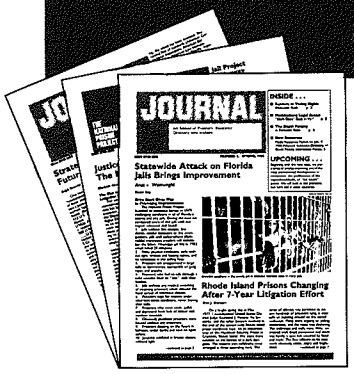
PUBLICATIONS



The National Prison Project JOURNAL, $20/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. NEW 7th Edition, published April 1986. Paperback, $20 prepaid from NPP.

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

The National Prison Project Status Report lists by state those presently under court order, or those which have pending litigation either involving the entire state prison system or major institutions within the state. Lists only cases which deal with overcrowding and/or the total conditions of confinement. (No jails except District of Columbia). Periodically updated. $3 prepaid from NPP.

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

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 March 31, 1986. Further details of any of the listed cases may be obtained by writing the Project.

Abbott v. Richardson—This is the national class action which challenges the Federal Bureau of Prisons' mail and literature policies. The appeal was argued in January before the D.C. Circuit.

Boudreau v. Wainwright—This case involves the right of inmates in Florida to wear armbands protesting the execution of John Spinkelink. Our objection to the Magistrate's report granting defendants' motion for summary judgment was rejected, and we filed an appeal this quarter.

Jerry M. v. D.C.—This case deals with conditions in the District's juvenile facilities. In February we moved for a TRO concerning the unsafe housing of children in large dormitories in Cedar Knoll. The parties reached a stipulation prohibiting the number of children that could be placed in dorms and required a higher ratio of staff to children.

Nelson v. Leeke—This case challenges terribly overcrowded conditions in South Carolina's major prisons. Due to extreme overcrowding and the resulting triple-celling at three facilities, we requested several actions by the court and the court-appointed monitor.

Palmigiano v. Garrahy—In the Rhode Island state-wide prison case we received an excellent opinion on May 12 holding that overcrowding had had an unconstitutional impact on various conditions at two facilities. The court ordered population caps, including single-celling at the new Intake Center, and required the defendants to develop plans to cure the deficiencies in programming, environmental health and safety, and medical and mental health care.

Ramos v. Lamm—This case challenges the totality of conditions at the Colorado State Penitentiary. On March 27, we received a favorable opinion increasing the fee award to $1,060,000 (less the interim award of $282,000). On April 21, the state finally agreed to settle the claim for $960,000, less the interim award, with payment to be made in 30 days.

Terry D. v. Rader—This action challenges the conditions in six juvenile institutions in Oklahoma. We filed motions for summary affirmance in the 10th Circuit in order to obtain the uncontested portion of our fees and costs judgment.

U.S. v. Michigan/Knop v. Johnson—In *U.S. v. Michigan,* the court's independent expert issued a report finding subtantial areas of defendants' noncompliance. The court ordered defendants to explain their failure to implement their own mental health care plan and ordered supplemental relief regarding mental health services. In May, the defendants were held in contempt on this issue. In *Knop* the plaintiffs won several discovery motions.

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of these things, but they can help to see to it that they are done when such measures must be part of the solution.

A federal judge once remarked to me that when he was in law school he wondered why judges did not make more use of their equity powers in the public interest. When at last he found himself on the bench, he soon found out that these powers came with burdens that fell on him alone. Neither the National Prison Project nor anyone else can entirely remove these burdens from the judge's shoulders, but they can be lightened. There is a lot more that has to be done—judges, litigators, and experts must get on with doing it, enlisting help from governors, administrators, legislators, and the interested public wherever litigation is not enough. ■

John Conrad has done extensive academic and consulting work in the field of criminal justice. He has served as project director and member of the board of directors of the American Justice Institute. Mr. Conrad has held various positions in the California Department of Corrections during his career. He has served as chief of research of the U.S. Bureau of Prisons and chief of the Center for Crime Prevention and Rehabilitation of the National Institute for Law Enforcement and Criminal Justice, now the National Institute of Justice.

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