THE NATIONAL PRISON PROJECT JOURNAL

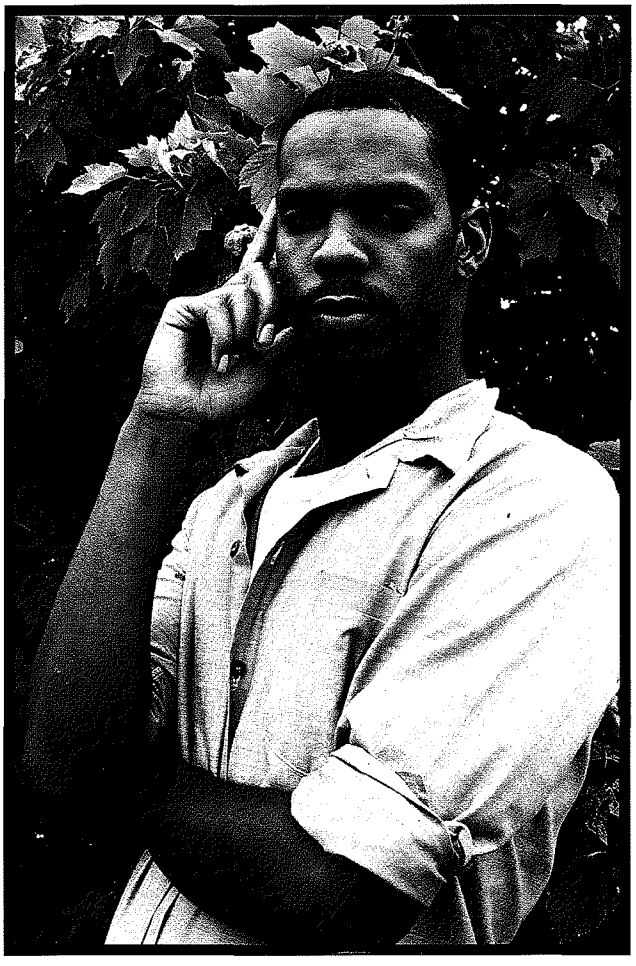
A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
VOL. 9, NO. 1, WINTER 1993/94 • ISSN 0748-2655

Black Prisoners Organize for Self-Empowerment

BY ALICE P. GREEN, PH.D.

In 1990 the publication of a research report by The Sentencing Project on the incarceration of Black males provoked an unusual degree of public attention. Communities throughout the nation responded with shock and dismay to the news that nearly one out of four young African-American males are under the control of the criminal justice system.[1] Black communities were particularly shaken. They continue to search for meaningful ways to respond to what they view as yet another symbol of oppression and social control.

African Americans have always protested their oppression in some form or other. They have publicly struggled against enslavement and civil rights violations. However, the movement against the maltreatment of Black prisoners and the use of imprisonment as a method of social control and oppression has received less publicity. Much of the leadership in this area has come from Black prisoners themselves.



Anthony Coleman, Lorton Photography Workshop

"The non-traditional approach works to empower prisoners, the prison, and the community to work toward...change together."

Historically, the way in which protests against prison conditions have been carried out has reflected the attitudes and the social, economic, and political climate of the Black community of the time. Protest strategies have been shaped by both ideology and pragmatism, giving credence to the observation made by the Black intellectual, W.E.B. Du Bois:

> *...the attitude of the imprisoned group may take three main forms, —a feeling of revolt and revenge; an attempt to adjust all thought and action to the will of the greater group; or, finally, a determined effort at self-realization and self-development despite environing opinion.*[2]

All three of these attitudes—accommodation, rebellion, and self-realization (or self-determination and empowerment)—have been adopted by African American prisoners responding to their overrepresentation in prison, the extraordinarily harsh conditions of their confinement, and racial segregation and discrimination which have long characterized prisons across the country. Here, we will offer three examples of how these attitudes have been reflected in Black prisoner protests. The accommodationist attitude was clearly represented during the period following the Civil War until 1954, the year of *Brown v. Board of Education*. Then, "rebellion" characterized the period following that momentous decision until the mid-1970s. And finally, during the Reagan-Bush administrations, the current attitudes of Black self-determination and empowerment were developed.

Accommodation

The state of Black male imprisonment reported by The Sentencing Project is not new. African Americans have been overrepresented in prisons since

1994 STATUS REPORT

See Page 3

INSIDE...

the beginning of American penitentiaries in 1790.[3] Immediately following the Civil War, newly freed Blacks soon became victims of the "Black Codes" designed to legally re-enslave them as prisoners. So successful were these discriminatory laws that barely five years after emancipation, Blacks represented 33% of the American prison population and 95% of most prison populations in the South. In addition, Black prisoners were almost totally separated from white prisoners[4] and were confined under the most inhuman and brutal conditions—conditions even worse than those suffered under slavery. Arkansas provides a perfect example of the result: the Black death rate in that state's prisons reached 25% in the 1880s.[5]

How did Black prisoners respond to these horrible conditions at the time? Unfortunately little is known, because early historians, sociologists, and scholars of the American penal system adopted a "color-blind" approach. Only since 1970 have researchers focused serious attention on race in prisons.[6] To date, none have examined this issue in an historical context. Therefore, we are left to speculate that, in the first half of the 20th century, the responses of prisoners to the oppressive nature of Black imprisonment mirrored contemporary attitudes of large segments of the Black community. Following Reconstruction, which was marked by Black political and social activism, much of Black protest shifted gradually to accommodation due to Black disenfranchisement, the proliferation of segregation laws, and other racist, oppressive, and violent actions. Subsequently, many Blacks began to devalue political participation, accept segregation, stress the ideals of self-help and racial solidarity[7], and curtail confrontational and active forms of protest.

A noted prisoner of a more recent era, Eldridge Cleaver, presents a graphic description of the period:

> *Prior to 1954, we lived in an atmosphere of novocain. Negroes found it necessary, in order to maintain whatever sanity they could, to remain somewhat aloof and detached from 'the problem'. We accepted indignities and the mechanics of the apparatus of oppression without reacting, by sitting-in or holding mass demonstrations.*[8]

The adoption of an accommodationist stance was prompted by several other factors. First, the reigning prison philosophy stressed the importance of keeping prisoners docile. Individual expression and resistance were strongly discouraged. Secondly, Blacks were particularly discouraged from protesting their condition since they occupied a subordinate position to all others in society, had no political or legal influence, and were given no opportunity to complain or press charges against whites of any social position. But, most importantly, Blacks constantly lived with the threat and fear of lynching and other forms of white violence. Any overt political activity challenging white authority could spark the flames of racist attack. Manning Marable notes that "no jail or state penitentiary would be secure enough to keep the Black man/woman from his/her certain fate."[9]

It is well established that prisoners were often taken from jails and lynched with the support and help of law enforcement officials.

Rebellion

Like other African Americans in the late 1950s, Black prisoners began to actively protest segregation and discrimination and later the "political" nature of their imprisonment. The Black Muslims initiated the prison protest movement by challenging discriminatory treatment of Muslims. They soon expanded their fight to include the constitutional rights of all prisoners. They worked to increase Black prisoners' awareness of their environment and their self-identity. The Muslims have been credited with helping to destroy the barriers to political consciousness which impeded prisoners in previous attempts to struggle against their oppression.[10]

Many of the new prisoners entering the system during this era had been involved in major social movements—fighting for civil rights and welfare rights, protesting the Vietnam War, and defining themselves as Black nationalists. Their experiences in those struggles equipped them with political sensitivities that were new among imprisoned populations. Armed with these perspectives, prisoners began legal challenges, strikes, and rebellions; they wrote books and articles to focus the free world's attention on the problem of prisons and Black oppression.

In the early 1970s, Black prisoners advanced the proposition that they should be thought of as "political prisoners,"[11] arguing that since their condition derived from the political and economic inequality of Blacks in America, they were victims of that oppressive order. Chrisman argued that even when the Black prisoner's crime is not political, the state's action against him is political. That is, Black offenders are not tried and judged by the Black community itself, but by whites who "are served by the systematic subjugation of all black people."[12]

The revolutionary consciousness that grew out of this new political awareness took hold and erupted in September 1971 at Attica Prison in New York State, where 32 prisoners and 11 state employees died during the bloodiest American prison revolt.

Following the revolt, The Attica Commission Report acknowledged the influence on Black prisoners of the movement for equality in the Black community:

> *[T]he increasing militancy of the black liberation movement had touched him...he came to Attica bitter and angry as the result of his experiences in the ghetto streets and in the morass of the criminal justice system.*[13]

Attica and the FBI attack on Black radical groups such as the Black Panthers, sufficiently suppressed the Black protest movement that developed in the Sixties. Panthers such as Eddie Ellis were targeted for surveillance by COINTELPRO (the FBI surveillance program) and imprisoned. Following the uprising, Ellis and many

(cont'd on page 20)

THE NATIONAL PRISON PROJECT JOURNAL

Editor: Jan Elvin
Editorial Asst.: Jenni Gainsborough
Regular Contributors: John Boston, Russ Immarigeon
Alvin J. Bronstein, Executive Director
The National Prison Project of the American Civil Liberties Union Foundation
1875 Connecticut Ave., NW, #410
Washington, DC 20009
(202) 234-4830 FAX (202) 234-4890

The National Prison Project is a tax-exempt foundation-funded project of the ACLU Foundation which seeks to strengthen and protect the rights of adult and juvenile offenders; to improve overall conditions in correctional facilities by using existing administrative, legislative and judicial channels; and to develop alternatives to incarceration.
The reprinting of *JOURNAL* material is encouraged with the stipulation that the National Prison Project *JOURNAL* be credited with the reprint, and that a copy of the reprint be sent to the editor.
The *JOURNAL* is scheduled for publication quarterly by the National Prison Project. Materials and suggestions are welcome.

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

Status Report: State Prisons and the Courts – *January 1, 1994*

COMPILED BY EDWARD I. KOREN

STATUS REPORT BY JURISDICTION

1. **Alabama:*** The entire state prison system was under court order dealing with total conditions and overcrowding. *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in substance sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978). A receiver was appointed. 466 F. Supp. 628 (M.D. Ala. 1979). On January 13, 1983, the district court entered an order establishing a four-person committee to monitor compliance with previous orders. In December 1984, the district court relinquished active supervision after the parties agreed that substantial compliance had been achieved. The court dismissed the case in December 1988.

2. **Alaska:*** The entire state prison system is under a consent decree and a court order entered in 1990 dealing with overcrowding and total conditions of confinement. *Cleary v. Smith*, No. 3AN-81-5274 (Super. Ct., 3rd Jud. Dist.) (complaint filed Mar. 3, 1986). The parties agreed to population caps at each facility and a mechanism to reduce the population when a cap is exceeded. The parties contemplated that the mechanism would remain in effect until the state legislature approved an emergency-overcrowding reduction statute. By October 1992, the legislature had failed to pass such legislation, the DOC had failed to reduce the population at the six largest prisons, and the state filed for relief from the order. In an order entered on October 25, 1993, the court lifted the population cap at the Spring Creek maximum-security facility. A motion for reconsideration was filed on November 4, 1993 and granted by the court. A briefing schedule has been entered. The court ordered trial on compliance issues including program parity for the state's women prisoners.

3. **Arizona:*** The state penitentiary is operating under a series of court orders and consent decrees dealing with overcrowding, classification, and other conditions. Orders, August 1977-1979, *Harris v. Cardwell*, CIV-75-185 PHXCAM (D. Ariz.). A special administrative-segregation unit at the Arizona State Prison in Florence was operating under a December 12, 1985 consent decree. A monitor was appointed. *Black v. Ricketts*, C.A. No. 84-111 PHXCAM (D. Ariz.). The unit was later found to be in full compliance with the consent decree, and *Black* was dismissed in February 1988.

A statewide class action, filed on behalf of Arizona prisoners on January 12, 1990, challenges legal access, health care, and discrimination against handicapped prisoners. *Casey v. Lewis*, CIV-90-0054 PHXCAM (D. Ariz.). Partial summary judgment for plaintiffs was entered in August 1991 enjoining discrimination against HIV-positive prisoners in job assignments. The state has appealed. Trial on the remaining issues occurred in 1991-92. On November 13, 1992, the district court entered a favorable decision on the legal-access issues; on March 19, 1993, the court declared mental-health care unconstitutional; and on April 3, 1993, the court found that the defendants had denied mobility-impaired prisoners access to bathroom facilities and other areas, in violation of the Constitution. On September 23, 1993 a Ninth Circuit panel vacated the district court's injunction on contact attorney-client visitation and the denial of food-service jobs to HIV-infected prisoners. 4 F.3d 1516 (9th Cir. 1993). Plaintiffs await a ruling on their petition for a rehearing *en banc* from the Ninth Circuit.

4. **Arkansas:*** The entire state prison system was under court order dealing with total conditions. *Finney v. Arkansas Board of Correction*, 505 F.2d 194 (8th Cir. 1974). A special master was appointed. *Finney v. Mabry*, 458 F. Supp. 720 (E.D. Ark. 1978). Compliance was assessed in 1982. 534 F. Supp. 1026 (E.D. Ark. 1982); 546 F. Supp. 626 (E.D. Ark. 1982). After a finding of full compliance, the federal court relinquished jurisdiction in August 1982. 546 F. Supp. 628 (E.D. Ark. 1982).

5. **California:*** The administrative-segregation units at San Quentin, Folsom, Soledad, and Deuel (DVI) are under court order due to overcrowding and conditions. A preliminary injunction was entered. *Toussaint v. Rushen*, 553 F. Supp. 1365 (N.D. Cal. 1983), *aff'd in part sub nom. Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984). The district court thereafter entered a permanent order enjoining double-celling and other conditions at the San Quentin and Folsom units. *Toussaint v. McCarthy*, 597 F. Supp. 1388 (N.D. Cal. 1984). The court of appeals reversed on the issues of placement and retention in administrative segregation. 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987). A monitor was appointed to oversee compliance. *Toussaint v. Rowland*, 711 F. Supp. 536 (N.D. Cal. 1989). The monitorship was dissolved in 1991, but the plaintiffs continue to evaluate compliance. On June 29, 1992, acting on the defendants' motion under Rule 68, the district court entered an order on conditions and double-celling with respect to Soledad and DVI.

The California Men's Colony at San Luis Obispo is under a court order establishing population limits. *Dohner v. McCarthy*, 635 F. Supp. 408 (C.D. Cal. 1985). However, compliance monitoring has ceased.

The California Institution for Men at Chino is operating under a settlement agreement providing for improved sanitation, classification, legal access, and other conditions. Compliance monitoring has ceased. *Boyden v. Rowland*, CV-86-1989-HLH.

The California Medical Facility at Vacaville is under a 1990 consent decree concerning the delivery of health-care and psychiatric services, including housing and programming for HIV infected inmates. Compliance is being monitored. *Gates v. Deukmejian*, No. S-87-1636-LKK-JFM (E.D. Cal.). In 1992, plaintiffs filed a contempt motion concerning the staffing requirements of the order. A magistrate judge filed a report on this issue and the district judge ordered limited further relief. (Order of Apr. 3, 1992). In 1993, a further contempt motion was filed; a ruling is awaited.

Two lawsuits concern the delivery of medical and mental-health services to prisoners at the California Women's Institution at Frontera. *Whisman v. McCarthy*, No. OCV-33860 (Super. Ct., San Bernadino County) and *Doe v. CDC*, A-Civ.-89-598-GLT (C.D. Cal.). In *Whisman*, a settlement was reached in May 1992, in which the parties agreed to a state DHS inspection and to correct problems with inadequate treatment and care identified by this inspection. *Doe* deals with the treatment of HIV-positive prisoners at CWI. Discovery continues. Substantial changes have occurred in the DOC policy that have changed the posture of the case.

In 1990, a class-action suit against the Department of Corrections was filed challenging conditions at the state's new "supermax" facility at Pelican Bay. *Madrid v. Gomez*, C-90-3094 (N.D. Cal.). The complaint alleged the use of excessive force and brutality by guards, deliberately cruel and dehumanizing conditions of confinement, deliberate indifference to prisoners' serious medical needs, and unnecessary risk of inmate-upon-inmate violence. During 1992, a class was certified and discovery was ongoing. The case went to trial on September 17, 1993, and ended December 15. A decision is awaited.

A case was filed against the state challenging the adequacy of mental-health care in all California prisons (except Vacaville and San

Quentin). *Coleman v. Wilson*, CV-90-520-LKK-JFM. The trial concluded in June 1993; a decision is awaited.

6. **Colorado:*** The state maximum-security penitentiary at Canon City is under court order on total conditions and overcrowding. *Ramos v. Lamm*, 485 F. Supp. 122 (D. Colo. 1979), *aff'd in part and remanded*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), *on remand*, 520 F. Supp. 1059 (D. Colo. 1981). During the compliance stage, the parties reached a series of agreements later approved by the court concerning general conditions, as well as specific areas such as legal access, double-bunking and treatment of HIV-infected prisoners. On this last issue, see *Diaz v. Romer*, 961 F.2d 1508 (10th Cir. 1992).

A lawsuit filed on February 27, 1990, challenges conditions and delivery of health-care services at three other major state facilities (Buena Vista, Fremont, and the women's prison). *Nolasco v. Romer*, No. 90-C-340 (D. Colo.). In 1992, the parties reached a comprehensive settlement on all of the issues. The district court approved this agreement in June 1992. 801 F. Supp. 405 (D. Colo. 1992). During 1993, the state filed a series of compliance reports, in both *Ramos* and *Nolasco*, to which the plaintiffs will respond.

Lawsuits concerning inadequate classification resulting in increased assaults and violence at the Lymon Correctional Facility were consolidated in August 1993. *Wilson v. Romer*, No. 92-C-1470 and *Hall v. Romer*, No. 92-M-1932. Discovery is ongoing; an amended complaint will be filed.

7. **Connecticut:*** The Hartford Correctional Center is under court order dealing with overcrowding and some conditions. *Lareau v. Manson*, 507 F. Supp. 1177 (D. Conn. 1980), *aff'd in part, modified, and remanded*, 651 F.2d 96 (2d Cir. 1981).

Other facilities under consent decree are Bridgeport Correctional Center, *Mawhinney v. Manson*, No. B78-251 (D. Conn. 1982) and New Haven Correctional Center, *Andrews v. Manson*, No. N81-20 (D. Conn. 1982). Although the orders entered in both of these cases remain in effect, they are not being monitored actively.

Niantic Women's Prison is under a court order on a full range of women's prison issues. *West v. Manson*, No. H-83-366 (D. Conn.) (entered Oct. 3, 1984). Compliance is being monitored in this case.

The treatment of HIV-positive Connecticut prisoners was the subject of a 1988 lawsuit. *Doe v. Meachum*, No. 88-562 (D. Conn.). In 1991, a negotiated agreement was reached and a consent decree was entered. Compliance is being monitored.

Litigation challenging violence and overcrowding is pending at the state prison at Somers. *Bartkus v. Manson*, No. H-80-506 (D. Conn.). During 1993, the parties were engaged in settlement discussions concerning population limits and out-of-cell time. In October, the plaintiffs were granted a temporary restraining order enjoining further double-celling at the prison.

8. **Delaware:*** All major Delaware prisons are under a consent decree filed in state court on issues of overcrowding, physical plant, medical care, and access to the courts. *Dickerson v. Castle*, C.A. No. 10256 (Del. Ch. Nov. 22, 1988). On December 7, 1992, a supplementary agreement on overcrowding and tuberculosis control was approved by the court. Compliance monitoring commenced in 1993.

9. **Florida:** The entire state prison system was under court order dealing with overcrowding. *Costello v. Wainwright*, 397 F. Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir. 1976) *and* 553 F.2d 506 (5th Cir. 1977). In 1980, the court entered a consent decree providing measures for population control. 489 F. Supp. 1100 (M.D. Fla. 1980). A special master was appointed. Additional consent decrees were entered covering environmental health and safety. In 1992, the parties agreed that the standards and terms of the population order would be embodied in a state statute and that the Correctional Medical Authority (CMA), an independent state-funded agency, would monitor and enforce compliance.

A consent decree was entered on December 17, 1987 in *Costello* concerning health-care services. Later, in 1991, the parties negotiated to end court supervision of the health-care order by turning over monitoring and enforcement to the CMA.

In 1993, the state statute came into effect authorizing CMA to monitor and enforce population, habitability, and health-care provisions, and providing a unique model whereby modification of these provisions can be made only through a medical waiver. However, prisoners have an automatic right to sue the Department of Corrections if an adverse ruling is made.

On the basis of the settlement and the statute, the district court issued a final judgment "closing" the statewide Florida crowding and medical-care litigation (the *Costello* case noted above), thereby vacating the previously imposed injunction and relieving class counsel, the special master, and the monitor of any further responsibilities. *Celestineo v. Singletary*, 147 F.R.D. 258 (M.D. Fla. 1993).

Inadequate security provisions leading to predictable inmate violence and sexual assaults at Glades Correctional Institution were challenged in a lawsuit seeking injunction and monetary relief. The district court entered an injunction benefiting the class, and awarded damages to some of the named plaintiffs. The decision was substantially affirmed on appeal. *LaMarca v. Turner*, 995 F.2d 1526 (11th Cir. 1993).

10. **Georgia:** The state penitentiary at Reidsville is under court order on total conditions and overcrowding. A special master was appointed in 1979, and dismissed in 1983. *Guthrie v. Evans*, C.A. No. 3068 (S.D. Ga.). The case was closed in 1983, but the injunction remains in effect. The order requires single-celling, improvements in the medical- and mental-health-care delivery system, and improvements in environmental health, among other things. Compliance is being monitored.

A number of other state facilities have come under challenge. In 1993, a class-action lawsuit begun in 1984 on behalf of the state's women prisoners alleging inadequate living conditions and physical and psychological mistreatment was updated to include allegations of sexual abuse. *Cason v. Seckinger*, 84-313-1-MAC. These allegations are now the subject of a federal investigation by the U.S. Attorney General.

11. **Hawaii:*** The men's prison (O.C.C.C.) in Honolulu and the women's prison on Oahu were under court order as a result of a 1985 consent decree entered in a totality of conditions suit. *Spear v. Ariyoshi* (now *Spear v. Waihee*), Civ. No. 84-1104 (D. Haw.). Monitors were appointed and continued to assess compliance with the court decree. Following negotiations with a view toward modifying the decree to reflect current conditions more accurately, a new agreement was finalized in July 1993. The new agreement addresses changed conditions, simplifies the process of court supervision, and provides a mechanism for determining when such monitoring is no longer necessary. The agreement also provides for permanent population caps that will be enforced by the state courts. An order putting the new agreement into effect was signed on November 19, 1993.

12. **Idaho:*** The men's Idaho Correctional State Institution is under a court order concerning conditions. *Balla v. Idaho State Board of Corrections*, 595 F. Supp. 1558 (D. Idaho 1984). In 1987, incident to *Balla*, the district court held that the prison was unconstitutionally overcrowded and ordered population reductions. 656 F. Supp. 1108 (D. Idaho 1987). The court of appeals upheld the district court decision rejecting defendants' attempt to obtain more time to reduce the population, among other things. 869 F.2d 461 (9th Cir. 1989).

The women's prison is operating under an interim agreement signed in July 1991 concerning conditions, including overcrowding and medical care, which will remain in effect until the DOC opens a new facility. *Witke v. Vernon* (formerly *Witke v. Crowl*), Civ. No.

82-3078 (D. Idaho). Compliance is being monitored. Once the new facility is operational (currently scheduled for February 1994), the previous agreements reached in this case concerning programming, delivery of medical care, and legal access will continue to apply.

13. **Illinois:*** The state penitentiary at Menard is under court order on total conditions and overcrowding. A special master, appointed in 1980, was discharged after four years. There has been substantial compliance with the decree; however, the injunction remains in force. *Lightfoot v. Walker*, 486 F. Supp. 504 (S.D. Ill. 1980).

Dwight Correctional Center is under a May 1990 consent decree that requires programs for women prisoners and the construction of a 200-bed minimum-security facility for women. *Moorhead v. Lane*, No. 86-C-2020 (C.D. Ill.).

The Stateville facility is under a December 1990 consent decree, entered by the district court, which provides for improved protection from assault. *Calvin R. v. Peters*, No. 82C1955 (N.D. Ill.). A court monitor has been appointed and a classification evaluation by NCCD has been completed. Compliance monitoring continues. The district court ordered that protective-custody prisoners at the Stateville facility be provided with improved programming, conditions, and legal assistance. *Williams v. Lane*, 646 F. Supp. 1379 (N.D. Ill. 1986). The court of appeals affirmed this decision. 851 F.2d 867 (7th Cir. 1988), *cert. denied*, 488 U.S. 1047 (1989).

14. **Indiana:*** The state prison at Pendleton was found unconstitutional on total conditions and overcrowding. *French v. Owens*, 538 F. Supp. 910 (S.D. Ind. 1982), *aff'd in pertinent part*, 777 F.2d 1250 (7th Cir. 1985), *cert. denied*, 479 U.S. 817 (1986). The state penitentiary at Michigan City is under a court order on overcrowding and other conditions. *Hendrix v. Faulkner*, 525 F. Supp. 435 (N.D. Ind. 1981), *aff'd in part, vacated and remanded in part sub nom. Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984).

The state prison at Westville is under a consent decree on overcrowding, conditions, and delivery of mental-health services. *Anderson v. Orr*, C.A. No. S83-0481 (N.D. Ind.) (case filed in 1983). A comprehensive settlement was reached on March 31, 1989. During 1992 and 1993, the parties had extensive discussions about compliance.

In June 1990, a case was filed challenging conditions and delivery of health-care services to prisoners confined at Indiana's reception and classification facility. *Lecclier v. Bayh*, IP90-1460-C (S.D. Ind.). After conducting discovery, the parties reached a comprehensive settlement. A consent order was entered on July 5, 1991. In accordance with the terms of the order, and after two years of compliance, the case was closed.

On May 4, 1992, prisoners at the Maximum Security Complex at Westville (the state's so-called "supermax") brought an action in state court challenging placement and conditions. *Taifa v. Bayh*, No. 49-DO-7-9205-CP-489 (Super. Ct., Marion County). The state had the case removed to federal court. *Taifa v. Bayh*, No. S-92-429M (N.D. Ind.). The federal court remanded the state law claims to the state court. In 1993, the parties signed off on an Agreed Entry, which resolves the claims in both state and federal courts. The document restricts the criteria for placement, provides for improved conditions and increased out-of-cell time, and provides for a method to earn one's way out of the facility. The Agreed Entry has been submitted to the federal judge for approval.

15. **Iowa:** The Iowa State Penitentiary at Fort Madison is under court order on overcrowding and a variety of conditions; however, this decree is not being monitored actively for compliance. *Watson v. Ray*, 90 F.R.D. 143 (S.D. Iowa 1981).

Fort Madison is also under a series of consent decrees involving the delivery of medical-care services, *McBride v. Ray*, No. 73-242-2 (S.D. Iowa), segregation, *Gavin v. Ray*, No. 78-62-2 (S.D. Iowa), and protective-custody practices, *Parrott v. Ray*. These cases are being monitored actively.

Women prisoners confined to the Iowa Correctional Institution for Women (ICIW) at Mitchellville filed a class action concerning disparate treatment as against male prisoners in terms of programs and work opportunities. *Pargo v. Elliot*, No. 4-92-80781 (S.D. Iowa). Discovery is ongoing and a trial before the magistrate judge is scheduled for March 22, 1994.

16. **Kansas:** A consent decree on total conditions was entered in 1980 at the state penitentiary at Lansing. *Arney v. Bennett*, No. 77-3045 (D. Kan.). The case was reopened and expanded in 1988, and a more comprehensive order was entered in April 1989. That order requires the state's oldest facilities to meet and maintain standards of the American Correctional Association (ACA) and the National Commission on Correctional Health Care (NCCHC); the capacities of all other existing or new facilities must meet ACA standards. A panel of experts is monitoring mental-health treatment. In 1991, the defendants moved for modification of the consent decree to permit double-celling and to increase operating capacity due to construction delays. The court denied modification in two prisons that were the focus of this case and granted it in other institutions, but only where ACA standards and other limitations are met. *Arney v. Finney*, 766 F. Supp. 934 (D. Kan. 1991), *aff'd in part, appeal dismissed in part*, 967 F.2d 418 (10th Cir. 1992). (Subsequently the caption on the case was changed to *Porter v. Finney*.) In 1993, the mental-health monitoring team found that compliance had been achieved with that plan. Also during 1993, the court approved plans with respect to protective-custody and other segregation issues. Compliance monitoring continues on all other issues.

17. **Kentucky:*** The Kentucky State Penitentiary (KSP) at Eddyville and the Kentucky State Reformatory (KSR) at LaGrange were under court order by virtue of a consent decree on overcrowding and some conditions, including guard brutality. *Kendrick v. Bland*, 541 F. Supp. 21 (W.D. Ky. 1981). The court of appeals later vacated some requirements of the order related to the brutality issue. 740 F.2d 432 (6th Cir. 1984). The district court found the defendants in substantial compliance with the consent decree, with the exception of new construction requirements. As a result, the case was placed on the inactive docket of the court, a decision that was affirmed by the court of appeals. However, that court held that the district court could reinstate the case if the plaintiffs could prove "a major violation" of the decree. 931 F.2d 421 (6th Cir. 1991). On February 24, 1992, the district court, with respect to KSP, relinquished jurisdiction and dismissed the case. With respect to KSR, the court retained jurisdiction until all construction is completed and as long as major violations of the decree do not occur.

The women's prison, KCIW at Pee Wee Valley, was under court order on a variety of conditions, including crowding, physical plant, sanitation, access to the courts, programming, classification, and work. *Canterino v. Wilson*, 546 F. Supp. 174 (W.D. Ky. 1982), and 564 F. Supp. 711 (W.D. Ky. 1983). The district court's order concerning work and study release was vacated by the court of appeals. 869 F.2d 948 (6th Cir. 1989). The district court relinquished jurisdiction on July 13, 1992.

18. **Louisiana:** The Louisiana State Prison (Angola) is under court order dealing with overcrowding and a variety of conditions. *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977). In 1981, the court of appeals consolidated all state-prison-overcrowding and local-jail-overcrowding cases in Louisiana before one district court judge. This decision included *Williams*. *See Hamilton v. Morial*, 644 F.2d 351 (5th Cir. 1981). On December 7, 1983, the district judge who was appointed under *Hamilton* approved a consent decree dealing with crowding and population problems at Angola. In 1989, the judge declared a state of emergency, appointed a court expert, and request-

ed that the U.S. Department of Justice investigate. In 1991, the judge appointed a lawyer for the class of state prisoners; the lawyer has been actively involved in monitoring compliance with outstanding orders in the case. The case is now entitled *Williams v. McKeithen*. *See* 939 F.2d 1100, 1102 (5th Cir. 1991).

19. **Maine:*** The State Prison at Thomaston was challenged on overcrowding and a variety of conditions in 1978. The trial court granted relief on the issue of restraint cells, and otherwise dismissed the complaint. *Lovell v. Brennan*, 566 F. Supp. 672 (D. Me. 1983), *aff'd*, 728 F.2d 560 (lst Cir. 1984).

In October 1990, a lawsuit was filed against the state prison at Thomaston concerning conditions, treatment, and placement in the protective-custody and administrative-segregation units. *Brown v. McKernan*, No. 90-246-P (D. Me). In March 1991, the parties reached an agreement to end double-celling in those units and to enhance programming opportunities. Compliance is being monitored.

20. **Maryland:*** The Maryland House of Corrections at Jessup and the Baltimore Penitentiary were declared unconstitutionally overcrowded in, respectively, *Johnson v. Levine*, 450 F. Supp. 648 (D. Md. 1978), and *Nelson v. Collins*. 455 F. Supp. 727 (D. Md. 1978), *aff'd in part sub nom. Johnson v. Levine*, 588 F.2d 1378 (4th Cir. 1978), *on remand*, Nos. H-77-113 and B-77-116, (D. Md. Jan. 5, 1981), *rev'd and remanded sub nom. Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981) (en banc). A settlement agreement and consent decree were subsequently entered in both cases.

In a case against the Maryland Correctional Institution at Hagerstown, the district court approved a settlement agreement in 1979 that required that double-celling be eliminated and certain conditions improved. *Washington v. Keller*, 479 F. Supp. 569 (D. Md. 1979). The *Washington* and *Johnson* cases were later consolidated and further agreements were entered in October 1987 and February 1988. Compliance is being monitored. Subsequent contempt motions filed in these cases have been resolved by negotiation. In April 1993, the judge granted, in substantial part, plaintiffs' Motion to Compel, requiring the defendants to produce documents regarding the prison's policies and practices on TB detection, control, and treatment.

21. **Massachusetts:** The maximum-security unit at the state prison in Walpole was challenged on total conditions. *Blake v. Hall*, C.A. 78-3051-T (D. Mass.). The district court decided in the prison officials' favor. On appeal, this decision was affirmed in part and reversed in part and remanded, 668 F.2d 52 (lst Cir. 1981).

Numerous conditions, sanitation, and space issues at MCI at Walpole are being challenged, including housing prisoners in dayroom areas. *Nolan v. Fair*, No. 84-1360 (Super. Ct., Norfolk County).

A case filed in state court challenged unlawful conditions, use of force, and classification practices in DOC segregation units statewide. After months of trial before one justice, the Supreme Judicial Court ruled in the prisoners' favor. The state submitted draft regulations to which the plaintiffs commented and objected. Revised regulations were approved by the court. *Hoffer v. Fair*, No. 85-71 (Sup. Jud. Ct., , Suffolk County).

A case filed against MCI at Concord successfully challenged numerous unlawful conditions, including the use of dayrooms for housing prisoners. The practices have ceased and the state has settled for money damages. *Jacobs v. Fair*, No. 86-81758 (Super. Ct., Suffolk County).

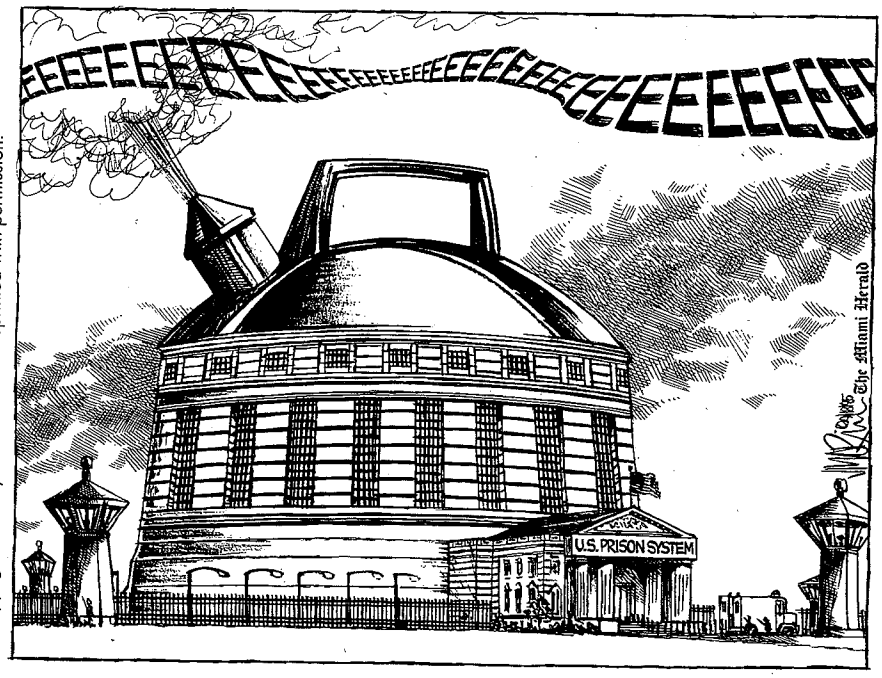
In 1991, a consent decree was entered improving the delivery of prenatal services provided to pregnant prisoners at MCI Framingham. *McDonald v. Fair*, No. 85-80352 (Super. Ct., Suffolk County). Compliance is being monitored.

22. **Michigan:*** The women's prison is under a court order concerning the total conditions of confinement, including programming. *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979); further orders entered, 510 F. Supp. 1019 (E.D. Mich. 1981). Later, the Department of Corrections was found in contempt. 659 F. Supp. 621 (E.D. Mich. 1987), *vacated and remanded*, 855 F.2d 277 (6th Cir. 1988). On remand, the state was required to appoint a special administrator to design and implement a remedy for violations of the order. 721 F. Supp. 808 (E.D. Mich. 1989), *aff'd in part and rev'd in part*, 934 F.2d 703 (6th Cir. 1991). Subsequently, a special administrator was appointed, and a compliance plan was ordered submitted.

Four men's prisons (Marquette, Michigan Reformatory, Riverside, and a portion of Jackson) are under a consent decree on overcrowding and other conditions. This case was brought by the U.S. Department of Justice under the Civil Rights of Institutionalized Persons Act (CRIPA). *United States v. Michigan*, 680 F. Supp. 928 (W.D. Mich. 1987). In 1992, the DOJ filed a motion to vacate portions of the decree under a new policy announced by Attorney General William Barr. On December 1, 1992, the court dismissed some relatively minor portions of the decree. In January 1993, the defendants filed a notice of appeal from the order refusing to dismiss most of the case. In the last half of the year, the DOJ actively sought discovery from the defendants on a variety of issues. The court granted a motion to compel inspection by the DOJ; it appears that the DOJ will now attempt to enforce the consent decree. In a change of position, in its brief in the Sixth Circuit the DOJ defended the order rejecting the stipulation.

Court orders in another case, *Knop v. Johnson*, cover issues not included in the consent decree in *United States v. Michigan*. The *Knop* court entered orders favorable to prisoners on various issues, including the provision of legal assistance. *Knop v. Johnson*, 667 F. Supp. 467 (W.D. Mich. 1987) (merits); 685 F. Supp. 636 (W.D. Mich. 1988) (remedy).

The Central Complex and most of the North Complex at the Jackson State Prison are operating under a consent decree. *Hadix v. John-*



son, No. 80-73581 (E.D. Mich.) (order entered May 13, 1981). Among other issues, the decree requires improved health-care delivery, sanitation, out-of-cell activity, and staff supervision. Another order in *Hadix* requires the defendants to subdivide the enormous Jackson Prison into more workable units. Compliance is being monitored. A court order was made requiring improved legal assistance to prisoners. *Hadix v. Johnson*, 694 F. Supp. 259 (E.D. Mich. 1988), *aff'd*, 871 F.2d 1087 (6th Cir. 1989). In March 1993, the court held hearings on medical-enforcement and mental-health-enforcement provisions and issued a number of enforcement orders. The defendants filed notices of appeal from the enforcement orders, and in August 1993 the plaintiffs filed a motion to dismiss the appeals.

The state appealed from various specific orders entered in both the *Knop* and *Hadix* cases. In 1992, the Sixth Circuit, in a consolidated decision, affirmed on the issues of liability in not providing adequate legal assistance, the provision of winter clothing, and other matters. The court of appeals reversed on racial harassment and the denial of access to toilets. *Knop v. Johnson*, 977 F.2d 996 (6th Cir. 1992), *cert. denied sub nom. Knop v. McGinnis*, 113 S. Ct. 1415 (1993) (denying *certiorari* on the issue of racial slurs). In March 1993, the trial court scheduled proceedings on the development of the legal-access remedial order.

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

24. **Mississippi:** The entire state prison system is under court order dealing with overcrowding and total conditions. *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974). Compliance is not being monitored.

25. **Missouri:*** The State Penitentiary at Jefferson City is under court order on overcrowding, medical care, and other conditions. *Burks v. Walsh*, 461 F. Supp. 454 (W.D. Mo. 1978), *aff'd sub nom. Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979). On remand, the state was held liable for failing to provide adequate medical care. *Burks v. Teasdale*, 492 F. Supp. 650 (W.D. Mo. 1980). In 1982, a separate order was entered on the medical-care issues.

A further complaint has been filed concerning conditions at the state penitentiary. This complaint includes sanitation, fire safety, and violence issues. *Wilson v. Moore*, No. 87-4516-CV-C-5 (W.D. Mo.). In 1992, a class was certified; the plaintiffs have begun discovery efforts.

26. **Montana:*** During 1993, an investigation was conducted in order to commence a lawsuit concerning conditions at the Montana State Penitentiary (MSP) located at Deer Lodge. A prior state lawsuit was withdrawn. Health-care services, among other issues, are the subject of this litigation. *Lankford v. Racicot*, CV 92-13-H-LBE (Fifth Amended Complaint filed Dec. 29, 1993). The Department of Justice is also contemplating a CRIPA lawsuit.

The women's prison in Warm Springs has severe problems with respect to environmental health and sanitation, the delivery of health care, and parity of programming with the men. The state had planned to build a new facility, but in 1993 withdrew its support for such a facility. A lawsuit was filed on April 21, 1993 on behalf of the women prisoners. *Kay Many Horses v. Racicot*, Civ-93-3F-BU-PGH. Class certification was ordered and discovery is ongoing.

27. **Nebraska:** A class action was filed concerning four general-population units of the Nebraska State Penitentiary. The action challenges overcrowding and other conditions of confinement, including protection from harm issues. On June 11, 1992, the magistrate judge entered his Report and Recommendation, finding that these facilities were not "unconstitutionally overtaxed." However, in terms of the violence issue, the magistrate judge found that the defendants failed to develop adequate policies to protect prisoners from assault. The magistrate judge also warned the defendants about the consequences of continuing population growth, and invited the plaintiffs to return to court upon a showing of changed circumstances. This decision was adopted by the district judge. *Jensen v. Gunter*, 807 F. Supp. 1463 (D. Neb. 1992). The state appealed on the violence issue, but in 1993 the Eighth Circuit held that the appeal was not timely. On remand, the state has submitted a proposed remedial plan; hearings will be scheduled.

In a case challenging conditions at the Medium Security Unit of the Nebraska State Penitentiary, the court held that there was no violation of the Eighth Amendment. However, the court did note that those conditions "are potentially close to creating intolerable conditions...unless remedial measures are implemented." *Kitt v. Ferguson*, 750 F. Supp. 1014, 1019 (D. Neb. 1990), *aff'd without opinion*, 950 F.2d 725 (8th Cir. 1991).

Women prisoners confined to the Nebraska Center for Women (NCW) at York brought a class action seeking parity with male prisoners in terms of programs and services. On June 21, 1993, the district court judge entered a favorable decision. *Klinger v. Lofgren*, 807 F. Supp 1463 (D. Neb. 1993). The state has appealed.

28. **Nevada:*** The Nevada State Prison at Carson City has been under a comprehensive court order since 1980 concerning population, conditions, and delivery of health-care services. A new consent decree consolidating the previous orders was entered by the district court on May 19, 1988. *Phillips v. Bryan*, CVR-77-221-ECR (name later changed to *England v. Miller*, with the same docket number). Two monitors appointed under the terms of the agreement have been reporting on compliance. By the end of 1993, all areas of the original decree were in compliance and the order was vacated, with the exception of the inmate-jobs issue. A decision is awaited on the defendants' pending motion to vacate that last issue.

In 1979, a lawsuit was filed challenging the delivery of mental-health services to all Nevada prisoners. *Taylor v. Wolff*, CVN 79-162JMB (D. Nev.). An agreement and consent decree were entered in 1986. Compliance is being monitored.

Women prisoners confined to Nevada Women's Correctional Center have filed a lawsuit alleging gender discrimination with respect to programming and conditions at the facility. Defendants' motion for summary judgment was denied. *McCoy v. Nevada Department of Prisons*, 776 F. Supp. 521 (D. Nev. 1991). The case was settled in 1993 with the filing of a Stipulated Settlement Agreement. Dillard v. Nevada Department of Prisons, CV-N-89-94-HDM (filed February 10, 1993).

29. **New Hampshire:*** The state penitentiary is under court order dealing with total conditions. *Laaman v. Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977). The parties negotiated a consent decree in May 1990 that resolved a pending motion for contempt. The plaintiffs filed a further contempt motion in June 1993 covering health care and the prison's operation of the maximum-security unit. Discovery is ongoing.

30. **New Jersey:** For years, the state has been able to stave off overcrowding in its prisons by mandating that county jails take the overflow of sentenced prisoners from the state system. However, most of the state's twenty-one county jails are under court order. In 1993, the New Jersey Supreme Court, incident to a jail case, lifted the requirement that the local facilities must confine sentenced prisoners. The state was given until April 22, 1994 to prepare a plan.

31. **New Mexico:*** The entire system is under court order on overcrowding and total conditions. *Duran v. Apodaca*, C.A. No. 77-721-C (D.N.M.) (consent decree entered Aug. 1, 1980). A special master was appointed in June 1983. The defendants moved to vacate the consent decree, but the district court denied the motion. *Duran v. Carruthers*, 678 F. Supp. 839 (D.N.M. 1988). The court of

appeals affirmed the decision. 885 F.2d 1485 (10th Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990). Because the state is in substantial compliance with much of the decree, in August 1991 the parties agreed to an eventual vacating of the decree. In exchange, the state agreed to a permanent, nonmodifiable set of population controls, including a prohibition against double-celling. The district court approved this settlement in an order entered on September 20, 1991. Following the special master's reports evaluating compliance, filed in January 1993, the judge ordered the DOC to resolve health and safety problems at the Penitentiary of New Mexico complex near Santa Fe, but released from federal court supervision the three state prisons that had achieved compliance. Conditions at the penitentiary continue to be audited.

32. **New York:** While no statewide comprehensive lawsuits have been brought, numerous prison facilities are under court order, and injunctive relief has been obtained in the following cases:

In 1979, a case was filed challenging the delivery of medical care at Green Haven Correctional Facility. *Milburn v. Coughlin*, 79 Civ. 5077 (S.D.N.Y.). In 1982, the parties entered into a comprehensive settlement. Later, in order to settle a contempt motion, the parties negotiated a modified agreement. Compliance is being monitored.

A case was filed challenging delivery of medical care at the Bedford Hills women's prison. The court of appeals upheld a favorable opinion and order. *Todaro v. Ward*, 565 F.2d 48 (2nd Cir. 1977). In 1988, a renegotiated consent decree was entered, including improvements in the delivery of health care in general and the enforcement of services to HIV-positive prisoners. Compliance is being monitored. In 1993, a further addition to the decree was made concerning gynecological care, increasing medical staffing, and providing that some other terms of the judgment will be relaxed upon a showing of a satisfactory record of compliance.

A statewide class-action suit was filed in 1980 on behalf of prisoners confined to segregation units. *Anderson v. Coughlin*, 80 Civ. 3037 (S.D.N.Y.). A consent decree was entered in 1984 on the medical and legal-access issues. In 1985, the court of appeals upheld an unfavorable decision on the exercise and recreation issues. *Anderson v. Coughlin*, 757 F.2d 33 (2nd Cir. 1985). Compliance is being monitored.

The protective-custody unit at Green Haven Correctional Facility is operating under a 1983 consent judgment concerning conditions and practices. *Honeycutt v. Coughlin*, 80 Civ. 2530 (S.D.N.Y.). Compliance is being monitored.

A federal district court judge held defendants liable for racial segregation in housing and job assignments at Elmira Correctional Facility. *Santiago v. Miles*, 774 F. Supp. 775 (W.D.N.Y. 1991). During 1992, the parties and the judge developed an order to correct the problems. A remedial order was entered in 1993 and is currently being monitored.

Prisoners at Clinton Correctional Facility brought a class-action suit in 1983 concerning the delivery of mental-health services. *Tomasullo v. LeFevre*, 84 CV 1035 (N.D.N.Y.). A settlement was reached in early 1992, including improved access to recreation, improved supervision, and the installation of surveillance cameras.

Anderson v. Coughlin was filed as a class action on behalf of all mentally ill inmates in Green Haven Correctional Facility and Auburn Correctional Facility. *See* 119 F.R.D. 1 (N.D.N.Y. 1988). In 1991, the magistrate judge consolidated *Anderson* and *Tomasullo* (above). A summary judgment motion was later filed by plaintiffs. Since 1992, the parties have been involved in settlement negotiations.

The Attica Special Housing Unit is under challenge on conditions of confinement. In 1990, the court granted a preliminary injunction providing substantial relief on the delivery of medical-care services. *Eng v. Coughlin*, CV-80-3859 (W.D.N.Y.). *See also* 865 F.2d 521 (2nd Cir. 1989). In 1992, a settlement was reached on the medical issues; a later agreement was reached on the law-library claims. Mental-health discussions have been consolidated with the *Anderson* and *Tomasullo* cases discussed above.

In May 1992, prisoners housed in overcrowded dormitory facilities in ten New York prisons filed a lawsuit challenging these conditions on the grounds that they increase the risk of exposure to tuberculosis. TB screening and access to adequate treatment are also at issue. *Cunningham v. Coughlin*, No. 92-CV-0579 (N.D.N.Y.). A class has been certified and discovery is proceeding.

The Bedford Hills Correctional Facility was under challenge concerning the delivery of mental-health services for women confined in segregation facilities. The injunctive claims were settled by stipulation in 1989. After two years of monitoring compliance, the case was closed. Class damage claims were the subject of defendants' motion for summary judgment on the ground of qualified immunity. This defense was denied. *Langley v. Coughlin*, 709 F. Supp. 482 (S.D.N.Y.), *appeal dismissed*, 888 F.2d 252 (2nd Cir. 1989). In a later opinion, the court accepted the recommendations of the magistrate to deny defendants' further motion for summary judgment and for class decertification. 715 F. Supp. 522 (S.D.N.Y. 1989). Subsequently, the damage claims were settled for $350,000.

A state court action was commenced in 1991 challenging aspects of the medical-care system, the excessive use of restraints and cell shields, and other conditions at the Special Housing Unit prison at Southport, the state's so-called "supermax" facility. *Rivera v. Coughlin* (Sup. Ct., Chemung County). Plaintiffs obtained a partial consent order and were successful on other issues. Counsel continue to monitor compliance with the orders.

A statewide class-action suit was filed in 1990 challenging the inadequate treatment of HIV-positive prisoners and deficiencies in the HIV education program. *Inmates with AIDS v. Cuomo*, No. 90CV252 (N.D.N.Y.). This action was certified as a class action and discovery is proceeding, subject to elaborate safeguards to protect confidentiality.

33. **North Carolina:*** In September 1985, a consent judgment was entered covering overcrowding, staffing, programming, and medical services in thirteen units of the state's road and farm camp system in the South Piedmont area. *Hubert v. Ward*, C-C-80-414-M (W.D.N.C.). Compliance was achieved, and the case was placed on the court's inactive docket.

The Craggy Unit outside Asheville was under an August 1987 consent decree covering conditions and overcrowding. *Epps v. Martin*, A-C-86-162 (W.D.N.C.). A new prison was completed and Craggy was closed.

The Caledonia Farm facility is operating under a 1988 consent decree concerning overcrowding and general conditions. The consent decree imposed a population cap and emphasized both the protection from assault and the reduction of violence. *Stacker v. Stephenson*.

There are also pending cases on overcrowding and conditions at Odom Farm, *Barnet v. Allsbrook*, No. 89-705 CRT BO (E.D.N.C.), and Harnett Correctional Center, *Bass v. Stephenson*, No. 87-499-CRT BO (E.D.N.C.). These cases, filed in 1989, are still in the discovery phase.

The remaining forty-nine units of the state system are operating under a December 1988 settlement covering overcrowding and conditions. *Small v. Martin*, 85-987-CRT (E.D.N.C.). Compliance is being monitored. In 1993, the state filed a motion for modification; the plaintiffs responded on November 12, 1993.

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

35. **Ohio:*** In a case involving the Southern Ohio Correctional Facility, the district court banned double-celling. The Supreme Court later reversed this decision. *Chapman v. Rhodes*, 434 F. Supp. 1007 (S.D. Ohio 1977), *aff'd*, 624 F.2d 1099 (6th Cir. 1980), *rev'd, Rhodes v. Chapman*, 452 U.S. 337 (1981).

A preliminary injunction was entered at the

Columbus State Prison on the housing of prisoners by race and on the use of certain physical restraints. *Stewart v. Rhodes*, 473 F. Supp. 1185 (S.D. Ohio 1979). A consent decree was later entered in 1979, incorporating the provisions of the preliminary injunction. *See* 656 F.2d 1216 (6th Cir. 1981). The state prison was closed in 1985.

The Ohio State Reformatory at Mansfield was operating under a consent decree on various conditions. *Boyd v. Denton*, C 78-1679 (N.D. Ohio) (order entered June 1983). The prison was closed at the end of 1990. Medical care at Mansfield operated under a 1982 consent decree. *Register v. Denton*, C-78-1680 (N.D. Ohio). The plaintiffs presently are arguing that the decree is applicable to the successor facility, called the Mansfield Correctional Institution. In 1993, the parties engaged in settlement negotiations.

The Marion Correctional Facility was operating under various court orders concerning conditions and population. *Taylor v. Perini*, No. C69-275 (N.D. Ohio). See published orders and reports of the special master in this case at 413 F. Supp. 189 (N.D. Ohio 1976); 421 F. Supp. 740 (N.D. Ohio 1976); 431 F. Supp. 566 (N.D. Ohio 1977); 446 F. Supp. 1184 (N.D. Ohio 1977); 455 F. Supp. 1241 (N.D. Ohio 1978); and 477 F. Supp. 1289 (N.D. Ohio 1980). The remedial orders were vacated in 1991, following a report and recommendation of the special master.

A case filed by an individual prisoner challenging conditions and crowding at the Hocking Correctional Facility was dismissed by the district court. On appeal, this decision was affirmed. *Wilson v. Seiter*, 893 F.2d 861 (6th Cir. 1990). In June 1991, the Supreme Court reversed and remanded. 111 S. Ct. 2321 (1991). The district court on remand entered summary judgment against the plaintiff. The plaintiff filed a notice of appeal; however, because the prisoner was subsequently released, the case was dismissed as moot. *Wilson v. Seiter*, No. 92-3332 (6th Cir. Aug. 20, 1992) (order).

In November 1991, a class-action suit was brought by prisoners at the London Correctional Institute concerning overall conditions of confinement, including overcrowding, inadequate building maintenance, and racial discrimination. *Thompson v. Alexander*, No. C2:90-CV-845 (S.D. Ohio). Discovery was ongoing during 1993.

A class action challenging racial discrimination in assigning inmates to double-cells at the Southern Ohio Correctional Facility of Lucasville was commenced in 1988. The district court approved a settlement requiring random housing without regard to race, unless particular circumstances required otherwise. *White v. Morris*, 811 F. Supp 341 (S.D. Ohio 1992.)

Several prisoner *pro se* lawsuits have been transformed into a class-action suit. An Amended Complaint and Motion to Certify the Class were filed on October 6, 1993, alleging inadequate or nonexistent mental-health coverage in all Ohio prisons. *Dunn v. Voinovich*, No. CI-93-0166 (S.D. Ohio).

36. **Oklahoma:*** The state penitentiary at McAlester is under court order on total conditions, and the entire state prison system is under court order on overcrowding. *Battle v. Anderson*, 564 F.2d 388 (10th Cir. 1977). The district court's decision in 1982 to retain jurisdiction to assure continued compliance was upheld. 708 F.2d 1523 (10th Cir. 1983), *cert. dismissed*, 465 U.S. 1014 (1984). Later, in 1984, the district court relinquished jurisdiction; that decision was affirmed. 788 F.2d 1429 (10th Cir. 1986). Although the court has ended active supervision, all compliance orders are still in effect, and the penitentiary remains under permanent injunction. In fact, the state recently asked the court to vacate or amend the original order to allow the state to renovate closed housing due to overcrowding. The court determined that the order is still in effect, and refused to amend the order because circumstances have not changed. Plaintiffs' counsel remains actively engaged in compliance monitoring.

37. **Oregon:** The state penitentiary was under a court order on overcrowding. *Capps v. Atiyeh*, 495 F. Supp. 802 (D. Or. 1980), *stayed*, 449 U.S. 1312 (1981) (Rehnquist, J.), *vacated and remanded*, 652 F.2d 823 (9th Cir. 1981). On remand, the district court determined that only medical care and fire safety violated the Eighth Amendment. 559 F. Supp. 894 (D. Ore. 1982).

Prisoners brought an action concerning the delivery of health-care services at the Eastern Oregon Correctional Institution. On May 29, 1991 the district court entered an opinion holding that such services were constitutionally inadequate up to March 1990. *Van Patten v. Pearce* No. 87-298-PA (D. Ore.). The court later appointed an expert who filed a report. Based on that report, the court entered an order requiring improvements. Order of February 10, 1992. The state has appealed.

38. **Pennsylvania:*** A case was filed at the women's state prison at Muncy challenging equal protection violations and hazardous physical conditions, including fire-safety violations. *Beehler v. Jeffes*, 664 F. Supp. 931 (M.D. Pa. 1986), *aff'd without opinion sub nom. Beehler v. Lehman*, 989 F.2d 486 (3rd Cir. 1993). Most of the claims have been settled or voluntarily dismissed; an asbestos claim is pending and plaintiffs are monitoring the removal schedule.

The State Correctional Institution at Pittsburgh (SCIP) is under court order to reduce double-celling in the old 19th-century cellblocks and to improve staffing and the delivery of medical and mental-health services. *Tillery v. Owens*, 719 F. Supp. 1256 (W.D. Pa. 1989), *aff'd*, 907 F.2d 418 (3d Cir. 1990), *cert. denied sub nom. Mikesell v. Morgan*, 112 S. Ct. 343 (1991). The parties negotiated a remedial agreement in 1990, which the court then entered as an order. In early 1991, the district court entered further orders on segregation legal-access issues. The state appealed from this order; on April 14, 1993, the district court order was affirmed. *Tillery v. Owens*, No. 92-3492 (3d Cir.). On remand, the parties are negotiating various other segregation legal-assistance issues. Compliance monitoring is ongoing with respect to the other orders in the case.

On November 20, 1990, a case was filed challenging conditions and overcrowding at thirteen state facilities, excluding those already under court order. *Austin v. Lehman*, C.A. No. 90-7497 (E.D. Pa.). A motion to dismiss was denied, and discovery is under way. On September 28, 1992, the district court entered a preliminary injunction ordering the defendants to implement an effective tuberculosis-control program throughout the state prison system. In November 1993, trial commenced on the corrections issues; environmental-health and health-care delivery issues will be tried thereafter.

39. **Rhode Island:*** The entire state system is under court order on overcrowding and total conditions. *Palmigiano v. Garrahy*, 443 F. Supp. 956 (D.R.I. 1977). A special master was appointed in September 1977. New population caps were imposed by court order in June 1986. Various contempt orders have been entered. *See, e.g., Palmigiano v. DiPrete*, 700 F. Supp. 1180 (D.R.I. 1988). On August 21, 1989, the First Circuit affirmed in all respects the trial court's opinions and contempt orders of October 21, 1988 and April 6, 1989, imposing sanctions. The trial court ordered that the fines be utilized to establish a bail fund to release low-bail detainees. 710 F. Supp. 875 (D.R.I.), *aff'd*, 887 F.2d 258 (lst Cir. 1989). In May 1990, the court made an additional finding of noncompliance with population-cap orders and required the release of certain prisoners. 737 F. Supp. 1257 (D.R.I. 1990). In November 1992, the Governor created an overcrowding commission, and legislation has now been passed permanently controlling the prisoner population at agreed limits, with a permanent justice oversight committee to monitor developments. The final details of a settlement agreement covering all of the issues in *Palmigiano* are being negotiated.

40. **South Carolina:*** The entire prison system is under a 1985 consent decree on

overcrowding and conditions. *Plyler v. Evatt*, C.A. No. 82-876-0 (D.S.C. Jan. 8, 1985). A release order entered by the district court in the summer of 1986 was held moot by the court of appeals. 804 F.2d 1251 (4th Cir. 1986). In 1988 the district court denied the state's motion to modify the consent decree and ordered the state to reduce the prison population in conformance with the decree. This order was vacated and remanded by the court of appeals. 846 F.2d 208 (4th Cir. 1988). In 1990 the district court again denied the state's motion to modify the decree and again the court of appeals vacated and remanded the case. 924 F.2d 1321 (4th Cir. 1991). There have been extensive subsequent negotiations in this case. In 1990, the parties agreed to permit an increase in population, but the state made important concessions in programming and future construction. On June 1, 1992, the plaintiffs filed a state court action to enforce the terms of the 1985 agreement to utilize extant state statutes to reduce population. *Plyler v. Evatt*, No. 92CP 402275 (Ct. Comm. Pleas, 5th Jud. Cir.). Also in 1992, incident to the federal action, the defendants moved to modify the classification and education terms of the 1985 consent decree. An agreement was reached through negotiation and signed by the parties on August 23, 1993. On October 12, the defendants moved to withdraw their consent to the Compromise Agreement. Plaintiffs opposed the defendants' motion. The court's decision is pending on this issue and on plaintiff's motion to compel compliance with the population requirements of the consent decree.

41. **South Dakota:*** The state penitentiary at Sioux Falls is under court order on a variety of conditions. *Cody v. Hillard*, 599 F. Supp. 1025 (D.S.D. 1984). The appeals court reversed an overcrowding order, finding that double-celling was not unconstitutional. 830 F.2d 912 (8th Cir. 1987) (*en banc*), *cert. denied*, 485 U.S. 906 (1988). In 1992, the district court conducted an evidentiary hearing on the plaintiffs' motion for enforcement of the order on environmental conditions. The motion for enforcement was granted on November 29, 1992.

42. **Tennessee:*** The entire system is under court order for overcrowding and conditions. *Grubbs v. Bradley*, 552 F. Supp. 1052 (M.D. Tenn. 1982). The court ordered a reduction in population, and appointed a special master in December 1982. In an October 25, 1985 order, the court enjoined the intake of new prisoners because the state had failed to comply with the population-reduction terms of prior orders.

On May 14, 1993, the district court found that the defendants cured the constitutional violations previously found in the areas of housing conditions, sanitation, personal safety, classification, and the delivery of health-care services to state prisoners. *Grubbs v. Bradley*, 821 F. Supp. 496 (M.D. Tenn. 1993). The court then vacated and dissolved all of the outstanding remedial orders entered in the case, except for a requirement in terms of health care that a quality-assurance program be instituted and a ban on housing any prisoners at the old State Penitentiary in Nashville. "If the past, present and future officials of the State of Tennessee have not learned a Three Hundred Million Dollar ($300,000,000) plus lesson in this litigation, then further instruction is hopeless, and the solution will have to be left for another day and another lawsuit". *Id.* at 503 n.4.

43. **Texas:** In 1980, the entire state prison system was declared unconstitutional on overcrowding and conditions. A special master was appointed. *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir. 1982). The parties negotiated an agreement and, in 1985, a consent decree was entered on the issue of overcrowding. On December 3, 1986, the district court held state officials in contempt. *Ruiz v. McCotter*, 661 F. Supp. 112 (S.D. Tex. 1986). The contempt order was vacated on April 27, 1987; no fines were imposed. The state sought to modify the terms of the consent decree concerning crowding; this motion was denied and the denial was affirmed on appeal. *Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987). During the summer of 1989, private corporations operating state prisons on a contract basis were added as party defendants.

In 1992, the *Ruiz* parties filed a negotiated proposed final judgment in the case. The proposed order contains system-wide and facility population limits and the provision of adequate medical care, including accreditation by the NCCHC. Significant orders concerning staffing, a ban on the use of "building tenders," administrative segregation, and the use of force remain in effect. The agreement requires compliance with other provisions of the order, including renovation of facilities by June 1, 1993, to permit the termination of the special master and the withdrawal of plaintiffs' class counsel. The final judgment was approved by the court on December 11, 1992. As of June 1, 1993, pursuant to the terms of the judgment, the plaintiffs' counsel was relieved of any obligations to the class and the Office of the Special Master was discharged with respect to all but three discrete issues.

Because the backlog of state prisoners confined in county facilities affects the *Ruiz* consent order, the Fifth Circuit has ordered the *Ruiz* court and the district court having jurisdiction over the jail cases to hear jointly any requests for relief requiring the transfer of county prisoners into state custody. *In re Clements*, 881 F.2d 145 (5th Cir. 1989), and *Alberti v. Sheriff of Harris County*, 937 F.2d 984 (5th Cir. 1991), *cert. denied sub nom. Richards v. Lindsay*, 112 S. Ct. 1994 (1992).

44. **Utah:** The state penitentiary is operating under a consent decree on overcrowding and some conditions. *Balderas v. Matheson* (formerly *Nielson v. Matheson*), C-76-253 (D. Utah). The 1979 consent decree was ignored because it lacked an effective mechanism for enforcement. A lawsuit challenging double-celling at the penitentiary was filed in 1986. *Baker v. DeLand*, No. C86-0361G. In June 1989, the court entered a temporary restraining order regarding double-celling. In November 1991, the magistrate judge filed a report with the court recommending that double-celling be barred in some units, while permitting it in others after remodeling. On March 20, 1992, the district court accepted the report and entered an injunction. *Baker v. Holden*, 787 F. Supp. 1008 (D. Utah 1992).

In December 1989, a further complaint was filed challenging the delivery of medical and mental-health services at the state penitentiary. *Henry v. DeLand*, C.A. 89-C-1124 (D. Utah). On September 8, 1992, the parties signed a consent decree to improve mental-health services. A medical-care plan was submitted to the court, which approved the plan on February 11, 1993. The court approved a final order settlement of the medical and dental claims on June 1, 1993, and retained jurisdiction for the purposes of enforcing the settlement.

45. **Vermont:*** The old state prison was closed in the late 1970s. However, conditions as a result of overcrowding and the delivery of health-care services in Vermont's prisons (which also house pretrial detainees) are the subject of a lawsuit filed recently in the federal district court. *Goldsmith v. Dean*, No. S:93-CV-383 (D. Vt. filed Dec. 13, 1993).

46. **Virginia:*** The state prison at Powhatan is under a consent decree dealing with overcrowding and conditions. *Cagle v. Hutto*. 79-0515-R (E.D. Va.).

The maximum-security prison at Mecklenburg, including its death-row unit, is under a 1985 court order dealing with various practices and conditions. *Brown v. Hutto*, 81-0853-R (E.D. Va.).

The 190-year-old state penitentiary at Richmond was challenged in 1982 on the totality of conditions. *Shrader v. White*, C.A. No. 82-0247-R (E.D. Va.). The trial court dismissed the complaint in June 1983. The court of appeals affirmed in part and remanded in part. 761 F.2d 975 (4th Cir. 1985). The remand was settled in 1987, covering certain prisoner-safety issues.

On September 21, 1990, another lawsuit was filed challenging deteriorating conditions

at the Richmond penitentiary, which on three occasions the state had announced would be closed. *Congdon v. Murray*, 90-CV-00536 (E.D. Va.). On November 21, 1990, the district court ordered that basic fire-safety and sanitation measures be taken immediately. The state permanently closed the prison on December 14, 1990.

47. **Washington:*** The state penitentiary at Walla Walla was declared unconstitutional on overcrowding and conditions, and a special master was appointed. *Hoptowit v. Ray*, C-79-359 (E.D. Wash. June 23, 1980), *aff'd in part, rev'd in part, vacated in part, and remanded*, 682 F.2d 1237 (9th Cir. 1982). The court of appeals affirmed the subsequent decision of the trial court and remanded the case again for entry of an order. *Hoptowit v. Spellman*, 753 F.2d 779 (9th Cir. 1985). An order was filed on April 10, 1986. The defendants' motion to dissolve the injunction was denied on May 22, 1987. Compliance is being monitored.

A lawsuit filed in 1978 challenged conditions and delivery of medical-care services at the State Reformatory at Monroe. *Collins v. Thompson*, Nos. C-78-79R, C-78-134 (W.D. Wash.). The parties agreed to a settlement in 1981 that includes a population cap. Since then, the defendants have sought to have the decree vacated on four separate occasions. The last motion to vacate was filed in August 1992 and approved in February 1993. The plaintiffs appealed to the Ninth Circuit, which affirmed; an *en banc* review has been requested.

48. **West Virginia:** The state penitentiary at Moundsville is under court order on overcrowding and conditions. *Crain v. Bordenkircher*, No. 81-C-320R (Circuit Court, Marshall County) (memorandum and order dated June 21, 1983). The plaintiffs challenged as insufficient a remedial plan prepared by the defendants. The West Virginia Supreme Court of Appeals agreed with the plaintiffs, and ordered the defendants to develop a new plan. 342 S.E.2d 422 (W. Va. 1986). Since that 1986 decision, the Supreme Court of Appeals has maintained jurisdiction over this case. In 1988, the court ordered the defendants' improved plan to be implemented, and further ordered the state to close the prison. 376 S.E.2d 140 (W. Va. 1988). Thereafter, opinions on the status of implementation have been filed on an annual basis. *See* 382 S.E.2d 68 (W. Va. 1989); 392 S.E.2d 227 (W. Va. 1990); and 408 S.E.2d 355 (W. Va. 1991). In 1992, the court gave the state a two-year extension to close Moundsville, in order to coincide with the construction and opening of a new prison to be located at Mount Olive. July 1994 is currently the scheduled date for the closing of Moundsville and the opening of the new facility.

The Huttonsville Correction Center is also under court order with respect to crowding and conditions. The detailed order required population reduction and the building of a vocational training center. *Nobles v. Gregory*, No. 83-C-244 (Circuit Court, Randolph County) (memorandum and order dated Feb. 22, 1985). Enforcement proceedings are ongoing.

In 1981, the Supreme Court of Appeals held that women prisoners had a state statutory and constitutional right to rehabilitation and education. *Cooper v. Gwinn*, 292 S.E.2d 781 (W. Va. 1981). Detailed orders were entered thereafter. The women were transferred in 1990 to a facility located in Grafton, West Virginia. Compliance is being monitored.

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

The women's prison at Taycheedah is operating under a 1988 consent decree that imposes a population cap and deals with programming, delivery of medical services, and environmental-health issues. *Bembenek v. Bablitch*, No. 86-C-262 (E.D. Wis.). Compliance is being monitored.

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

51. **District of Columbia:*** The District jails are under court order on overcrowding and conditions. *Inmates of D.C. Jail v. Jackson*, 416 F. Supp. 119 (D.D.C. 1976); *Campbell v. McGruder*, 416 F. Supp. 100 (D.D.C. 1975), *aff'd in part and remanded*, 580 F.2d 521 (D.C. Cir. 1978) (concerning the old D.C. Jail). On remand, the court ordered a time limit on double-celling and an increase in staff at the new D.C. Jail (CDF). 554 F. Supp. 562 (D.D.C. 1982). In 1985, after trial, the district court ordered that intake be enjoined. *Inmates of D.C. Jail v. Jackson*, No. 75-1668 (D.D.C. July 15, 1985). A consent decree, which supplanted the initial order and required a reduction in population, was entered on August 22, 1985. After an evidentiary hearing on the delivery of medical and mental-health services in 1993, the district judge entered orders appointing a special officer, requiring her to prepare a report on improving health-care services, and ordering immediate interim relief.

Several facilities at the Lorton Complex, the District's facility for sentenced prisoners, are under court order for overcrowding, conditions, and the delivery of health services. Population caps are in place at both the Central Facility and the Maximum Security Facility. *Twelve John Does v. District of Columbia*, No. 80-2136 (D.D.C.) (Central); *John Doe v. District of Columbia*, No. 79-1726 (D.D.C.) (Maximum). A special officer has been appointed in both cases. The District has been held in contempt for violations of the cap at Central. *Twelve John Does v. District of Columbia*, 855 F.2d 874 (D.C. Cir. 1988). In 1992, the district court entered a further consent decree on various medical- and mental-health-care issues in the Central case. (Order of June 10, 1992.) Compliance monitoring continues.

On December 22, 1986, Lorton's medium-security Occoquan facilities came under court order, and a population cap was imposed. *Inmates of Occoquan v. Barry*, 650 F. Supp. 619 (D.D.C. 1986), *vacated and remanded*, 844 F.2d 828 (D.C. Cir.), *rehearing en banc denied*, 850 F.2d 796 (D.C. Cir. 1988) (containing dissenting opinions and separate statements). On remand, a second trial was held in January 1989. The facility was again held unconstitutional, and the defendants were ordered to devise a plan to alleviate constitutional violations. 717 F. Supp. 854 (D.D.C. 1989). Three plans were approved by the court. In 1992, the district court interpreted the mental-health-plan order to require that seriously mentally ill prisoners be transferred to the D.C. Jail and be provided an adequate treatment program. In 1993, the plaintiffs filed a motion for contempt on the delivery of mental-health services to transferred Occoquan prisoners. This motion was denied by the court without prejudice to renew. Compliance monitoring included tours by plaintiffs' medical and environmental-health experts.

In March 1990, a lawsuit was filed challenging crowding and conditions at Lorton's Modular Facility, a new prison that was designed as the District's reception-and-classification facility. *Inmates of Modular Facility v. District of Columbia*, No. 90-0727 (D.D.C.). In the middle of trial, a settlement was reached and a consent decree entered; the decree includes a population cap and requires improvements in medical care. (Order of Dec. 14, 1990.) Compliance is being monitored.

On May 20, 1992, a complaint was filed challenging the delivery of medical care at three other District prisons at Lorton: the Medium Security Facility, the Minimum Security Facility, and the Youth Center. *Inmates of Three Lorton Facilities v. District of Columbia*, No. 92-1208 (D.C.D.C.). Discovery is ongoing.

In October 1993, a lawsuit was commenced challenging the delivery of health-care services, conditions of confinement, and discriminatory treatment of women prisoners in D.C. prison facilities. *Women Prisoners of the District of Columbia Dep't of Correc-*

tions v. District of Columbia, No. 93-2052 (D.D.C.). Discovery is ongoing.

52. **Puerto Rico:** The entire Commonwealth prison system is under a 1979 court order dealing with overcrowding and conditions. *Morales Feliciano v. Romero Barcelo*, 497 F. Supp. 14 (D.P.R. 1979). In 1986, the Commonwealth was again found liable on crowding, conditions, and delivery of health-care services in its entire prison and jail system. Two court monitors were appointed. 672 F. Supp. 591 (D.P.R. 1986). In 1987, the Commonwealth was held in contempt for violation of the population limits set out in a 1986 stipulation. *Morales Feliciano v. Hernandez Colon*, 697 F. Supp. 26 (D.P.R. 1987).

In 1990, the defendants filed a motion to modify the space requirements of the 1986 stipulation; the plaintiffs renewed their motion for contempt. In 1991, the court denied the defendants' motion, granted the plaintiffs' motion, and entered a prospective fine of $10 per prisoner per day above the population cap. *Morales Feliciano v. Hernandez Colon*, 754 F. Supp. 942 (D.P.R. 1991). The court appointed a special master for the purpose of contracting on behalf of the defendants to prepare plans and to make evaluations on various environmental-health issues. 771 F. Supp. 11 (D.P.R. 1991). Later in 1991, the court ordered the defendants to transfer the accumulated fine money, amounting to one million dollars per week, to the U.S. Treasury. 775 F. Supp. 487 (D.P.R. 1991).

A population cap was established at Ponce District Jail, where sentenced felons are housed. *Morales Feliciano v. Hernandez Colon*, 697 F. Supp. 37 (D.P.R. 1988). The district court ordered contempt fines for violations of the cap; the fines were upheld on appeal. *Morales Feliciano v. Parole Board*, 887 F.2d 1 (lst Cir. 1989), *cert. denied*, 494 U.S. 1046 (1990).

53. **Virgin Islands:** The territorial prison is under court order dealing with conditions and overcrowding. *Barnes v. Government of the Virgin Islands*, 415 F. Supp. 1218 (D.V.I. 1976). As a result of a CRIPA action brought by the Department of Justice's Special Litigation Division, the St. Croix prison, Golden Grove, is covered by a 1986 consent decree. Following a prolonged lockdown at Golden Grove, the DOJ brought a motion to end the lockdown and participated in a status conference with the judge in St. Croix. A consent decree ended the lockdown as of December 20, 1993. The Criminal Justice Complex in St. Thomas is still locked down, and several ongoing *pro se* suits challenge conditions of confinement there. ■

Edward Koren is a senior staff attorney with the NPP.

Summary

*Thirty-nine states plus the District of Columbia, Puerto Rico, and the Virgin Islands are under court order or consent decree to limit population and/or improve conditions in either the entire state system or its major facilities. Thirty-three jurisdictions are under court order for overcrowding or conditions in at least one of their major prison facilities, while nine jurisdictions are under court order covering their entire system. Only three states have never been involved in major litigation challenging overcrowding or conditions in their prisons. The following list gives the current status of each state. (*Asterisks following the name indicate states/jurisdictions in which the ACLU has been involved in the litigation.)*

Note: *There is some overlap between the second and fourth categories because, in some states, one or more facilities are under court order while other facilities in that state are presently being challenged* (e.g., *Illinois*). *Also, Oklahoma is listed in both the second and third categories because the McAlester facility is still under the court order entered in* Battle v. Anderson *but is no longer under active court supervision.*

Entire Prison System Under Court Order or Consent Decree
9 jurisdictions: Alaska,* Delaware,* Mississippi,* New Mexico,* Rhode Island,* South Carolina,* Texas, Puerto Rico, Virgin Islands.

Major Institution(s) in the State/Jurisdiction Currently Under Court Order or Consent Decree
33 jurisdictions: Arizona,* California,* Colorado,* Connecticut,* Florida, Hawaii,* Idaho,* Illinois,* Indiana,* Iowa,* Kansas, Kentucky, Louisiana, Maine,* Maryland,* Massachusetts,* Michigan,* Missouri,* Nevada,* New Hampshire,* New York,* North Carolina, Ohio,* Oklahoma,* Oregon,* Pennsylvania,* South Dakota,* Utah,* Virginia,* Washington,* West Virginia, Wisconsin,* District of Columbia.*

Formerly Under Court Order or Consent Decree or Currently Released from Active Supervision of the Court
7 jurisdictions: Alabama,* Arkansas,* Georgia, Oklahoma, Oregon,* Tennessee,* Wyoming.*

Pending Litigation
12 jurisdictions: California,* Colorado,* Connecticut,* Georgia,* Montana,* Nebraska, New York, North Carolina, Ohio,* Pennsylvania,* Utah,* Vermont.*

Special Masters/Monitors/Mediators Appointed (present and past)
24 jurisdictions: Alabama,* Alaska,* Arizona,* Arkansas,* California,* Florida,* Georgia, Hawaii,* Idaho,* Illinois,* Kansas,* Louisiana, Michigan,* Nevada,* New Mexico,* New York,* Ohio,* Pennsylvania,* Rhode Island,* Tennessee,* Texas, Washington,* District of Columbia,* Puerto Rico.

Prison Systems or Major Facilities Under Court Order and Cited for Contempt (present and past)
8 jurisdictions: Alabama,* Michigan,* Mississippi, Rhode Island,* Texas, Virginia,* District of Columbia,* Puerto Rico.

Not Involved (to date) in Overcrowding or Conditions Litigation
3 jurisdictions: Minnesota, New Jersey, North Dakota.

THE NATIONAL PRISON PROJECT JOURNAL

Case Law Report

A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
VOL. 9, NO. 1, WINTER 1993/94 • ISSN 0748-2655

BY JOHN BOSTON

Highlights of Most Important Cases

EXERCISING RELIGIOUS FREEDOM IN PRISON

The biggest recent news about prison case law is actually about legislation. The Religious Freedom Restoration Act (RFRA) of 1993, P.L. 103-141, signed by President Clinton in November 1993, overrules two decisions by the Supreme Court that took a restrictive view of religious rights.

The core text of the statute provides:

> Sec. 3. FREE EXERCISE OF RELIGION PROTECTED
>
> (a) IN GENERAL.—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) EXCEPTION.—Government may *substantially burden* a person's exercise of religion only if *it demonstrates* that application of the burden to the person—
>
> (1) is in furtherance of a *compelling governmental interest*; and
>
> (2) is the *least restrictive* means of furthering that compelling governmental interest. [Emphasis supplied]

There is no question that the law applies to prisons. The legislative history explicitly refers to prisons, and a last-minute attempt in the Senate to exclude prisoners from the statute's coverage was defeated.

The statute's main target is the Supreme Court's holding in *Employment Division v. Smith*, 494 U.S. 872 (1990), that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" 494 U.S. at 879 (citations omitted). Many in Congress and elsewhere viewed this sweeping statement as a significant threat to citizens' religious rights. One federal appeals court remarked that *Smith* appeared to have "cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences...." *Hunafa v. Murphy*, 907 F.2d 46, 48 (7th Cir. 1990).

Employment Division v. Smith did not directly address prisoners' religious rights (although *Hunafa* noted that *Smith* cut back "the doctrine on which all the prison religion cases are founded." *Id.*) Nor did *Smith* have much practical effect on prison litigation. That is because for prisoners, the damage had already been done in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), which had held that prison religious restrictions must be upheld as long as they are "reasonably related to legitimate penological objectives," the same standard that it had applied to all other claims of infringement of prisoners' constitutional rights. *Turner v. Safley*, 482 U.S. 78, 89 (1987). Any notion of the "preferred" status of free exercise rights, or indeed any hierarchy of importance of constitutional rights, was rejected in *Turner* and *O'Lone*.

The RFRA explicitly states that it is intended to overrule *Employment Division v. Smith* and reinstate the compelling interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 405 U.S. 205 (1973). *O'Lone* is not mentioned in the text of the law. However, the legislative history is clear that Congress intended to overrule *O'Lone* as well. H.Rep. No. 88, 103d Cong., 1st Sess. at 7 (1993) ("House Rep."); S.Rep. No. 111, 103d Cong., 1st Sess. at 9 (July 27, 1993) ("Senate Rep."), reprinted in 1993 U.S.C.C.A.N. 1892, 1898-99.

The Mythical Golden Age

Ostensibly, the RFRA enlarges prisoners' free exercise rights by turning the clock back. The legislative history indicates that the statute is intended "to restore the traditional protection afforded to prisoners to observe their religions which was weakened by the decision in *O'Lone v. Estate of Shabazz*," Senate Rep. 103-111 at 9, and that before *O'Lone*, "courts evaluated free exercise challenges by prisoners under the compelling governmental interest test." House Rep. at 7.

Behind these blithe pronouncements lurks a much messier reality. Before *O'Lone*, only a few courts had adopted the "compelling interest test" in prison cases. *Kennedy v. Meachum*, 540 F.2d 1057, 1061 (10th Cir. 1976) ("interests of the highest order"); *Barnett v. Rodgers*, 410 F.2d 995, 1003 (D.C.Cir. 1969); *Walker v. Blackwell*, 411 F.2d 23, 24-25 (5th Cir. 1969). Others required only a showing of an interest that was "important," *Shabazz v. O'Lone*, 782 F.2d 416, 420 (3rd Cir. 1985) (*en banc*), *rev'd sub nom. Estate of O'Lone v. Shabazz*, 482 U.S. 342 (1987); *Madyun v. Franzen*, 704 F.2d 954, 959-60 (7th Cir.), *cert. denied*, 464 U.S. 996 (1983), "legitimate," *Walker v. Mintzes*, 771 F.2d 920, 929 (6th Cir. 1985), or "substantial," *Shabazz v. Barnauskas*, 790 F.2d 1536, 1539 (11th Cir.), *cert. denied*, 479 U.S. 1011 (1986); or they simply accepted prison security and order as justifying religious restrictions without specifying the constitutional rule or standard that they applied. *Jones v. Bradley*, 590 F.2d 294, 296 (9th Cir. 1979).

Moreover, "compelling interest" is only half of the RFRA's standard. The statute also requires that restrictions on religious exercise be narrowly tailored to constitute the "least restrictive means" of serving a compelling interest. Only one of the prison compelling interest cases, *Barnett v. Rodgers*, explicitly adopted a least restrictive means test. The others did not state the required degree of tailoring, *Walker v. Blackwell*, 411 F.2d at 24-25, or stated it ambiguously. *Kennedy v. Meachum*, 540 F.2d at 1061 (holding that inmates' free exercise rights can be overcome by "only those interests of the highest order and *those not otherwise served*...) (emphasis supplied), quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1973).

Courts that did not require a compelling

interest presented an equally mixed bag with respect to their means/ends requirements. Some adopted a variation of the least restrictive means standard. See *Shabazz v. O'Lone*, 782 F.2d at 420 (state must show that "no reasonable method exists by which [prisoners'] religious rights can be accommodated without creating bona fide security problems"); *Native American Council of Tribes v. Solem*, 691 F.2d 382, 385 (8th Cir. 1982) (restriction is unconstitutional if it is "more restrictive than necessary to meet the penal system's objectives"); *Shabazz v. Barnauskas*, 790 F.2d at 1539 (restrictions "must be no greater than necessary to protect the governmental interest involved"); *Barrett v. Virginia*, 789 F.2d 498, 502 (4th Cir. 1982) (restrictions must be "no broader than is necessary to the protection of those interests"); see also *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1033 (2nd Cir. 1985). Others did not. *Dettmer v. Landon*, 799 F.2d 929, 933 (4th Cir. 1986) (rejecting least restrictive means), *cert. denied*, 483 U.S. 1007 (1987); *Madyun v. Franzen*, 704 F.2d at 959-60 (reasonable adaptation required); *Walker v. Mintzes*, 771 F.2d at 930 (restrictions must be "reasonably related to prison security"); *Capoeman v. Reed*, 754 F.2d 1512, 1516 (9th Cir. 1985) (declining to read least restrictive means into prior circuit authority).

To complicate matters further, as the 1980s progressed, courts frequently framed prisoners' free exercise claims in the terms emphasized by the Supreme Court in its prison jurisprudence, such as the necessity for "deference" to prison officials' judgments and the presence of an "exaggerated response" to their concerns, and not in the language of degree of justification and the relation of ends and means that has characterized "free world" First Amendment jurisprudence. See, e.g., *Fromer v. Scully*, 817 F.2d 227, 230 (2nd Cir. 1987) (relying on deference holdings to limit important interest/least restrictive means standard to religious activities not deemed "presumptively dangerous"); *Tisdale v. Dobbs*, 807 F.2d 734, 739 n. 3 (8th Cir. 1986) (declining to reach least restrictive means question without evidence of an exaggerated response). In addition, as the judicial attitude toward prisoners' claims became more hostile, courts sometimes ruled with little reference (or little honest reference) to their own prior precedents. See, e.g., *Dettmer v. Landon*, 799 F.2d at 933-34 (rejecting least restrictive means without reference to earlier decisions embracing it); *Udey v. Kastner*, 805 F.2d 1218, 1221 (5th Cir. 1986) (upholding restriction based on "a problem that the state has a good reason to avoid" and "might create undue cost and administrative burdens"; no reference to prior compelling interest cases).

Thus, there is no substantial body of case law that can be identified as applying both the compelling interest and least restrictive means standards. Analytically, the "traditional protection" enjoyed by prisoners before *O'Lone* is mythical.

Applying the RFRA Standard

One approach to this problem is to employ what might be called analytical brute force, as follows. The RFRA adopts the compelling interest/least restrictive means test. That test is the constitutional standard most favorable to citizens challenging restrictions on their rights by government. Therefore, any result favorable to a prisoner plaintiff that was reached under any standard would, *a fortiori*, have been reached under the compelling/least restrictive standard. Therefore, the body of pre-*O'Lone* case law to which courts should look is the body of cases in which the prisoner won.

Stated so globally, this argument probably seems unsubtle at best and overreaching at worst. In a less sweeping form, it may be useful in persuading a court to resurrect or give weight to a favorable older decision in a particular jurisdiction. The clearest case for such an argument is presented when a court relying on *O'Lone* has explicitly overruled earlier precedent. See, e.g., *Fromer v. Scully*, 817 F.2d 227 (2nd Cir. 1987), overruled by *Fromer v. Scully*, 874 F.2d at 73-74 (striking down prohibition on beards longer than one inch as applied to an Orthodox Jew); *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975), overruled by *Iron Eyes v. Henry*, 907 F.2d at 813 (striking down prohibition on long hair as applied to a Native American).

On many issues and in many jurisdictions, there will be no such favorable precedent to resurrect. It will therefore be necessary to build a new jurisprudence of prisoners' free exercise claims. From a prison litigator's standpoint, the starting point in developing an approach to the RFRA is to identify the ways in which it differs from the *O'Lone* standard. They are substantial.

Under *O'Lone*, a governmental interest need only be "legitimate" to justify restricting religious rights; under the RFRA, the interest must be "compelling." In most prison cases, this difference will not count for much. The legislative history clearly contemplates that interests in security and order will be treated as compelling. "Ensuring the safety and orderliness of penological institutions, as well as maintaining discipline in our armed forces, have been recognized as governmental interests of the highest order." House Rep. at 8; see also Cong.Rec. H8714 (daily ed., November 3, 1993) (remarks of Rep. Hyde) ("maintaining security, discipline and order" in prison "should qualify as a compelling interest under this statutory standard"). In any case it is hard to imagine that a court would conclude otherwise. But in cases chiefly involving issues of money—for example, most prison diet cases—the new statute may shift the advantage significantly toward plaintiffs. The same may be true where the issue is one of administrative convenience. For this reason, it is certain that prison officials will attempt to manufacture security rationales for practices that are in reality based on financial or administrative factors, and that disputes over this question will play a major role in RFRA litigation.

Even in cases where a compelling interest is at stake, the RFRA requires prison officials to employ the least restrictive means in burdening religious rights. How this standard will be applied in prison cases is unclear. The legislative history expresses an expectation that "the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." Senate Rep. at 10, citing *Procunier v. Martinez*, 406 U.S. 396, 404-05 (1974).

This language is hard to square with the terms of the statute itself. After all, the *Turner/O'Lone* reasonableness test itself is a manifestation of this "tradition" of deference. In particular, *Turner* admonished courts to consider

> *the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.... When accommodation of an asserted right will have a significant "ripple effect" on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of prison officials....*
>
> 482 U.S. at 90.

To some degree, the resolution of this apparent conflict may be found in another clause of the statute, which states that government must "demonstrate" that burdens on religious exercise meet the compelling interest/least restrictive means requirements. This is a substantial change from former law, which generally places the burden of proof and persuasion on the plaintiff. *O'Lone*, 482 U.S. at 350. In particular, it relieves the burden on plaintiffs to "point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests" in order to prevail. *Turner v. Safley*, 482 U.S. at 91.

The importance of this last point cannot be overstated. The determination of what alternatives exist within an administrative struc-

ture operated by prison officials is a matter that is most easily addressed by prison officials, and the placement of this burden on plaintiffs was one of the most strikingly lopsided aspects of the *Turner/O'Lone* standard.

But exactly what it is that government must "demonstrate" remains unclear. A major bone of contention in litigation under *Turner* and *O'Lone* is the extent to which prison officials may restrict rights in the service of security or other concerns that are purely hypothetical or anticipatory. Many courts have granted prison officials such latitude in this respect that questions of burden of proof become almost irrelevant. For example, in *Smith v. Delo*, 995 F.2d 827 (8th Cir. 1993), the court upheld the removal of correspondence to the media and the clergy from the "privileged" category of outgoing mail that is not read by prison staff. It observed that it was not "terribly important" that there was no evidence of transmission of escape plans, contraband, threats, or evidence of illegal activity in mail to the clergy or media. "[P]rison officials do not need to wait for problems to occur before addressing them; prison officials are entitled to act preemptively in order to prevent problems from occurring in the first place." *Id.* at 831.

By contrast, the House committee report states that under the RFRA, "Seemingly reasonable regulations based upon speculation, exaggerated fears of [sic: read 'or'] thoughtless policies cannot stand." House Rep. at 8; accord, Senate Rep. at 10 ("inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements"). In light of this language, it is hard to avoid the conclusion that prison officials will be held to a higher and more fact-based standard of justification for the security rationales that they invoke when restricting free exercise rights.

Finally, one particularly troublesome element of the *Turner/O'Lone* standard appears to have been conclusively rejected. That is the analysis of whether a restriction leaves open "alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. Applying this analysis, the Supreme Court in *O'Lone* upheld the exclusion of certain inmates from Muslim Jumu'ah services in part because they were able to pray together during nonworking hours, to observe Ramadan, and to follow Muslim dietary restrictions. 482 U.S. at 351-52.

This line of argument leads straight to *reductio ad absurdum*. Prison officials could well argue that as long as all inmates are allowed to pray silently while locked in their cells, the existence of this "alternative" absolves them of any further obligation to accommodate prisoners' religious rights. No court has accepted such an extreme argument (perhaps because no prison system has pressed it), but there is no principled stopping place once the argument based on alternatives is accepted.

The RFRA disposes of the alternatives approach by requiring that any "substantial burden" be justified under the compelling interest/least restrictive means test. Nothing in the statute authorizes officials to justify a restrictive practice on the ground that other kinds of religious observance are permitted.

Litigating under the RFRA

In addition to the more favorable legal standard, the new statute provides several important advantages to litigators.

Section 3(c), titled "Judicial Relief," provides, "A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." Thus, the statute explicitly creates a cause of action, and not simply a statutory right enforceable through 42 U.S.C. §1983. In any prison religious freedom case, the RFRA should be explicitly pled as a separate ground for relief from §1983—indeed, as the primary ground for relief.

Relief is available against a "government," which is defined as "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." Thus, the RFRA is an exception to the Eleventh Amendment's restrictions on federal court suits against states and their agencies. There is no suggestion in the statute's language or in the legislative history supporting any distinction between restrictions imposed as a matter of government policy and those imposed at a lower level of officialdom. Thus, the showing of municipal policy required by *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and its progeny, to obtain relief against municipal governments under §1983, appears to be unnecessary under the RFRA.

The statute provides for "appropriate relief against a government" without further explanation. Nor is there any elaboration on this point in the legislative history. However, the Supreme Court has stated that there is a presumption that a federal statute creating a private cause of action permits the recovery of damages. *Franklin v. Gwinnett County Public Schools*, 503 U.S. ___, 112 S.Ct. 1028, 1034-35 (1992). The primary defense to damage liability under §1983 is qualified immunity, which bars the award of damages against state actors unless they violate rights that are "clearly established." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). That defense is available only to persons sued in their individual capacities, and not to governmental units, who will be the most common RFRA defendants. *Owens v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398 (1980). Attorneys' fees, too, are available to the prevailing party in an RFRA suit on the same terms as under other civil rights statutes.

Putting these factors together, it would appear, for example, that if a state or city correctional officer bars a prisoner from religious services for a reason that is short of compelling, the prisoner can recover an award of damages from the state or city agency that employs the officer, as well as an award of attorneys' fees, regardless of whether the officer acted pursuant to policy. This is true even in cases where the prisoner would have lost under the *O'Lone* standard and where there was no prior ruling that the religious restriction at issue was unconstitutional.

In light of some judges' hostility toward prisoners' claims, some lower federal courts may invent limitations on prisoners' remedies under the RFRA by interpreting the phrase "appropriate relief" in restrictive ways, although there is no warrant in either the statutory language or the legislative history for doing so. Such efforts should be resisted in trial courts and challenged in appellate courts, keeping in mind that Congress has made no distinction between prisoners and other citizens with regard to the remedies provided by the RFRA. The body of remedial law that develops in nonprison cases under the RFRA should be applicable without exception to prisoners' claims as well.

Other Cases Worth Noting

U.S. COURTS OF APPEALS

Cruel and Unusual Punishment—Proof of Harm

Strickler v. Waters, 989 F.2d 1375 (4th Cir. 1993), *cert. denied,* 114 S. Ct. 393 (1993). This court previously held in *Lopez v. Robinson* that to establish an Eighth Amendment violation, "'there must be evidence of a serious medical and emotional deterioration' attributable to the challenged condition." Now, it "reaffirm[s]" this "essential holding," rephrasing it to require "evidence of a serious or significant physical or emotional injury resulting from the challenged conditions." (1381) At 1381 n.6:

> *At first blush, the standard that we embrace today might be thought to*

exclude instances where pain was suffered but no enduring injury resulted. We are satisfied, however, that in the unusual circumstance where such pain is sufficiently serious to rise to the level of a constitutional violation, it will either itself constitute a serious physical injury or will result in an emotional injury that would be cognizable under our standard.... [Citations omitted]

Crowding (1382): The plaintiff's complaints about double-bunking do not meet the serious injury standard.

Law Libraries and Law Books (1383-87): The plaintiff's claim of inadequate law library access is rejected in view of his failure to establish actual injury. The court rejects the view that deprivation of the "core requirements" of court access violate the Constitution independent of any showing of injury. The plaintiff's allegation that he would have filed his habeas corpus petition earlier and would have been released earlier is termed "vague and conclusory."

Privacy (1387-88): "... [W]hen not reasonably necessary, exposure of a prisoner's genitals to members of the opposite sex violates his constitutional rights...." However, the Constitution was not violated by jail practices, in which female officers only viewed male inmates from the waist up in a strip-search area and in which efforts were made to have them patrol cellblocks at regular and therefore predictable times.

Use of Force/Municipalities

Vineyard v. County of Murray, Ga., 990 F.2d 1207 (11th Cir. 1993). The plaintiff was arrested and taken to a hospital for previously sustained injuries. The officers thought he might have overdosed on drugs and along with hospital personnel tried to force him to drink a substance that would make him vomit. The officers told the hospital staff to leave and that he would cooperate when they returned. They then beat him repeatedly in the head and chest. He sustained a broken jaw among other injuries. A jury awarded $115,000 in compensatory damages and $60,000 and $20,000 respectively in punitive damages against the officer who administered most of the blows and the officer who struck a few blows and did not stop the other officer.

The record supported a verdict against the county. It showed that the Sheriff's Department gave whoever answered the telephone discretion about the initial handling of complaints and that no log of complaints was maintained. In this case, the officers who were the object of the complaint were sent to take statements from the witnesses. No one completed an arrest report on the incident. The Department had no policies and procedures manual. This evidence established a policy of deliberate indifference. Expert testimony supported a finding that the events would not have happened if officers had known that they must report all confrontations, that citizens could report complaints, and that complaints would be investigated.

Denial of Ordered Care/Personal Involvement and Supervisory Liability

Durmer v. O'Carroll, 991 F.2d 64 (3rd Cir. 1993). The plaintiff entered prison with a back injury and the sequelae of two strokes, for which his doctor had prescribed extensive physical therapy. He did not receive the prescribed therapy, but the physician in charge at the prison provided some treatment and sent him to some specialists.

Summary judgment for the defendants was inappropriate. The plaintiff received no physical therapy for seven months before he saw the defendant physician, although time is of the essence if physical therapy is to be effective. Then the defendant sent him to a neurologist rather than beginning physical therapy. The neurologist recommended physical therapy, but the defendant ignored the recommendation for four-and-a-half months. A trier of fact could find that the defendant's proffered reasons were a pretext and that he avoided physical therapy because it would have placed a considerable burden and expense on the prison system. Delay of treatment for nonmedical reasons can constitute deliberate indifference (68-69).

Medical Care/Qualified Immunity

Foulks v. Cole County, Mo., 991 F.2d 454 (8th Cir. 1993). The plaintiff was taken to an emergency room after being assaulted, found to have an outstanding warrant from another state, and turned over to the police with a head injury instruction sheet. He received no medical treatment despite the fact that he was throwing up blood and that his mother noticed that his speech was slurred and requested, unsuccessfully, to bring a doctor in at her own expense. The defendants are not entitled to qualified immunity.

Crowding/Modification of Judgments

Heath v. DeCourcy, 992 F.2d 630 (6th Cir. 1993). The district court in earlier proceedings had *sua sponte* added a "sunset provision" to a consent judgment, which the appeals court held in an unreported opinion should not have been done (n.1). Further proceedings resulted in a new consent decree that included population caps, and more enforcement litigation resulted. Subsequently, the court found the defendants in substantial compliance and ended supervision over everything but the population caps. The defendants then moved to increase the population caps by increasing double-celling and the district court granted the motion.

At 633:

A district court must determine whether and when to terminate supervision or jurisdiction over a consent decree by considering the specific terms of the consent decree.... Several factors to be considered include: (1) any specific terms providing for continued supervision and jurisdiction over the consent decree; (2) the consent decree's underlying goals; (3) whether there has been compliance with prior court orders; (4) whether defendants made a good faith effort to comply; (5) the length of time the consent decree has been in effect; and (6) the continuing efficacy of the consent decree's enforcement.... Court supervision is often expected to continue for several years, in order to assure compliance with the relevant decrees.... When the defendants are shown to be in compliance with its terms and the objectives of the consent decree have been achieved, the district court's jurisdiction over the case may be terminated.

The terms of the decree included specific requirements for terminating supervision or jurisdiction, including findings of compliance, and specified a twenty-year period for certain issues. The court abused its discretion in terminating supervision and jurisdiction inconsistently with these terms.

Modification of consent decrees requires a complete hearing and findings of fact. In institutional litigation, the lower court must identify "'a defect or deficiency in the original decree which impedes achieving its goal, either because experience has proven it less effective, disadvantageous, or because circumstances and conditions have changed which warrant fine-tuning the decree.' [Citation omitted] The modification must further the purpose of the consent decree, without upsetting the basic agreement between the parties." (634)

The district court should not have relied on unverified statements in the record, unauthenticated materials and counsel's argument to support modification of the judgment. The district court did not fully consider the "*Rufo* factors." At 635:

...First, neither defendants nor the district court identified a "significant change in circumstances" warranting revision of the consent decree.... In fact, overcrowding had been an ongoing problem over several years, resulting in the premature release of inmates. Second, the dis-

trict court did not inquire into the good faith of defendants' settlement intentions or anticipation of changes in conditions that would make the consent decree onerous and unworkable.... Third, the district court failed to determine if the proposed changes were "suitably tailored to the changed circumstances." More importantly, however, the district court should have required defendants to present evidence in support of their position to allow double-celling and to increase the inmate population, with an opportunity then for the plaintiffs to contradict the evidence. In making our ruling, we are not unmindful of the burden on the docket that a case of this magnitude makes.... However, it also affects the constitutional rights of citizens, so the courts must be ever vigilant to preclude a termination or modification of proceedings until everyone affected has an opportunity to be heard.

Use of Force/Qualified Immunity

Hill v. Shelander, 992 F.2d 714 (7th Cir. 1993). The plaintiff alleged that an officer grabbed his hair and shoulder, pulled him out of his cell, slammed his head and back against the bars, hit him in the face, and kicked him in the groin.

Although qualified immunity doctrine "eschews an inquiry into subjective intent, in some cases, proof of the defendant's mental state is an element of the constitutional violation." (717) An assertion of improper motivation must be accompanied by some specific factual support. The facts alleged—an unprovoked assault, and continuing abuse even though the plaintiff did not fight back—-support an inference of malicious intent. Since the qualified immunity question turns on a disputed issue of fact, the court lacks jurisdiction over the appeal.

The defendant argued that there was no clearly established right at issue because the Eighth Amendment force standard is a balancing test, "meaning that no generalizable parameters exist." (718) However, it is well established that beating a prisoner with malicious intent violates the Eighth Amendment.

Disabled/Cruel and Unusual Punishment—Proof of Harm

Hicks v. Frey, 992 F.2d 1450 (6th Cir. 1993). The plaintiff was rendered paraplegic in an escape attempt. Initially he was placed in a converted cell designed for his needs; he was later moved to an isolation cell as punishment for the escape attempt. He presented evidence that he was deprived of drinking and bathing water, proper physical therapy, and proper medical treatment, not turned regularly, harassed in various ways, and allowed to lie in his feces and vomit for hours. A jury returned verdicts against "the officer in charge of the jail" for $10,000, against the nurse in charge of medical services for $1,000, and against the corporation that provided medical services for $60,000.

The verdict against the officer in charge of the jail is supported by evidence that he received daily communications about the plaintiff and his problems. At 1457: "In the absence of inquiry or at least some show of concern about Hicks' condition and the problems with that condition, the jury reasonably could have found that Frey at least acquiesced in the mistreatment of Hicks that the jury found occurred." In addition, he knew that the plaintiff was completely dependent on a wheelchair and that his cell was too small for a wheelchair, and that he had no access to shower facilities.

The verdict against the nurse was supported by evidence that she directly supervised the nurses who gave daily care and that she knew of the plaintiff's complaints. The jury could have found that she displayed deliberate indifference "both by failing to address [the complaints] herself and by implicitly authorizing, approving, or knowingly acquiescing in unconstitutional conduct of others over whom she had supervisory authority." (1457) The fact that witnesses could not identify by name some of the subordinates in question was irrelevant.

Protection from Inmate Assault

LaMarca v. Turner, 995 F.2d 1526 (11th Cir. 1993). The district court entered an injunction benefiting the class and awarded damages to some of the named plaintiffs based on evidence of a pervasive risk of sexual assault at a Florida prison.

The record "painted a dark picture of life at GCI; a picture that would be apparent to any knowledgeable observer, and certainly to an official in Turner's position. An inference can be drawn from this evidence that [the warden] did know that GCI failed to provide inmates with reasonable protection from violence." (1536-37) The court distinguishes *Rizzo v. Goode* by noting that the warden's personal involvement was not based solely on statistical patterns. At 1536 n.21: "Moreover, [the warden's] supervisory role and the insular character of prison communities provided strong support for the court's conclusion that [the warden] must have known of these conditions."

Despite the warden's efforts to ameliorate the conditions and his budgetary constraints, his deliberate indifference was supported by evidence that he failed to ensure that his subordinates followed the policies he established, and that he failed to take specific, low-cost actions that were available to him and that his successors successfully undertook. His defaults included improper and inadequate staff training; a staff out of control who did not report rapes, assaults, and illegal activities; failure to station officers to patrol the dormitories; permitting inmates to obscure vision by hanging sheets; the lack of a standard procedure for investigating allegations of rape; his failure to control inmate movement, permitting aggressive inmates to move casually within the dormitories; and the failure to transfer inmates who were known or should have been known as assailants.

The causation requirement of §1983 was met by evidence of five conditions that were under the warden's control and created an unconstitutional risk of violence: a prevalence of weapons, the lack of adequate patrols, the lack of adequate reporting procedures for rapes and assaults, the presence of "obvious and rampant indicia of homosexual activities," and a lack of supervision of officers. The rapes of the plaintiffs flowed directly from these lawless conditions. (1539) However, the district court should have identified the specific potential solutions that the defendant actually or recklessly disregarded and determined whether they would in fact have eliminated the "infirm" conditions.

Procedural Due Process—Administrative Segregation/Qualified Immunity/Personal Involvement and Supervisory Liability

Hall v. Lombardi, 996 F.2d 954 (8th Cir. 1993). The plaintiff was placed in the Special Management Facility, a "behavior modification and administrative segregation unit." The Classification Committee repeatedly recommended that he be released to general population protective custody, but he was not released.

The defendants were not entitled to qualified immunity. Although the relevant regulations had not previously been held to establish a liberty interest, such a holding was predictable since there are many Supreme Court and Eighth Circuit cases supporting the well-developed legal principles governing liberty interests. At 959: "Any reasonable official would understand that once Hall obtained final approval for release, he had a legitimate expectation of being released in a reasonable amount of time, and that failing to meet that expectation for such a long time violated Hall's rights."

At 961:

...[P]roof of actual knowledge is not an absolute prerequisite for imposing supervisory liability.... We have "consistently held that reckless

disregard on the part of a supervisor will suffice to impose liability." [Citations omitted]

Prison regulations required the reporting to the warden of the names of all inmates assigned to the Special Management Facility, the reason for the assignment, and the length of time assigned; the warden was required personally to review assignments and retentions of more than one year and report them to the commissioner. "Thus, their compliance or noncompliance with these regulations may establish actual knowledge or reckless disregard."

DISTRICT COURTS

Law Libraries and Law Books/Verbal Abuse.

Martin v. Ezeagu, 816 F.Supp. 20 (D.D.C. 1993). An allegation that the law librarian engaged in an "ongoing pattern of harassment and arbitrary exclusion" of the plaintiff from the law library stated a claim for denial of court access. The right "entails not only freedom to file pleadings but also freedom to employ, *without retaliation or harassment*, those accessories without which legal claims cannot be effectively asserted." (24, citing *Ruiz v. Estelle*, 679 F.2d 1115, 1153 (5th Cir. 1982), *cert. denied*, 460 U.S 1042 (1983) (emphasis supplied)). The requirement of prejudice does not apply because the plaintiff "alleges not an isolated episode, but an ongoing pattern of denial of access." (24)

Allegations of "an extensive period of harassment, including racial epithets and profanity," implicating a constitutional right, stated a claim for intentional infliction of emotional distress. This tort requires " 'extreme and outrageous conduct' which 'intentionally or recklessly causes severe distress' and is 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.' " (26, *citing Jackson v. District of Columbia*, 412 A.2d 948, 956-57 (D.C.App. 1980).)

Medical Care/AIDS

Haitian Centers Council, Inc. v. Sale, 817 F.Supp. 336 (E.D.N.Y. 1993). The government conceded that adequate medical care was not being and could not be provided for "screened-in" Haitians held on Guantanamo with diminished T-cell counts and that its own doctors had recommended that these persons be evacuated to receive appropriate care. In the exercise of its "inherent power to protect the parties appearing before it, to preserve the integrity of an action, to maintain its ability to render a final judgment, and to insure the administration of justice," not to mention "to prevent any loss of life or the diminution of the plaintiff class" during the litigation, the court orders that the defendants within ten days either provide the level of care recommended by its own doctors or evacuate the affected class members to a place (except Haiti) where such medical care is available.

Hygiene/Qualified Immunity

Matthews v. Peters, 818 F.Supp. 224 (N.D.Ill. 1993). The plaintiff's allegation that he was denied hot water in his cell during 11 months in segregation despite his repeated complaints stated an Eighth Amendment claim. At 227: "What Matthews presents here is not a case of the limited and short-term absence of some amenity.... Instead, when Matthews' allegations are taken at face value with reasonably favorable inferences...what the case involves is a long-protracted deprivation that was deliberately imposed on someone confined in segregation and that made it impossible for him to bathe during extended periods of time." The defendants were not entitled to qualified immunity under *Wilson v. Seiter*.

Restraints

Jones v. Thompson, 818 F.Supp. 1263 (S.D.Ind. 1993). The plaintiff tried to hang himself in jail. He was placed in "three-way restraints" (the court uses the term "hog-tied") and left in a detox cell which had nothing in it but an 18-inch bench which he could not mount in his restraints. He was stripped to the waist. He could not stand or sit, but could only squat. He could not use the toilet; instead he used the drain in the floor while he was lying down. He was not permitted to shower or change clothes. He was subjected to these conditions for about a week. He received no medical evaluation for five days.

This treatment was not reasonably related to a legitimate goal or interest and was therefore punishment. At 1268: "This was nothing short of flagrant governmental abuse which is decried by the Due Process Clause."

Punitive damages of $2,000 are assessed against the captain, "whose authority, presence and knowledge of the continuing retention of Jones day after day without a systematic or humane response to his condition demonstrates her complete callousness to that condition." (1268) The court notes in connection with the deterrent purpose of this award that the hog-tying procedure is still in use in the jail.

The plaintiff's treatment was caused by two county policymakers, the captain and the sheriff, and by "the custom and practice to apply restraints without medical consultation and keep them on for extended and undocumented periods without review. The practice may be infrequently invoked, but is nonetheless barbaric." (1269) Deputies were trained on how to apply restraints but not on when to take them off or how to ensure the detainee's welfare while they were in use. Accordingly, the county is liable for $5,000 in compensatory damages (presumably the same award that the defendants are individually responsible for).

Privacy

Arey v. Robinson, 819 F.Supp. 478 (D.Md. 1992). In a newly constructed prison, the toilets, showers, and urinals are located at one end of a dormitory and screened from view only by a wall about four feet high containing open entryways. Prison officials declined requests to provide shower curtains or other visual barriers. Two-hour periods were scheduled in morning and evening when opposite sex officers would not be present.

At 487:

The combined effect of the open dormitory and the open bathroom area at the new JPRU is to put inmates on display virtually 24 hours a day no matter how personal an activity they may be involved in. A shower schedule that allows female guards unrestricted access to the dormitory from 8:30 a.m. to 4:30 p.m. means there is no opportunity for an inmate to change clothes during that time period or use the toilet without the likelihood of being seen by a correctional officer of the opposite sex. Basic human dignity requires some minimal protection of privacy, at least from the opposite sex and particularly where no security concerns have been advanced to justify the design chosen.

Under the *Turner* standard, these conditions are unconstitutional. The state provided no reason for them; the predecessor institution had an enclosed bathroom with doors and shower curtains, and no evidence was presented that security problems resulted. There is no alternative way for prisoners to exercise their right to privacy in the bathroom. Since there is no record of security problems, it is unlikely that there will be an effect on guards' performance of their duties. The impact of change on prison resources would be minimal, since shower curtains or semi-opaque plastic sliding windows could be installed "with a *de minimis* cost to prison security and relatively little cost in terms of dollars." (487)

Law Libraries and Law Books/ Non-English Languages

Acevedo v. Forcinito, 820 F.Supp. 856 (D.N.J. 1993). At 888:

... This court agrees that for prisoners who cannot read or understand English, the constitutional right of access to the

courts cannot be determined solely by the number of volumes in, or size of, a law library."

* * *

... It would be wholly contrary to the spirit and purpose of Bounds to conclude that the provision of a law library afforded [] protection for prisoners who cannot understand the language in which the books are written.... Clearly, Bounds requires some form of assistance to those for whom even the most comprehensive law library is of no avail."

The fact that the plaintiff filed a complaint and the magistrate denied the appointment of counsel do not show that the plaintiff had adequate access to court. If this argument were accepted, courts could never reach the merits of a court access claim.

Judicial Disengagement

Grubbs v. Bradley, 821 F.Supp. 496 (M.D.Tenn. 1993). The court finds that the defendants have cured the constitutional violations previously found in the state prison system in the areas of housing conditions, sanitation, food service, personal safety, exercise for segregation inmates, and classification.

With respect to health care, the constitutional violation is found to have been mostly remedied. The court cites specific deficiencies that have been remedied (499-500), including the use of health care staff to oversee security, housing inmates in the medical facility who do not meet the admissions criteria, the lack of 24-hour emergency coverage, and the use of inmates to deliver medical services. There remains one "glaring deficiency," the absence of a quality assurance plan, which the court views as "indispensable and not unduly intrusive in remedying the systemic deficiency." (500) The court retains jurisdiction on this issue, accepts the defendants' plan, and requires a one-year period of self-monitoring and reporting with reports furnished to plaintiffs' counsel.

With respect to violence, which was caused in large part by overcrowding, the defendants have taken sufficient action in terms of providing new space, new parole policies, and new sentencing legislation, and contracting with local governments and development of community corrections. They have also remedied the deficiencies in academic and vocational programs and added inmate job programs in order to reduce idleness. (501)

The defendants have complied with the requirement to close the Tennessee State Penitentiary and to implement a computer system, apparently for tracking inmates.

The court vacates and dissolves all outstanding remedial orders and injunctive relief in the case except for the quality assurance monitoring requirement and a permanent injunction against housing inmates in the State Penitentiary. At 503: "...[T]he Court's extended experience with this litigation convinces the Court that the defendants have the commitment, operating structure and skills necessary to continue operating the prison system in accordance with constitutional requirements." At 503 n.4: The court vacates all population limit orders and declines to impose any permanent population caps. "If the past, present and future officials of the State of Tennessee have not learned a Three Hundred Million Dollar ($300,000,000) plus lesson in this litigation, then further instruction is hopeless, and the solution will have to be left to another day and another lawsuit." ■

John Boston is the director of the Prisoners' Rights Project, Legal Aid Society of New York. He regularly contributes this column to the NPP JOURNAL.

For the Record

■ Janet Gardner, a San Francisco writer and spouse of a prisoner, is putting together a book to help people deal with the problems involved in having a loved one in prison. Through the initial detainment, trial, local jail time and resulting state imprisonment, the family on the outside first goes through shock and denial but must finally come to the reality of the daily struggle to survive, provide for their family and maintain relations with their loved one in prison while facing the long years ahead. Ms. Gardner wants to use the experience and lessons learned by those who have faced this ordeal to help others. If you would like to share your experiences and complete a questionnaire, you can write to Coping, Box 3125, San Francisco, CA 94104, or call 415-391-5360.

■ When Oregon State builds a new correctional facility they are required by state law to use part of the money to fund an art project. Out of the construction of Multnomah County Inverness Jail, came *Pro and Con*, an eight-minute documentary by academy-award winning filmmaker and animator Joan C. Gratz and animator Joanna Priestley. Using a combination of drawings, 2-D puppets, object animation, and clay painting, the film exposes the realities of prison life as explained from the viewpoints of a corrections officer (Pro) and a long-term prisoner (Con). Oregon inmates donated some of the artwork seen in the film—both officially sanctioned self-portraits and "contraband" art made during hours of intensive, clandestine labor from improvised supplies such as clothing, magazines, and vegetable dyes. After reading almost 300 questionnaires returned by prisoners describing their lives, the filmmakers selected the response from one, Jeff Green, to provide the entire "Con" narration. The video is being distributed by Pyramid Film & Video, P.O. Box 1048, Santa Monica, CA 90406. The VHS purchase price is $195, a three-day rental $75. To arrange a free preview screening, call Pyramid at 1-800-421-2304.

■ *Going to Prison?* is a recently published guidebook with information for first-time Federal prisoners. Written by Jim Tahoun who has been a newspaperman, restaurant manager, Philadelphia city councilman, member of the Pennsylvania State House of Representatives and Federal prisoner, the book provides information in a concise format for the prisoner and his/her family on what to expect—the mechanics of prison life, explanations of formal and informal vocabulary, guidelines for coping. Single copies of *Going to Prison?* can be purchased for $7.95 plus $1.75 p & p, from Biddle Publishing Co., PO Box 1305 #103, Brunswick, ME 04011. 207-833-5016

BLACK PRISONERS • *con't from pg. 2*

other former Panthers at Attica were transferred to Green Haven Correctional Facility north of New York City. There they met Larry White, a self-empowerment visionary. His ideas reflected those developing among Black Americans: that they must now seriously attend to the unfinished struggle for Black liberation, freedom, and the self-determination of *all* Black people.

Self-determination—the non-traditional approach to empowerment

Many of the activist Black and Latino prisoners placed in Green Haven "to keep them busy and out of trouble" were intelligent and committed to the new struggle. They quickly took advantage of new prison programs that offered college degree courses. A number graduated from the masters degree program offered by New York Theological Seminary. They led in forming a prisoner "think tank" to explore the nature and causes of minority oppression and imprisonment in this country, focusing on New York State; they were aided by community activists and intellectuals. Out of this mix of political activists, prisoners, and scholars came new analyses and innovative proposals to address painful social problems that many of them knew first-hand.

As soon as prison administrators caught on to the new prisoner movement, they quickly dispersed the participants to other prisons. But it was too late. Wherever they went, similar "think tanks" were developed, with Auburn Prison, in upstate New York, becoming the second most influential intellectual center.

During a 12-year period of research, Green Haven prisoners looked at New York's disproportionate incarceration of minorities, a prison system in which 85% of the prisoners are African American or Latino. They found that 75% of minority prisoners come from only seven neighborhoods in New York City to which 95% of them return. Most of the remaining 25% of prisoners come from the other five major urban communities in the state.

Those findings led to the development of what prisoners call "the Non-traditional Approach" to criminal and social justice. The Approach is an "analysis of the psycho-cultural, socioeconomic, and historical patterns that affect imprisonment rates."[14] It describes the "direct relationship" between prisons and communities of color: although located in rural areas, prisons are still part of the dysfunctional institutional structure of urban communities. Like schools, welfare departments, and employment services that supposedly serve "ghetto" communities, they are often accomplices in the destruction of families and individuals within these communities. The failure of these institutions, along with racism, produce "crime-generative" attitudes among urban youth and lead to negative values, feelings of alienation, crime, poverty, violence, drugs, and death.

The Non-traditional Approach forms the basis of a movement that is not only becoming influential among prisoners but is also beginning to catch the serious attention of state legislators, government officials, prisoner advocacy groups, members of Black and Latino communities, and even European penologists.

Although this socioeconomic perspective is not entirely new, it represents a significant change in our approach towards prisoners and community crime-prevention efforts. It redefines the role of prisons and proposes solutions, including effective prison programs, that occur within a community context.

Prisons are dysfunctional. They do not protect the community, and they still operate in much the way they did during the early part of the 20th century when most prisoners were first- or second-generation European immigrants. Thus prisons, still dominated by white administrators and staff, ignore the change in prison demographics that has taken place over the past 25 years. Furthermore, the criminal justice system as a whole has failed to address the criminogenic factors identified by Blacks and Latinos. "Rather than change the socioeconomic conditions of communities that generate crime, the system prefers to deal with individuals and ignores the very structural circumstances that produced their imprisonment in the first instance."[15]

Determined to make prison policies and programs more effective and relevant to communities of color, Green Haven prisoners under the umbrella prison organization, the Political Action Committee (PAC), have developed model programs that teach prisoners individual and civic responsibilities. One of these, "The Resurrection Study Group," uses a prisoner-developed curriculum in study groups throughout the prison system to prepare African Americans and Latinos for their return to their old neighborhoods. Once released, they are expected to educate and organize young people before they too get into trouble with the criminal justice system. To prepare, prisoners are taught Afrocentric values, history, economics, politics, and belief systems designed to build self-esteem, enhance self-confidence, and encourage constructive social attitudes.

PAC members and their supporters are lobbying the state legislature for reforms that would change the roles and responsibilities of prisoners. For example, they have proposed legislation that would require prisoners to train for community service in prison and perform specific housing, education, or crime-prevention duties as a condition of parole. These and other ideas were presented at a state legislative hearing by Eddie Ellis, one of the early "think-tank" members now on work release in Harlem. A number of his proposals are now under serious consideration by legislators.

Eddie Ellis and other "think-tank" members are now back in their home communities. In Harlem they have organized a community-based agency, the Community Justice Center, to carry out the program of community involvement that they began in prison. They work actively to shepherd young Black and Latino youth into constructive work that improves their own lives and their communities. They are also working to empower poor neighborhoods through community-specific economic development projects and culturally enriching programs.

Larry White, one of the chief architects of the Non-traditional Approach, is still incarcerated in Green Haven Correctional Facility. He is proud to see the products of his work taking root in the community. From Green Haven, he writes:

> *The Non-traditional approach to criminal and social justice is really about the relationship between social justice and criminal justice....Social justice is a measure of how fair and equitably the system operates for all the people within its jurisdiction. The Non-traditional approach employs a holistic perspective in the analysis of crime and delinquency. It holds that at bottom criminal justice is an aspect of social justice. While it may be an extreme to hold that all crime is a result of the experience of social injustice, there should be no doubt that social injustice is a crime generative factor. Therefore the task of criminal justice requires not only effort directed toward changing the individual offender, which has been its primary focus, but mobilization and change of the community and its institutions.*[16]

The non-traditional approach works to empower prisoners, the prison, and com-

munities to work towards such change together. At the outset there must be a reassessment of the criminal justice system to determine the needs of a prison population that is demographically different from that of an earlier period. There must also be a reassessment of how curricula and programs can be structured to meet those needs. At a minimum, programs need to be directly related to communities from which prisoners come and be appropriately Afrocentric or Latinocentric.

Led by Black and Latino prisoners, this new response to minority oppression is not only based on a strong commitment to self-empowerment, but is enriched and strengthened by an appreciation of the long history of Black protest. The "Non-traditional Approach" promises to become a powerful influence in prisons and urban communities across the country suffering from racism, poverty, and the surrender of too many of their young to the nation's ineffective prison system. ■

Alice Green is the Executive Director of the Center for Law & Justice, Inc., in Albany, New York.

---

[1] Marc Mauer, *Young Black Men and the Criminal Justice System*. Washington, D.C.: The Sentencing Project (February 1990).
[2] W.E.B. DuBois, *The Souls of Black Folk*. New York: Bantam Books (1989).
[3] Charshee C.L. McIntyre, *Criminalizing A Race - Free Blacks During Slavery*. Queens: Kayode Publications, Ltd. (1992).
[4] Christopher Adamson, "Punishment After Slavery: Southern State Penal Systems, 1865-1890." *Social Problems*, Vol. 30, No.5 (June 1983) (pp.555-569).
[5] Manning Marable, *How Capitalism Underdeveloped Black America*. Boston: South End Press (1983).
[6] James B. Jacobs, *New Perspective's on Prisons and Imprisonment*. Cornell University Press (1983).
[7] August Meier and Elliot Rudwick, *From Plantation to Ghetto*. New York: Hill and Wang (1976).
[8] Eldridge Cleaver, *Soul on Ice*. New York: Delta Books (1968).
[9] See note 5 above.
[10] John Pallas and Bob Barber, "From Riot to Revolution." *Issues in Criminology*, Vol.7, No.2 (Fall 1972).
[11] Robert Chrisman, "Black Prisoners, White Law." *The Black Scholar*. April-May (1971) (pp.44-46).
[12] Angela V. Davis, *If They Come in the Morning*. New York: The New American Library (1971).
[13] See note 11 above
[14] *Attica: The Official Report of the New York State Special Commission on Attica*. New York: Bantam Books (1972).
[15] Community Justice Center. Harlem (1993).
[16] Larry White, (unpublished letter to Alice Green, July 13, 1993.)

"Dear Prison Project..."

"Dear Prison Project..."

What is discovery, and what discovery can a prisoner do?

Dubious About Discovery

Dear Dubious:

Discovery is a method to "discover" or find documents and relevant information in order to present the court with the evidence you need to prove your case. Another purpose of discovery is to find out your opponent's arguments and evidence. Rules 26 through 37 of the Federal Rules of Civil Procedure address discovery.

Before you begin the discovery process, make a list of each issue or claim in your case, the individual elements of each issue, and what information or documents you will need to prove each element. Additionally, consider what defenses the opposing party may raise, and what information you will need to defeat them. Also consider using the resources already available to you. Interview prisoners and helpful prison employee witnesses, have them sign their statements, and have the statements notarized or sworn to according to 28 U.S.C. §1746. Determine if your state has a freedom of information act or public records act. If so, you can request policy directives, regulation manuals, and other relevant information through the act. Use the grievance procedure to request information (i.e., why you have not yet received recommended medical surgery?). Also, ask friends and family to write prison officials with similar questions (i.e., why was Daniel Jones transferred?). This information will help focus your case, and perhaps give you an indication of where you might find other helpful information.

The primary devices used in the discovery process are interrogatories, requests for production of documents, and requests for admissions.

Interrogatories are written questions submitted to the opposing party for an answer. They are most useful for obtaining the names and locations of people with information about the case and for determining the existence and location of documents. Requests for production of documents allow for the inspection and copying of documents which are in the custody or control of the defendant and which may be relevant to your case. Requests for admissions ask the opposing party to admit or deny the truth of certain facts and their admissions become binding on the party.

Of course, each of these tools of discovery are governed by the Rules of Civil Procedure and those rules should be read carefully to determine the specific requirements of each. Additionally, these requests may be objected to by the opposing party and therefore you should know exactly why each request or interrogatory is important to your case in order to counter defendant's objections and/or to compel their production if defendants refuse to give you the information. If the opposing party refuses to give you a requested item, you may have to file a motion to compel, (Fed. R. Civ. Pro. 37(a)) and go to court to force them to give you the item.

Following are general tips for conducting discovery to insure that the process runs smoothly:

(1) Be as clear as possible in describing what you are looking for. Give as many details as you can, and spell out exactly what you want. If possible, describe the documents in terms used by the party from whom you are requesting the documents (i.e., Grievance Report regarding June 23, 1993 assault on inmate Tom Smith). The more specific your request, the more difficult it will be for the opposing party to claim they do not know what you are looking for. If you think there may be other relevant materials, but do not know how to focus your request, make a general request and add specific requests to define the general request.

(2) Establish priorities. Determine what information is most important to our case and what information will be the easiest to obtain. You may want to conduct discovery in stages, always remaining within the court-determined deadlines. By requesting information in stages you may get the easily accessible information without having the opposing party delay the request as a result of the more difficult items.

(3) Be reasonable. Do not request items just to aggravate or burden the opposing party. Rule 26(g) of the Federal Rules of Civil Procedure prohibits such a practice, and allows a judge to impose sanctions for such action. If the opposing party asks for an extension, consider granting it as long as you are not in an emergency situation and the extension is a reasonable length of time (i.e., 30 days).

BY JACKIE WALKER

Women Unite to Provide Education and Support

Peer education programs led by women prisoners have revolutionized HIV/AIDS education for prisoners. Women from two of these programs speak here about the impact their projects have had on prisoners, staff and the outside community:

***Shawnee AIDS Unit*-FCI-Marianna, Florida**

For the last two-and-half-years, women imprisoned at the High Security Unit in Marianna, Florida have been working to combat the AIDS epidemic. An informal group began after the arrival of a woman who had been a peer counselor at the Washington, D.C. Jail, and has since tried to educate to defeat widespread ignorance and fear, and to create a supportive environment for women who are HIV positive.

In April 1993, the informal group coalesced into the Shawnee AIDS Awareness Group, sponsored by the Psychology Department. We held an "AIDS Fair," made a panel for the AIDS Memorial Quilt, became certified Red Cross AIDS instructors and raised over $3,500 for the local area AIDS organization by holding a walkathon. The AIDS Awareness Class, an eight-week course offered three times a year, is our most important ongoing project. Besides educating women about the virus, routes of transmission, and their rights as prisoners, the class focuses on prevention and changing high risk behavior. For Hispanic Heritage Month the group did a presentation in Spanish, hoping to attract more interest from the Latina community.

Real strides have been made since the beginning of the project, but the group has been unable to change the level of medical care provided to HIV-positive women. This is now the overriding concern, along with the children of the women and the development of an orientation packet.

Shawnee AIDS Awareness

Members of the Shawnee AIDS Awareness Group at FCI-Marianna. From left to right: Silvia Baraldini, Linda Oliver, Valeria Vistoli, Susan Rosenberg, Laura Whitehorn, Andrietta Britton, Linda Pea.

***PLACE*-FCI-Dublin, California**

At FCI-Dublin, a federal prison housing 1,000 women, an inmates' club is trying to change attitudes about AIDS in prison. PLACE (Pleasanton AIDS Counseling and Education) was founded in 1991 to provide AIDS education to the population and to give support to the women who are HIV positive, or who have HIV-positive loved ones. We have produced a poster in Spanish and English for display throughout the prison, and prepared a questionnaire about AIDS and risky behavior to give to every prisoner. Group members include many women who have lost family members and beloved friends to AIDS, and some women who are HIV positive themselves. Membership is all-inclusive, and crosses the racial, age, national, and sexual-preference differences that are so especially divisive in prison. Meetings and presentations are conducted in both English and Spanish because Spanish is the primary language for 40% of the women.

This last year, a major project has been constructing panels for the International Memorial AIDS Quilt. Because many of us know women who have died of AIDS in prison, or who suffer being HIV-positive inside, we wanted to make a panel remembering women prisoners who have died of AIDS. We wanted to remember the thousands of AIDS orphans in another panel. Many women worked on pieces of the group panels in their living units, and the whole prison became conscious that the AIDS Quilt was going to be displayed at the prison. More women became involved and decided to make individual panels for family members or friends who had died. Finally, our display dedicated two new large (12' X 12') panels, and nine small (3' X 6') panels to be added to the International Quilt.

On August 28 and 29, 1993, the Quilt was displayed at FCI-Dublin—the first major display organized entirely by women—with thanks and credit to the facilitation and support of staff sponsor Mark Lewellyn and Dr. Maisonet. In addition to the total of three large panels, the NAMES Project brought in 40 more panels which were hung on the walls and displayed on the floor of the Recreation Barn. Over 80 women worked as volunteers during the weekend, participating in the Unfolding Ceremonies, providing comfort for people viewing the quilts, answering questions about AIDS, translating, and providing music. During the weekend at least 700 women prisoners and numerous staff viewed the Quilt, definitely increasing AIDS awareness.

Women in prison are very concerned with continuing to have meaningful relationships with our children, including educating them about AIDS. PLACE has a booth at the annual Children's Day/Family Day, where we distribute teen-oriented literature, show safer-sex rap videos, and answer questions. PLACE plans to continue the program by adopting the HIV ward at the Oakland Children's Hospital. Women will make holiday and birthday cards, and with donated materials, will make blankets, clothes, and stuffed toys for the children. This "adoption" process has already opened our hearts to the children and their families, and increased the urgency we feel about educating ourselves and our communities about AIDS. ■

Jackie Walker is the Project's AIDS information coordinator.

THE NATIONAL PRISON PROJECT

Publications

QTY. COST

_____ **The National Prison Project JOURNAL,** $30/yr. $2/yr. to prisoners.

_____ **The Prisoners' Assistance Directory,** the result of a national survey, identifies and describes various organizations and agencies that provide assistance to prisoners. Lists national, state, and local organizations and sources of assistance including legal, AIDS, family support, and ex-offender aid. 10th Edition, published January 1993. Paperback, $30 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 cases which deal with overcrowding and/or the total conditions of confinement. (No jails except District of Columbia.) Updated January 1994. $5 prepaid from NPP.

_____ **Bibliography of Material on Women in Prison** lists information on this subject available from the National Prison Project and other sources concerning health care, drug treatment, incarcerated mothers, juveniles, legislation, parole, the death penalty, sex discrimination, race and more. 35 pages. $5 prepaid from NPP.

_____ **TB: The Facts for Inmates and Officers** answers commonly-asked questions about tuberculosis (TB) in a simple question-and-answer format. Discusses what tuberculosis is, how it is contracted, its symptoms, treatment and how HIV infection affects TB. Single copies free. Bulk orders: 100 copies/ $25. 500 copies/$100. 1,000 copies/$150 prepaid.

_____ **1990 AIDS in Prison Bibliography** lists resources on AIDS in prison that are available from the National Prison Project and other sources, including corrections policies on AIDS, educational materials, medical and legal articles, and recent AIDS studies. $5 prepaid from NPP.

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

(order from ACLU)

_____ **ACLU Handbook, The Rights of Prisoners.** Guide to the legal rights of prisoners, parolees, pre-trial detainees, etc., in question-and-answer form. Contains citations. $7.95; $5 for prisoners. ACLU Dept. L, P.O. Box 794, Medford, NY 11763.

Fill out and send with check payable to:

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

Name _____

Address _____

City, State, ZIP _____

THE NATIONAL PRISON PROJECT

Highlights

The following are major developments in the National Prison Project's litigation program since September 15, 1993. Further details of any of the listed cases may be obtained by writing the Project.

Farmer v. Brennan—The Supreme Court of the United States appointed the National Prison Project to represent the plaintiff. Farmer, a pre-operative transsexual, was raped within days of her transfer to U.S.P.-Terre Haute. Following Seventh Circuit precedent, the trial court granted defendants summary judgment after they alleged a lack of actual knowledge of the danger to petitioner. The judge refused to allow the plaintiff to conduct discovery to determine if defendants should have known of the risk, and the Seventh Circuit summarily affirmed. The Supreme Court granted *certiorari* on the plaintiff's *pro se* petition on October 4, 1993.

The question before the Court is what constitutes "deliberate indifference" to a prisoner's safety by correctional staff. We argue that it is sufficient proof of "deliberate indifference" to show that staff knew, or *should have known*, of an unreasonable risk if the risk was "obvious." The case was argued on January 12, 1994.

Austin v. Lehman—The first phase of the trial, involving issues of overcrowding, lack of programs, and staff- and prisoner-on-prisoner assaults began on December 6, 1993. Following the corrections phase, the parties are scheduled to try sanitation and physical plant issues, and then medical and mental health issues. The judge has postponed the resumption of the trial until March 1 to allow the parties to conduct negotiations towards a possible settlement.

Goldsmith v. Dean—In December 1993, after negotiations with the State of Vermont broke down, the National Prison Project filed a class action suit in the federal court on behalf of all Vermont prisoners. In addition to challenging the denial of adequate medical and mental health care, intolerable environmental health hazards, and other conditions of confinement under the Eighth Amendment and the Americans with Disabilities Act, the Complaint challenges extraordinarily invasive behavior modification programs on various constitutional grounds. In one of these, the Vermont Treatment Program for Sexual Aggressors, prisoners are subject to mandatory masturbation sessions, to manipulation of their genitals by a device called the penile plethysmograph, and to other degrading and humiliating practices.

Hadix v. Johnson—In June 1992, the National Prison Project entered this case, in which there is a long-standing consent decree that comprehensively addresses conditions of confinement at the State Prison of Southern Michigan. During 1993, the court issued a number of enforcement orders which the defendants appealed to the Sixth Circuit. On October 4, 1993, the Sixth Circuit issued an order dismissing some of the defendants' appeals. The defendants then filed their brief on the merits. The plaintiffs' brief will be filed on January 30, 1994. In addition, the defendants have filed an appeal from the order awarding plaintiffs their attorneys' fees.

John A. v. Castle—The suit filed in 1990 challenged conditions of confinement at the Ferris School and Bridge House for Delaware juveniles who have been charged with offenses or committed to state custody following adjudication. In January 1994, following extensive negotiations, the parties arrived at a detailed settlement agreement addressing all major allegations of the complaint. The court has scheduled a hearing for March 14, 1994, to determine whether the agreement should be approved.

Lankford v. Racicot—Following an investigation of conditions at the Montana State Penitentiary located at Deer Lodge, and the withdrawal of a prior state lawsuit, the National Prison Project together with local counsel filed a comprehensive lawsuit in December 1993. The suit alleges inadequate medical, dental, and mental health care; dangerous overcrowding, environmental and fire safety conditions; arbitrary classification, treatment and good-time policies; and a degrading and humiliating sex offender program. The Department of Justice has also announced its intention to file a CRIPA lawsuit. ■

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

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

Printed on Recycled Paper