

JOURNAL

THE
NATIONAL
PRISON
PROJECT

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NATIONAL PRISON PROJECT

WITHOUT CLIENTS there can be no lawsuits. Without prisoners who are willing to step out of the darkness of prison life into the light of public exposure, the litigation described in the following pages could not have happened. This fifteenth anniversary issue of the *JOURNAL* is therefore dedicated to the unrealized promise of equal justice under law and to all of the men, women and children in America's cages. In particular, we wish to recognize the courageous men and women who

have worked with us to improve the lives of their fellow prisoners:

Nick Palmigiano, Leonard Jefferson—Rhode Island

Bobby Battle—Oklahoma
Worley James, Jerry Lee Pugh—Alabama

Scotty Grubbs—Tennessee

Dwight Duran, Sharon Tower, Lonnie Duran—New Mexico

Lois Witke—Idaho

Fidel Ramos—Colorado

Charles Black, Eldon Escalante, Travis

Williams, Armando Munoz—Arizona

Agnes Spear, Maile Silva, Bernadette Kukahia, John Wilder, Jeff Mueller, Gene Spurgeon—Hawaii

Pat Canterino—Kentucky

Robert Lovell—Maine

Gary Knop—Michigan

Billy Shapley—Nevada

Gary Nelson—South Carolina

Roger Flittie, William Cody—South Dakota

Everett Shrader,
Joe Giarratano, Willie Lloyd Turner, Alan Brown,
Johnathan Lee "X"—Virginia

Felix Delgado—Wisconsin

Inmates of the D.C. Jail and
Occoquan—District of
Columbia

and to

Frank Coppola, whose life was taken by the State of Virginia in the ultimate act of barbarism.

—Alvin J. Bronstein

A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.

NATIONAL PRISON PROJECT

IN THE WORDS OF JUDGES

We thought it would be interesting to look at a sampling of judicial comments on prison litigation over the years:

Palmigiano v. Garrahy, 443 F.Supp. 956 (1977):

Officials who engage in massive, systemic deprivations of prisoners' constitutional rights are entitled to, and can expect, no deference from the federal courts, for the constitution reserves no power to the state to violate constitutional rights of any citizens.

This case is not an exercise in making prison life more pleasant for prisoners, nor is the ACI about to be transformed into a Holiday Inn. The conditions under which inmates in Rhode Island exist shocked the Court, and the Court is convinced that they would shock the conscience of any reasonable citizen who had a firsthand opportunity to view them.

In effect, each prisoner sentenced to a prison term in Rhode Island, or sent to the ACI awaiting trial, is sentenced to a regime in which he will be forced to live in a state of constant fear of violence, in imminent danger to his bodily integrity and physical and psychological well-being, and without opportunity to seek a more promising future.

The lack of sanitation, lighting, heating, and ventilation, and the noise, idleness, fear and violence, and the absence or inadequacy of programs of classification, education, physical exercise, vocational training or other constructive activity create a total environment where debilitation is inevitable, and which is unfit for human habitation and shocking to the conscience of a reasonably civilized person.

The Court was particularly struck by the testimony of one expert who had directed the prison systems in both Minnesota and Delaware for a number of years. He observed that the ACI was the only prison he had ever visited for which he could find nothing good to say. In common with other witnesses, he found every evidence of a management overwhelmed by the problem of managing a population of prisoners in a building of so many problems, and a staff so accustomed to conditions of deterioration that they had become inured to what they lived with. These conditions and this attitude have a devastating impact on inmates, reinforcing their low self-esteem and making rehabilitation impossible.

These conditions of confinement serve no legitimate correctional purpose . . . and are so far beyond the pale of civilized standards that they would be unjustified even if they did serve some such purpose.

THE BEGINNING

Sixties Civil Rights Gave Momentum to Prisoners' Rights

Sam Walker

Friends and foes alike have characterized the explosive growth of constitutional law over the last 20 years as a "rights revolution." One critic refers to the network of public interest law groups as the "rights industry." This critic's intended insult is in fact a tribute to the sustained commitment to extend the principles of the Bill of Rights to all areas of American society. If there is a rights industry then certainly the ACLU's National Prison Project is one of its most industrious—and effective—parts.

The fifteenth anniversary of the National Prison Project is an occasion to reflect on the sweeping changes in civil liberties over the past 20 years. The changes in the law are only one part of that story. Equally important are the changes in public attitudes about civil liberties and the transformation of how the ACLU is organized to carry on the fight for civil liberties.

Twenty years ago the ACLU's civil liberties agenda did not include a distinct prisoners' rights item. Indeed, most of today's compelling civil liberties issues—abortion, women's rights, gay and lesbian rights, national security—were either just emerging or did not exist at all.

The National Prison Project is, in microcosm, the story of the transformation of American civil liberties. The Project grew out of the 1960s civil rights movement which inspired virtually all of the new rights movements. Prison Project Director Al Bronstein began his career as a full-time civil rights lawyer in the civil rights movement in 1964 with the Lawyers Constitutional Defense Committee. LCDC coordinated the efforts of hundreds of attorneys who volunteered to go into the Deep South to provide legal assistance to civil rights workers at a time when no local lawyers would handle civil rights cases. The southern civil rights movement had other wholly unanticipated consequences. By bringing volunteers into direct contact with the struggle for justice it heightened their awareness of other areas of injustice and deepened their personal commitment. It literally

Samuel Walker is Associate Professor of Criminal Justice at the University of Nebraska, Omaha and is writing a history of the ACLU.

The National Prison Project is, in microcosm, the story of the transformation of American civil liberties.

changed peoples' lives. As Henry Schwarzschild, LCDC Director and current head of the ACLU Capital Punishment Project put it, "a lot of those lawyers went south and never returned."

The civil rights movement provided the inspiration for the revived women's movement, the new movements for Native American rights, gay rights, students rights, as well as the anti-Vietnam War movement. All these movements borrowed the rhetoric and tactics of the civil rights movement. But on a more fundamental level the struggle for black equality heightened an awareness of the unfinished business of the American commitment to equality and justice and forged a commitment to apply the Bill of Rights to previously neglected areas of our society: schools, the military, mental hospitals and, of course, prisons. The "rights revolution" was not, as neo-conservatives argue, an elitist coup, foisted on the country by the courts and the public interest bar. Rather, it was a broad-based revolution of rising expectations that expressed a demand for dig-

THE JOURNAL OF THE NATIONAL PRISON PROJECT

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The National Prison Project is a tax-exempt foundation 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.

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

nity and participation on the part of millions of previously voiceless and powerless victims of injustice.

It is fashionable today to sneer at the 1960s, to dismiss it as a decade of mindless and destructive excess. One critic called it "a slum of a decade." There was much destructive or silly excess. But the 1960s also stand as a historic awakening in American history, a period of a compelling vision of equality for all people in our society. Many activists of that period have fallen away, either in frustration or neo-conservative backlash. The historic contribution of the ACLU, as exemplified by the National Prison Project, has been to take emerging ideas about individual rights and give them intellectual coherence and organizational force. The Sixties never died. The best of that decade continues in the special projects of the ACLU, including the National Prison Project.

In a formal sense, the National Prison Project evolved out of two independent efforts. In Virginia, civil rights attorney Phil Hirschkop began handling an increasing number of complaints from prisoners in local institutions. Hirschkop was himself a veteran of the civil rights movement as one of the organizers of the Law Students Civil Rights Research Council (LSCRRC). As word of his interest and expertise began to spread, he soon found himself swamped with a flood of over 100 letters a week. As he remembers it now, "We were running a 'mom and pop' operation in our living room." Meanwhile, in Buffalo, New York, law professor Herman Schwartz began handling prisoners rights problems at the New York state penitentiary at Attica several years before the 1971 riot that made "Attica" a household word.

Independently, Hirschkop and Schwartz helped to shape the emerging prisoners rights movement intellectually and organizationally. Both began to sense that the problems facing prisoners should not be seen as discrete First Amendment or due process problems. The ACLU's involvement in prisoners rights issues went back to the late 1950s. The most important early cases involved the First Amendment rights of Black Muslims. The Muslims were having considerable success recruiting among black inmates and prison authorities, terrified at this assertion of black self-consciousness, sought to shut down the Muslim activities by banning distribution of the Koran. The ACLU won several Muslim cases on free exercise of religion grounds. By the late 1960s both Hirschkop and Schwartz understood that the real problem was the unconstitutionality of prison life itself. Hirschkop published the first article that pointed in the direction of an attack on the totality of con-

VA Prisoners Find Advocates in Early Prison Reformers

Michael Millemann

In the summer of 1968, I was working as an ACLU law clerk for Phil Hirschkop when Phil received a letter "kited" out of the Virginia State Penitentiary. Phil's

Michael Millemann is Professor of Law at the University of Maryland Law School. He has been involved in prisoner and civil rights since his days as an ACLU law clerk in the late 60s.

ditions in prisons.

The practical consequences of this conceptual revolution were immediately obvious. An attack on the full range of prison conditions required a new organizational strategy. The traditional ACLU pattern of taking individual cases and assigning them to volunteer attorneys was simply inadequate to the enormous task posed by American prison conditions. While other people across the country began to recognize the need for a broad-based assault on prison conditions, Hirschkop and Schwartz found an institutional home in the ACLU that could translate this vision into effective action. Hirschkop secured a grant to establish a prisoners rights project with the ACLU affiliate in Northern Virginia in 1968 while Schwartz established a similar project with the New York Civil Liberties Union, then directed by Aryeh Neier. Meanwhile, the 1968 ACLU Bien-

By the late 1960s both Hirschkop and Schwartz understood that the real problem was the unconstitutionality of prison life itself.

nial Conference declared prison conditions a "prime new area" for the ACLU.

Aryeh Neier's role was particularly important. As Director of the NYCLU he perfected the strategy of organizing civil liberties work through grant-funded projects. The NYCLU's largest and most successful effort was the Mental Health Law Project directed by Bruce Ennis. This strategy not only tapped an entirely new source of funds for the ACLU but allowed it to mobilize cadres of lawyers who could become fully expert in their particular fields. Given the intractable problems of prisons, and what soon emerged as the serious challenge of monitoring compliance with court orders, this new style of professionalism was an invaluable supplement to the

response to that letter triggered a series of events that, combined with the extraordinary work of Herman Schwartz and others, led to the creation of the National Prison Project.

The letter told a brutal story. In the aftermath of a racially integrated, non-violent inmate work stoppage to protest racial discrimination, among

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ACLU tradition of volunteer lawyering.

While Director of the NYCLU between 1965 and 1970, Neier also helped formulate a conceptual framework to guide the ACLU's expansion into new civil liberties issues. Along with his Associate Director Ira Glasser and staff attorneys Burt Neuborne and Allan Levine, he formulated what they called the "enclave" theory and the "victim group" theory. They argued that American society was filled with certain enclaves untouched by the Bill of Rights: the schools, the military, the mental hospitals and the prisons. Meanwhile, there were certain victim groups—the poor, women, homosexuals—who were systematically denied constitutional protections. These theories gave coherence to the new organizational strategy Neier was developing at NYCLU. In 1970 he was appointed Executive Director of the ACLU.

Moving upstairs to his new offices, Neier immediately set out to apply the ideas and strategies he had developed at NYCLU to the national level. Within six weeks of becoming Executive Director he arranged a meeting where ACLU staff and volunteers presented fifteen proposals for major grants to executives of the major private foundations. Out of this developed the National Prison Project in 1972. With the mutual consent of both Hirschkop and Schwartz their local projects were merged into a national foundation-funded effort.

The vision of human freedom sparked by the civil rights movement of the 1960s was a compelling one. Fulfillment of that vision, however, has not been easy. As Osmond Fraenkel, the ACLU's greatest Supreme Court litigator put it over forty years ago, "It must not be supposed that it is easy to be free." The National Prison Project represents one of the most successful ventures in translating a noble idea into sustained and effective work. ■

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The Court must now face the difficult task of fashioning a remedy in this case. To begin at the area of broadest agreement, the record here overwhelmingly supports, and no one seriously disputes, the conclusion that the present Maximum facility is irremediably obnoxious to constitutional standards and that it must be closed, and it is so ordered in conformance with the timetable in the Order to be issued in these cases. But this is not simply a case where, if a new jail is built, all will be well. As other courts have recognized in identical situations, a new prison operated like the present structure would soon lose whatever momentary advantages accrued.

The barbaric physical conditions at the ACI are but the ugly and shocking outward manifestations of a deeper dysfunction, an attitude of cynicism, hopelessness, predatory selfishness, and callous indifference that appears to infect, to one degree or another, almost everyone who comes in contact with the ACI and that the present administration, like its predecessors, appears powerless to correct or even arrest.

Ramos v. Lamm, 485 F.Supp. 122 (D. Colo. 1980):

As I have stated in my bench ruling, there is, from the beginning of my assignment to this case to the present time, a complete and utter distaste for having to cross that Rubicon which separates the federal government from the state government. In addition to the cited decisions, the history which I have recounted shows that this circuit and district have shown great deference to prison officials, especially toward the Colorado State Penitentiary and the 150 cases that have been filed from there in the past three years. Nevertheless, the plaintiffs have presented substantial, often compelling, evidence of long existing and continuing constitutional violations. Except in fashioning the necessary relief, deference is no longer possible.

Thus, defendants say that they have concentrated their efforts and resources on the places where such would accomplish the most. Defendants directed these efforts and resources to minimum security and medium security institutions, since these institutions require less resources and successful results are more easily realized. The decision may indeed be described as rational and intelligent, but it was made at a cost which cannot be accepted. The decisions obviously did not include consideration of the quintessential question which all republican governments must address; that is, does the Constitution permit or prohibit this course of action? The utilitarian calculus does not provide a means by which that question may be answered. In-

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other prison conditions, the Virginia State Penitentiary was locked down tight. All visits and communications, including legal visits and legal mail, were stopped. Inmates were confined in 120° cells for weeks. Those who criticized the harsh conditions, as well as inmates who sat quietly in adjoining cells, were teargassed in locked cells.

When we arrived at the Virginia State Penitentiary, we were denied access initially, but subsequently allowed to visit the inmates only because Judge Merhige, a federal judge in Richmond, issued a temporary restraining order mandating legal visits.

Upon interviewing the inmates, we learned about the Warden's special measures to break the body, mind and spirit of each inmate who asserted his constitutional right to criticize or challenge prison conditions in court. The inmates we interviewed became plaintiffs in a series of landmark prisoner rights cases.

The memories of that first prison visit endure:

■ Basically, Robert Landman looked like a tough Bogart convict. Intellectually he was the Laurence Tribe of inmate writ-writers whose practice included almost 2,000 cases. He was a relentless, committed, and gifted advocate whose pro se won-lost record was phenomenal. Landman's "reward" for his indispensable legal assistance was 266 days in solitary confinement and 743 days padlocked in his cell, at least some of which he spent preparing sophisticated draft amendments to 42 U.S.C. §1983.

■ Leroy Mason was an articulate black inmate civil rights leader. He had developed black and white prisoner support for desegregation and other basic reforms at the Penitentiary. As a result of an inmate election proposed by the Warden, he was elected inmate representative after the work stoppage. Shortly thereafter, he was locked in segregation for almost two years, with long periods in solitary confinement. His moving letters to us from solitary confinement gave continuing momentum to our work.

■ The punishment of Calvin Arey, another successful writ-writer, defined the lengths the Warden went to in his war on the law. Arey was locked in solitary confinement on separate occasions for lengthy periods of time to punish him for discussing with other inmates a court order we had obtained from Judge Merhige and for reading aloud from a letter sent to him by a state senator.

A flood of letters followed our initial visit to the prison. For the first time in Virginia, inmates had advocates. The letters confirmed the litany of horrors that Landman, Mason and Arey had given

us. Sometimes lyrical, sometimes plain, sometimes formal, the letters were all powerful pleas for help. They inspired within us feelings of anger, commitment, and helplessness. Most importantly, they began to define the enormous need for the National Prison Project.

We were able to provide legal help to some inmates who had common legal problems; Phil, with help from Nancy Crisman, Caryl Pines, Peggy Kerry, and others, filed a series of lawsuits, all of which were eventually successful.

But we had to refuse help to the majority of prisoners who asserted unrelated civil rights problems, as well as valid post-conviction and habeas corpus claims.

With the creation of the Penal Reform Institute, the letters came from many states other than Virginia. However, the harder we tried to help, the more the need for an expanded national source of legal help became apparent.

In creating the National Prison Project, its founders assured its institutional integrity by linking it to the civil rights movement. Prisoner rights owes its existence as much to the vision of Martin Luther King as to the prose of James Madison. The kinship and common experiences that Phil Hirschkop shared with Arthur Kinoy and Bill Kuntzler, among other civil rights litigators, was plainly evident in his early prisoner rights work.

The vital connection between the civil rights movement and the National Prison Project was sealed with the hiring of Al Bronstein. Al's southern civil rights work is legendary. I had first heard of him when he represented Richard Sobol, another civil rights lawyer who supervised me when I was a Law Students Civil Rights Research Council (LSCRR) intern in Louisiana. (Al was able to convince a federal court to enjoin a patently malicious prosecution against Sobol initiated by the dean of segregation in the South, Leander Perez).

In short, those of us who were lucky enough to participate in the early prisoners' rights litigation learned invaluable lessons. We learned about the civil rights movement. We learned how to draft emergency pleadings in the back of a (usually speeding) car, and came to understand that imagination, seasoned withchutzpah, is an indispensable quality of civil rights lawyers.

Most importantly, we discovered in our clients that endless reserve of human dignity, strength and spirit that would motivate us, and animate our legal work for years to come. ■

Prisoners' Rights Lawyers in VA and NY Merge to Form NPP

Herman Schwartz

"You've come a long way, baby" would be an apt description for the National Prison Project today, were it not for the line's crudely sexist overtones. When I first started the ACLU Prison Project in 1969, neither I nor Ed Koren, who helped me right from the start, thought it would become the massive force in the area that it is today. It may be interesting to provide some reminiscences of how it all began.

The story really begins in the mid 1960s, when I was a member of a citizen-legislator panel in New York State that looked into prison conditions. As a lawyer, law professor, and an active civil libertarian, I was appalled at the total absence of any check on arbitrariness by authorities in the American prison system, as I saw it in New York. Prisoners had no rights at all in the courts, which we had already begun to see as our primary protection for individual liberties and rights.

In 1967, the Second Circuit Court of Appeals came down with the landmark decision of *Wright v. McMann*, in which the court abandoned the traditional "hands-off" doctrine. I thought then that it might be a good idea to try to bring the rule of law into New York prisons by challenging prison conditions in court.

After spending a year in academic solitude in Ann Arbor, Michigan, I contacted Aryeh Neier, then Executive Director of the New York Civil Liberties Union, with whom I had worked very closely on police brutality, civil rights and wiretap problems, and suggested it to him. He was immediately enthusiastic and that summer we managed to get a small grant from the Norman Fund. Shortly thereafter Aryeh became Executive Director of the American Civil Liberties Union, and we moved the project over to the ACLU.

There were only a few of us in the prisoners' rights movement at this time: William Hellerstein of the New York City Legal Aid Society, Stanley Bass of the NAACP Legal Defense & Education Fund, Inc. and a handful of others scattered around the country. Hellerstein, Bass and I decided we would coordinate our efforts. I also decided to push the

Herman Schwartz is Professor of Law at American University's Washington College of Law. He has been active in civil rights and other public interest issues for many years.

cause not only with litigation, but in writing and community organizing.

Ed Koren, who had been a student of mine, and was working as an ACLU staff attorney, offered to work with me. We had almost no money at this time and Ed, characteristically, offered to work for almost nothing in the hope that sooner or later some money would come in. Happily, the Playboy Foundation soon came through, and Ed was able to move above the bread and water stage to have an occasional bit of margarine for the bread.

We filed our first suit, *Jackson v. McGinnis*, in the Western District of New York, in the fall of 1969, case number 69-435. It was not finally resolved—and this was an omen of some of the problems we would face—until sometime in 1978, when attorneys' fees were awarded to the National Prison Project.

The work began intensively during the summer of 1970 and in December 1970, we had a major victory. In *Carter v. McGinnis*, the Federal District Court in Western New York ruled that the Warden could not arbitrarily confine inmates in segregation for 60 days after they had been transferred from another prison simply because he wanted to. Although we did not realize it at the time, this decision shocked many prison officials and guards. I think it was the first time that a New York disciplinary or security measure had been challenged in court. I recall that Ed and I went out and bought a couple of fancy ties to celebrate that victory.

At this time also Phil Hirschkop was performing litigative miracles with the ACLU in Northern Virginia, and won a suit challenging conditions throughout the Virginia prison system.

Remembering Attica

Haywood Burns

Last year, when my teenage son finished his personal statement for one of those many college application forms, I was surprised to read that he counted as

Haywood Burns, Dean of CUNY Law School at Queens College, was the coordinator of the Attica Brothers Defense Committee, a founder of the National Conference of Black Lawyers and is a member of the Steering Committee of the NPP.

Landman v. Royster, 333 F.Supp. 621 (E.D.Va. 1971).

During the '69-70 year we filed more cases and then, in September 1971, the Attica uprising erupted. That transformed the prison rights situation. It brought home to the American public, at least for a while, as nothing else had, the horror of prison life and the desperation of the prisoners. For a while we thought that that dreadful tragedy, in which 43 people died, might do some real good. We were wrong. Although some changes followed in the immediate aftermath, as we all know, the combination of overcrowding, public indifference, and the Supreme Court's turning its back on prisoners, have made it much harder not only to achieve improvements, but to maintain those we already have gotten.

In 1972 Aryeh suggested that Phil and I merge our projects and put the new organization under the direction of Alvin Bronstein, a civil rights lawyer working in Jackson, Mississippi, and New Orleans, Louisiana, who was returning North. Both Phil and I readily acceded to this. We both had come to realize (I certainly had) that the problems far exceeded the very limited resources that I, at least, as a law professor working with Ed and a few students, could ever hope to deal with. The National Prison Project was created in Washington, with Phil and myself as co-chairmen and we helped put together a Steering Committee.

The rest, as the cliché goes, is history. Under able administration the project took off. It gathered support from foundations and it is obviously now the preeminent prison rights organization in the country, and probably in the world. I am proud to have contributed something to it and especially pleased that Ed Koren, who was with me at the creation, remains a vitally important participant in the effort to inject something of the rule of law in what future historians must record as a barbarous system. ■

one of his most important formative experiences those days when, as a small child, he would sit upon the shoulders of a former Attica prisoner and be carried through the streets of Buffalo, New York. This was in the midst of massive street demonstrations as the crowd chanted "Attica means-fight back. Attica means-fight back."

I probably should not have been

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stead of giving proper consideration to the rights of individuals, the decision was harassed to a balance sheet. The results of this process are there for everyone to see. Indeed, if the Colorado Department of Corrections were Dorian Gray, the Canon Correctional Facility would be its portrait.

I have always entertained the somewhat wistful notion that the public interest is best served by dedicated observance to the rule of law on the part of government as well as individuals. Unless and until reversed by a higher court, the rules of law and orders implementing them remain in full force and effect and it thus seems that adherence best serves the public interest. We are all aware of the recent horrible tragedy at the state prison in New Mexico. Compared with the estimated cost of rebuilding there, the costs involved in correcting the unconstitutional conditions at Old Max are a pittance. If conditions at Old Max continue unabated, I cannot say with confidence that such an occurrence there is unlikely. It has happened before. I hesitate even to mention the possibility, but this motion for stay requires me to do so.

Palmigiano v. Garrahy, 707 F.2d 636 (1983):

We note that the out-of-state attorneys in question, who were associated with a public interest firm specializing in prison matters, had unique competence in the subject matter of this litigation. They brought to the case experience and resources not easily duplicated locally.

Ramos v. Lamm, 539 F.Supp. 730 (1982):

In March, 1978 Mr. Knowles became the Associate Director of the National Prison Project of the American Civil Liberties Union Foundation. . . . He participated throughout the trial and post-trial proceedings in this case. A general conclusion regarding his excellent ability and integrity is not sufficient. I must point out that during the entire time I have been connected with the profession of law as student, practitioner and judge I have never observed a lawyer who was more talented or accomplished in the art of cross-examination. Mr. Knowles undertook the cross-examination of most of the defendant's expert witnesses with devastating effect.

Brown v. Landon, C.A. No. 81-0853-R (1984):

The Court finds that these attorneys from the ACLU National Prison Project are of the highest caliber. We have had them here before. They have done much to help the corrections system. I remember cases in which they walked away with the most *de minimus* fee, including one case in which they had obtained a \$500,000 settlement for their clients. For them and their clients to be treated in this way and singled out, I think, is just unconscionable.

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surprised. Experiencing the Attica rebellion and its aftermath in whatever form was an indelible experience for almost everyone. It certainly was for me. Attica was a searing sword slicing into the American consciousness, cleaving all time for those involved with prison work, into "Before Attica" and "After Attica." A watershed. A new place name to add to our lexicon of national shame and barbarity, alongside place names like Wounded Knee and My Lai.

"Attica" means, to many, the rebellion of prisoners at New York's Attica Prison September 9-13, 1971, which ended in a bloody assault by the State Police, National Guard and correctional officers. State forces gassed and then fired upon inmates who had no guns. They fired automatic weapons, deer rifles, and shotguns loaded with dum-dum bullets, whose soft lead spread upon contact to assure maximum damage to human flesh and bone; weapons which, in time of war, would be outlawed by the Geneva Convention. They killed and wounded inmates and hostage guards alike. Forty-three persons lost their lives as a result of the rebellion. Eighty others were wounded by gunfire during the 15-minute re-taking of the prison that rainy September morning. Americans had been involved in bloodier one-day encounters before—but not since the 19th century massacres of Native American people.

The horror of the re-taking was compounded by the brutality of the aftermath.

The horror of the re-taking was compounded by the brutality of the aftermath. By the hundreds, prisoners were stripped naked and made to crawl through a field of mud and broken glass, and then forced to run through a gauntlet of corrections officers as they were beaten viciously and showered with the most vile of racial epithets. Individual prisoners were taken away for torture.

Days later, as part of the first contingent of a group of lawyers who overcame prison officials' opposition and gained access to the prison, I could still see on the bare back of the first inmate I interviewed the unmistakably clear outline of a club.

"Attica" also means, for many, the prosecution that eventually followed in the wake of the rebellion. This was a full-scale judicial assault that was mounted as a complement to the physical assault which had taken place in D-yard. When it became clear that the state had been responsible for all the deaths that occurred in the September 13th re-taking of the prison and that the stories of inmate atrocities had been

gross fabrications, the prosecutions were a convenient and useful deflection of attention away from the State's culpability. Members of the assault force were not indicted for their criminal actions. Millions of dollars were provided for prosecution of prisoners, and the state eventually obtained more than 40 indictments against a total of 62 prisoners for almost 1,300 crimes carrying the collective possibility of tens of thousands of years in prison.

These prosecutions set the stage for a major engagement of contending forces as a defense effort sprung up that attracted varied and far-flung supporters of the prisoners' cause.

"Attica," to many, is also a parable or symbol of American prisons. It was clear, upon examination, that the volatile mix of conditions present at Attica was present at prisons throughout the land. Attica was just an archetype of the pathology of prisons at that time. It happened in a small rural community in upstate New York, but so reflective was Attica of the situation endemic to American correctional facilities, it could have happened anywhere. As the New York State Special Commission on Attica (the "McKay Commission"), formed to investigate the rebellion and its aftermath, concluded, "Attica is every prison; and every prison is Attica."

"Attica" as rebellion, as judicial assault, as parable has had, and continues to have, a tremendous impact.

The rebellion served as a source of education to so many about the realities of the American prison system. It revealed the conditions in all their stark, ugly and unforgivable inhumanity. The takeover of part of the prison by prisoners had come only as a last resort after the unsuccessful exhaustion of a wide array of administrative routes to unresponsive officials. When the prisoners' demands were made, apart from one or two pipe dreaming flights of fancy which might have been expected under the circumstances, such as transportation for any prisoner who desired to a non-imperialistic country, they were asking no more than what should have been expected by way of elemental human needs. Demands for adequate nutrition, opportunity for personal hygiene, religious freedom and the like were not only far from radical, they were, for the most part, already required by international minimal standards on the treatment of prisoners.

The response to the rebellion served as a further education, providing shocking insight into just how far the State was prepared to go in inflicting force and violence upon a prison population. For all of those who watched tensely over the several days of the rebellion leading up to the re-taking, hop-



ing and believing (as I hoped and believed) that the police and corrections officials would never go as far as they eventually did, the events of September 13, 1971 were a sad and startling revelation. As such, Attica also served as an extraordinary galvanizer of people who saw American prisons and understood the need for change.

The prosecutions served as a source of litigation and inspiration. The defense apparatus, consisting mainly of volunteers who often shared little except a revulsion of the treatment of the imprisoned and a fierce sense of justice, not only took on the awesome tasks of organizing to defend the criminal indictments and building a popular movement in support of the legal defense work, but went on the offensive in other ways. They brought civil actions attacking jail and prison conditions, and sought damages for Attica prisoners killed or injured in the rebellion. The damage actions remain unresolved and in contention to this day.

It revealed the conditions in all their stark, ugly and unforgivable inhumanity.

In court one day I heard an Attica prisoner defendant, Shango Bahati Kaka-wana, appearing *pro se*, telling the presiding judge that the State was so powerful and its resources so great that it was a "David and Goliath" situation.

This was very true, but the network of Attica prisoner supporters that was forged was ultimately able, through victories in court and through exposing the improper selective enforcement of the law by the Special Prosecution, to win or have dismissed almost every Attica case. It was David and Goliath, but, as in the original, David won.

Those of little power banded together, using the courts, popular education and mass organizing to defeat the powerful. It was a great inspiration to many, and bonded many of the Attica alumni for life, as they moved off in dif-



AIP Wide World Photos

ATTICA REMEMBERED

Above left, Prisoners raise hands in solidarity during negotiation sessions with Commissioner Oswald. Above, state police march through cellblocks trying to regain control. Riots broke out at 9:28 a.m.—note clock stopped at that time below railing. Right, police on catwalk and in the yard line up inmates; trench was dug by inmates when they controlled the yard.



ferent directions to apply these lessons in other arenas where the poor, despised and dispossessed struggled to wrest some small measure of dignity and decency from the wretchedness of their existence. Attica, the parable gave birth to a wider general understanding of the need for institutional innovation and structural changes in order that the problems of which Attica was emblematic could be addressed systemically. There is a direct linear connection between the Attica Rebellion and a host of efforts calculated to reform and improve American prison conditions—legislation, funded research, development of model standards, and so forth.

Although, obviously, the Attica rebellion was not the sole cause of this impetus towards systemic, structural and institutional approaches, it was its catalyst.

It was in this climate that prisoners' rights projects were developed by bar groups, legal aid societies, and law schools. It was out of this immediate post-Attica period that the National Prison Project of the American Civil Liberties Union was formed with some of the key Attica defense participants, such as Professor Herman Schwartz and Ed-

ward Koren, playing a crucial role from its early development, right up to and including the present moment. With an excellent staff and the outstanding leadership of Al Bronstein, the National Prison Project has provided the leadership and quality work to address the issues present in Attica the parable wherever they are found.

This is especially critical in a time when much of the fervor of the 70s has dissipated. Now, more than ever, the imperative for change Attica represents must be carried forward. The National Prison Project is needed now more than ever. Great strides, in some ways, have been made in the 16 years since Attica and the 15 years since the formation of the National Prison Project. Unfortunately, not nearly enough, however, and all too often those that have been made are largely cosmetic. We are still warehousing human beings, and are still plagued by racism, overcrowding, degrading, dehumanizing conditions. As a society, as it relates to our prisons, we are still in battle for the right to call ourselves truly "civilized." It is only at our great peril that we allow ourselves to forget what Attica means. ■

IN THE WORDS OF JUDGES

Pugh v. Locke, 406 F.Supp. 318 (1976):

An oral order enjoining the use of isolation and segregation cells which do not meet minimum standards was issued by the Court at the conclusion of the trial in these cases. The indescribable conditions in the isolation cells required immediate action to protect inmates from any further torture by confinement in those cells. As many as six inmates were packed in four foot by eight foot cells with no beds, no lights, no running water, and a hole in the floor for a toilet which could only be flushed from the outside. The infamous Draper "doghouse" is a separate building, locked from the outside, with no guard stationed inside. Inmates in punitive isolation received only one meal per day, frequently without utensils. They were permitted no exercise or reading material and could shower only every 11 days.

Canterino and the U.S. v. Wilson, (C.A. No. 80-0545) (Memorandum Opinion, Jan. 9, 1985):

Having observed Ms. Wright's skill throughout the *Canterino* litigation, the Court found that she demonstrated an unusual and unique ability to grasp the issues and to cross-examine witnesses. Indeed, Ms. Wright's overall litigation skills throughout the trial placed her among the top litigators that have appeared before this court.

Canterino v. Wilson, 546 F.Supp. 174 (1982):

The Court has been guided by a general principle in this case: male and female prisoners must be treated equally unless there is a substantial reason which requires a distinction to be made. In the areas of privileges and opportunities for work, vocational education, training, and community release programs, this standard is not being met in Kentucky. Those issues have been the focus of this lawsuit and as a result, this opinion has necessarily focused on the problems which exist at KCIW.

The Court has not been unmindful, however, of the sincerity of the staff and the effort which has been made to keep KCIW clean and in good repair in spite of the difficulties which come with over-population and age. These factors, while commendable, cannot be a defense to the Constitutional deficiencies which were proved at trial. The Court breaks no new ground in the ruling entered today. Virtually every area has been addressed by other courts and the existing precedent in each area is indistinguishable from the facts demonstrated in the record in this case. The Court feels bound to the rules of law established by the cases cited in the conclusions of law.

THE ALABAMA CASE

12 Years After James v. Wallace

Matthew L. Myers

It was early July 1975, and Judge Frank M. Johnson Jr. had scheduled the trial of *James v. Wallace* to begin on August 20th. We had asked seven nationally known experts to testify at trial about the conditions of confinement in the Alabama prison system and their impact on the prisoners confined there. Carl Clements, Ph.D., a psychologist from the University of Alabama, was scheduled to take the first and most comprehensive of the expert tours. It was also the first in-depth tour of the Alabama prison system for the lawyers involved in the case.

As we approached the Atmore Prison Farm (later its name was changed to the G.K. Fountain Correctional Center) in Southern Alabama, we saw a white man on a horse with a shotgun in his arms pointed at a small group of black men who were chained together, trudging out into a large farm field. Later, we discovered that virtually all of the guards were white men from rural Alabama, that the vast majority of the prisoners were black from urban Alabama, and that white prisoners were rarely assigned to work in the farm fields.

The dormitories were so dangerous that no guard dared venture inside.

After two solid days of inspecting every corner of the Atmore Prison Farm and the nearby Holman Maximum Security Facility in sweltering heat, Ralph Knowles, Dr. Clements, and I thought that nothing new that we saw could have an impact on us. For two days we had been surrounded by prisoners crowded into filthy, unbearably hot, unsanitary dormitories so unsafe that the prison guards were afraid to go inside. Beds were stretched six across and stacked three high, only inches apart, and inches from exposed electrical wires hanging down from sockets where lights had once appeared. Only a few feet from this living area were leaking, non-functioning bathrooms with one or at most two functioning toilets for two to three hundred men from which smells emanated which defied description. Everywhere we went we were engulfed

Matt Myers, a partner with Asbill, Junkin, Myers and Buffone, was a staff lawyer and the Chief Staff Counsel of the NPP and is a member of the NPP Steering Committee.

We thought nothing could be worse than what we had already seen. We were wrong.

in a sea of humanity of men who endured unrelenting idleness, a constant fear of being raped or stabbed and virtually no hope that these conditions or their lives would ever improve.

We thought nothing could be worse than what we had already seen. We were wrong. I will never forget the fear we saw the next morning in the eyes of the young men—boys is a more apt description—cramped into the so-called modern classification center at Mt. Meigs, Alabama in conditions even more crowded than those we had seen at Atmore and Holman. Every available inch of floor space was occupied by prisoners waiting to be shipped to one of the other prisons. Many were forced to sleep beneath cracked and broken toilets and urinals which often leaked or overflowed because they no longer worked properly.

It didn't take long to understand what caused the fear. The dormitories were so dangerous that no guard dared venture inside. Even during our tour the warden warned us repeatedly that we were entering at our own risk. We later heard story after story of prisoners being raped and brutalized, including one retarded teenaged prisoner with the I.Q. of a five-year old who was raped five times the first night he was at Mt. Meigs and brutally beaten the second night, after his pleas for help to the warden fell on deaf ears.

From Mt. Meigs we went to the Draper Correctional Center. Nothing we saw previously had prepared us for what we later encountered at Draper. It is hard to describe the reaction each of us felt as we climbed up to one second floor dormitory to find dozens upon dozens of old, helpless men, many in wheelchairs, incontinent or bedridden, unable to care for themselves and jammed into squalid, dilapidated living quarters which could only be described as a human death trap. But we had not yet witnessed the worst.

We had heard rumors of a segregation unit at Draper known as the "doghouse." Several hundred yards from the main prison facility, we found the infamous "doghouse." It was a concrete building with no windows and a solid front door with eight cells, each about

the size of a small door. This windowless concrete building and the cells in it had no lights, no ventilation, no toilets, no furniture, no beds, no running water, and no sinks or showers. In each cell there was a single hole in the concrete floor for the men to use in place of a toilet. There was no guard in or near the building when we arrived. Prisoners in the doghouse received one meal a day, but were allowed no utensils. They were not permitted to leave their cell for any purpose. Two of the cells were empty, while each of the other four-foot by eight-foot cells contained either five or six prisoners. There wasn't room for them all to sit on the floor at the same time, let alone sleep.

What heinous act had these men committed to be condemned to such barbaric conditions? Several were there because they had been late to work. Several others were there for "talking back" to a prison guard. On the day we visited none were there for having committed an act of violence.

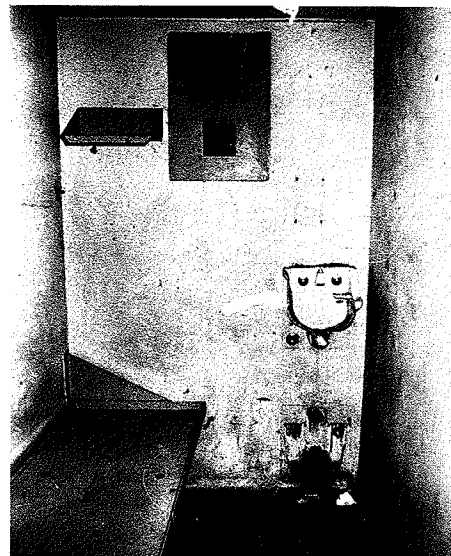
The risk of recounting these observations is that they give the impression that the Alabama prison system in 1975 was truly different from any other prison system in the United States. It wasn't. The lesson of the last twelve years is that while the conditions we found in Alabama were more visible than elsewhere, they were not qualitatively different. What we saw in Alabama in 1975—the overcrowding, the racial disparity and animosity between the guard staff and the prisoners, the unrelenting idleness, the constant fear of being raped or stabbed, the justifiable lack of hope, and the total irrationality of the treatment—has been seen in prison system after prison system all over the country.

James v. Wallace, now known as *Pugh v. Locke*, 406 F. Supp. 318 (M.D.Ala. 1976) was the first conditions of confinement case in which the American Civil Liberties Union Foundation's National Prison Project was involved. In many respects, *James v. Wallace* has served as the most significant catalyst for setting the agenda for the National Prison Project over the last decade. As much as any other case, it has prompted conditions of confinement cases in unprecedented numbers with unprecedented success to be filed by prisoners' rights lawyers all over the country.

James v. Wallace was not, however, the first major conditions of confinement case. Five years earlier the Federal Court in Arkansas had found and condemned barbaric conditions in Arkansas' two main prisons. *Holt v. Sarver*, 309 F. Supp. 362 (E.D.Ark. 1970), *aff'd* 442 F.2d 304 (8th Cir. 1971). Three years earlier the federal court in Mississippi had found that the living conditions at



Prisoners going to work on farm detail at G.K. Fountain Correctional Center in Alabama near the time the NPP lawsuit was filed in 1975.



Judge Johnson's vivid description of the "rampant violence and jungle atmosphere" in the Alabama prison system captured the nation's attention.

Parchman, the state's largest institution, were "unfit for human habitation" and that its medical staff and medical facilities were totally inadequate. *Gates v. Collier*, 349 F. Supp. 881 (N.D.Miss. 1972), *aff'd* 501 F.2d 1291 (5th Cir. 1974). Similarly, deplorable conditions had been exposed in Virginia's largest penitentiary in *Landman v. Royster*, 333 F.Supp. 621 (E.D.Va. 1971).

Nonetheless, *James v. Wallace* was perceived differently throughout the nation and had a different impact. Judge Frank M. Johnson Jr.'s January 13, 1976 decision was the lead story on all three network newscasts. Judge Johnson's vivid description of the "rampant violence and jungle atmosphere" in the Alabama prison system captured the nation's attention. *Newsweek* and *Time* magazines both declared it "the most sweeping prison decision" ever issued. The *Wall Street Journal* called the decision "unprecedented."

Why did this decision invoke this reaction? In a number of critical respects, *James v. Wallace* was different. It was the first decision to deal with an entire state prison system. It was the first decision which dealt with every aspect

of prison life. It was the first time a federal judge had set down a comprehensive set of minimum constitutional standards that had to be maintained for the operation of a state prison system. It was the first prison decision to recognize the need for an enforcement and compliance mechanism from the very beginning. It was the first decision to order a state to reclassify all prisoners who could and should be transferred to alternative, less restrictive facilities. It was the first decision to order a state to provide each prisoner with work and meaningful educational and vocational training opportunities. Finally, and perhaps most importantly, it was the first decision to recognize that a state violates a prisoner's Eighth Amendment protection against cruel and unusual punishment if it houses prisoners in an environment that not only makes it impossible for inmates to rehabilitate themselves, but also makes debilitation and deterioration inevitable.

The biggest difference between *James v. Wallace* and earlier conditions of confinement cases, however, may be not in what Judge Johnson wrote, but in the hopes he engendered. This was a prison decision that for the first time created, at least, the hope that the courts could play a role in bringing about a significant, fundamental change in how prisoners are treated. Judge Johnson went beyond the narrow but important issues such as the adequacy of medi-

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NATIONAL PRISON PROJECT

IN THE WORDS OF JUDGES

The inferiority of programs and discrimination in the area of privileges which were demonstrated at trial are not always the result of conscious sex discrimination. They are often attributable to oversight, omission, and traditional views of female offenders which have not kept pace with the changing inmate population. The discriminatory treatment which has resulted must be remedied. An appropriate order will be entered.

Morales v. Schmidt, 340 F.Supp. 544 (W.D. Wis. 1972):

I am persuaded that the institution of prison probably must end. In many respects it is as intolerable within the United States as was the institution of slavery, equally brutalizing to all involved, equally toxic to the social system, equally subversive of the brotherhood of man, even more costly by some standards, and probably less rational. The immediate question for the courts, while prisons continue to exist, is how to respond to them in terms of constitutional litigation: whether to support the institution but to shape it, or to end it, or to be neutral with respect to its continued existence.

Procurner v. Martinez, 416 U.S. 426 (1973):

When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment. Whether an O. Henry writing his short stories in a jail cell or a frightened young inmate writing his family, a prisoner needs a medium for self-expression. It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit. ■



Two levels of dormitory housing at Alabama's Draper Correctional Center in 1975.

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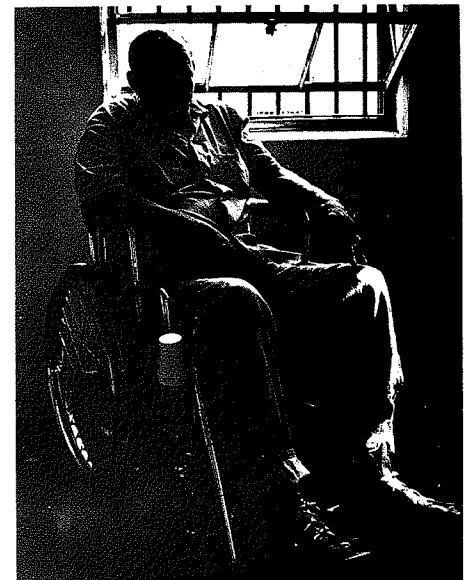
cal care or the conditions in a particular segregation unit, on which previous cases had primarily focused and instead discussed many of the most insidious, widespread, destructive aspects of prison life.

Today, conditions in Alabama's prisons are far better than anyone thought they could be when *James v. Wallace* was filed, but they are far from what many hoped they would become when *James v. Wallace* was decided. The prisons are cleaner, less crowded and less violent. The infamous "doghouse" has been torn down and prisoners in segregation are not routinely deprived of basic essentials. New jobs, educational programs and vocational training opportunities have been added. Decent living conditions for aged and infirm prisoners have replaced the death trap. Many of the experts who testified at the original trial have revisited the prison system during the compliance process and most have been impressed by the change. Alabama's prisons are no longer "barbaric," but they are not models of correctional reform. They have become more humane and less destructive, but no more than that.

In many respects, *James v. Wallace* had its greatest effect outside of Alabama. The ink was barely dry on Judge Johnson's decision when *Palmigiano v. Garrahy*, 443 F.Supp. 956 (D.R.I. 1977) demonstrated that the problems exposed by Judge Johnson in Alabama were not unique, nor were they confined to the South. Rhode Island didn't have a doghouse, but it had rampant violence, unrelenting idleness, devastating overcrowding, physical conditions which could only be described as unfit for human habitation, a non-functioning classifi-

cation system and a medical and mental health care system totally incapable of keeping up with demand. If anything, Judge Raymond J. Pettine's decision in *Palmigiano v. Garrahy* was more powerful and more decisive than the decision in *James v. Wallace*. He was appalled by what he had seen and it showed. To implement his decision, Judge Pettine appointed a master and gave him extraordinary powers. To demonstrate his attitude about the importance of compliance, he and the master held close to a dozen compliance hearings in the following two years at which he cajoled, threatened and otherwise did what he could to keep the state under constant

One of 350 geriatric prisoners at Draper Correctional Center in Alabama in 1975. This elderly man was confined to a wheelchair and housed in a second story dormitory with only one stairway for egress.





The infamous "doghouse" at Draper Correctional Center in Alabama. "This windowless concrete building and the cells in it had no lights, no ventilation, no toilets, no furniture, no beds, no running water, and no sinks or showers."

pressure to bring about meaningful change.

Alabama and Rhode Island represented the tip of the iceberg. Over the next ten years well over two thirds of this nation's prison systems came under judicial scrutiny and court orders condemning various aspects of the conditions of confinement were issued with disturbing regularity.

The big conditions of confinement cases became the staples of the Prison Project.

James v. Wallace also had a very substantial impact on the agenda of the National Prison Project. The big conditions of confinement case became the staple of the Prison Project. Cases against the entire state prison systems of Tennessee, Colorado, New Mexico and

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Counsel for Alabama seemed peculiarly inept: he was putting to me by way of cross-examination the proposition that, as confirmed criminals, the aged and infirm in the appalling prison dormitories deserved the conditions in which they were held. He didn't deny the brutalities, the rapes, the filth; he implied, so what? He took particular issue with my earlier suggestion that such conditions were "unseemly." I offered as synonyms "uncivilized," "unconstitutional,"; and then the right phrase came to me: "Young man, is this how you would have your father treated, criminal or not?"

My memory, generous no doubt to myself, tells me that he sat down.

—Norval Morris

Norval Morris, Kreeger Professor of Law, University of Chicago Law School, was a plaintiffs' witness in the Alabama prison case.



The 4' x 8' cell in the "doghouse" which housed six prisoners in almost total darkness. Draper Correctional Center, Alabama, 1975.



The "Chinese toilet" or hole in the floor in a Draper doghouse cell.

Alvin J. Bronstein (l.) and George P. Taylor (r.) being interviewed by Carl Stern, NBC TV, outside the federal courthouse in Montgomery, Alabama at the beginning of the August 1975 trial in the Alabama prison case.



NATIONAL PRISON PROJECT

Of the 68 total staff members of the National Prison Project since 1972, not including interns and law clerks, there have been 44 females, 24 males, 45 whites, 23 minorities, 11 ex-offenders, and 24 lawyers. There have been over 110 interns and law clerks.

Who Are These Lawyers?

Almost all of the lawyers have come from backgrounds in civil rights, legal services, public defenders and, since the Reagan administration, "refugees" from the Civil Rights Division of the Department of Justice. Those who have left the Project have gone mainly into public interest law firms, public defender offices and law school teaching.

Where Was Bronstein Before NPP?

Project Director Alvin J. Bronstein was in private practice in New York before becoming Chief Staff Counsel of the Lawyers' Constitutional Defense Committee from 1964 to 1968 in Jackson, Mississippi. He litigated civil rights cases during that time in Mississippi, Alabama, and Louisiana, and represented the Mississippi Freedom Democratic Party (MFDP), the Congress of Racial Equality (CORE), the Student Nonviolent Coordinating Committee (SNCC), and the Southern Christian Leadership Conference (SCLC). In 1968 he became a Fellow at the Institute of Politics, Kennedy School of Government, and from 1969 to 1971 he was the Associate Director of the Institute of Politics. From 1971 to 1972, he was a partner in the public interest law firm of Elie, Bronstein, Strickler, and Dennis. In June of 1972, he came to Washington to become the first Director of the National Prison Project. ■



Prison Project Director Alvin J. Bronstein and staff attorney Adjoa Aiyetoro.

Maine all followed shortly thereafter for the Prison Project's attorneys. Once filed, these cases took years to complete. Often the initial victory was just the beginning because compliance went on for years.

These cases demonstrated that the type of conditions that prompted Judge Johnson in Alabama and Judge Pettine in Rhode Island to act could be found in prison systems in all parts of the country. No geographic region was immune. *James v. Wallace* set off what turned into a tidal wave of suits challenging the very essence of the conditions in which

prisoners throughout America were being housed.

Have these cases made a difference? Where these suits have been brought, the most barbaric and inhumane conditions have been eliminated. On the other hand, budgetary restrictions, the get-tough attitude with criminals which has dominated our criminal justice system for the last decade and the concomitant overwhelming rise in the prison population have prevented these cases from bringing about the fundamental change that many considered possible. ■

EXPERT WITNESSES

Expanding Their Role in Prison Cases

Claudia Wright

In the Beginning, there was Bill Nagel. And John Conrad, Ted Gordon, and Dr. Lambert King. In the beginning of big prison litigation, these experts testified for plaintiffs in cases that laid the foundation for institutional reform. Their role in educating courts, and in guiding concerned judges to exercise the power to impose requirements for humane conditions of confinement, was vital. Today that role has expanded to every stage of the litigation process, and is of even more critical importance.

Before 1974, most prison cases were specialized, dealing with First Amendment rights, procedural due process rights, or other discrete issues. With the development of the totality of conditions theory in the Alabama case¹, expert witnesses were called upon not only to fulfill their traditional role of observing and describing conditions to the court, but also to explain the significance of conditions in regard to long-term debilitation of prisoners, and even more importantly to find and propose remedies for these conditions. Modern classification systems that are taken for granted today were generated by the Alabama prison litigation. The development and acceptance of uniform standards for the operation of prisons also began in the early cases.² It was the expert witnesses who taught courts the value of uniform standards in the implementation of meaningful reform.

Expert witnesses are of course still necessary to testify in court on an ever

Claudia Wright is a senior staff attorney with the National Prison Project.

¹Pugh v. Locke, 406 F.Supp. 318 (M.D. Ala. 1976).

²See, e.g., Palmigiano v. Garrahy, 443 F.Supp. 956 (D.R.I. 1977).

Modern classification systems that are taken for granted today were generated by the Alabama litigation.

widening range of issues, including such erudite topics as nutrition³, architecture⁴, and behavior modification techniques⁵ when prison cases go to trial. But the role of experts has become more complex as prison litigation has become more difficult. Lawyers must be more careful and more thorough in their initial preparations before filing cases in order to conform with recent contractions of the law.⁶ The use of expert witnesses has become essential to investigation, the framing of issues, and to analysis of the likelihood of success before a complaint is filed. Experts also are now involved in all phases of pretrial preparation. Their presence is invaluable when depositions are taken or when interrogatories are drafted. They assist in the review and analysis of documents, selection of exhibits, and preparation of cross-examination.

The world of prison litigation is very different now, even from just ten years ago. Lawyers are anxious, with good cause, not only because the Reagan courts have made success much more difficult, but because of the fear that even the most successful district court

³Black v. Ricketts, CIV 84-111 PHX-CAM (consent decree June 1985).

⁴Ramos v. Lamm, 485 F.Supp. 122 (D. Colo. 1980).

⁵Canterino v. Wilson, 546 F.Supp. 174 (W.D.Ky. 1982).

⁶See, e.g., Hoptowitz v. Ray, 682 F.2d 1237 (9th Cir. 1982); Rhodes v. Chapman, 452 U.S. 337 (1981).

orders may not be sustained on appeal. Rights that were hard won years ago can be wiped out with the stroke of a Supreme Court pen, so that a case may take on significance much broader than its own merits. Because of these factors, lawyers now must aggressively and creatively pursue settlement agreements, and experts are extremely useful in this effort.

Carefully chosen expert witnesses, particularly corrections experts who enjoy the respect of their peers, can often informally play the role of a mediator in pre-trial settlement attempts. In *Arizona*,⁷ we used a structured form of this concept in our settlement effort. By agreement, the plaintiffs chose Gordon Kamka, the defendants chose Allen Ault, and they then chose Allen Breed as the third member of an expert panel. This panel then set about the task of preparing a settlement proposal. Although the panel's proposal was not initially accepted because of political reasons, the proposal eventually formed the framework for an agreement which was reached midway through trial.⁸ The benefits of an expert-prepared settlement proposal, especially when one or more of those experts may return as monitors of compliance, are enormous.

In some situations defendants have balked at the suggestion of the appointment of a special master to report on compliance as a condition of settlement. Administrators have been more amenable when that role was assigned to an expert who would be called an auditor, a monitor or a technical assistant, and who would be chosen jointly by the parties. Allen Breed and Bill Nagel have performed that function with great success.⁹

The utility of panels of experts to inform the court and to monitor compliance was foreseen as early as 1975. In *Costello v. Wainwright*, the late, legendary District Court Judge Charles R. Scott of the Middle District of Florida appointed a panel of medical doctors to conduct a comprehensive study of health services in all correctional institutions in Florida, to report their findings to the court and to recommend appropriate remedial measures.¹⁰ This medical panel is still in operation today, and has been the primary motivating factor in bringing major reforms in prison medical care to Florida. In 1984, physicians Ron Shansky

⁷*Black v. Ricketts*, *id.* at note 3.

⁸See, *NPP JOURNAL*, Fall 1984, p.3, Fall 1985, p.4.

⁹Allen Breed in Idaho, *Witke v. Crowl*, C.A. No. 82-3078 (consent decree Nov. 1984); Bill Nagel in Florida, *Bobby M. v. Graham*, C.A. No. TCA83-7003 MMP (partial consent decree on preliminary injunction Feb. 1983).

¹⁰397 F.Supp. 20 (M.D.Fla. 1975), *aff'd* 525 F.2d 1239 (5th Cir. 1976).

and Robert Cohen reported that 17 inmates died for lack of proper care. In 1985, six more prisoners died. The court then acted by ordering the closure of the Lake Butler Reception and Medical Center hospital. The state finally responded to this situation, and has since added 350 new medical positions in the corrections department, increased the medical budget by \$16 million, and has formed a new, five-person Correctional Medical Authority to oversee health care needs. Bill Sheppard, counsel for the plaintiffs in *Costello*, said, "I believe our case is unique. The reforms that have taken place are the direct result of the efforts of these doctors." Dr. Shansky is still carrying out his duties as medical expert for the court and acknowledged that, even though Florida "has a long way to go," the reforms probably would not have occurred without the persistence of the medical panel.

The qualities experts possess which make them effective in obtaining meaningful reforms, such as objectivity, persuasiveness, and a degree of trust from prison administrators which lawyers may lack, also make them exceedingly helpful in settlement efforts. This idea is best demonstrated in two recent cases settled by the National Prison Project. In *Hawaii*¹¹, a new format for agreement was created to meet the needs of administrators as well as plaintiffs. Panels of experts were selected jointly by the parties to prepare the actual plans for reform of the system. The parties agreed to broad, general principles and left the details to be decided by the ex-

¹¹*Spear v. Ariyoshi*, C.A. No. 84-1104, consent decree May 1985.

Allen Breed and Bill Nagel have performed that function with great success.

perts. Once the plans were prepared to solve problems of overcrowding, medical care, programming and the prison environment, the panels remained on the job to monitor the defendants' compliance. Through this arrangement, the defendants are able to actively participate in the structure of their own reform, and to become committed to its success.

In the District of Columbia juvenile case¹², a panel of juvenile justice experts was charged with the task of studying the needs of the plaintiff class and then preparing a plan to accomplish the provision of services to meet those needs. This panel was even given the very basic responsibility of deciding how many children the government can incarcerate. As in *Hawaii*, the panel will remain intact to monitor compliance.

These recent cases delegate power to expert masters, monitors and panels which lawyers have traditionally retained for themselves. Defendants have proved to be more amenable to this delegation of power to experts than they were to relinquishing power to the adversary lawyers or to the courts. The results to date have been mixed, but continue to signal hope for the future. Undoubtedly the importance of the dedicated professionals to the progress of institutional reform will continue to grow, and with it the prospect of real, positive change. ■

¹²*Jerry M. v. District of Columbia*, C.A. No. 1519-85 (consent decree July 1986) (IFP).

Reflections of An Expert Witness

William G. Nagel

Early in the 1970s a team composed of an architect, a clinical psychologist, and I studied the architectural and programmatic features of over a hundred new correctional facilities coast to coast. A book, *The New Red Barn*, resulted from that survey. On page 82 of that book was the following description:

In one institution at the time of our survey, nearly 18% of the inmate population was in some kind of segregation . . . The isolation was especially brutal. As many as eight people have been locked into one of the tiny, dark, airless and bedless isolation cells for up to 21 days.

William G. Nagel, is retired after a long career in corrections. He was the Warden of a New Jersey state prison and a cabinet level official in Pennsylvania.

During our visit each of these gloomy, bare dungeons held two, three, or four men sitting naked on the cement floors. Only the five-inch holes in the floors, used as toilets, served any human purpose . . .

*When we left that sad, sad prison we were reminded of Primo Levi, speaking of his experiences at Auschwitz in *If This Is Man* 'It is not possible to sink lower than this; no human condition is more miserable than this, nor could it be conceivably so. Nothing belongs to us; they have taken away our clothes, our shoes, even our hair; if we speak they will not listen to us, and if they listen, they will not understand.'*

Al Bronstein of the ACLU's Na-

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NATIONAL PRISON PROJECT

Law Student Interns Recall Moments They Won't Forget

Over the years, law student interns have played an important part at the Prison Project. Not only have they contributed hours of hard work, they've also brought humor, enthusiasm and a diversity of personalities that has kept the office lively. Therefore, as part of our fifteenth anniversary, we tried to track down as many of these former law interns as possible to find out what they're doing now and what they remember about the time they spent at the Prison Project. Here are some of their memories:

Dale Drozd, 1977-78

I had never seen people work so hard for an unpopular cause in which they held a strong belief. Lawyers like Al Bronstein, Matt Myers, Ralph Knowles and Ed Koren were my first mentors and I will always think of them in that way.

My most memorable experience while at the NPP was accompanying the lawyers who went to Alabama for the compliance and contempt hearings in *Pugh v. Locke* before Judge Frank Johnson. I was able to tour some of the Alabama prisons with our experts, see the NPP lawyers cut the state to shreds, see an entire side to people in Alabama that I never would have believed existed, eat crowbars, see state run liquor stores for the first time in my life and find out I hated grits—all in one very memorable trip. I will also never forget NPP staffers Bobbie Messalle and Jimmy Potts who not only showed great kindness to me but also taught me a great deal about life and people during a time when I needed to be taught.

Michele Deitch, 1984

... going to Mecklenburg Prison right after the riot and takeover there—getting a tour, talking to officials who had been involved and inmates who had been beaten, and recognizing in stark form the tension between security needs and some prison reform goals. It made me realize that the problems faced by all parties in the prison context are not easy ones.

Sandra Levick, 1979-80/80-81

I remember the horror of the New Mexico Prison riot and the dedication of attorneys like Ralph Knowles and later Steve Ney in their representation of those prisoners.

Louis Siegel, 1987

... the fact that so many diverse personalities can work together as a unit.

Caroline Canning, 1983

My experience at the NPP ... fostered in me the greatest respect for those individuals who have the dedication, and are willing to make the emotional and financial sacrifices necessary to dedicate their professional lives to justice and individual rights.

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tional Prison Project apparently read *The New Red Barn* and identified the offending institution (which we had not) as being in Alabama. He asked me to testify as an expert witness for the inmate plaintiffs in a suit against the state of Alabama. I agreed.

In August of 1975, in the company of lawyers for both sides, I again visited Alabama's prisons, and on the following day testified before Judge Frank M. Johnson Jr., then Chief Judge of the United States District Court in Montgomery, Alabama. My testimony was far-ranging. Among other things, I described to the court the disciplinary area at Draper, a prison which I had not previously visited.

"If we speak they will not listen to us, and if they listen to us, they will not understand."

This area, known locally as the "doghouses," was located some distance from the main compound. It was surrounded by a locked fence the key to which was retained within the main compound. The deputy warden who accompanied us on our tour directed that the key be made available "on the double because this is important." Nevertheless we waited several minutes before it was available. Inside this remote compound we found no officer. There was a series of tiny 4' x 8' cells void of furnishings, but containing a hole in the floor, the "oriental toilet." These could not be flushed from within the cells, and with no officer present they were only flushed during the occasional inspections. Each cell had a solid door except for a small, very tightly meshed security screen through which observation was virtually impossible. My testimony reads:

I thought that these cells, unsupervised and with no officer present, were unoccupied—a residual from another era. But when I peered through the tight mesh screen I saw human beings—naked human beings—two to three to a cell. I have during my long career experienced just about everything within correctional institutions. I do not consider myself to be more sensitive than other people, but it sickened me to know that such a "doghouse"—their term—existed, and that people in power knew it existed, and used it. And that these cells in which human being were confined, and where despair, violence, rape, and even suicide occurred were not supervised by a staff person within the compound. The miserable persons within those cells were being punished for such insignificant offenses as "late for detail," and "going through the line twice," and the like.

... no single opinion or order has given me greater satisfaction.

Later in the testimony, I was asked why conditions such as I had described existed. My reply, edited for brevity, was as follows: As I travel around the country I am aware of a "we-they" syndrome which influences policies and practices. In Wisconsin, Vermont, and Minnesota, for example there is homogeneity in the general population. In those states the prison population resembles the policy makers who can easily empathize with the offenders. There but for the grace of God go I. The prisoner is treated as the policy maker would want to be treated. This is also true in much of Europe—the Netherlands, Denmark, Sweden for example. In other places there is great heterogeneity. The prisoners are different from the policy makers and the prison administrators. They are a breed apart. It is my opinion that in such places prisons are overused, and practices which I have described are accepted as penal necessities.

Judge Johnson did not view the practices as penal necessities. Indeed he ordered the "doghouses" torn down forthwith. Within a week of my testimony Walter Cronkite's evening news showed inmates with sledges pounding the brick and mortar of that hideous place into rubble. Though I have subsequently testified in many prison conditions suits from Puerto Rico to Alaska, and from New Hampshire to California no single court opinion or order has given me greater satisfaction.

The orders of district judges across the country have helped greatly to define the limits of such practice. But to this witness nothing has been more grievously disturbing than that many correctional colleagues—including some who are much honored in the profession—have either remained silent before the courts of this land, or have actually testified that practices such as I have described are acceptable—even penologically necessary. ■

To help put an end to such practices, Mr. Nagel has agreed again and again to appear as an expert witness.

Debate Needed on Role of Masters in Litigation

Allen Breed

The positive changes in corrections that have occurred during the past decade can, without question, be attributed to the leverage exerted by the courts as litigation, or the threat thereof, has forced reform. The role of the Special Master¹ in performing such tasks as assisting in the formulation of remedial decrees, the negotiating of consent decrees, the finding of facts, the monitoring of court orders has contributed greatly to the translation of plans and decrees into the reality of humane, fair and safe correctional practices.

The use of Special Masters in correctional litigation, however, is a relatively recent application of the traditional exercise of the inherent equity power of the court. The decision to employ a Master has not been reached lightly, nor executed carelessly, as the appointment necessarily reduced the control of parties and even, to some extent, the court over the course of the litigation. The Master's powers of investigation and fact finding are wide and his or her factual findings, unless clearly erroneous, are likely to be controlling. The decision of some courts to utilize Masters in correctional litigation began in the 1970s after the almost total failure of defendants to comply with the remedial orders issued in early prison and jail cases. Few judges had any understanding of what the roles and responsibilities of Masters should be, and perhaps even less comprehension of the legal implications involved. One U.S. District Court Judge responded to the question of what a Special Master was by replying, "I don't really know, except that he can't be a committee!"

Individuals appointed as Special Master, or interested in the concept knew even less. Fortunately, the initial appointees reached out to each other and banded into a support group, with an effective information network. It was their

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¹The generic term Special Master is used, although it is recognized that various titles and roles such as Monitor, Auditor, Reporter, Compliance Coordinator, Ombudsman, Mediator, etc. are used.

trial and error techniques, the brainstorming, the creative and innovative approaches to uncharted waters, and the willingness to share ideas that marked the efforts of those early years. In fact, it was this support group, coordinated and, to some degree financed, by the National Institute of Corrections in the early 1980s, which made it possible to provide training for newly appointed Special Masters, information regarding compliance techniques to interested courts, a training manual for both courts and Masters, and, of greatest value, a forum though which "research and development" could take place.

Unfortunately, like all pioneering movements, the newness wore off; "old masters" became overly involved in their practices and lost the need to confer, techniques and approaches became routinized and comfortable to maintain, limited new blood was admitted to the circle of Masters, and the National Institute of Corrections shifted its interests and resources to other priorities. The result has been that little progress has been made in recent years in the refining of roles and procedures of a crucial component in the correctional litigation/compliance process.

The purpose of this short article then, is to encourage a renaissance of learning as to the most appropriate use of Special Masters—a reaching out from the experiences gained over the past 10-12 years, to the potential that hasn't even been imagined. There are many ways that this can be done—through workshops, forums, papers and networking. Of greater importance than the process utilized, however, is the willingness and leadership of all parties in the correctional litigation arena to break with traditional patterns and thoughts, and attempt to find more effective ways of using Special Masters.

In the hopes of stimulating a dialogue towards developing an agenda for change, let me list some personal concerns:

■ Orders of reference are not clearly describing the Special Master's role and responsibilities, setting forth both the authority vested, as well as the limitations intended.

■ Orders of appointment are not stating the experiences and training required to fulfill whatever roles and responsibilities that the court wishes car-

ried out. The statement of what is required to carry out the duties would assist the court in its recruitment and hiring process.

■ Many Special Masters are not bringing to the assignment experience in mediation, arbitration, understanding of management issues, expertise in the substantive areas of corrections, and a political sense, although these qualities are necessary to the successful functioning of the position.

■ Should a Special Master utilized in the pre-decreetal stages be the same individual who will later monitor the decree? Are there roles and techniques used in the negotiating process of developing a remedial plan that alienates the effectiveness of monitoring and reporting? Can any individual play the numerous roles required of a Special Master, or should the process be placed in the hands of a multi-discipline team?

■ The time periods for compliance with a consent decree are ridiculously short, creating unrealistic expectations on the part of the defendants, and frustration on the part of the plaintiffs when compliance doesn't take place. The Special Master is almost immediately placed in an unfair controversial role, as progress towards compliance is reported as being "behind schedule."

■ Courts are all too often accepting compliance on the basis of the defendants' having adopted a policy, without delaying the decision in order to determine whether the policy has been implemented and maintained.

■ Special Masters are being treated as "another party" rather than as an expert and agent of the court. Unnecessary effort is being required to "prove" all observations, analyses, interpretations and opinions.

■ Counsel are often continuing the adversarial process by becoming overly involved in the compliance process, being picky on minor issues, demanding in reviewing all documents, communications and data. Litigation resources are in too short supply to allocate as much attention as compliance is currently receiving.

■ Special Masters, through their interpretations of wording, are "expanding" cases beyond the intent of the decree.

■ Special Masters are overly complicating both the planning and monitoring processes resulting in prohibitively costly operations.

■ Perhaps monitoring should be left to the parties with a neutral coming in only when mediation or arbitration services are required.

Each of these concerns can be argued from different perspectives, and

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NATIONAL PRISON PROJECT

Law Student Interns Recall Moments They Won't Forget

Art Meneses, 1981

The thing I remember most about my NPP internship is Al Bronstein portraying a street person, complete with cigarette butts and 5 or 6 old sweaters, at the Halloween party Michelle Osborne and I had at our apartment.

Caroline Smith, 1984-85

... I... miss the spirit of the people who are doing private sector public interest work. It is difficult to be an activist bureaucrat, but I am trying.

I remember the look on the faces of the inmates who were being triple-celled in the Intake Service Center in Rhode Island.

Michele Ann Zavos, 1977-78

... a tour of the Maryland House of Corrections, a prison I came to know very well. An entourage went through the place to allow the environmental expert for *Bailey v. Mandel* to conduct an inspection. It was like visiting the dirtiest, darkest, smelliest zoo you could imagine. The contrast between seeing that place and litigating *Bailey* in a quiet, clean courtroom stays with me to this day.

Laurie Solomon, 1983

My working with Elizabeth Alexander [is memorable to me]. I enjoyed her so much; she was pleasant, encouraging, fun to work with, and very competent! Obviously, along with that, goes my enthusiasm for the inmates at Mecklenburg, especially Willie Lloyd Turner and Joe Giarratano.

Mark Kluger, 1985

My experience at NPP was and continues to be invaluable. It was my first law related job and the encouragement and feedback I received from the attorneys has provided me with confidence that continues to influence my work.

My favorite story from the summer of 1985 involves an incident with Steve Ney. The D.C. Circuit ordered the D.C. jail population to be reduced almost immediately. Just after the order came down, television news crews showed up to interview Steve. Like most days, he was wearing an orange Hawaiian shirt and shorts. He came running to the library looking a little frantic and asked to borrow my oxford button-down shirt so that, as he said, he could look like a lawyer from the waist up. During the interview he sat behind his desk wearing a borrowed shirt and tie, and nobody watching him on TV ever knew the NPP summer dress code. I went home early to watch my shirt on the six o'clock news.

Elizabeth (Liz) Rosenthal, 1984

The thing most memorable about my NPP internship is the humidity in Washington, D.C. and also the evil smirk of [a former] warden at Mecklenburg when Elizabeth Alex-

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should be. The tragedy is that such debates are not occurring, and new approaches and points of view are not being developed.

Correctional litigation must be continued if needed reform is to take place. However, it is imperative that we begin

to ask questions and experiment with creative answers to how, within the constraints of the law, we can find the most effective methods of gaining organizational compliance with constitutional standards. ■

Lawsuits Fundamental to Prison Reform

Vincent Nathan

Any suggestion that the time has come for litigators to abandon the field of prison and jail reform, apart from being a reflection of a seemingly persistent desire of humankind to "kill all the lawyers," is tantamount to a declaration that legal norms have become irrelevant to the maintenance of constitutional correctional facilities. It is a suggestion that thoughtful students of the American correctional scene must reject. This is not to say, however, that litigators and others should not acknowledge a variety of important forces that have arisen during the past 10 to 15 years that are complementary to litigation efforts to reform American prisons and jails.

The establishment of the Commission on Accreditation for Corrections and its progressive standards, long overdue attention to correctional problems by elected officials in a number of jurisdictions resulting in increased appropriations for correctional agencies, expanding efforts by citizens' groups to affect the political process as it relates to corrections, and the trend toward professionalism corrections all are phenomena of signal importance to the improvement of our jails and prisons. Even the most vocal critics of institutional reform litigation, however, must acknowledge that these praiseworthy developments have derived largely from pressures generated by lawsuits won against jail and prison officials. Although lawyers and judges should welcome progressive and humane administrators, government officials, and organized citizens as allies, their presence—even their increasing effectiveness—cannot diminish the role of law, and thus that of lawyers, in dealing with issues that are essentially legal in character.

Steady progress toward ameliorating the worst abuses in our prisons and

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jails as a result of the combined efforts of litigators, enlightened public officials, concerned citizens and dedicated correctional professionals, however, has led some observers to conclude that continued emphasis upon the adversarial litigation process is no longer a necessary, or appropriate, means by which to spur further reform. For reasons that I shall discuss briefly, this conclusion ignores several harsh realities that are likely to confront American correctional institutions for the foreseeable future.

First, prisoners as a class are politically impotent. Their classification as slaves in the 13th Amendment to the United States Constitution, inability to affect the political process through the exercise of the vote, and lack of access to political power reserved primarily for members of the mainstream strata of our society guarantee that prisoners by and large will be unrepresented in the halls of legislatures and the offices of executive officials. Although concerned citizens' groups and articulate and committed directors of correctional agencies have attempted, with limited success, to construct a constituency for prison reform, these efforts have had only a marginal impact on legislators and executives who must answer to those who elected them and who are crucial to their reelection. Even as one acknowledges that there are elected officials who personally are deeply concerned about the horrendous conditions they know exist in many American jails and prisons, the majoritarian principle that underlies the concept of representational government assures that the needs of prisoners are likely to be relegated to an extremely low priority by the realities of executive and legislative politics.

The only antidote to this effect of the operation of majoritarian democratic principles—and how well the founders of our nation knew this—is the involvement of an independent judicial branch of government in protecting the constitutional and other legal rights of those members of society who do not have access to the mainstream of political

power. Courts, however, can hear and decide only those issues that are brought before them. Thus, it is institutional reform litigation that triggers the essential judicial element of the operation of our constitutional, democratic system as it relates to the maintenance of constitutional conditions in prisons and jails.

Second, one must acknowledge that prisons and jails in the United States, in too many cases, fall far short of standards dictated by federal constitutional principles and state law. Dilapidated physical structures, shockingly inadequate environmental conditions, rampant staff brutality, unchecked inmate violence, substandard medical, dental and psychiatric care—to name only a few—are conditions that, although no longer virtually universal, continue to affect the lives of prisoners in more than isolated instances. Although those who have labored in courtrooms, cellblocks and legislative committee rooms can take pride in the accomplishments of the past two decades, it is far too early to declare that the war on inhumane and illegal conditions of confinement has been won.

Finally, such progress as has been made in the effort to bring the rule of law into American correctional institutions is seriously threatened by the seemingly intractable problem of increasing crowding of prisons and jails. The figures are all too familiar: some 550,000 men and women are held in state and federal prisons; the nation's jail population numbers approximately 250,000; between 1970 and 1979, the prison population increased by 39%, the largest increase since the federal government began compiling prison population statistics. A similar increase in the national prison population was experienced during the first six years of the current decade. Although between 1979 and 1984 the opening of 138 new state prisons and the renovation of existing prisons added nearly 5.4 million square feet of housing space, an increase of 29%, inmate population increased 45% over the same period, resulting in an 11% decrease in the average square feet of housing space per inmate.¹

Like the figures themselves, the causes of crowding are well known. Unfortunately, the fear of victimization is all too real in American cities and towns.²

¹Bureau of Justice Statistics Special Report, *Population Density in State Prisons* (December 1986).

²Criminal victimizations in the United States approximated 34.9 million in 1985 for persons age 12 and older. Although this reflects a decrease of approximately 2% from the criminal victimization rate in 1984, and a heartening 16% reduction from the 41.5 victimizations recorded in 1981, one can hardly describe the fear of crime in America as un-

Reactions by state executives and legislators to the public's demand to "get tough" with prisoners has resulted in statutory mandatory sentences, minimum sentences, the elimination of good time earned for constructive prison behavior, and the abolition of parole outside the context of intelligent sentencing reform. These developments predictably produced ever-increasing numbers of prisoners, with little corresponding attention to the need to expand facilities, services and staff to accommodate that increased population. The relative inelasticity between rates of incarceration and crime rates, although virtually irrefutable, has played no discernible role, at the national or state level of government, in the development of criminal justice and other social policies designed to address the public's legitimate concerns about criminality.

As a result, courts in more than two-thirds of our states are overseeing litigation relating to crowding and the effects of crowded conditions upon prisoners. Similar litigation affects a large number of major urban jails in America. Moreover, conditions of economic retrenchment being felt in many cities and states have tied the hands even of prison administrators, elected executive officers and legislators who otherwise might avail themselves of negotiated or other voluntary forms of resolution of problems they recognize and wish to correct. Thus, in many instances, litigation offers the only avenue for all concerned in the effort to bring about constructive change mandated by constitutional and other legal principles.

The underlying assumptions—as well as the realities—of majoritarian, representational government, the persistence of unconstitutional conditions, and the very real threat that long-sought and hard-earned progress will be eroded by the rising tide of commitments combine to establish the vital need for continued emphasis upon litigation as a principal element of institutional reform efforts. Increased correctional professionalism, widespread efforts to achieve compliance with accreditation standards, enhanced public awareness of the true state of affairs in American prisons and jails and the effects this increased awareness has had on the political process are salutary developments. For the foreseeable future, however, they must be viewed as being complementary to the fundamental responsibility of lawyers and judges to uphold and defend the Constitution as it applies to the inhabitants of America's prisons and jails. ■

justified. Bureau of Justice Statistics Bulletin, *Criminal Victimization 1985* (October 1986).

According to Bureau of Justice Statistics, in 1986 criminal victimizations reached the lowest level in the 13-year history of the National Crime Survey. From the year before, the number of violent crimes (rape, assault, and robbery) fell by a total of 5.5%. Rape, however, increased by 10.9%. But the BJS survey found that the proportion of women who said they had been raped, and reported the crime to police, declined by 20.4%. The peak year for crime was 1981.

In 1985, the average cost of housing a resident for one year in a public juvenile facility was \$25,200 nationally.

Nineteen states reported 18,617 early releases in 1985 because of overcrowding. Nineteen states said that 10,143 prisoners were backed up in local jails because their prisons had no room.

The number of federal prisoners could double to 83,000 in the next five years and may nearly quadruple in 15 years, according to the U.S. Sentencing Commission. "Natural growth" in convictions and recent anti-crime laws will account for most of the increase, with the commission's own guidelines boosting it further. Federal prisons presently hold 43,000 prisoners, and operate at 53% over capacity.

Southern states experienced the most significant reduction in prison space per inmate during the period from 1979 through 1984, from 75 square feet to just under 60 square feet.

NATIONAL PRISON PROJECT

Law Student Interns Recall Moments They Won't Forget

ander, Maggie Wood Hassan and I were sitting in his office in early July, 1984. I look back on all the staff and every day I spent there with great nostalgia.

Stephen Martin Kohn, 1983

My internship at the NPP introduced me to some important aspects of public interest law and prisoner rights law.

Kenny Riaf, 1984

My experience at the NPP was the difference, the thing that bridged the gap between theory and practice.

The most memorable incident of my internship was when I asked a prisoner what he wanted to do when he got out. He said, "Become a mercenary in Central America—it pays a thousand dollars a year." I told him it didn't sound like much money for all the risk involved, just a thousand dollars a year. He said, "Nay, nay, my friend—a thousand dollars an ear."

Max W. Beck, 1980

NPP showed me that lawyers could work together in a humane workplace.

The things I remember most are reading Jack Abbott's correspondence and meeting Ed Koren.

Norm Townsend, 1975

More than anything, my internship at the NPP reaffirmed my commitment to criminal defense practice to (hopefully) avoid my clients going to the hell-holes NPP deals with.

I... enjoyed getting to help Al prepare to argue a case before the Supremes, and then watch the argument. All in all, I loved the whole experience working at NPP.

Larry Allen Nathans, 1980

My NPP internship was motivating in that I had an opportunity to work with many fine lawyers. My most memorable experience was spending approximately 32 straight hours at the Project working on a last minute brief for Steve Ney.

Margaret Wood Hassan, 1984

I came away from the experience [at the NPP] with a much deeper appreciation for both the daily struggle that constitutes an inmate's life and the need for full time advocates for prisoners. I gained a very strong sense of the incredible efforts necessary to make even very small changes in the prison system. I have continued to use my experience at the NPP as an advocate for individual inmates (during a co-op through Northeastern University) and in helping my current colleagues who are representing inmates. I have a feeling that I may be using my experience some more, as I now live in the state with the most crowded prisons in the country [Massachusetts].

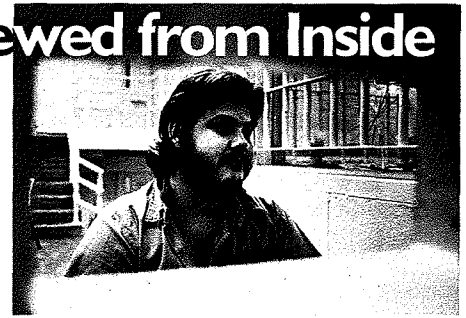
Prison Reform Viewed from Inside

Joseph Giarratano

Dostoevski once stated that "the degree of civilization in a society can be judged by entering its prisons." In our age of advanced technology our prisons still remain an accurate measure of our humanity. That our prisons have become more humane since Dostoevski's day goes without saying. But to say that our prisons are, for the most part, humane is a falsehood that we must all face. Thanks to a small handful of committed individuals, who dedicate their time and energy to prison reform, the prison where I have spent the past eight years is a much better place than it once was. Trekking through the intricacies of prisoners' rights litigation in the judicial arena, the political labyrinths, and other shocking horror stories has been a trying, though enlightening experience.

Our country professes to be not only the stanchion of democracy, but also a paradigm of justice and a humane society. Juxtapose that ideal with our penal system and compare for yourselves. Approximately three years ago a federal judge stated, "I thought the dark ages in Virginia's penal system were over 15 years ago. Apparently I was wrong." The judge was talking about a place where guard violence against prisoners was rampant; a place where mentally ill prisoners were chained to steel bunks under strip cell conditions; a place where prisoners were forced to live in their own excrement; a place where prisoners were denied proper medical care; a place where prisoners were locked down under long-term isolation for minor rule infractions (or just on the whim of a guard); a place where prisoners were subjected to body cavity searches for no apparent reason other than harassment; a place where visitors were harassed and intimidated to discourage visiting their family members; a place where visiting attorneys were harassed and denied access to their clients. All of this, and much more, was done under the guise of "behavior modification." To list all of the indignities and deprivations would take several pages—all of them a matter of record. The

Joe Giarratano, a Death Row prisoner in Virginia, is a named plaintiff in *Brown v. Murray*, the NPP lawsuit. He also filed, and won, *Giarratano v. Bass*, a legal access case, and filed *Giarratano v. Murray*, a right to counsel case (see NPP JOURNAL, Summer 1987) now pending in the 4th Circuit Court of Appeals. Mr. Giarratano has also assisted other Death Row inmates in dozens of legal matters.



judge was referring to Mecklenburg Correctional Center (MCC), a place not unique for its horror stories. None of this is meant to imply that the prisoners were blameless angels. We were all, guard and prisoner alike, caught in a vicious cycle of violence.

Through the efforts of the Prison Project and a small group of others, change came—it came slowly—but it came. Negotiations were often heated, all manner of highjinks were employed to discourage their efforts, the judicial process was slow and the litigation extensive. Resolutions were reached and agreements made: all broken again and again. MCC is a much more humane and safe prison than it was eight years ago, but even now it falls far short of the ideal I mentioned above. The efforts of those few dedicated people continue to this very day.

Bleeding heart liberals advocating rights for the criminal element? Incarcerated law breakers? Those seeking to turn prisons into hotels? When confronted with that mind-set I can only shake my head. For a country that oftens condemns human rights violations in other countries, that attitude is more than ludicrous—it's hypocritical.

So many seem to forget that the incarcerated individual was removed from society and placed in prison as punishment: that person was not sent to prison to be punished. Punishment serves a legitimate purpose—punishment's ultimate goal is correction/rehabilitation of the offender. Our society has a vested interest in how its prisons are managed. The majority of prisoners will, one day, be released back into society. Punishment of the offender is legitimate, but no more than is rehabilitation. That our prisons are not conducive to rehabilitation is a clear indication of society's refusal to accept responsibility for its institutions. Humane prison conditions should be everyone's concern—yet prison reform activists are generally ridiculed for their work in this area. That such organizations serve a legitimate societal interest should be clear to all of us. They see that whether the prisoner is rehabilitated or not, eventually his or her sentence will expire, and that person will be released back into society.

We are quick to blame the courts, the politicians, and so-called bleeding hearts for the problems within our institutions. As a whole we have passed our mass responsibility on to them: we pass the buck and then ridicule them. Quick to condemn and even quicker to deny our responsibility. These prison reform activists aren't taking the prisoners' side, they aren't trying to turn prisons into hotels, they don't say that a lawbreaker should not be punished, and I haven't met a single one who believes that prisoners should be molly-coddled. They are

taking society's side, they see no logic in a prison system where the person comes out worse off than she or he went in, and their aim is to see that our prisons are conducive to the goal of rehabilitation. Through their chosen profession they seek to uphold the bulwark that binds our society together: the United States Constitution. A task whose common thread is human beings, some good, some not so good, be they guards or prisoners, judges or politicians, and the public at large: whether we choose to be responsible or not. ■

The Class Representative: A Personal Experience

Roger G. Flittie

I am a prisoner at the South Dakota State Penitentiary in Sioux Falls, South Dakota, and I am the named plaintiff in a prison conditions class action case that is being represented by the ACLU National Prison Project and two local attorneys¹.

When I first came to the prison in late 1977 it was my first prison experience. I did not like what I saw. The prison was fast becoming overcrowded, cell halls were poorly ventilated, numerous fire safety violations existed, an antiquated locking system for the cells was in use, the kitchen facility lacked standard health and sanitation practices, food storage areas were pest- and rodent-infested, medical, dental and psychological care for the inmates was severely under par, and the prison law library lacked trained clerks to assist inmates with their legal problems. These are but a few of the more serious conditions that existed here, and it had been going on for a long time.

For two years I was an inmate law clerk appointed by the Warden, until I was fired after a severe riot in late 1981. I believe to this day my firing was in retaliation for my law work on behalf of other inmates.

While I was working in the law library I became very interested in civil rights law. That study led me to join

Roger G. Flittie is the national award winning editor of The Messenger, SDSP inmate magazine; a six-year member of the National Lawyers Guild; SDSP chapter coordinator of the NLG Jailhouse Lawyer Project; National Coordinator of the Thunderbird Prison Alliance, a project of the Committee to Safeguard Prisoner's Rights, Inc. headquartered in Huntsville, Texas.

¹*Cody v. Hillard*, 599 F.Supp. 1025 (D.S.D. 1984), *aff'd.*, 700 F.2d 447 (8th Cir. 1986), *reh. granted on different issue*, 804 F.2d 440 (8th Cir. 1986), *reh. granted to 8th Cir. en banc*, Jan. 12, 1987.



Willie Lloyd Turner is a lead plaintiff in the Prison Project case, *Brown v. Murray*.

it came on all too soon and we found ourselves facing trial in June 1983. Prison officials were actually coming up to us and mocking us, saying we had no case, there was nothing wrong with this prison. I was, for the second time, desperate for help.

I found it out of sheer luck, again in the law books. By chance I ran onto a case in one of the Federal Reporters on a women's prison suit. Just below the caption of the case I read "Claudia Wright, ACLU National Prison Project for the plaintiffs." Now there had to be help there, I said to myself. So I quickly wrote a letter to the ACLU in Washington literally pleading with them to come and join our case. It was within weeks of the trial, but I had to try, and with little hope, I mailed the letter, telling no one.

Five days later I was called to get some legal mail. It was from Elizabeth Alexander, an ACLU attorney with the National Prison Project. She said she'd be here the following Monday with an expert to tour the prison and decide if the ACLU would get involved with the case. The rest is history in the law books.

The ACLU came to South Dakota in full force. We got the trial continued to July 1983 to give them time to bring in other experts in areas of environmental conditions, health and sanitation, medical and psychological care and general prison standards. All these experts came from across the country, took a good look at our prison and pronounced it in serious trouble in nearly every area we had claimed wrong in our lawsuit. They appeared at trial and testified, along with several inmates, and in early 1984 the district court judge declared the conditions at the South Dakota State Penitentiary unconstitutional. One of the biggest wins for us was the court's finding that overcrowding was a serious problem at the prison and combined with the totality of conditions of confinement the court ordered a ban on double-celling at the prison.

The case did not stop when I was released in February 1984. I found myself back at the prison for the second

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What we need was help, lots of it, and fast. The case had dragged on slowly during the discovery stages and it seemed we would never get to trial, but

NATIONAL PRISON PROJECT

Law Student Interns Recall Moments They Won't Forget

Jody Hart Levine, 1985

The thing most memorable about my NPP internship? Great people! Hard working but also party animals!

Delbert Bauldock, Jr., 1985

My experience at the NPP influenced me greatly by giving me many examples of the dedication and personal sacrifice needed (Al, Adjoa, Dan, everyone) to become effective advocates in the public interest.

John Fitzpatrick, 1986

I was impressed by the large-scale systemic changes that the litigation of the NPP brought about in various prison systems. The length of many NPP-induced consent decrees—many of which have been ongoing for years—is a tribute to the NPP's comprehensive approach.

Howard Friedman, 1975-76

My first job after graduating law school was as a staff attorney for the Prisoners Rights Project in Boston and I continue to practice civil rights law; working at NPP helped me on my way. Over the years, I have been able to get excellent advice and assistance from Al Bronstein whenever I need it.

I still recall my first trip to Patuxent (Institution) when I saw a large door marked "Receiving" and realized they were not receiving packages or mail, but people.

Marvin Hamilton, III, 1986

Working at NPP did two things: it confirmed my vocation to work with prisoners, and it spoiled me. NPP has the best Eighth Amendment litigators in the country. It is a high profile office with prestige, pride, and clout.

The things I remember most about my NPP internship are living with my landlord, Dan Manville; the 1812 Overture at Wolf-trap; morning runs through the zoo; learning to juggle at 11 p.m. in the law clerk's office; packing 15 million boxes for the Michigan trial; Beryl's laugh; Al's war stories; Friday afternoon parties; the Royal Wedding; settling Jerry M.; the Lorton riot and subsequent media blitz ("Who wants to be on 'Nightline'?"); and historic Alexandria.

Ira Burnim, 1976

I greatly enjoyed the summer. It was my first exposure to a public interest law organization. The most memorable part of my internship were the people in the office. I really enjoyed being around them.

SallyAnne Campbell, 1985

I'm still doing prison work (and everybody here in California asks in awe, "What's it like to work for Al?").

I remember Adjoa Aiyetoro, Steve Ney, Nkechi Taifa and others reenacting a court scene with salt and pepper shakers and other table utensils at an outdoor cafe . . . and being asked to quiet down. And finally, I remember

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time in December 1985, and shortly after I returned I again joined the case. The original inmate who had joined with me in 1980 got outside the walls in late 1985 so I have taken on the case as the sole class representative since that time.

About this same time it became obvious to us that the prison was not complying with the previous orders of the court. While there had been major improvements in some areas of the prison, other things seemed to be going downhill rather than up.

The ACLU attorney, working with our local attorney decided it was time to go back to the district court with complaints of noncompliance. In our initial pleadings we alleged that the medical, dental and psychological services were still being operated under minimum accepted standards. Many inmates were still not being treated for obvious conditions. There were still problems in the kitchen with sanitation and pest infestations, and there were serious industrial shop safety concerns. Also, the population at the prison was steadily climbing and double-celling continued despite the court's earlier order.

We had hearings before the court in July 1987, our experts again appeared to testify along with several inmates, and at the time of this writing we are awaiting an opinion from the court. We expect it will again be favorable.

As a class representative, I have spent hundreds of hours working on this case over the last seven years, perhaps thousands. It has been a long and difficult road for all of us. I did not do it all myself, I had help from many, many inmates who came to me with their stories about what was happening to them. Without the help and support of the inmate population here I could not have accomplished what I have. It has taken years for me to gain the faith and trust of the other inmates.

Here that is easier than at most prisons, as we have had an inside the walls population maximum of only 615 men. With those numbers I have gotten to know most of them. But be it a large prison or a small one, you will find very shortly that you need a significant portion of the population behind you if you bring a class case.

That has been perhaps the single biggest struggle I have faced in my experience with this case. And the prison staff seems to do their utmost to make things difficult for you. They will spread rumors about the population that you are going to get them to lose privileges they already have because you are suing. They will say you are just suing to bring attention to yourself, they mock you and say you do not have a case and try to get the other inmates against you.

That's serious, and you've got to be able to handle it, take the heat from the staff and the inmates. One of the best ways I've found to do that is to let everyone, especially inmates, know what you are doing. I've made a lot of copies of our pleadings, especially earlier on in the case of the complaint, to let inmates know what we were claiming and that we had a sound legal basis for our claims.

I've spent a lot of hours talking to inmates who had valid, serious complaints and were afraid to do anything about it because they did not want to be denied parole or trusty status for speaking out. You have to convince the men that you can get their complaints before the court and in the end you can win something that will help everyone.

You'll spend a lot of time talking to and helping a lot of inmates you personally do not like. But you will have to do it because when you signed your name on that line on the complaint and said you wanted to be a class representative you were making a commitment that you would fairly and adequately represent every single member of the class. That's a legal obligation you take on, and you could get your complaint dismissed if you don't.

Being a class representative in a prison case is the most difficult and time-consuming tasks I have ever taken on in my whole life. I had no idea what I was getting into when I started out.

In the final analysis, being a class representative is not for everyone. I'm sure there are good ones and bad ones, but for all it is just plan hard work and no rest. You can expect the case and all that goes with it to go on for years.

The rewards however are personal and intimate to you and you alone. I feel great pride looking back at what we've accomplished in seven years of litigation. I've been the spotlight many times and I like that, I'm not a shy person. I set out seven years ago to do something good for my fellow man and myself because I was here and did not like what I saw and the way I was being treated. I've been very fortunate, we won the case, so in a sense this is a success story. It's not over yet, a lot of things are still wrong, I still see inmates suffering emotionally and physically every day, but it's improving, it is way better than it was in 1977. And I firmly believe it would not be better if we hadn't done what we did, and I'm happy about that.

We could not have accomplished this without the fine, dedicated people at the ACLU. To them we all owe a debt of gratitude we can never repay. But those of us who are like this, we know if you don't fight, you'll never win. ■

The Reform of Federal Sentencing and Parole Laws

Dennis Curtis

The National Prison Project's work is profoundly influenced by sentencing and parole policies. In 1984, Congress enacted the Sentence Reform Act of 1984, which, when implemented, will work almost a complete metamorphosis in federal sentencing practices and procedures. The Act—not yet effective—created a Sentencing Commission to draft guidelines for sentencing and abolished parole. By examining the federal sentencing and parole system as it has existed over the past fifteen years, one can understand both the pressures for change and what problems will crop up in the wake of "sentencing reform." While my familiarity with the federal system and the magnitude of the changes there have led me to write about that system, many state systems have undergone similar changes during the same period.

For several decades prior to the 1960s, the federal sentencing system was relatively stable. Congress defined federal crimes and set penalties for violation of federal laws. Typically, Congress gave judges wide latitude in choosing whether to impose the penalty of imprisonment and, if so, the maximum length of such incarceration. In addition, the sentencing judge determined the amount of time (typically one third of the sentence) to be served prior to parole eligibility. A judge's discretion in sentencing was, practically speaking, unlimited.

Once a prisoner was sentenced, there were two ways to affect the time served by the prisoner. First, a defendant could ask the sentencing judge for a reduction of sentence, and once again, the judge had essentially free rein. Second, for those defendants who were sentenced to prison, the United States Parole Board played a key role, for the Board determined the actual time to be served by a prisoner. Up until the early seventies, the Parole Board's operations were shrouded in mystery; the Board provided no information on why it decided to release or to retain prisoners. Prisoners did not know how to affect the decision, although the rhetoric of rehabilitation (which surrounded both sentencing and parole) led prisoners to argue to the Board that, while in prison, they had demonstrated progress to-

wards reform. To the extent one could divine the Parole Board's "policy," it seemed that the Board looked for signs that a prisoner had "turned around," that the "magic moment" for parole had come because the prisoner was now a good bet for success on the street and continued incarceration would be harmful to his or her morale.

The new federal parole system, begun informally in the early 1970s, was turned into law with the enactment of the Parole Commission Reorganization Act of 1976. But parole guidelines could never respond completely to the disparity inherent in the federal sentencing system, for judges still controlled the parameters in which the (now) Parole "Commission" worked. Two identically situated defendants could still be given vastly different amounts of time to serve. Once again, reformers (myself included) clamored for more restrictions upon sentencing discretion, for eliminating disparity "up front" by creating guidelines for judges to use. Sentencing guidelines would, it was thought, require judges to focus upon the most appropriate aims of sentencing, punishment and incapacitation. Further, reformers argued for the abolition of parole, for "truth in sentencing," so that the sentence announced and the sentence served would be roughly comparable.

By the late 1970s, several states had adopted guideline and determinate sentencing systems. After several attempts, Congress followed suit in 1984. This reform, in turn, coincides with the preeminent prison problem of the 1980s: overcrowding. The federal prisons now hold some 50,000 prisoners, nearly two-thirds more than their rated capacity of about 30,000. Many state facilities are even worse off. Determinate sentencing has been one of the causes of overcrowding: the new federal system will exacerbate the problem. What we, the reformers, did not understand sufficiently were the political pressures for incarceration. "Truth in sentencing" means longer sentences. Legislators and the committees and commissions they appoint work within the public eye; no one wants to seem "soft on crime." With relatively long sentences as the baseline, new guidelines work to increase the time to be served—and hence add to the population of prisons.

Students of the criminal justice system have known for a long time that actors at different segments of the system

do not have much communication or coordination with each other. Congress passes laws to increase penalties for certain crimes but does not do a "prison impact" analysis. Wardens of prisons typically accept all who are sent to them—without thinking either of refusing to participate in overcrowding or of developing systems to inform the judiciary of the problems caused by the sentences imposed. No lobby effectively communicates the problems of overcrowding; no one has yet fully accepted the notion that society should not develop plans to incarcerate more prisoners than it is willing to house in constitutionally acceptable conditions.

By the early 1970s, the discretionary components of sentencing and parole (like the discretionary components of other administrative systems) began to give both academic reformers and the system's participants cause for concern. An impression of widespread disparity in sentencing emerged: similarly situated offenders who seemed to commit similar crimes were sentenced to serve widely different periods of incarceration. The criticism ripened into a series of interrelated complaints: that there were no standards to guide the sentencing decision, that there were no procedures to explain or to inform the public and the prisoners about the reasons for and length of incarceration, and that there was unnecessary tension within prisons populated by prisoners who, when they began their sentences, had no idea how long they would actually be incarcerated.

The emergence of these concerns coincided with the decline of rehabilitation as a sentencing goal. Studies seemed to demonstrate that nothing worked—that recidivism rates for those who had taken part in prison "treatment" programs were the same as for prisoners who had simply "done their time." Moreover, rehabilitation as a goal was seen to encourage gameplaying by inmates, attempting to convince their keepers/treaters that they had been "cured." Sentiment built for a different model of sentencing and of parole, one designed to eliminate disparities and respond to the "real" needs of prisoners.

It was at this juncture that the United States Parole Board worked a truly revolutionary change in its own procedures. Voluntarily, the Board decided to curb its own discretion, to eschew rehabilitation as a goal, to publish its decision-making criteria, and to base its decisions about parole release principally on two factors: the seriousness of a crime and an actuarially-determined measure of the risk of recidivism for each individual. The Board assessed crimes to determine relative seriousness.

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NATIONAL PRISON PROJECT

Law Student Interns Recall Moments They Won't Forget

Mary McClymont returning from Hawaii and talking more about seeing Tom Selleck than the settlement.

Heidi Reavis, 1984

Prisons are ghettos behind bars. My experience at the NPP is one of a long series of efforts to make an impact on this problem.

Notable memories include getting that phone call about "rat tartar" being served to one of our clients at the D.C. Jail.

Bonnie Barnes, 1985

I remember interviewing Mecklenburg Death Row prisoners and also discovering that our calls to Mecklenburg prisoners were subjected to wiretap. . . . Jack Abbott's First Amendment Appeal as well as letters, letters, letters containing cries for help, yells of outrage and dead cockroaches.

Serena Stier, 1979

My experience at the Prison Project contributed to my belief that even extremely well-meaning and hard-working people cannot improve the conditions in our society when these conditions are addressed in a piecemeal fashion. I remember the general esprit de corps of the Prison Project, contributed to by its location in a wonderful run-down building [the Dupont Circle Building] which was full of other good souls trying their best.

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For the recidivism measure, the Board used such factors as previous criminal record, age at the commission of a first offense, history of drug dependency, and the like. Based upon these two factors, the Board drafted "guidelines," which consisted of a matrix with which its hearing offices were to determine parole release dates. Use of the guidelines was designed to accomplish two goals: reduction of disparity stemming from the time of sentence and increased fairness in parole decision-making. Further, because the information needed to make decisions about seriousness of crime and risk of recidivism were all known at the time of sentencing, it became possible to predict (virtually at the time of sentencing) when a prisoner would be released on parole. Early prediction was seen as a desirable by-product of the reform: prisoners who knew upon entry of their release dates would, it was thought, be less tense, less manipulative.

If legislators and sentencing commissions create harsh sentences but do not provide adequate space in which to serve them, what response is appropriate?

Without parole boards to act as safety valves, the only alternatives are legislative "roll backs," or good time increases, typically wholesale reductions of sentences done only when the seams are bursting. Legislative rollbacks have disproportionate effects; those with shorter sentences receive greater proportionate reductions than do those with longer sentences. Increases in good time mock the concept of "truth in sentencing."

Although once an advocate of parole abolition, I now find that the determinate sentencing experience has led me towards supporting some form of parole. A vision of a sentencing system keyed to fairness and equity, with a free flow of information among the component actors, with research to seek effective patterns of sentencing and to insure that occupancy never exceeds capacity, seems unattainable in light of the current "war on crime." Sadly, the United States Sentencing Commission acknowledges that the guidelines it has recently proposed will increase prison populations by 10% (a conservative estimate, in my view) over the next 10 years and that other Congressional measures will further increase the population; yet the Commission seems willing to live with that result.

What we have learned from guideline sentencing is not only that guidelines mean long sentences and overcrowded prisons. We have also learned that no one—and most certainly not the authors of the guidelines—have any theory about how much time is appropriate for a given offender to serve. Sentencing judges, lawyers, criminologists, all can describe a crime as serious, agree that punishment and incapacitation is required, and yet vary widely in the actual amount of time to be served. Congress delegated the decision about how much time to the Sentencing Commission, a group of five men and two women, none of whom has articulated any theory about how the numbers—the months and years to be served—were arrived at.

In the absence of theory, practical limitations ought at least to inform our decisions. We are sending more people to prison than we are willing to house; we must institute some mechanism to insure that the prisons do not become more inhumane than they already are. An institution (perhaps we might call it something other than a "parole board") is needed to monitor the occupancy level of prisons and to develop equitable release plans to prevent overcrowding. ■

Prisoners' Lawyers Face Critical Issues

Elizabeth Alexander

For the past few years there has been a growing recognition that there is a crisis in prison overcrowding. Between 1974 and 1985, the total number of prisoners nationally rose from 200,000 to over 500,000, an increase of over 150%. This increase, which shows no signs of abating, is occurring in the face of a declining crime rate and a decline in the population at the ages of highest risk of incarceration. Whether this increase owes more to political trends, to demands for more punitive sanctions for crime, to demographic factors, to the country's economic trouble, or to changes in the mental health system nationally, no one denies that a crisis in rising populations exists.

This mammoth increase in prison populations has not yet been accompanied by a corresponding increase in prison capacity. Predictably, prison conditions that were already deplorable have in many prisons deteriorated

gravely. This has presented both a danger and an opportunity for the ACLU and other prisoner rights groups. The danger is that we will be manipulated into a solution for particular state or local prison crises that will result in an attempt to build a cell for every potential inmate. We at the Project have long believed that building cells usually means more bodies in prison, rather than better conditions; the exhaustive study commissioned by the National Institute of Justice, *American Prisons and Jails*, confirms that:

As a matter of history, this study has found that state prison populations were more likely to increase in years immediately following construction than at any other time, and that the increases in the numbers of inmates closely approximate the changes in capacity.

Id. at Vol. I, 138.

The opportunity, on the other hand, is to create an alliance with the budget-minded and argue that the solution must be alternatives to incarceration.

Elizabeth Alexander is a senior staff attorney with the National Prison Project.

tion, in part because the public is not willing to pay the mammoth costs associated with running constitutional prisons at current population levels.

Ironically, it is the conservatives who have expressed a willingness to foot the bill at the same time that positive social programs are systematically gutted. Disregarding the literature on the impact of building new prisons, the Attorney General's Task Force on Violent Crime has endorsed proposals that could lead to major increases in state prison capacity. But the prospects for such conservative expenditures are extremely uncertain. Neither the federal government nor the states are in a position to take on mammoth spending initiatives.

Just as the obvious solution for the ACLU and other prison activists is to seek population reductions, the obvious solution for conservatives is to allow for substantial population increases at minimum cost by allowing conditions in prisons to deteriorate. The major barrier to the conservative solution is the federal courts. For approximately the last 25 years, the courts have abandoned the hands-off doctrine and intervened in increasingly sophisticated ways to enforce minimum constitutional standards in prisons and jails.

But at least since 1976, the principal role of the Supreme Court has been to halt the doctrinal expansion of prison law. Our response, along with that of other prison litigators, has been the development of increasingly sophisticated litigation tools mimicking the use of techniques from other fields of complex litigation, such as mammoth discovery, extensive use of experts, and requests for appointment of special masters. Among the first consequences of this approach was a move away from the types of due process and first amendment cases that were used earlier as a means to get a foot in the prison door. In part, this shift resulted from disillusionment as a result of bad Supreme Court decisions.¹ In part, however, it represented a commitment of concentrated litigation resources to factual demonstration of the evil of existing prison conditions.

The ability of prison litigators to

¹*Hudson v. Palmer*, 468 U.S. 517 (1984) and *Block v. Rutherford*, 468 U.S. 576 (1984) narrowed prisoner due process rights and virtually eliminated any privacy rights for prisoners. *Meachum v. Fano*, 427 U.S. 215 (1976) and *Montanye v. Haymes*, 427 U.S. 236 (1976) also limited prisoner due process rights; *Jones v. North Carolina Prisoners' Union, Inc.*, 433 U.S. 119 (1977) signalled a similar pull-back in the first amendment area. In *O'Lone v. Estate of Shabazz—U.S.*—the Supreme Court limited religious freedom for prisoners by holding that all that was necessary to justify restriction was a rational connection to legitimate governmental interests.

put together the sort of resources necessary to undertake this type of litigation was serendipitously facilitated by the passage of the 1976 Civil Rights Attorney's Fees Award Act. Under the statute, successful plaintiffs can shift to the defendants their attorneys fees, which in practice means virtually the entire cost of the case.

The virtue of this approach to litigation is that it is very difficult for conservatives to confront. Even in the Supreme Court's most reactionary opinions, the Court claims to reaffirm the principle that conditions of confinement in the nation's prisons are subject to review under the Eighth Amendment's prohibition against cruel and unusual punishment. See *Whitley v. Albers*, U.S., 106 S.Ct. 1078 (1986), discussed *infra* at n.4.

Thus, the problem for conservatives is how to articulate a rationale for rejecting such challenges. It would be difficult to state baldly that the Constitution does not protect prisoners once harm is shown; the more successful strategy would be to attack our ability to make a showing of harm.

In a sense, what conservatives have needed is a substantive equivalent of *Jones v. North Carolina Prisoners' Union, Inc.*, *supra*, n.1. In that first amendment case, Justice Rehnquist for the Court had held that the burden was on the plaintiffs to disprove the predictions of correctional officials that recognizing prisoner first amendment claims will lead to impairment of security. In *Jones*, Justice Rehnquist made deference to prison administrators a virtual principle of decision.

The more serious problem for conservatives, however, has been to translate the doctrinal thrust of *Jones* into a mechanism for precluding factual showings by litigants like the ACLU that have the resources to undertake complex factual cases.

It is interesting to recall, then, that the first true totality of conditions case taken by the Supreme Court came from a modern federal facility. As a new facility, it was completely atypical of the sort of institution in which totality suits are ordinarily brought. Moreover, the Supreme Court tends, with some reason, to think of federal facilities as generally benefitting from more enlightened administration than most state or local institutions.² Thus, in *Bell v. Wolfish*, 441 U.S. 520 (1979), the Supreme Court was setting standards for all totality of conditions cases in an institution that did not reflect the physical reality of the overwhelming majority of jails. Similarly,

²See, e.g., *Proconier v. Martinez*, 416 U.S. 396, 414-415, n.14 (1974).

the Court, in *Bell*, in a decision written by then Justice Rehnquist, endorsed an artificial distinction between constitutional minimum standards and actual practice. When, for example, Justice Rehnquist for the Court upheld visual body cavity searches, he did so while explicitly ignoring the District Court's finding that the searches had been conducted in an abusive manner and that such abuses were predictable. *United States ex rel Wolfish v. Levi*, 439 F.Supp. 114 (S.D.N.Y. 1977). While in Justice Rehnquist's discussion of double-celling in *Wolfish*, he stressed the atypical amenities present in the facility, in the case of body cavity strip searches, he ignored the actual record made by plaintiffs in order to uphold the defendants' policies.

Although the *Wolfish* Court had found double-celling constitutionally permissible under the unusual circumstances of the case, the burgeoning prison populations continued to lead to additional court orders enjoining double-celling. Again, when the Supreme Court next considered another double-celling case, it granted *certiorari* in an unusual case. The prison at Lucasville, Ohio, is one of a handful of maximum security prisons around the country constructed in the 1970s. Most of the trial court's factual findings were favorable to the defendants and the judge's ultimate decision enjoining double-celling was heavily linked to generalized expert testimony regarding the negative impact of overcrowding.

When the Supreme Court did hand down its decision in *Rhodes v. Chapman*, U.S., 101 S.Ct. 2392 (1981), we felt that the decision was not as damaging to the cause of prison law as expected. Although the Court had somewhat retrenched regarding overcrowding, the Court endorsed specific decisions of lower courts that had granted relief in totality cases.³ While the Court reversed the lower court decision, it did so by focussing on the lower court's failure to find specific harms at the prison resulting from the overcrowding and by rejecting the lower court's reliance on generalized expert opinion.

The Court's opinion in *Rhodes* clearly did several things. By limiting the use of expert witnesses, the Court was able to continue to articulate a concern for minimum constitutional standards in prisons while making it more difficult for

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³Among the cases cited by the majority and concurring opinions were several Prison Project cases, including *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *Pugh v. Locke*, 406 F.Supp. 318 (M.D.Ala. 1976), and *Duran v. Apodaca*, No. 17-721-C (N.M. 1980).

NATIONAL PRISON PROJECT

Status Report: State Prisons and The Courts

Compiled from the National Prison Project Status Report as of October 1987.

STATE	FACILITIES	TYPE OF ORDER	ISSUES	OTHER
Alabama	Entire Prison System	Court Order	Overcrowding and Conditions	
Alaska	Entire Prison System	Consent Decree	Overcrowding and Conditions	Stay pending appeal
Arizona	State Penitentiary Special Maximum Security	Consent Decree Consent Decree	Overcrowding and Conditions Conditions	
Arkansas	Entire Prison System	Court Order	Overcrowding and Conditions	Court relinquished jurisdiction
California	San Quentin Prison Folsom Prison Soledad Prison Deuel Prison Medical Facility Institution for Women Men's Colony	Court Order Court Order Court Order Court Order Court Order	Overcrowding and Conditions Segregation-Overcrowding and Conditions Segregation-Overcrowding and Conditions Segregation-Overcrowding and Conditions Segregation-Overcrowding and Conditions	Litigation pending Litigation pending Litigation pending
Colorado	Maximum Security Penitentiary	Court Order	Overcrowding and Conditions	Prison ordered closed
Connecticut	Hartford Correctional Center Somers Correctional Center Montville Correctional Center Niantic Women's Facility	Court Order Consent Decree Court Order	Overcrowding and Conditions Overcrowding and Conditions Overcrowding Overcrowding and Conditions	Litigation pending Litigation pending
Delaware	Correctional Center	Court Order	Overcrowding and Conditions	
Florida	Entire Prison System	Consent Decree	Overcrowding	
Georgia	State Prison-Reidsville	Court Order	Overcrowding and Conditions	
Hawaii	Oahu Community Correctional Center	Court Order	Overcrowding and Conditions	
Idaho	Women's Prison Men's Correctional Institution	Consent Decree Court Order	Conditions Conditions	
Illinois	Menard Correctional Center Pontiac Correctional Center	Court Order Court Order	Overcrowding and Conditions Overcrowding	
Indiana	State Reformatory at Pendleton State Prison at Michigan City	Court Order Court Order	Overcrowding and Conditions Overcrowding and Conditions	
Iowa	State Penitentiary	Court Order	Overcrowding and Conditions	
Kansas	State Penitentiary	Consent Decree	Overcrowding and Conditions	
Kentucky	State Penitentiary State Reformatory Correctional Institution for Women	Consent Decree Consent Decree Court Order	Overcrowding and Conditions Overcrowding and Conditions Conditions	
Louisiana	State Penitentiary	Court Order	Overcrowding and Conditions	
Maine	State Prison	Court Order	Restraint Cells	
Maryland	State Penitentiary House of Correction Reception, Diagnostic and Classification Center	Consent Decree Consent Decree Consent Decree	Overcrowding Overcrowding Overcrowding	
Massachusetts	Correctional Institution at Walpole		Overcrowding and Conditions	Court ruling for prison officials reversed and remanded in part
Michigan	Huron Valley Women's Facility Entire Men's Prison System State Prison of Southern Michigan	Court Order Court Order Consent Decree	Conditions Overcrowding and Conditions Conditions and Overcrowding	
Mississippi	Entire Prison System	Court Order	Overcrowding and Conditions	
Missouri	State Penitentiary	Court Order	Overcrowding and Conditions	
Nevada	State Prison New Addition to State Prison	Consent Decree Court Order	Overcrowding and Conditions Overcrowding and Conditions	
New Hampshire	State Prison	Court Order	Overcrowding and Conditions	
New Mexico	State Penitentiary	Consent Decree	Overcrowding and Conditions	
New York	Long Island Correctional Facility	Court Order	Facility Kept Open	Facility kept open to ease overcrowding and unconstitutional conditions at other facilities
North Carolina	13 Facilities in South Piedmont Area Craggy Correctional Center for Women	Consent Decree	Overcrowding and Conditions Overcrowding and Conditions Overcrowding and Conditions	Litigation pending Litigation pending
Ohio	Southern Ohio Correctional Facility Orient Correctional Institution Ohio State Reformatory	Court Order Consent Decree Consent Decree	Overcrowding Overcrowding and Conditions Overcrowding and Conditions	
Oklahoma	State Penitentiary Entire Prison System	Court Order Court Order	Overcrowding and Conditions Overcrowding	Court decision to relinquish jurisdiction on appeal
Oregon	State Penitentiary	Court Order	Overcrowding	On remand court held no 8th Amendment violations
Pennsylvania	Correctional Institution at Muncy (Women's) Correctional Institution at Graterford		Overcrowding and Conditions Overcrowding and Conditions	Litigation pending Litigation pending
Rhode Island	Entire Prison System	Court Order	Overcrowding and Conditions	
South Carolina	Entire Prison System	Consent Decree	Overcrowding and Conditions	
South Dakota	State Penitentiary	Court Order	Conditions and Overcrowding	Rehearing en banc argued 1/87
Tennessee	Entire Prison System	Court Order	Overcrowding and Conditions	
Texas	Entire Prison System	Court Order	Overcrowding and Conditions	
Utah	State Prison	Consent Decree	Overcrowding and Conditions	
Vermont	Vermont Prison	Prison Closed		
Virginia	Powhatan Correctional Center Mecklenburg Correctional Center State Penitentiary	Consent Decree Consent Decree Consent Decree	Overcrowding and Conditions Conditions Conditions Protection from Harm	Dismissal of complaint affirmed on appeal
Washington	State Reformatory State Penitentiary	Court Order	Overcrowding and Conditions Overcrowding and Conditions	Litigation pending
West Virginia	State Penitentiary Huttonsville Correctional Center	Court Order Court Order	Overcrowding and Conditions Overcrowding and Conditions	State case
Wisconsin	Waupun Correctional Institution	Court Order	Overcrowding and Conditions	
Wyoming	State Penitentiary	Consent Decree	Overcrowding and Conditions	Court relinquished jurisdiction in 1983
District of Columbia	Entire Jail System Several Facilities at Lorton	Court Order Consent Decree Court Order	Overcrowding and Conditions Overcrowding Overcrowding and Conditions	
Puerto Rico	Commonwealth Penitentiary Entire Prison System	Court Order Court Order	Overcrowding and Conditions Overcrowding and Conditions	
Virgin Islands	Golden Grove Correctional Facility	Court Order	Overcrowding and Conditions	

—continued from page 23

plaintiffs to show that constitutional standards had been violated. In short, *Rhodes* was a partial substantive equivalent in the law for the procedural burden placed upon plaintiffs in *Jones, supra*. In essence, the Court raised the ante in prison litigation by requiring proof directly related to harm from overcrowding at the particular institution in question.

But *Rhodes* also raised as many questions as it answered. First, one can view with a certain amount of skepticism the Court's characterization of Lucasville as an essentially benign institution. The plaintiffs below had attempted unsuccessfully to broaden the case from a simple overcrowding suit to raise other totality of conditions claims. Had they been able to do it, it is possible that the judge's ultimate findings would have presented the institution in a different manner. Justice Marshall's dissent argues that the majority had misread some of the trial court's findings to make them appear more favorable to the defendants. 101 S.Ct. 2412, n.6. Moreover, one cannot keep from believing that the evidence of harm in Lucasville was there but that for some reason, possibly because of overconfident reliance on the generalized expert testimony, the plaintiffs did not present it.

Still, *Rhodes* continues to present critical issues to prison litigators. *Rhodes* left unresolved numerous evidentiary questions. To what extent had the Court created special standards for the receipt of expert testimony that do not apply in other areas of the law? Where there is a scientific body of evidence about, for example, the public health effects of overcrowding of a quality that would be accepted in other contexts, must each plaintiff in an overcrowding case nonetheless prove that the predicted impact on communicable diseases and stress-related diseases has in fact occurred at the institution in question, possibly with an appropriately controlled study? Will the Supreme Court ultimately require proof that serious injury has occurred to identifiable individuals rather than proof that conditions make the probability of serious harm overwhelming?

Since *Rhodes*, the Supreme Court has not taken any other prison overcrowding cases.⁴ Beyond the specific questions raised by *Rhodes*, however,

⁴*Whitley v. Albers*, 106 S.Ct. 1078, *supra*, is the only major Supreme Court post-*Rhodes* Eighth Amendment conditions of confinement case. In *Whitley*, in a doctrinally confused opinion, the Court exempted virtually all instances of official use of force during prison disturbances from federal court review.

We at the Project have long believed that building cells usually means more bodies in prison, rather than better conditions.

is the implicit hostility the Court expressed toward prison litigation in general. Just as we suspect that there really was evidence of concrete harm in Lucasville, the general importance of *Rhodes* is that cases can be lost because the plaintiffs lack the resources to find and prove the harm. In short, it is likely that cases will succeed or fail not on the basis of how unconstitutional the conditions are, but on the basis of how resourceful the lawyers and experts are. The National Prison Project's annual Status Report lists the status of overcrowding and other totality of conditions litigation in every state and the District of Columbia (see Table, p. 24).

Without the promise of attorneys fees or dependable funding, very few organizations can underwrite the costs of contemporary conditions of confinement prison litigation. In *Pugh v. Locke*, 406 F.Supp. 318 (M.D.Ala. 1976), the case in which the concept of totality of conditions litigation was developed, the entire liability trial cost approximately four thousand dollars. In contrast, the Department of Justice, in its last major prison case before the Reagan era, reportedly spent over a million dollars in litigation costs in *Ruiz v. Estelle*, 503 F.Supp. 1265 (S.D.Texas 1980).

In short, the major impact of recent Supreme Court cases, and *Rhodes* in particular, has been to increase the necessity for resource-intensive litigation. To the extent that plaintiffs do have the resources available, ironically *Rhodes* increases the risks to defendants by increasing the expenses that may ultimately be shifted to the defendants. This puts some pressure on defendants in some circumstances to negotiate with plaintiffs rather than litigate. Because of the federal courts' increasing conservatism, the Prison Project has attempted to concentrate more thought into strategies to persuade defendants to settle before trial, as well as more innovative settlement and compliance mechanisms.

There is a harsh message for the plaintiffs involved in prison litigation here. The major result of cases like *Rhodes* and *Whitley* is that totality of conditions cases, including in particular overcrowding cases, are virtually impossible to win and generally should not be attempted without substantial financial resources and experienced counsel. There may be situations in which a particular Department of Corrections invites a lawsuit in order to have a

weapon to force the legislature to fund the elimination of unconstitutional conditions. But invitations to engage in such litigation should be viewed with considerable suspicion because the resulting consent decree could serve as legal protection for any unconstitutional conditions not remedied. Nor should a plaintiff's lawyer be manipulated into helping the Department of Corrections obtain funding for new prisons. Finally, since often the most extensive part of the litigation involves enforcing the order, the plaintiffs' lawyer must have the financial resources and litigation skills to pursue compliance with the consent decree.

A far disproportionate percentage of the successful prison plaintiffs are represented by repeat players such as the Prison Project, the NAACP Legal Defense Fund, the Southern Prisoners' Defense Committee, and the New York Legal Aid Prisoners' Rights Office, among others.⁵

Because, then, the few relatively well-financed and staffed prisoners' rights offices necessarily play such an important role in prison litigation, it is particularly disheartening to recognize that the ability of such offices to continue undertaking complex litigation requiring substantial financial resources is under direct attack. On the one hand, in every session of Congress bills are introduced to cut back on the Attorney's Fees Act. Since 1976, the Project and other groups litigating on behalf of prisoners have come to count on attorneys fees to provide a significant portion of each group's total budget. Without the shifting of the expenses of litigation made possible under the Act, it is very questionable whether these groups can continue to finance resource-intensive litigation.

This is not to say we should reduce our commitment to prison litigation. The continuing dreadful conditions demand, instead, an even greater level of commitment. Unless the ACLU, and our allies, can continue to provide the necessary litigation resources, the crisis in prison litigation will match the crisis in the prisons. ■

⁵Until a few years ago, I would have listed the Department of Justice Special Litigation Unit, but the Special Litigation Unit under William Bradford Reynolds' leadership no longer plays a significant positive role in prison litigation. For example, recently the Department of Justice failed to support a contempt order regarding overcrowding against the State of Michigan in one of its own cases. See, Alexander, "U.S. v. Michigan: An Update from the Battlefield," *NPP JOURNAL*, No. 12, Summer 1987. The contempt order was entered at the urging of the *amicus curiae*, including the Prison Project and the Michigan ACLU affiliate. Obviously, too, the cuts in the Legal Services Corporation budget have eliminated potential plaintiffs' attorneys.

15 Years of Litigation History

Listed below are all of the cases filed by the National Prison Project, indicating the state in which they were filed and the issues involved. Those cases preceded by an asterisk (*) are still in active litigation.

1972

Scruggs v. Gaffney. Kansas. Disciplinary due process in state prison.

Wallace v. Kern. New York. Procedural and substantive rights of pre-trial detainees in Brooklyn House of Detention.

Novak v. McCune. Virginia. Challenge by federal prisoners to lack of due process afforded by U.S. Board of Parole.

Carter v. McGinnis. New York. Disciplinary due process in state prison.

Corley v. Amico. New York. Due process in parole revocation hearings.

Parman v. District of Columbia. District of Columbia. Prisoners' right to marry.

Lacey v. Gaver. Ohio. Challenge to officer brutality in state prison.

Robbins v. Kleindienst. District of Columbia. Federal prisoners' right to due process hearing before punitive transfer.

***Abbott v. Richardson.** District of Columbia. National class action on behalf of federal prisoners challenging correspondence and publications censorship.

Wilkinson v. Skinner. New

York. Due process in jail disciplinary hearings in all county jails.

1973

Coxe v. Turley. Kentucky. Challenge to non-lawyer judges having the power to hear juvenile cases which result in incarceration in county jails.

O'Neal v. Oswald. New York. Challenge to state prisoner transfer to behavior modification program without due process hearing.

Peterson v. SLA. New York. Challenge to restrictions on employment of ex-offenders.

Roberts v. Virginia Board of Parole. Virginia. State prisoner's challenge to lack of due process in parole hearing.

Arey v. Oliver. Virginia. State prisoner challenge to censorship of mail and publications.

Clonce v. Richardson. Missouri. Challenge to experimental behavior modification program in federal prison.

Stinnie v. Gregory. Virginia. Statewide jail regulations and conditions.

MacMillan v. Carlson. District of Columbia. Right of author to interview federal prisoner for planned book.

Adams v. Carlson. Illinois. Challenge to lack of disciplinary due process, conditions of segregation and interference with attorney-client access at federal prison.

Butler v. Preiser. New York. Right of state prisoners

to contribute to Attica Brothers Defense Fund.
Barefoot v. Richardson. Disciplinary due process in federal prison.

1974

Pell v. Procunier. California. Right of press access to individual prisoners.

Sero v. Preiser. New York. Statewide challenge to treatment of youthful offenders.
Berenguer v. Froehke. Kansas. Challenge to practices and lack of due process for military prisoners.

Doe v. Virginia. Virginia. Challenge to behavior modification programs funded by LEAA in state prisons.

Carr v. Thompson. New York. Challenge to restrictions on employment of ex-offenders.

Starnes v. McGuire. District of Columbia. To enforce right of federal prisoners throughout the country to sue Federal Bureau of Prisons in D.C. federal court.

Bailey v. Mandel. Maryland. Challenge to use of state prisoners for non-therapeutic medical experiments.

National Prison Project v. Sigler. District of Columbia. To require U.S. Board of Parole to be subject to Freedom of Information Act.

Taylor v. Manson. Connecticut. Challenge to use of electric shock therapy to treat state prisoners.

Garnes v. Taylor. District of Columbia. Challenge to conditions of confinement and practices for dealing with women prisoners.

Wolff v. McDonnell. Nebraska. Due process in state prison disciplinary hearings (amicus).

1975

***Pugh v. Locke, James v. Wallace.** Alabama. Challenge to totality of conditions in statewide prison suit.

Black v. Saxbe. West Virginia. Challenge to practices at federal prison for women.

Aikens v. Lash. Indiana. Challenge to censorship of literature for state prisoners.

Marion County Jail Inmates v. Eads. Indiana. Challenge to conditions in county jail.

***Inmates of D.C. Jail v. Jackson.** District of Columbia. Challenge to totality of conditions at large urban jail.

McCray v. Burrell. Maryland. Challenge to requirement that prisoner must exhaust administrative remedies before filing civil rights action.

Grunderstrom v. TDC. Texas. Challenge to state prison regulation prohibiting prisoners from providing legal assistance to other prisoners.

Grosso v. Lally. Maryland. Challenge to lack of equal programming for state's women prisoners.

1976

Haymes v. Montanye. New York. Challenge to state prisoner's punitive transfer for engaging in constitutionally protected conduct.

***Palmigiano v. Garrahy.** Rhode Island. Challenge to totality of conditions in statewide prison suit.

***Grubbs v. Bailey.** Tennessee. Challenge to totality of conditions in statewide prison suit.

Thompson v. Bond. Missouri. Challenge to state statute which proclaims that state prisoners are civilly dead and have no right to sue, contract, etc.

Liles v. Ward. New York. Challenge to behavior modification program for women prisoners in state prison.

Gee v. Mandel. Maryland. Challenge to state's "defective delinquent" statute under which prisoners could be held in state prison indefinitely.

Dodge v. Herschler. Wyoming. Challenge to state practice of confining women in out of state prisons.



The Limits of Parity in Prison

Judith Resnik

The fifteenth anniversary of the National Prison Project is an appropriate time to mark the progress—most of it during the last 15 years—that women prisoners have made in turning our attention to the problems they face. In cases around the country, in lawsuits filed in Connecticut, New York, Pennsylvania, Washington, D.C., Virginia, West Virginia, North and South Carolina, Louisiana, Florida, Kentucky, Georgia, Michigan, Idaho, North Dakota, New Mexico, California, and Hawaii, women offenders and their advocates are challenging prison systems that do not pro-

vide for women. In an impressive series of cases, courts have articulated a right of "parity of treatment," that women be given roughly comparable rights of access to educational, rehabilitational, and vocational programs, to legal and medical services, as those provided to men prisoners.

But the fifteenth anniversary of the Prison Project is not only an occasion upon which to note that women—invisible members of the prisons 15 years ago—have made strides towards visibility. It is also an occasion upon which to comment on the limits of "parity of treatment," of using men as the yardstick by which to measure what services ought and must be provided to women.

A bit of history is needed. In the

middle of the 19th century, reformers who were concerned about the violence and difficulties of prison life sought to insulate women prisoners by creating distinct institutions, ostensibly "for" women. The relatively small number of women prisoners were placed either in isolated institutions (often euphemistically called "farms") or were segregated in separate wings of men's facilities. In almost every state, all women were lumped together—classified exclusively on the basis of their sex—and confined in the "women's prison."

Some hundred years later, a new wave of reformers, whose concerns were shaped by the women's movement, looked at "women's prisons." What they saw were woefully impoverished conditions. In 1979 and 1980, the Comptroller General of the United States issued two reports, "Female Offenders: Who Are They and What are the Problems Confronting Them?" and

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Bustos v. Herschler. Wyoming. Challenge to conditions and practices at state prison.

1977

Laaman v. Helgemoe. New Hampshire. Challenge to totality of conditions in state prison.

Harris v. Cardwell. Arizona. Challenge to totality of conditions in state prison.

Tucker v. Hutto. Virginia. Medical malpractice by state prison doctors and officials resulted in largest damage award ever won by state prisoner.

Kepner v. Grzegorek. Virginia. Damage action on behalf of youthful federal prisoner who was assaulted while in protective custody.

Stewart v. Rhodes. Ohio. Challenge to totality of conditions in state prison.

1978

DiMarzo v. Cahill. Massachusetts. To require state Commissioner of Corrections to promulgate minimum standards for local jails.

Greenholtz v. Inmates of Nebraska. Nebraska. Due process in state parole hearings (amicus).

Bell v. Wolfish. New York. Challenge to overcrowding and various practices in federal pre-trial facility (amicus).

National Prison Project v. Federal Bureau of Prisons. District of Columbia. To require Federal Bureau of Prisons to comply with Administrative Procedures Act.

Cordero v. Levi. District of Columbia. Challenge to punitive conditions of confinement of 5 Puerto Rican Nationalist prisoners.

Rogers v. Brady. Mississippi.

Challenge to restrictions on employment of ex-offenders.
Ramos v. Lamm. Colorado. Challenge to totality of conditions in statewide prison case.

1979

***Arias v. Wainwright.** Florida. To require State Commissioner of Corrections to promulgate and enforce minimum standards for local jails.

***Duran v. Apodaca.** New Mexico. Challenge to totality of conditions in statewide prison case.

Terry D. v. Rader. Oklahoma. Right to treatment and to least restrictive alternative for all juveniles in the state.

National Prison Project v. Carlson. District of Columbia.

To require Federal Bureau of Prisons to make public an index of all final dispositions of administrative grievances.

Jacobs v. Britten. Alabama. Challenge to conditions and practices for state death row prisoners.

Picariello v. Carlson. Pennsylvania. Damage action on behalf of group of federal prisoners who were brutalized by prison officials.

Freeman v. Georgia. Georgia. Challenge to the involuntary drugging and transfers to mental units without a hearing at state women's prison.

Maiorca v. Lamb. Nevada. Lack of medical care in county jail.

1980

Lovell v. Brennan. Maine. Challenge to totality of conditions at state prison.

Jenkins v. Brewer. New York. Challenge to requirement that state prisoners must exhaust administrative remedies before filing civil

rights action (amicus).

Jones v. Diamond. Mississippi. Challenge to conditions and practices in local jails (amicus).

Tucker v. Halifax County. Virginia. Damage action on behalf of family of young prisoner who committed suicide in unattended county jail.

Rhodes v. Chapman. Ohio. Challenge to overcrowding in new state prison (amicus).

McKnight v. Virginia. Virginia. Damage action on behalf of prisoner who suffered serious injuries because of medical and psychiatric neglect in state prison.

1981

Ruiz v. Estelle. Texas. Appropriateness and authority of trial judge to appoint Special Master in statewide prison conditions case (amicus).

***Shrader v. White.** Virginia. Challenge to totality of conditions at state prison.

Canterino v. Wilson. Kentucky. Challenge to conditions and practices at state women's prison.

***Brown v. Murray.** Virginia. Challenge to various practices and guard brutality at state super-maximum security prison.

Doe v. Buford. District of Columbia. Damage action on behalf of 12 year old placed in a jail cell with older prisoner with history of assaultive behavior.

1982

***Witke v. Crowl.** Idaho. Challenge to conditions and practices at state women's prison.

***Bobby M. v. Graham.** Florida. Statewide challenge to conditions and practices at

state juvenile training schools.

***Delgado v. Cody.** Wisconsin. Challenge to totality of conditions at state prison.

Clark v. District of Columbia. District of Columbia. Challenge to conditions and practices at behavioral adjustment unit of state facility for youthful offenders.

***Shapley v. O'Callaghan.** Nevada. Challenge to totality of conditions at state prison.

1983

***Nelson v. Leake.** South Carolina. Challenge to totality of conditions in statewide prison suit.

Union County Jail Inmates v. Buono. New Jersey. Challenge to conditions at large county jail (amicus).

Akers v. Landon. Virginia. Challenge to state prison policy automatically denying mothers access to newborn babies.

***Flittie v. Solem.** South Dakota. Challenge to totality of conditions at state prison.

1984

***U.S. v. Michigan.** Michigan. Intervened in totality of conditions case brought by U.S. Department of Justice against state prison system (amicus).

***Black v. Ricketts.** Arizona. Challenge to practices and policies in large segregation unit of state prison.

***Knop v. Johnson.** Michigan. Challenge to totality of conditions case in statewide prison suit (in conjunction with U.S. v. Michigan).

Mohler, et al. v. Prince Georges County. Maryland.

Series of damage actions on behalf of detainees who were sexually assaulted in large county jail.

***Garza v. Heckler.** Texas. Challenge to amendments to Social Security Act which exclude incarcerated felons from old age benefits.

***Spear v. Ariyoshi.** Hawaii. Challenge to totality of conditions in state men's and women's prison.

1985

***Jerry M. v. District of Columbia.** District of Columbia. Challenge to conditions and practices at District's juvenile facilities.

Whitley v. Albers. Pennsylvania. Challenge to deadly force standard in state prison emergency (amicus).

***Washington v. Tinney.** Maryland. Challenge to totality of conditions in state prison.

***Johnson v. Galley.** Maryland. Challenge to totality of conditions in state prison.

1986.

Re: Petition to the United Nation's Commission on Human Rights. United Nations. Complaint on behalf of Cuban refugees detained in Federal penitentiary.

***Epps v. Martin.** North Carolina. Challenge to totality of conditions at state prison.

***Inmates of Occoquan v. Barry.** District of Columbia. Challenge to totality of conditions at 3 District prisons.

O'Lone v. Shabazz. New Jersey. Right of Muslim prisoners to attend congregational religious services (amicus).

This table was compiled by Julia Cade.

"Women in Prison: Inequitable Treatment Requires Action." The reports articulated the emerging themes: "With few exceptions, neither jails nor prisons ... today do more than warehouse ... female inmates; physical plant, staffing services, and programs are ... sadly inadequate." "Women in correctional institutions do not have access to the same types of facilities, job training, jobs in prison industries, and other services as [do] men prisoners."

Lawsuits became one vehicle for the expression of inadequacy of treatment in prisons "for" women. Two class actions, *Glover v. Johnson*, 478 F.Supp. 1075 (E.D. Mich. 1979), and *Canterino v. Wilson*, 546 F.Supp. 174 (W.D. Kentucky 1982), provide examples of the disparate treatment of women and of courts' responses to the inequalities. In *Glover*, women demonstrated that they were permitted fewer job-training opportunities than were men. Women were offered

work in only five minimally remunerative areas (such as food services) while men had access to some 20 vocational programs. Men printed a newspaper; women made personal calendars. Men learned welding; women did small handicrafts—again for personal use. Men apprenticed as machinists, tool-and-die makers and electricians and were permitted to practice those trades in prison industries. There were no apprentice programs for women, no industries in their prison. Based upon the constitutional right of equal protection, the federal district court concluded that "significant discrimination against the female prison population" existed.

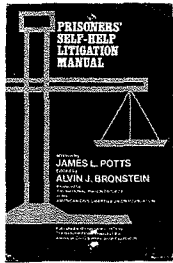
In *Canterino*, women at the Kentucky Correctional Institution for Women challenged the behavior control system to which all women, but none of the men, who entered the prison system were subjected. As women entered the prison system, they were all strictly lim-

ited in their access to visits, recreation, and services. Prison officials limited newly-admitted women (regardless of the nature of their crimes) to only one five-minute telephone call per month. They forbade newly-admitted women to place pictures of their children on the walls of their cells. These women had no access to the yard, while men—even those in maximum security facilities—had use of the yard on a regular basis. The trial judge concluded: "women [prisoners] are restricted in the exercise of normal privileges [bedtime hours, dress, access to visits, phone calls] ... while men [prisoners] are not." In Kentucky, as in Michigan, federal courts found violations of United States constitutional guarantees and ordered comparable treatment.

The problems of comparative disadvantage for women are not limited to Michigan and Kentucky. In almost every

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NATIONAL PRISON PROJECT



In 1976 the Prison Project published *The Prisoners' Self-Help Litigation Manual*, a practical book which enabled prisoners to redress their legal grievances on their own. The book was written by James L. Potts, an ex-prisoner who had done a lot of legal work while in federal prison, and was edited by Alvin J. Bronstein, NPP Director. With the assistance of foundation grants, the Prison Project was able to distribute 20,000 copies of the book to prisoners around the country before it went out of print.

The first *Prisoners' Assistance Directory* was published in 1977 by the Prison Project. It is a compendium of organizations and people, listed by individual state, who provide assistance to prisoners and ex-offenders. The *Directory* has been updated periodically and the seventh edition was published in 1986.

In 1984 the NPP published *A Primer for Jail Litigators* which provides a step-by-step guide to litigating cases involving local jails.

In the fall of 1984, the NPP began publication of its quarterly *JOURNAL*. It contains articles about prison litigation, legal and substantive issues confronting people in the field as well as a series of topics such as AIDS in prison, super-maximum security prisons, alternatives to incarceration, women in prison, capital punishment, and privatization of prisons.

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jurisdiction in which women are housed, disparities—sometimes seemingly endless disparities—exist. Data from the federal prison system demonstrate the problems on a national scale. The United States Bureau of Prisons operates more than 40 facilities for convicted prisoners. More than 12 are “camps,” the least restrictive settings available to federal prisoners. No women are housed in camps, despite the fact that the Bureau has estimated that a large percentage of women meet the eligibility requirements for assignments to camps, and despite the fact that many women’s advocates have repeatedly pointed out the absence of camps for women. Moreover, although population studies by the Bureau have indicated that the preponderance of its

female prisoners come from the Northeast, the Great Lakes, and Southern California, all of the women in the federal system are placed in one of five facilities: Alderson, West Virginia; Lexington, Kentucky; Fort Worth, Texas; Morgantown, West Virginia; and Pleasanton, California. Most federal women prisoners are, thus, inevitably far away from the communities in which they had lived, and their visitors—children, family, friends, lawyers—if they come at all, must travel at great expense. The problems faced by women in the federal prison system have also given rise to a lawsuit, *Butler v. Meese*, Civ. No. 84-2604, now pending before the United States District Court for the District of Columbia.

While recent United States Supreme Court decisions have signalled substantial retreat from the concern for prisoners evidenced by that Court in the 1970s, the doctrinal development of parity of treatment seems relatively secure. Although the Court is likely to defer to prison officials’ claims on security, many of the gross disparities between women and men are difficult to justify on security grounds. For example, if men can learn trades and work in prison industries, why not women? Further, not all of the litigation is based on federal constitutional guarantees: in some instances, lawsuits founded in state constitutional provisions and statutes have helped to provide better treatment for women prisoners.

But even if parity of treatment can survive the indifference (or hostility) of some members of the United States Supreme Court to prisoners’ rights, parity of treatment does not solve all of the issues faced by women prisoners. A first problem is one common to all equal protection claims: the claim is based upon comparison between two groups. Equality can be achieved either by bringing one group up to the other or by reducing the benefits of the group that was “better off.” In the prison context, this ratchet aspect of equal protection is particularly painful. No one claims that men prisoners have it “good” in prison: all the arguments are about degrees of deprivation. A second difficulty with parity is that the concept is tied to resources. As overcrowding increases and interest in rehabilitation diminishes, many vocational and educational programs are reduced. If programs provided by men set the standard and those programs are ended because of budget cuts, parity is achieved by providing nothing for women or men.

Moreover, the problems of parity are not limited to the ratchet effect and scarce resources. A third difficulty is that parity assumes that what is provided to

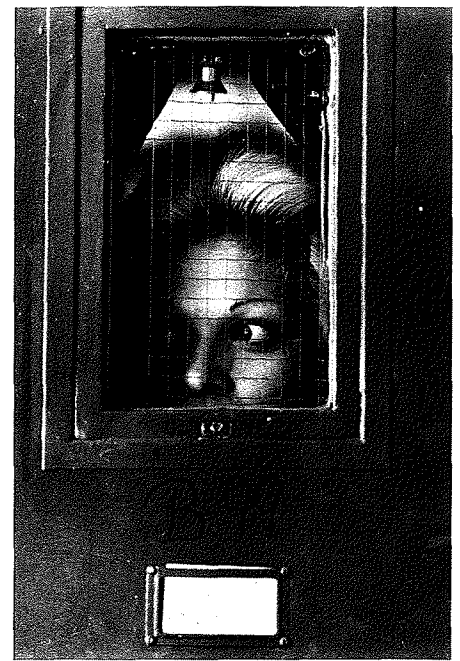


Photo by Judy Griesedieck, San Jose Mercury News

men is sufficient to set the standard for what ought to be provided to women. Here—as in other areas in which feminists have raised concern—the male model may be a useful way to begin a conversation. “Treat us like them” helps to obtain attention to the failure to treat women fairly. But equal treatment need not be translated into treatment “like them”—like men. Women have some needs that differ from those of men. In one of the opinions issued in the *Canterino* case, the trial judge noted this problem in the context of legal services. The judge concluded that, because of women’s history of not using law libraries, the right of access to courts for women demanded different services than those provided for men prisoners. Another easy example is health; medical care based on the needs of men fail to provide adequate care for women. Further, unlike men prisoners, the majority of women who enter prison are responsible for children. While cultural developments may someday bring us to a world in which women and men share equally in parenting, today women are primarily responsible for children. Parity of treatment does not help those who are mothers and prisoners.

Claims of equal treatment have special poignancy in this culture. We should celebrate the information developed over the past 15 years about women in prison and the strides made in articulating legal protection for women prisoners. As in any other area of litigation or statutory regulation, we must acknowledge, with impatience, the slowness and the limited implementation of the principles developed. And we must also remember that equal treatment should not, simplistically, be translated to mean: fair treatment of prisoners is the treatment accorded, historically, to men. ■

Medical Care: Past and Future

Nancy Dubler

The label "prison doc" has historically and accurately been a term of opprobrium. For decades the detritus of the medical profession with few exceptions practiced on persons despised by society and condemned by that society to punishment. Whereas it is difficult to measure and evaluate the emotional and psychological pain of imprisonment, it is relatively easy to assess the physical signs of unaddressed trauma and the results of neglected medical needs. When the "hands-off" doctrine fell, lack of adequate medical care was one of the first areas of prison life to receive scrutiny.

The reasons for this examination were many. First, instances of inexcusable care were so shocking: a terribly sick inmate found dead with a dry intravenous line, eaten by maggots; surgery performed by inmates; a ten hour drive to reach emergency care. Second, because the deprivations of care were so clear, the distance from any decent and justifiable standard of medical practice was readily apparent. Third, although access to health care has never been a legal right in this country, health care has long been recognized as a good distinguishable from those commodities and services which are exclusively subject to and regulated by a free market economy—in sum, health care is different.

Legal Developments

In the early 1970s a range of cases in the federal courts began to expose the terrible medical neglect amounting to the abuse of prisoners. The struggle in these cases centered not on proof of mistreatment but concerned the development of a legal standard which could permit federal courts to differentiate between constitutionally prohibited deprivations of care and charges of medical negligence which are clearly reserved to the jurisdiction of the state courts. Early cases suggested therefore that if "some" care had been provided it would preclude the finding of constitutional inadequacy—a very minimal standard; other cases suggested that "reasonable" care was necessary to acquit institutional responsibility. Almost all of these cases harkened back to the Eighth Amendment. It was argued that to put persons in prison, where they could neither gain access to nor provide for their own care, and not to provide that care, had

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in the past and must in the future, result in precisely the kind of pain, suffering, anguish and humiliation which the Eighth Amendment was designed to prohibit. The deprivation of medical care, it was argued, produced precisely the cruel and unusual punishment precluded by the Constitution.

It is interesting to note, in an era in which the "intent" of the framers of the Constitution has suddenly become important and relevant to legal interpretation, that the jurisprudence of the Eighth Amendment had developed according to converse principles. Cases had held explicitly that the Eighth Amendment does not apply only to those instances of cruel and unusual punishment in existence in the late Eighteenth Century but that the aegis of the amendment changes with contemporary standards of decency and dignity. Thus the amendment may prohibit punishments which seem disproportionate and excessive and those which offend a more recently developed moral norm. Whereas the provision of medical care was of scant import in the 1780s when physicians could diagnose and comfort but could rarely intervene without extraordinary pain and distress, it was a most different matter in the 1970s when medicine could often bring alleviation of suffering, disease, and the accompanying pain. The provision of medical care could not have been argued to be morally mandatory when its benefits were so uncertain, but in an age of successful medical technologies and interventions, the radical disjunction of practice within and outside of the walls was clearly unacceptable.

In 1976, in the case of *Estelle v. Gamble*, 97 S. Ct. 285, 290, 429 U.S. 97, 104-105 (1976) the Supreme Court in recognition of the specialness of medicine and in light of the jurisprudence of the Eighth Amendment held that:

Deliberate indifference to the serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with treatment once prescribed.

This standard, criticized by many at the time as insufficiently protective, has proved over the last decade to be remarkably flexible as an instrument for bringing direct change in the quantity and quality of prison and jail health ser-

vices. For example, one Federal Circuit held that a finding of "deliberate indifference" was not dependent on intent to harm but could be proved by a showing of systemic deficiencies, e.g. a set of infirmary cells for sick women, locked at the end of a locked corridor beyond which a nurse sat, with no method for communicating between the cell and the nurse. *Todaro v. Ward*, 565 F.2d 48 (2d Cir. 1977). Other cases addressed more broadly the complex issues of constitutionally adequate access to care in a locked community fashioning protections for mental health care, dental care, special care for women and children, and staffing issues. Thus the various Federal circuits have continued to redefine the contours of the "deliberate indifference" standard.

Emerging Health Standards

At the same time however other forces were at work helping to change the practice of the "prison doc." In 1972 the AMA had established a small project designed at first to survey the medical care in the nation's jails. The findings were shocking. Out of over 1,500 rural and urban jails who answered the survey questionnaire less than 50% had any regular sick call, and 6% had no medical service available, not even a first aid kit. Despite the fact that jail inmates have particular problems, i.e. they are likely to have experienced recent traumatic injury, and are subject to high rates of drug and alcohol withdrawal, most jails had no medical screening on premises and no arrangements to permit prompt and effective medical intervention in an emergency.

The AMA survey led in the next few years to the establishment of a project to use the questionnaire results and subsequent field surveys to draft a set of minimum standards for health care in jails. Not surprisingly as this was a physician-centered project, the role of the physician was central to the organization, management and supervision of the jail health service. These standards were published in 1978.

In 1976, the American Public Health Association published the very first set of National Standards on Health Services in Correctional Institutions. This was a ground-breaking enterprise which garnered the little experience then available in correctional health care (mainly the perceptions of a few physicians who had become involved in care in San Francisco, New York, and Boston), combined this with the extensive knowledge about public health principles and environmental requirements, and set standards which were justified by sound public health and medical principles.

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WHERE ARE THEY NOW?

Norm Townsend, 1975. Deputy State Public Defender, Steamboat Springs, CO.

Howard Friedman, 1975-76. Partner, Avery & Friedman, a small litigation firm in Boston, MA focusing on police misconduct litigation, criminal defense, personal injury actions and civil rights cases on behalf of prisoners.

Ira Burnim, 1976. Legal Director, Children's Defense Fund, Washington, D.C.

Michele Ann Zavos, 1977-78. Dolkart & Zavos, Washington, D.C.. Practice in areas of employment, sexual harassment, real estate, probate, military, small business and domestic relations.

Dale Drozd, 1978. Partner, Blackman & Drozd, in Sacramento, CA. which limits its practice to the defense of criminal cases at the trial and appellate levels in both the State and Federal Courts.

Rick Seligman, 1979. Sole practitioner in Washington, D.C., handling civil rights litigation.

Serena Stier, 1979. Adjunct Professor at the College of Law and School of Social Work at the University of Iowa. Ms. Stier was a psychologist before attending law school and has been able to put her psychology and law to use by developing a program in family mediation; she also teaches a general survey course on alternative dispute resolution.

Alexandra Cury, 1979. Criminal defense attorney, Alternate Defense Counsel, Los Angeles, CA.

Sandra Levick, 1979-80/1980-81. Sole practitioner in Washington, D.C. Represents defendants in criminal trial and appellate matters and plaintiffs in police misconduct and civil rights litigation.

Larry Allen Nathans, 1980. Assistant Federal Public Defender, District of Maryland.

Max W. Beck, 1980. Assistant District Attorney, Middlesex County, MA.

Art Meneses, 1981. Senior associate with Parkinson, Wolf, Lazar & Leo in Los Angeles, CA.; insurance litigation.

Leslie Hiebert, 1982. Supervising Attorney, Alaska Public Defender Agency in Kotzebue, AK.

Rob Friedman, 1982. Attorney, West Palm Beach Public Defender, West Palm Beach, FL., handling felony trials.

Santha Sonenberg, 1982. Public Defender, District of Columbia Public Defender Service.

Kirk Abbott, 1982. Public Defender, New Hampshire Public Defender.

Urvasi Vaid, 1982. Public Information Director, National Gay and Lesbian Task Force, Washington, D.C.

Barbara White, 1982. Public Defender, West Palm Beach Public Defender, West Palm Beach, FL.

Caroline Canning, 1983. Bankruptcy and insolvency law at Buchalter, Nemer, Fields & Younger, Los Angeles, CA.

Laurie Solomon, 1983. Attorney, Environmental Protection Agency Preparedness Staff (to prepare for and prevent chemical spills).

Johnathan Zucker, 1983. Sole practitioner in Washington, D.C., specializing in criminal defense.

Stephen Martin Kohn, 1983. Clinical Director, Government Accountability Project, Washington, D.C.

Rhonda Lipkin, 1983. Attorney, Maryland Legal Aid Bureau.

Donna Gomien, 1983. Visiting scholar at the Norwegian Human Rights Institute in Oslo, Norway.

Elizabeth (Liz) Rosenthal, 1984. Attorney, New Jersey Department of Personnel.

Linda Goldstein, 1984. Litigation associate, Kramer, Levin, Nessen, Kamin & Frankel, New York City.

Cynthia Jackson-Garrett, 1984. National Director, Law Students Civil Rights Research Council in New York City.

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The original AMA jail project evolved into the National Commission on Correctional Health Care, an umbrella organization with 29 sponsoring and participating national member organizations which continues to publish revised and improved standards for health care in jails and prisons and has an expanded jail and prison accreditation process. The American Public Health Association Standards were revised in 1986; they again pursue larger public health and environmental goals, while attempting to stipulate clear ethical guidelines for correctional health purposes.

In the decade since *Estelle v. Gamble*, a sense of professionalism has emerged among correctional health care providers. The ACHSA, the American Correctional Health Care Association was founded in the early 1980s and the *Journal of Prison and Jail Health* began at the same time. The National Commission emerged some few years later. Nonetheless the major gains in service delivery capability are the result of litigation. Despite a growing cadre of dedicated physicians, nurses and physician extenders, state legislatures and county governments almost never appropriate funds adequate to the task of caring for a population which is overwhelmingly poor, minority, medically underserved, and medically neglected. The incarcerated population is characterized by a high degree of unattended chronic medical conditions and a health status far less robust than that of a comparable age matched non-imprisoned cohort.

Private Health Care Providers

One interesting development in the last years has been the emergence of private for-profit correctional health care providers. These companies market their services as a complete package designed to provide the full range of service from the initial health screening through consultation. They also promise to provide constitutionally adequate care which will discourage or defeat legal challenge. Estimates vary, but most indicate a \$800 million market, unquestionably attractive to an entrepreneurial mentality.

Nonetheless it remains difficult in most areas to attract well-qualified medical staff. The setting and the subordinate position of medicine in a correctional institution are too alien to the usual assumptions and surroundings of medical practice. Salaries and working conditions are at odds with the images of quality medical care: civil service salaries are not competitive, and professional isolation looms large.

The Future of Correctional Health Care: AIDS

The future of correctional health care will be only more complex given the growing AIDS epidemic and the demographic characteristics of many incarcerated populations. AIDS is a disease spread by sexual contact, blood products and the sharing of dirty needles. It was first diagnosed in the male homosexual community and shortly thereafter in the intravenous drug abusing population and among transfusion recipients. It is now clear that it may be spread by heterosexual contact. AIDS is now invariably fatal. There are no precise statistics but experts assume that in many incarcerated populations well over the majority have IV drug experience and that a large proportion of these persons will test positive for the AIDS virus. No one yet knows how many of those who are seropositive will convert to AIDS. This disease however will define the future of correctional health services.

There is as yet no treatment which can cure AIDS and no vaccine which can protect the uninfected from disease. AIDS patients are feared by caregivers. Although the major routes of disease transmission are characterized by intimate behaviors, there is documented evidence of a minute chance of spread to health workers who have not taken proper precautions in handling blood and other body fluids. A previously undesirable and stigmatized population may now be seen as dangerous to health and other care and custody providers, despite the fact that proper precautions are a barrier to the casual spread of infection.

The stage is also set for new constitutional challenges. Even though no cure exists for AIDS, certain drugs have been proved effective in controlling the recurrence of the opportunistic infections which AIDS permits and thus in extending life. These drugs are expensive and many non-incarcerated persons are having difficulty obtaining them. There is no question, however, that they are effective treatment for many persons with AIDS. Will the non-provision of these drugs demonstrate "deliberate indifference" to a prisoner's health needs? It is hard to imagine that this will not be so.

It is also a growing suspicion that infection with the HIV virus produces many more subtle health status changes before full blown AIDS appears. Medications may prove effective in the future for many HIV infected persons who have not yet developed AIDS. A vast number of these persons are incarcerated. What will be their right to treatment? At what cost? Will the voting public and legislators permit greater access to life

extending treatment in prison than without? Will infected persons seek convictions in order to receive medical care and treatment? Will systems attempt to parole inmates in order to survive financially? Will providers be willing to serve this population? Will correctional systems segregate sero-positives and what

will be the result of that segregation? Will institutions screen for HIV infection, and how will that information be used, abused, guarded or shared? These are the imponderables which will define the future of health care in correctional institutions. ■

depictions of prison cruelties, and isolated reports on the more unproductive consequences of conventional jails and prisons.

Nevertheless, there are conventions in news that contribute substantially to the cycle of cruel and unproductive public policies in criminal justice.

One of these conventions is the generations-old practice of the over-reporting of crime and doing it without context. Crime and its causes are important public matters. In periods of increased crime it is important to report some individual crimes, some because they may have pragmatic importance to certain communities or locales, and some because they have obvious public impact, like assassinations and other crimes against significant public figures, or because they may reflect systemic problems in police and other criminal justice practices.

I believe that most reporting of crime in American newspapers and other media have a less respectable set of reasons.

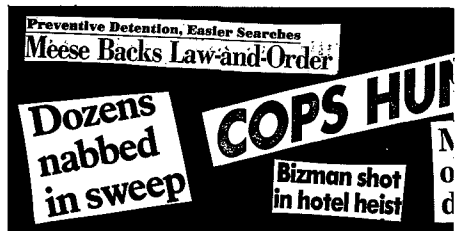
Media Treat Crimes As Isolated, Random Events

Ben H. Bagdikian

There is an amnesiac cycle in prison policies in which little or nothing seems to be remembered about the past, a loss of memory for which the news media share responsibility.

The media do not play the primary role. The dubious distinction goes to political leadership that too often governs these matters as though there were nothing to learn from the past and behaves as though modern criminal justice began with the last grisly crime reported by the media.

Mister Dooley said that the Supreme Court follows the election returns. So do presidents, governors and legislators. When it comes to criminal justice policies, the election returns are heavily influenced by the pattern of headlines and televised news of crime. A distressing percentage of news items treat crimes and prison problems as isolated, random events with neither underlying cause nor discernible remedy beyond endless incarceration.



The amnesiac pattern goes like this: crime becomes a heated public issue, the safest political approach is to press for longer sentences, prisons become overcrowded, there are violent prison rebellions, new prisons must be built to handle the longer sentences, and politicians get elected by promising precisely that. Once in office, politicians discover that

Ben H. Bagdikian is Dean of the Graduate School of Journalism at the University of California, Berkeley. He is the former assistant managing editor for national news at the Washington Post; among the books he has written about prisons are *The Shame of the Prisons* (1972) and *Caged* (1976).

Among all categories of news, crime is one of the cheapest, easiest to gather, and safest to publish.

the promised rate of imprisonment will bankrupt the government, so in the time-honored ritual the impasse is finessed by appointing a commission. In due course, the commission reports that crime has certain underlying causes that must be dealt with in any honest analysis of criminality and that hard imprisonment is a highly limited remedy. Furthermore, a range of alternatives that have



been adopted in the past that are both less expensive and more effective. Some of these alternatives are adopted with quietude—the voters may remember election promises of harshness—but because these alternatives are less dramatic than electrocution and solitary confinement, and because they, like everything else, are never 100% effective, a parolee or diversionary defendant commits a crime, the news media headline the fact and the amnesiac cycle begins again.

In a society blessed by schools, universities, libraries, archives and other institutions of social recall, the subject of what to do about crime and imprisonment seems to escape the ability to remember what has been learned many times over. Among the causes for this amnesia is the behavior of the news media.

The news is not totally irrational or simple-minded about crime and punishment. Periodically, there are articles suggesting alternatives to widespread imprisonment, occasional televised



Crime is dramatic and violent, so it is a reliable attention-getter. It meets a largely unthinking convention in too much news that exaggerates all violence.

Among all categories of news, crime is one of the cheapest, easiest to gather, and safest to publish. It is gathered by the police, made available in a central place, and unless handled with gross incompetence is libel-free even though it deals with intimate and damaging events in personal lives. I have been a police reporter and an editor, so I speak as past sinner and confessor: if news organizations had to track down the commission of each crime, gather the details with their own paid reporters, and verify the events sufficiently to avoid law suits, I can guarantee that the incidence of reported crime in the American news media would plummet.

Furthermore, crime is almost always presented as a series of individual acts and in such a way that the phenomenon of crime seems to have no discernible cause beyond random evil. A phenomenon in society that seems to have no known causes is especially frightening. Throughout history, mysterious plagues have always produced hysteria and self-destructive reactions. Crime without a

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NATIONAL PRISON PROJECT

WHERE ARE THEY NOW?

Margaret Wood Hassan, 1984. Litigation associate at Palmer & Dodge, Boston, MA, specializing in education law.

Heidi Reavis, 1984. Ms. Reavis is spending her first year of law practice outside of the U.S., at five different law firms in Rotterdam, Sydney, Taipei, Stockholm and Paris.

Rose Musonye, 1986. Sole practitioner, immigration law. Independent contractor, Arnold & Porter, Washington, D.C.

Michele Deitch, 1984. Having finished a clerkship for Hon. R. Lanier Anderson, III of the Eleventh Circuit, Ms. Deitch is now working for Vince Nathan, Special Master of the Texas prison system, in Houston.

SallyAnne Campbell, 1985. Fellowship, Public Advocates, Inc. in San Francisco, focusing on AIDS prisoners at CMF-Vacaville.

Reva Brown, 1985. Associate, property law firm, Washington, D.C.

Mark Kluger, 1985. Attorney, Clapp & Eisenberg, Newark, New Jersey.

Jody Hart Levine, 1985. Worked most recently as legislative assistant for National Committee Against Repressive Legislation.

Bonnie Barnes, 1985. Attorney at Sessions, Keiner & Dumont, a small law office in Middlebury, VT, which handles the public defender work for the county.

Caroline Smith, 1984-85. Legislative counsel, Massachusetts Division of Insurance.

Marvin Hamilton III, 1986. Judicial clerkship with the Criminal Court of Appeals, Anchorage, AK.

John Fitzpatrick, 1986. Law clerk for Justices Clifford and Scolnik of the Maine Supreme Judicial Court.

Dan Huck, 1986. Assistant Attorney General, Antitrust Division, West Virginia. Also helping to draft national antitrust policy under Charles G. Brown, Attorney General of West Virginia and Chairman of the Antitrust Division of NAGG (Nat'l. Association of Attorneys General).

Delbert Bauldock, Jr., 1986. Staff attorney, New Jersey Department of the Public Advocate, Mental Health Division.

Michelle Lanchester, 1986. Ms. Lanchester is a private attorney in a general practice firm in Maryland.

Felipe Restrepo, 1986-87. Public Defender in Philadelphia, PA.

Laurie Whitaker, 1987. Attorney, U.S. Patent Office.

Louis Siegel, 1987. Civil rights practice and prison monitorship with Nathans & Roberts, Toledo, OH.

George Brooks, 1979. Law clerk/legal assistant at Beckett, Cromwell & Meyers in Bethesda, MD. Awaiting a decision on his admission to the Bar from the District of Columbia following a June hearing before the Court of Appeals. The District is debating what standard to apply to the admission of former prisoners.

Cary LaCheen, 1987. Cary is now in her third year at New York University Law School.

Mary Rowland, 1987. Mary is a third year law student at the University of Chicago Law School.

Robert Wilkins, 1987. Robert is now a second year student at Harvard University Law School.

Elizabeth Rolando, 1987. Elizabeth is now in her third year at Harvard University Law School.

Gerry Glynn, 1987. Gerry Glynn, a second year law student at American University, will be interning at the NPP through May, 1988.

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context of known epidemiology has the same effect as the medieval black plague—it creates mystical incantations, hysterical search for scapegoats (in this case, secular humanism, lack of patriotism, modern education, liberal social programs, race, chromosomes, etc.).

The sources of individual crimes cannot be easily analyzed, certainly not in the news. But the sources of crime as a social phenomenon are not mysterious. There are clear factors of age, of educational, economic, and familial deprivation in the case of most offenders. Culturally there are the factors of the place in our society of violence, materialism, extreme individualism, and the veneration of weapons.

Crimes by parolees or probationers typically are treated without context. When a parolee is arrested, it is treated as a definitive demonstration of the failure of the policy of ever releasing a prisoner. It could be treated just as reasonably as a demonstration of the failure of imprisonment.

Neither in simple politics of crime nor in the news is there much emphasis on these underlying causes of the incidence of crime. These have been identified with irrefutable, statistical reliability, but news treatment lacks memory of these, and this contributes to the political exploitation and hysteria.

All of these factors are intensified by the current political atmosphere in the country. Mister Dooley said that the Supreme Court reads the election returns. So do editors and publishers. In a period of Rambo and accompanying political machismo, of social insensitivity, and contempt for public institutions, the news establishment more than ever fears being labeled bleeding hearts and "reformers."

It is a discouraging picture, but there may be long-term hope. Journalists

are increasingly well educated and sophisticated, though when it comes to crime there are only feeble attempts to place individual crimes in a reasonable social context. But related problems of distorted values in the news have changed over time with serious discussions with top journalistic leaders, and with positive results that are often overlooked, even by the media themselves.

For example, it was not so long ago (if a generation ago is considered not "long" as reforms go) that news in the United States routinely reported names of juveniles in crime, names of rape victims (unless of middle class social status), fictionalized and otherwise committed unfair and cruel practices in dealing with crime and criminals that would be unthinkable today even in the most unthinking publications. It was a favorite device for the police to force a suspect to pose as though committing the crime, with the resulting photograph published as a recreation and the suspect, if he had any record whatever, described as having a "long criminal record" and be referred to in the news routinely as a "hoodlum." Reports from prisons were even more the creations of prison administrators than they are today.

A generation ago the Reardon Commission of judicial and editorial leaders articulated problems of unfairness and inaccuracies in conventions of pre-trial publicity. It has had a profound effect, though one enhanced by libel and invasion of privacy civil suits. It is not unrealistic to hope that a truly influential similar group, not politicized by partisan and ideological membership, could do the same for news treatment of prison issues. The time probably is ripe, since the country seems to be in that part of the amnesiac cycle in which it is realizing that it cannot afford the kind of imprisonment that was a standard political boast ten years ago. ■



SOVE NEY

Exploring the Connections Between Feminism and Justice

M. Kay Harris

Periodically, if we are lucky, we receive "a whack on the side of the head,"¹ something that stimulates a new way of thinking and opens mental locks. Reviewing Graeme Newman's book, *Just and Painful: a Case for the Corporal Punishment of Criminals*,² served to jolt my thinking about the punishment system. Newman argues that punishment should be made more painful and that its painful nature should be made more evident. Although he thinks harsh imprisonment should be retained to punish true criminals, Newman advocates corporal punishment, primarily in the form of electric shocks, as the standard non-custodial disposition.³

Although the entire book is jarring, I was particularly struck by Newman's brief section on the justification for punishment. Newman describes punishment as a "need," a need to settle a score that is deeply imbedded in the meaning of justice. As I read the examples he gave, it struck me that Newman's model of justice is a "macho" model. It is a view of justice drawn from the barroom, the old west cowboy movie, and the lynch mob. If someone threatens or injures you, you "call him out," you "make him pay," you run him out of town, shoot him, or string him up from the nearest tree. But Newman's view is not the only view. Reading *Just and Painful* pushed me to begin thinking about what a vision of justice based on feminist values might look like.

What is Feminism?

Feminism should be seen not merely as a prescription for granting rights to women, but as a far broader vision. Feminism is about much more than equal rights in the legal sense, since current legal definitions of equality tend to elevate form over substance and to be too restricted in focus. Feminists are

M. Kay Harris is the former Washington director of the National Council on Crime and Delinquency. She is an associate professor of Criminal Justice at Temple University in Philadelphia.

¹I am borrowing this term from Roger von Oech, *A Whack on the Side of the Head: How to Unlock Your Mind for Innovation*, 1983.

²Graeme, Newman, *Just and Painful: A Case for the Corporal Punishment of Criminals*, 1983.

³For a more complete summary of Newman's proposals, see my review of his book in *Journal of Criminal Law and Criminology*, v. 785, no. 3, Fall 1984, at 1030-1035.

concerned not simply with equal opportunities or equal entitlements within existing social structures, but with creating a different set of structures and relations that are not only nonsexist but also are nonracist and economically just.

Feminism offers, and is, a consciousness, a way of looking at the world, a set of values, beliefs, and experiences. Among the key tenets that lie at the core of feminist morality are that all people have equal value as human beings, that harmony and felicity are more important than power and possession, and that the personal is political.

Feminist insistence on equality in sexual, racial, economic, and all other types of relations stem from recognition that all humans are equally tied to the human condition, equally deserving of respect for their personhood, and equally worthy of survival and of access to those things that make life worth living. This is not to argue that all people are identical. Indeed, feminism places great emphasis on the value of difference and diversity. Different people should receive not identical treatment, but identical consideration. Feminists believe that it is possible to appreciate difference and individuality while also appreciating fundamental commonality.

In the feminist view, felicity and harmony are regarded as the highest values. Viewing all people as part of a network on whose continuation we all depend, feminists stress the themes of caring, sharing, nurturing, and loving. Recognition of shared humanity and of the sanctity and vulnerability of human life nourish a commitment to actively resist war, rape, and other life-destructive forces and to refuse to cooperate with injustice and with institutions that perpetuate racial prejudice, sexist privilege, and unfair distribution of wealth, resources, and opportunity.

Feminists believe that the political is the personal. This means that core values must be lived and acted upon in both public and private arenas, not simply regarded as abstract principles to be honored only when it seems convenient to do so. Thus, feminists reject the tendency to offer one set of values to guide interactions in the private and personal realms and another set of values to govern interactions in the public worlds of politics and power. Rather, feminists believe that empathy and compassion and the loving, healing, person-oriented values that now are seen as having value

mainly in the private, personal realms must come to be valued as highly as the skills and behaviors that advance people to the rank of lieutenant colonel, corporate president, or college professor.

Feminists believe that it is impossible to realize humane goals and create humane structures in a society that values power above all else.⁴ Where the central goal is power, power conceived as power-over—power-over people, institutions, nature, things,—people and things are not viewed as ends in themselves, but as instruments for the furtherance of power.

Where power is seen as paramount, hierarchical institutions and structures are established both to clarify power rankings and to maintain them. The resulting stratifications create levels of superiority and inferiority, which carry differential status, legitimacy, and access to resources and other benefits. Such division and exclusions engender resentment and revolt in various forms, which then are used to justify greater control.

The Criminal Justice Dilemma

The criminal justice system provides a clear look at the values against which feminists have been fighting. Here, there is no attempt to disguise the fact that the goal and purpose of the system is power/control. Although the stated goal is control of crime and criminals, the true function of the criminal justice system is social control generally. Law is an embodiment of power arrangements; it specifies a set of norms to be followed—an order—and also provides the basis for securing that order: coercive force. Coercive force is seen as the ultimate and the most effective mechanism for social defense. And once the order to be protected and preserved is in place, there is little concern with whether the social system to be defended is just or serves human ends.

We are caught in a truly vicious circle. Existing structures, institutions, and values create the problems that we then turn around and ask them to solve, or rather control, using the very same structures, forms, and values, which in turn lead to more problems and greater demand for control. We all want to be protected from those who would violate our houses, our persons, and our general welfare and safety, but the protections we are offered tend to reinforce the divisions and distorted relations in society and exacerbate the conditions that create much of the need for such protections.

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⁴Marilyn French, *Beyond Power: On Women, Men and Morals*, 1985.

NATIONAL PRISON PROJECT

Here is a listing of NPP Staff, past and present:

Alvin J. Bronstein*
 Adjoa A. Aiyetoro*
 Edward I. Koren*
 Jan Elvin*
 Alexa P. Freeman*
 Jere Krakoff*
 Victoria Inman*
 Lynthia Gibson*
 Lorna Tucker*
 Beryl Jones*
 Julia Cade*
 Betsy Bernat*
 Melvin Gibbons*
 Elizabeth Alexander*
 Claudia Wright*
 Mark Lopez*
 Mary McClymont
 Urvashi Vaid
 Steven Ney
 Nkechi Taifa-Caldwell
 Daniel E. Manville
 Sharon Goretsky
 Salaama Wadud
 Ursula Brown
 Ralph Knowles
 Matthew Myers
 Dwight Duran
 Jim Gaylord
 Shawn Moore
 Audrey Hair
 Peggy Weisenberg
 Arpiar Saunders
 Nancy Crisman

Janice Lothers
 Michael Millemann
 Irving Joyner
 Caryl Pines
 Norma Wigutoff
 William Patterson Nix
 Lois E. Adams
 Alaire B. Reiffel
 Thomas S. Howard
 Julie Bronstein
 Lanier Ramer
 Sarah Bronstein
 Sharon K. Coleman
 Isaac Lewis White
 Carol Hinds Horwitz
 Bonnie Milstein
 Rudolph Clemons
 Margaret O'Reilly
 Julie Huff
 Constance Potter
 Esau Prentiss
 Jill Raymond
 Jimmy Potts
 Roberta Messalle
 Janet Edmonds
 Rosa Greene
 Deborah Zak Mettger
 Carole Brooks
 Marjorie Hawkins
 Ron Phillips
 Nan Aron
 Louis Holloway
 Reita Pendry
 Jane (Parker) Whittington
 Mary Giesen

*present staff

Listed below are former NPP law interns who either did not respond to our survey or whom we were unable to locate.

Tamica (Mikki) Graves, 1986.
 Katie Baird, 1985.
 Ted Janger, 1985.
 Kym Cooper, 1985.
 Michelle Varrichio, 1984.*
 Jim Emineth, 1984.
 Maura Browne, 1983.
 Wayne Drummond, 1983.
 Kathleen Bowman, 1983.
 Sarah Chambers, 1983.
 Stephanie Brown, 1982.
 Sukari Hardnett, 1982.
 Greg McGillivray, 1981.
 Kelly Banach, 1981.
 Michelle Osborne, 1981.
 George Strafer, 1980.
 Jocelyn Jones, 1980.
 M. Watson, 1980.
 Julia Bingham, 1980.
 M. Bookman, 1980.
 Elizabeth Selleck, 1980.
 Richard Arvedon, 1979.
 Dan Gold, 1979.
 Kathy Grasso, 1979.
 Carol A. Joffee, 1978.
 Gloria Gelman, 1978.

M. Bennett, 1978.
 James Williamson, 1978.
 J. Comack, 1978.
 Wendy Conway, 1978.
 David Saevitz, 1978.
 Ann Marcus, 1977.
 Mary Elcano, 1977.
 Dale Saunders, 1977.
 L. Elstein, 1977.
 Carole Deitchman, 1977.
 J. Neuman, 1977.
 S. Resnick, 1977.
 Janis Levant, 1977.
 S. Forman, 1977.
 S. Page, 1977.
 S. Eastman, 1977.
 S. Hughes, 1977.
 Roxanne Grossman, 1975.
 Stephen Bricker, 1975.
 Thomas Foltz, 1975.
 Charles Barrett, 1975.
 Richard Lennon, 1975.
 Melanie Poster, 1975.
 Kenneth Ross, 1975.
 George E. Tuttle, 1974.
 Kathleen Mack, 1974.
 Michael Gordon Magnus, 1974.
 Irene Holzer Miels, 1974.
 Jules Charles Horwitz, 1974.
 Susan Sherer, 1973.
 Janet Zoglin, 1973.
 Barbara Joan Becker, 1973.
 Andrew Lawrence Lipps, 1973.

Clearly, the standard approach in recent years has been to seek more control—more prisons, more time in confinement for more people, more surveillance and restriction of those not confined. But as we acquiesce in accepting continuing escalation of such controls, we reduce correspondingly our efforts and prospects for the kind of safety that cannot be achieved through force and control.

It is important to bear in mind that penal sanctions, like crimes, are intended harms. "The violence, punishing acts of state . . . are of the same genre as the violent acts of individuals. In each instance these acts reflect an attempt to monopolize human interaction, to control another person as if he or she were a commodity."⁵ Those who set themselves up as beyond reproach define "the criminal" as less than fully human. Without such objectification, the routine practice of calculated pain infliction, degradation, domination, banishment, and even execution could not be tolerated.

The same dilemma arises whenever we touch issues related to self-defense, whether in an immediate personal sense (as when confronted by a would-be rapist or other attacker), in a penal policy sense (as when deciding how to deal with known assaulters), or in even broader terms (as when confronted by powers and structures that seem bound to destroy us). How can we respond to people who inflict injury and hardship on others without employing the same script and the same means that they do? How can we respond to immediate needs for safety without elevating the need for protection over the need to recreate the morality, relations, and conception of justice in our society?

Emerging Guides for the Future

Although recognition of the values central to a feminist orientation does not automatically yield a specific formula for better responding to and thinking about crime and other conflict, feminist values suggest some general guides for beginning to address what criminal justice ought to look like in the future and for how we should proceed in the short-term. A key standard to help in making choices is to ask: what kinds of behavior and responses will achieve the goal of the greatest possible harmony? Thus, the task is not to discover how to eradicate crime, but to discover how to behave as befits our values and desire for harmony.

A feminist orientation demands greater recognition of the role and re-

sponsibility of society, not just the individual, in development of conflict. This suggests that individuals, groups, and societies need to accept greater responsibility for preventing and reducing those conditions, values, and structures that produce and support violence and strife. Removing the idea of power from its central position is key here, and requires continually challenging actions, practices, and assumptions that glorify power, control, and domination, as well as developing more felicitous alternatives.

Acceptance of human equality and the interdependence of all people requires rejection of several common current tendencies. We need to struggle against the tendency toward objectification, of talking and thinking about "crime" and "criminals" as if they were distinct entities in themselves. We need to reject the idea that those who cause injury or harm to others should suffer severance of the common bonds of respect and concern that bind members of a community. We should relinquish the notion that it is acceptable to try to "get rid" of another person, whether through execution, banishment, or caging away with other persons about whom we do not care. We should no longer pretend that conflicts can be resolved by the pounding of a gavel or the locking of a cell door.

Commitment to the principle of equality means striving for interactions that are participatory, democratic, cooperative, and inclusive, characteristics that are incompatible with hierarchy, stratification, and centralized decision-making. Thus, rules, which often are substituted for sensitive, respectful engagement of persons in cooperative problem-solving, should not be regarded as sacrosanct. And because people learn from the nature of the processes in which they participate, as well as from the objectives of those processes, we should give greater attention to what the process teaches and how it is experienced.

It may be difficult to imagine how some conflicts could be resolved amicably. Especially while we are in the process of transition, we have to contend with all of the effects that our present structures, values, and stratifications have had on people. Thus, much as I would like, I do not think we will soon reach a stage in which we can expect never to feel the need to resort to exercising control over another person. But I do think we can greatly reduce our current reliance on repressive measures and that we should aim to move continually in the direction of imposing fewer coercive restraints on other people.

While we are in the transition process, and where we continue to feel that it is necessary to exercise power-over

⁵Dennis Sullivan, *The Mask of Love: Corrections in America—Toward a Mutual Aid Alternative*, 1980 at 6.

other people, we should honor more completely certain familiar principles that are often stated but seldom fully realized. Resort to restriction of liberty, whether of movement, of association, or of other personal choices, should be clearly recognized as an evil. Whenever it is argued that it is a necessary evil, there should be a strong, non-routine burden of establishing such necessity. And where it is accepted that some restriction is demonstrably necessary, every effort should be made to utilize the least drastic means that will satisfy the need established. Thus, we should approach restriction and control of others with trepidation, restraint, caution, and care.

In addition, we should recognize that the more we restrict an individual's chances and choices, the greater is the responsibility we assume for protecting that person and preserving his or her personhood. We should no longer accept the routine deprivations of privacy, healthful surroundings, contacts, and opportunities to exercise choice and preference that we have come to treat as standard concomitants of restriction of liberty. Such deprivations are not only unnecessary but also offensive to our values and destructive to all involved.

These principles make it apparent that we should abandon imprisonment, at least in anything like the way we have come to accept the meaning of that word. There is no excuse for not only continuing to utilize the dungeons of the past, but also replicating the assumptions, ideology, and values that created them in their newer, shinier, more "modern" brethren now being constructed on astonishing scale.

How should we deal with people who demonstrate that they cannot live peacefully among us, at least for a time? Although the answers to that question are not entirely clear, feminist values would suggest that we should move toward conceiving restriction of liberty as having less to do with buildings, structures, and walls and more to do with human contacts and relations. Few if any creatures are dangerous to all other creatures at all times, especially not to those with whom they are directly and closely connected on an ongoing basis. A range of compassionate, constructive, and caring arrangements need to be created. And we should not allow the most difficult cases to stand in the way of more rapidly evolving better approaches for the rest.

It may be tempting to conclude that no efforts in the directions I suggest will be worthwhile, that nothing can be done until everything can be done, that no one can confront crime humanely until everyone is willing to do so. But glor-

ification of control and the power ethic have failed to serve human happiness. That course has yielded only division, alienation, enmity, bitterness, and despair. To have a harmonious society, we must act in ways designed to increase harmony, not to further fragment, repress, and control. We should try to act as we believe would be the best way to act—

not just in the future, but in the present. ■

For further elaboration, see M. Kay Harris, "Moving Into the New Millennium," in *The Prison Journal*, v. LXVII, No. 2 (Fall/Winter 1987), [forthcoming]. This is a special issue in recognition of the two hundredth anniversary of the Pennsylvania Prison Society on "The Future of Corrections."

Another Day, Another Dead Roach in the Mail

Why, when we gripe about the office cockroaches, Al merely waves us aside. "I put those roaches there," he claims. "A measure of sympathy for our clients."

Betsy Bernat

When I was little, I wanted to be something glamorous when I grew up. Like a stewardess. Or a queen. Last week, I typed an entire brief about toilets—numbers of, access to, hours of use. A queen? Ha! I work at the National Prison Project.

I remember interviewing for this job. Most prospective employers ask about office skills and career goals. Al Bronstein asked me how I felt about the death penalty. Was that a hint of things to come?

You bet. I understand he asked other applicants if they had any relatives in prison, and if they did, his eyes lit up encouragingly.

Let me tell you about this place. It's not your average law firm. I know; I've been here four years. For starters, the attorneys are a breed apart. Brilliant, yes, but definitely a breed apart.

Who else goes to Hawaii and spends their time visiting the state prison? We've had attorneys come back from Hawaii with no tan at all and it wasn't because it rained the whole time they were there.

And for all the times our lawyers have gone to Santa Fe, they have never once visited a pueblo or gone on the Roadrunner Tour Tram. They've been on tours, sure, but only through the New Mexico State Penitentiary with a couple of experts and local counsel in tow.

What a way to make a living. It makes you wonder, who are these people who have voluntarily entered such a gruesome field? They could make a lot of money and never have to eat a meal in South Hill, Virginia again. What in the world motivates them?

Betsy Bernat has worked at the National Prison Project for four and a half years as a secretary, an editorial assistant on the *JOURNAL* and more recently as one of Mr. Bronstein's assistants.

Is it the hallway art in the NPP office? Blown-up photos of grungy show-ers we have known? Or is it the mail we receive? Ready-made exhibits like dead mice and burnt toast?

Are they simply fanatics? When they play Monopoly, are they glad to be sent to jail?

I shouldn't knock it; you can really learn a lot here. Take sanitation standards. I've typed enough expert reports to know the dangers of mold, grime and mildew. I'm ready to file a lawsuit against our office kitchen. The inside of the toaster oven alone could bring in enough attorneys' fees to last me at least a couple of months.

I've also learned where all the prisons are. If there's ever a game show called "Name That Slammer", I'd clean up. "P.O. Box 51, Comstock, NY" the host would say, giving the clue. I'd smack my buzzer: "Great Meadow Correctional Facility, New York"! I've learned how to make a diet loaf, thanks to several of our behavior modification cases. When I make it at home, I simply put a loaf pan on the floor, tilt my refrigerator until all of its contents have spilled into it and then I bake it 'til it's hard as a rock.

I remember last year we got a call from a woman who wanted to recite what she called a "litany of horrors" about a county jail. The phrase struck a chord. A litany of horrors? I could recite a few myself. Like I said, you learn a lot on this job. Sometimes I wish I didn't know as much as I do.

I know exactly what motivates these lawyers. I see the answer to that question every day, in every prisoner letter and every call from every mother concerned about her son. If the Prison Project lawyers are a breed apart, and uncommonly committed, maybe it's because they feel that they don't have any other choice. ■

NATIONAL PRISON PROJECT

INSIDE...

This year marks the fifteenth anniversary of the founding of the National Prison Project. In commemoration of that beginning, we offer this special 36-page issue of the *JOURNAL* which brings together the thinking of a number of noted authorities on corrections. The issue includes:

The Alabama Case: Reflections of an expert witness and a young lawyer about the effect this first big prison conditions case in 1975 had on them.

Special Masters: Special Masters Allen Breed and Vince Nathan debate the role of the Master in prison litigation.

Expert Witnesses: The evolution of the use of expert witnesses in prison litigation is explored.

The Beginnings: The founders and former staff and law student interns of the Prison Project look back

on their experiences, both personal and professional.

And: The media portrayal of crime, the impact of the uprising at Attica, and the application of feminist values to corrections are some of the other captivating topics discussed by our distinguished guest authors.

We hope it proves to be provocative reading.

—The Editor



Current Prison Project staff 1st row from left: Elizabeth Alexander, Claudia Wright, Lorna Tucker, Beryl Jones; 2nd row: Lynthia Gibson, Sharon Goretzky, Al Bronstein, Betsy Bernat, Jan Elvin, Julia Cade, Melvin Gibbons; 3rd row: Jere Krakoff, Ed Koren, Louis Seigel*, Seth Nthai*. *law clerks

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