JOURNAL

THE NATIONAL PRISON PROJECT

INSIDE . . .

ISSN 0748-2655 NUMBER 14, WINTER 1987

Imprisoned Mothers Face Extra Hardships

Ellen Barry

Ten years ago, the subject of incarcerated mothers was rarely discussed in the wider criminal justice community. Now, thanks to the efforts of a growing number of organizations and community agencies, the pressing problems of incar-

—continued on next page

Photo by John David Sims. Inset photo by Karen Ruckman

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

ALTERNATIVES TO INCARCERATION

Photo by John David Arms

—continued from front page

cerated mothers and their children are receiving a greater amount of attention and response. Legal Services for Prisoners with Children in California has focused on several critical areas of concern to incarcerated parents in the last several years. We have made some improvements in conditions within the institutions and in the programs which affect these parents and children. We have also filed conditions lawsuits on behalf of pregnant women prisoners in state and county jails. Challenges have been made to the lack of effective alternatives to imprisonment for mothers with young children, and we have scrutinized the policies and procedures of state social services agencies which place these children in foster care. Some victories have been achieved in these areas, but much remains to be done.

Prenatal Medical Care for Women Prisoners

On April 20, 1987, Judge John Davies of the Federal District Court in Los Angeles approved the final settlement in *Harris v. McCarthy*, a lawsuit filed on behalf of pregnant and postpartum state prisoners in California. A strong and comprehensive settlement covers all aspects of prenatal and post-natal medical care. It was based, in part, on prenatal care standards developed by the American College of Obstetrics and Gynecology, and was carefully reviewed by respected experts in the field.

Specifically, the settlement requires defendants (California Department of Corrections and the California Institution for Women) to 1) allow pregnant women to receive regular treatment and monitoring of medical care by a qualified OB-GYN. (Prior to the filing of the lawsuit, many pregnant women at CIW never saw an obstetrician while at the prison until they were brought to an outside hospital to deliver); 2) create a Pregnancy Related Health Care Team,

Ellen Barry is the Director of Legal Services for Prisoners With Children, 1317 18th St., San Francisco, CA 94107, 415/824-1070.

Women have had unnecessary hysterectomies and suffered severe complications after delivery.

which will consist of the OB-managing physician, nurse, midwives, nurse practitioners, a pharmacist, and other necessary personnel and will act to provide each woman with coordinated health emergency treatment and high risk protocols; 3) implement detailed emergency treatment and high risk protocols developed in the course of the settlement discussions; 4) implement a number of other changes with respect to the provision of care for high-risk pregnant women and women with regular pregnancies and 5) report regularly to plaintiffs, their attorneys, and the court concerning the implementation of the settlement for a period of 18 months.

Plaintiffs and their attorneys are very pleased with the results of the settlement, since we feel that, if the Department of Corrections complies with the terms of the settlement, prisoners at CIW are far more likely to receive good prenatal and post-natal medical care.

The lawsuit was filed in September of 1985 by women prisoners at CIW who had suffered miscarriages, infant deaths, hysterectomies or other traumatic pregnancy-related conditions. Plaintiffs were represented by Legal Services for Prisoners with Children, the law firm of Heller, Ehrman, White and McAuliffe in San Francisco, and the Southern California ACLU.

Plaintiffs alleged that pregnant women at the prison were being deprived of adequate prenatal and post-natal medical care in violation of their constitutionally protected right to be free from cruel and unusual punishment. The suit was filed as a class action on behalf of seven named women prisoners, and the class of pregnant women at the Southern California prison.

The lawsuit alleged a wide range of deprivations in the provision of medical care, including denial of adequate medical care in pregnancy-related emergency and life-threatening situations, inadequate care following delivery, inadequate treatment of critically high-risk women, dissemination of prescription drugs to pregnant women which were contra-indicated during pregnancy, and other serious violations. Plaintiff Annette Harris lost her baby at five months after gestation after bleeding and cramping for over two weeks without, plaintiffs alleged, treatment or without being seen or examined by an OB-GYN. She went into labor after she had been prescribed flagyl; the baby lived two hours. A second plaintiff gained 120 pounds during her pregnancy, but, it was alleged, she was not given adequate medical treatment. A third plaintiff not only suffered a late-term miscarriage after months of bleeding and cramping, she also required a complete hysterectomy. Plaintiffs alleged that defendants' failure to provide them with adequate medical care during and after their pregnancies resulted in a number of infant deaths, still-births and miscarriages, as well as several incidents where women had to have unnecessary hysterectomies and suffered severe complications after delivery.

Because of the particularly strong and comprehensive nature of the settlement, we are optimistic that the lawsuit will have implications not only for women prisoners at CIW, but also that it will lead to improved treatment for women prisoners in other states and jurisdictions.

Prenatal Conditions Suit Pending Against Santa Rita County Jail

In February of 1986, women prisoners at the Santa Rita County Jail in Alameda County, California, filed suit against county jail officials, alleging that they had been given grossly inadequate prenatal and post-natal medical care in violation of their constitutional and statutory rights. The lawsuit, *Jones v. Dyer*, seeks not only injunctive relief to improve the overall quality of medical care for pregnant women, but also the creation of a halfway house alternative for pregnant women and new mothers who would otherwise be confined to the jail during their pregnancies or separated from their newborns at birth.

The plaintiffs are represented by the law firm of Public Advocates and the office of Legal Services for Prisoners

THE JOURNAL OF THE NATIONAL PRISON PROJECT

Editor: Jan Elvin
Editorial Asst.: Betsy Bernat

Alvin J. Bronstein, Executive Director
The National Prison Project of the
American Civil Liberties Union Foundation
1616 P Street, N.W.
Washington, D.C. 20036
(202) 331-0500

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

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

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

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

with Children in San Francisco. Plaintiffs have won two motions for contempt due to defendants' refusal to comply with discovery requests, and have been awarded sanctions on both occasions. The parties are now in active settlement negotiation.

Alternatives to Incarceration for Mothers and Children

One of the most critical efforts identified by Legal Services for Prisoners with Children was the need to expand available alternatives to incarceration for women in prison who had infants or young children. This concern was based on several factors: the intolerable overcrowding that currently exists for women prisoners both in California state women's prisons and in prisons throughout the nation, the tremendous cost-effectiveness of using alternatives to incarceration, both on financial and humane levels, and the enormous damage done to both mothers and children by the separation due to parental incarceration. In California, Section 340 of the *Penal Code* allowed for placement of the primary caretaker of a child under the age of six years in a halfway house community facility provided that the parent met certain screening criteria concerning length and type of sentence and prior ability to appropriately care for children. The law was originally drafted in 1978, enacted in 1979, and amended in 1981. However, between 1981 and 1985 an extremely small number of eligible mothers were placed in the program with their children. Thus, Legal Services for Prisoners with Children and the Southern California ACLU filed *Rios v. McCarthy*, a lawsuit on behalf of pregnant mothers and mothers of young children in California state prisons on June 5, 1985, alleging that the Department of Corrections was failing to properly implement the Mother-Infant Care Program in violation of California state statutory and constitutional provisions. Plaintiffs were granted a temporary restraining order placing four pregnant women in the Mother-Infant Care Program immediately after the birth of their infants, and three weeks later, defendants agreed to place several other of the named plaintiffs immediately in the Program with their young children.

Specifically, the lawsuit alleged that the defendants failed to properly screen and administer the Program, failed to properly advise prisoners of the program in violation of the statutory provisions, unfairly denied applicants who were, in fact, eligible for the program, and improperly denied applicants an adequate right to appeal denials. In addition, the lawsuit claimed that the program itself was inadequately funded, and that insufficient resources were being provided for medical care, counseling and programs for the children. The Youth Law Center of San Francisco filed a companion case, *In Re Maria G.*, making similar allegations on behalf of the children who might be placed in the alternative program.

Since the filing of *Rios v. McCarthy* four additional halfway houses have been contracted, licensed and opened throughout the state of California. The original halfway house (Brandon House in San Jose) has been kept at full capacity, or close to capacity, and five additional sites for new houses are being explored. However, much remains to be done to ensure that the program is a functional and effective alternative to incarceration. Funding is still not adequate to maintain a comprehensive program for mothers and children; additional sites must be opened in order to accommodate the eligible clients and children; standards for acceptance must be fairly and consistently applied; conditions within the houses must be improved; and provisions must be agreed upon concerning adequate procedures for application processing and appeals.

—continued on next page

A mother at the Children's Center playing with her child and two others.

A teacher's aide and two children at the Prison MATCH Children's Center at Pleasanton Federal Correctional Institution.

Inmate mothers and children on a "Pumpkin Patch" trip from the Children's Center at Pleasanton.

Photos this page courtesy of inmate mothers and children at the Prison MATCH Children's Center at Pleasanton-FCI.

Baby Irwin was born to this Native American woman while she was incarcerated.

—continued from previous page

One of the factors that makes this case—and this avenue of litigation—most important is the severe overcrowding that currently exists in California state women's prisons. The California Institution for Women is now at over 250% over design capacity; 75 to 80% of these women are mothers of young children, and the overwhelming majority are single mothers serving time for nonviolent and economic-based crimes. The Mother-Infant Care Program offers a necessary alternative to the current warehousing within this prison system. The costs of needless and unnecessary incarceration—both economic and human—are enormous. The Mother-Infant Care Program and other alternatives to incarceration offer a viable and constructive solution to the problems of warehousing low-security prisoners who are mothers of young children, the failure of corrections departments to provide effective rehabilitative programs for prisoners, and unnecessary separation of these young children from their mothers. Attorneys for plaintiffs in *Rios v. McCarthy* are currently in active settlement negotiation with defendants' attorneys and hope to be able to arrive at a comprehensive agreement that will greatly improve and expand the Program.

Foster Care and Parental Rights Issues

In a major victory for incarcerated parents and their children, the Florida Supreme Court issued a decision in December 1986 reversing a lower court decision to terminate the parental rights of an incarcerated father who had kept substantial contact with his children during the period of his incarceration. *In the Interest of B.W., J.W. and M.W.*, No. 68, 192 (Fla. Sup. Ct. 12/18/86) held that the incarcerated father had not abandoned his children under the Florida statute governing the termination of parental rights, finding that indigency of incarceration alone would not support a finding of abandonment.

The decision by the Florida Supreme Court in *In the Interest of B.W., J.W. and M.W.*, No. 68, 192 (Fla. Sup. Ct. 12/18/86) is a highly significant milestone in the advancement of the rights of incarcerated parents and their children. In a unanimous decision, the Court overturned the decision of the district court affirming the decision to terminate a prisoner's parental rights, stating that a prisoner's efforts "to assume his parental duties through communicating with and supporting his children must be measured against his limited opportunity to assume these duties while imprisoned." Even a cursory review of the record from the lower court indicates that the father in this case had made substantial efforts to communicate with both his children and the Department of Social Services. The Florida decision will, we hope, provide guidance to other state courts and legislatures which are facing the question of how to ensure contact and communication between incarcerated parents and their children.

The California Institution for Women is now at over 250% over design capacity.

C. James Dulfer of Central Florida Legal Services, Inc., Daytona Beach, Florida, represented Petitioner, William Wirsing. Legal Services for Prisoners with Children submitted an amicus brief on behalf of Petitioner, as did Florida Institutional Legal Services and the Florida Criminal Defense Attorneys Association.

Most county jails and state prisons have significantly inadequate systems of providing prenatal and post-natal medical care for pregnant women; most county jails refuse to allow parents to have contact visitation with their children; alternatives to incarceration are in disfavor in many communities, even though they are tremendously cost-effective and humane; and federal and state revisions to foster care legislation are making it more and more difficult for incarcerated parents to regain custody of their children upon release from prison. Thus, the battle continues. However, we have found that the effort involved is always worth it every time we are able to allow one child or infant to maintain that precious relationship with his or her imprisoned parent. ■

Rhodes v. Chapman Analyzed for Effect on Prison Overcrowding

Michael B. Mushlin

It has been almost seven years since the Supreme Court in *Rhodes v. Chapman*, 452 U.S. 337 (1981), held that double-celling at the Southern Ohio Correctional Facility was not unconstitutional. In that time the overcrowding of American prisons has worsened by the day. As of December 1985, prisons in the United States held over a half a million citizens, an astounding figure that represents an increase of over 68% in the years since *Chapman* was litigated. Four out of five state prison systems now are overcrowded; thirty-four prison systems operate at levels of over 50% beyond capacity. Jails, too, are chronically overcrowded. As of June 1984 they held almost a quarter of a million persons.[1] In short, *Chapman* was decided at a time of crisis in corrections caused by unprecedented growth of prison populations.

*In the post-*Chapman *world, litigators must do much more than we early prisoner rights lawyers needed to do.*

Chapman has been called "the most encouraging decision in prisoners' rights to have emerged from the Supreme Court in a decade."[2] On the other hand, it has been described as setting "the limits of the eighth amendment lower than had previously been thought."[3] From my vantage point seven years later, I think it's a bit of both. But given the prison overcrowding crisis the negative aspects of *Chapman* are particularly troubling. To see why requires some background and explanation.

Michael Mushlin is a Professor of Law at Pace University School of Law. From 1973 to 1981, Professor Mushlin was actively involved in prisoners' rights litigation with the Legal Aid Society in New York City. Laura Hurwitz, a second year law student, assisted in the research and preparation of this article.

[1]These statistics are drawn from Bureau of Justice Statistics, U.S. Department of Justice, *Prisoners in 1985 (1986)* and Bureau of Justice Statistics, U.S. Department of Justice, *Jail Inmates 1984 (1986)*, reprinted in Ira Robbins, *Prisoners and the Law*, Appendix C and D (Rev. 1987).

[2]Herman, *Institutional Litigation in the Post-Chapman World*, 12 N.Y. Rev. of Law and Social Change, 299, 302 (1983- 84).

[3]Collins, *The Defense Perspective on Prison Conditions Cases*, 7-5 in Ira Robbins, *Prisoners and the Law*, (Rev. 1987).

The Supreme Court's Opinions in *Chapman*

In my days as a prisoners' rights litigator before *Chapman*, we were able to address prison overcrowding by presenting straightforward evidence to the federal courts about the consequences of policies that led to the overcrowding. In many cases we were able to persuade courts, through testimony of experts in fields such as penology and psychiatry, and by the use of minimum standards from professional organizations together with the testimony of inmates who experienced the conditions, that populating a facility significantly beyond its capacity, was unconstitutional.[4] These results were sensible since when more prisoners are placed in an institution than it was meant to hold, one can almost feel the place begin to collapse. Essential services, such as medical care, become strained. Violence starts to rise as tensions mount. Any semblance of privacy that may have existed is quickly sacrificed to the pressure to accommodate the added bodies. Whatever hope there may have been for the preservation of a modicum of basic human dignity is lost. The harmful effects of overcrowding on health and well-being are amply documented. *See, e.g.*, Thornberry & Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 Hast. L. J. 313 (1983). An overcrowded prison is anything but a "rose garden."[5]

Even if the United States Supreme Court did not encourage our work in the lower federal courts, it left it largely undisturbed. That changed in 1981 when the Supreme Court broke its silence, and in *Chapman* addressed the constitutional questions posed by prison overcrowding for the first time.[6]

[4]Pre-*Chapman* cases outlawing overcrowding include: *Leeds v. Watson*, 630 F.2d 674 (9th Cir. 1980); *Battle v. Anderson*, 564 F.2d 388 (10th Cir. 1977); *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977); *Detainees of Brooklyn House of Detention v. Malcolm*, 520 F.2d 392 (2nd Cir. 1975); *Ramos v. Lamm*, 485 F.Supp. 122 (N.D. Col. 1979); *Ambrose v. Malcolm*, 414 F.Supp. 485 (S.D.N.Y. 1976); *Pugh v. Locke*, 406 F.Supp. 318 (M.D. Ala. 1976).

[5]Chief Justice Rehnquist appears to think that the goal of prisoners' rights litigation is to make prisons into rose gardens. *See, Atiyeh v. Capps*, 449 U.S. 1312, 1316 (1981) (In Chambers).

[6]In an earlier case, *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court upheld double celling as practiced at the federal Metropolitan Correctional Center in New York City. *Chapman*, however, is a more significant case since it dealt with overcrowding in a prison rather than a jail, and since the prison, although new, was built according to rather traditional design concepts. By contrast, *Wolfish* dealt with the rights of pretrial detainees in an ultra-modern, state-of-the-art jail which featured college dormitory-like rooms rather than cells.

An overcrowded prison is anything but a "rose garden."

The *Chapman* court was deeply fractured. While the Justices determined by a vote of 8 to 1 that double-celling inmates at the Ohio Prison did not unconstitutionally overcrowd the facility, it took three separate opinions to explain why. In a fourth opinion, Justice Marshall gave his reasons for concluding that a constitutional violation did exist.

Justice Powell wrote the opinion of the five-member majority. In it, he limited the role for experts and standards in the judicial determination of constitutionality. Those persons and groups, Justice Powell said, might tell us where we as a society should be going, but they do not describe enforceable minimum standards. 452 U.S. at 348 n.13. Justice Powell laced his opinion with additional language unsympathetic to prisoner claims for humane treatment. The opinion reminded lower courts that the state legislatures have the primary responsibility for operating state prisons, and they can, if they wish, make them uncomfortable places. These discomforts apparently can include any deprivations other than those contained in a limited grouping of items that Justice Powell considered among "life's necessities." 452 U.S. at 347. In addition, "restrictive and even harsh" prison conditions, in Powell's lexicon, are simply "part of the penalty that criminal offenders pay for their offenses against society." *Id.* Finally, the majority saw no magic in the rated capacity of an institution. Since prison populations are driven upward by a variety of factors, prisons that house more people than they are designed to hold are simply facilities built by officials who "guessed incorrectly about future prison population[s]," and no more. 452 U.S. at 349 n.15.

Despite all this, Justice Powell's opinion reaffirmed a role for lower federal courts in assuring that prison overcrowding does not get out of hand. Federal courts, he said, have a "responsibility to scrutinize claims" of unconstitutional prison conditions. 452 U.S. at 352. Four cases in which lower courts had ordered extensive changes, including the elimination of overcrowding, were cited with apparent approval.[7]

The remaining three opinions collectively express the view of Justices Brennan, Blackmun, Marshall and Stevens that federal courts are a "critical force" for prison reform. 452 U.S. at 359. As Justice Blackmun put it, federal courts must be a bastion against policies that would make imprisonment an "open door for unconstitutional cruelty or neglect." 452 U.S. at 369.

Given the seriousness of the overcrowding crises, there are troubling aspects of the *Chapman* decision. Most disquieting is that the *Chapman* majority raised the requirements of proof for a finding of unconstitutional overcrowding. Proving that many more prisoners are housed in a prison than it was designed to hold will no longer require a finding of unconstitutionality. Nor will proof that professionally recognized minimum standards have been violated compel court-ordered population reductions. Experts, while still essential, are no longer enough to carry the day. In the post-*Chapman* world, litigators must do much more than we early prisoner rights lawyers needed to do. Now they must prove in vivid details that the actual effect of prison overcrowding is ruinous. To succeed they must demonstrate that the conditions' actual effect on inmates falls below the bottom line of human existence.

Experts, while still essential, are no longer enough to carry the day.

My quarrel with this stems from my belief that the approach of many of the pre-*Chapman* opinions was not, as the majority suggests, wrong. Minimum standards do matter; experts do count; design capacities do not descend from the air. The *Chapman* majority's depreciation of these criteria, makes prison overcrowding litigation unnecessarily difficult. When these holdings are added to the tone of the Court's majority opinion, which at its best, provides only a grudging acceptance of federal courts in the correction of overcrowding in prisons, an environment is created in which far more overcrowding than should exist can be condoned.

The Impact of *Chapman* on Lower Court Overcrowding Cases

In the years since *Chapman*, prisoners' rights litigation has continued. As one might expect, much of it has focused on overcrowding. I have tried to figure out how *Chapman* has influenced the conduct and the results of that litigation by examining the reported decisions.

The good news first. The obviously restrictive approach of the Supreme Court majority has not stopped many federal courts from acting when faced

—*continued on next page*

[7]452 U.S. at 352 (citing *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974); *Pugh v. Locke*, 406 F.Supp. 318 (M.D. Ala. 1976) *aff'd as modified*, 559 F.2d 283 (5th Cir. 1977), *rev'd. in part on other grounds*, 438 U.S. 781 (1978) (per curium).

—continued from previous page

with grave claims of overcrowding. In a host of cases, many brought by the National Prison Project, lower courts have enjoined overcrowding when it has been shown to cause deplorable prison conditions. Those courts have focused on the totality of conditions affected by the overcrowding. They have looked at the basic architecture and design of the facility and have calculated the impact made by the increased numbers upon such basic components of a living environment as heat, ventilation, lighting, sanitation, and food services. They have also been concerned with the effect of overcrowding on the level of activities that can be provided and the ever-present danger of violence in the institution. When overcrowding has caused the facility to slip below the "bottom line conditions of basic human existence," *Jackson v. Gardner*, 639 F.Supp. 1005, 1010 (E.D. Tenn. 1986), it has been found to be unconstitutional.[8] The reality of prison life in America in the 1980s is that many prisons are so deplorable they are unfit for human existence, much less advancement, and thus satisfy the test for unconstitutionality. Indeed, in its latest calculation, the National Prison Project reports that prisons in thirty-six states are currently under court order to eliminate unconstitutional prison conditions.[9] Thus, after *Chapman* it is fair to say that federal courts continue to play a crucial—indeed, an indispensable—role in offering hope for hundreds of thousands of citizens who are incarcerated under unnecessarily harsh conditions in prisons in the United States.

Unfortunately, this is not the full story. The federal reporters now also contain decisions in which lower courts have felt constrained by *Chapman* to accept a level of overcrowding that in the pre-*Chapman* days almost certainly would have been found unconstitutional. In *Smith v. Fairman*, 690. F.2d 122 (7th Cir. 1983), the Seventh Circuit reversed a lower court that had ordered an end to overcrowding in a hundred-year-old facility in which 56% of the prison population were double-celled in cells that offered no more than 33 square feet per person. In *Dohner v. McCarthy*, 635 F.Supp. 408 (C.D. Cal. 1985), a court held that housing 4,000 people in a prison designed to accommodate only 2,400 was not unconstitutional. The court recognized that the conditions were an "ordeal," but, because of *Chapman*, refused to act. 635 F.Supp. at 430. In *Delgado v. Cady*, 576 F.Supp. 1446, 1448 (E.D. Wis. 1983), the court recognized that double-celling is "among the most debasing and most dehumanizing aspects of present prison life. It rips away the sense of privacy—of dignity which can make bearable many things which would not otherwise be endured." Nevertheless, even though the overcrowding in the prison was "highly offensive to human dignity," the court refused to act based on *Chapman*. *Id.* at 1457.

To be sure, in some of these cases the conditions were not quite as bad, as a general matter, as conditions in those cases in which courts did intervene. Also in some of the cases prison administrators had made good faith efforts to cope in a less chaotic way with the effects of the overcrowding. While conditions may not be as subhuman as in those in which courts have responded, the consequences of overcrowding were, nonetheless, demonstrated to be quite serious. Moreover, the good faith attempts of administrators to cope, while admirable, cannot compensate for conditions that reduce life to a quest for mere survival.[10]

The Significance of *Chapman*

Chapman did not close the courthouse doors to prison overcrowding cases. Federal courts have remained available even after *Chapman* when there are lawyers with the skill and resources to use them to meet the high standard of proof imposed by the Court. Indeed, the record achieved by lower federal courts in improving the lot of those caught in the floodtide of overcrowding in the years following *Chapman* is both impressive and important. But, it would be incorrect to suggest that *Chapman* has not had a discouraging effect on the conduct of overcrowding litigation. It has forced some courts to tolerate debilitating levels of overcrowding, and it has limited others to only those situations in which the overcrowding caused conditions to deteriorate to a point of near collapse. We all bear the consequences of this development. In a real sense, the Supreme Court in *Chapman* contributed to the overcrowding crisis. Had it not ruled as it did the explosive effects of overcrowding could have been dealt with before great damage is done. Now we must wait. Because this has happened, I, for one, will not praise *Rhodes v. Chapman*. ■

[8]*Cody v. Hillard*, 799 F.2d 447 (8th Cir. 1986) rehearing ordered. *Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984); *Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983); *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982); *Reece v. Gragg*, 650 F.Supp. 1297 (D. Kan. 1986); *Palmigiano v. Garrahy*, 639 F.Supp. 244 (D.R.I. 1986); *Jackson v. Gardner*, 639 F.Supp. 1005 (E.D. Tenn. 1986); *Albro v. County of Onondaga*, 627 F.Supp. 1280 (N.D.N.Y. 1986); *Monmouth County Correctional Inst. Inmates v. Lanzano*, 595 F.Supp. 1417 (D.N.J. 1984); *Fischer v. Winter*, 564 F.Supp. 281 (N.D. Cal. 1983); *Benjamin v. Malcolm*, 564 F.Supp. 668 (S.D.N.Y. 1983); *Grubbs v. Bradley*, 552 F.Supp. 1052 (M.D. Tenn. 1982); *McMurry v. Phelps*, 533 F.Supp. 742 (W.D. La. 1982); *Dawson v. Kendrick*, 527 F.Supp. 1252 (S.D.W. Va. 1981).

[9]ACLU National Prison Project, *Status Report: The Courts and Prisons*, (March 1, 1987), reprinted in Ira Robbins, *Prisoners and the Law*, Appendix B (Rev. 1987).

[10]For additional cases which fit into these categories and deny relief even though the prison or jail was overcrowded, see, e.g., *Union County Jail Inmates v. DiBuono*, 713 F.2d 984 (3rd Cir. 1983) (It was agreed that the jail was "seriously overcrowded". *Id.* at 986. Conditions were constitutionally permissible, however, since inmates had time away from their cell and the basic physical facilities such as plumbing, ventilation and heating were minimally acceptable); *Nelson v. Collins*, 659 F.2d 420, 427 (4th Cir. 1981); *Miles v. Bell*, 621 F.Supp. 51, 62 (D. Conn. 1985) (Although overcrowding made the prison uncomfortable and inconvenient, conditions are held to be constitutional); *Lovell v. Brennan*, 566 F.Supp. 672 (D. Me. 1983) (Court found conditions to be "unpleasant, if not harsh." *Id.* at 687. Conditions were held to be constitutional, however, because inmates were provided with adequate food, clothing, medical care, mental health services, shelter, sanitation, lighting and ventilation. *Id.* at 688. *Capps v. Atiyeh*, 559 F.Supp. 894, 904 (D. Or. 1983).

Supreme Court Summary

David B. Goldstein

During the 1986-87 Term, the Supreme Court continued its assault on prisoners' exercise of fundamental constitutional rights. At the same time, the Court indicated that it is not quite prepared to reduce to empty rhetoric the oft-stated principle that inmates do not shed their constitutional rights by virtue of their incarceration.

David Goldstein was the ACLU's 1986-87 Karpatkin Fellow. He is currently an associate at Rabinowitz, Boudin, Standard, Krinsky, & Lieberman in New York City.

In two cases, *Turner v. Safley*, 107 S.Ct. 2254 (1987), and *O'Lone v. Estate of Shabazz*, 107 S.Ct. 2400 (1987), a 5-4 majority rejected prisoners' claims that their First Amendment free speech and free exercise rights, respectively, were violated. In *Turner*, the Court also found, unanimously, that a near-ban on inmate marriages was unconstitutional. In a third case, *Board of Pardons v. Allen*, 107 S.Ct. 2415 (1987), the Court, 6-3, found that Montana's parole statute created a liberty interest in parole protected by the Due Process clause.

Clearly, *Turner* was the Term's most significant, and devastating, prisoners' rights case. The inmates claimed that the complete ban on inmate-to-inmate correspondence (except between immediate family) to and from their prison violated their free speech rights. They also claimed that the prison policy of authorizing inmates to marry only in cases of pregnancy or childbirth, whether or not the partner was another inmate or an outsider, violated the constitutional right to marry.

Justice O'Connor's opinion for the Court first embraced the "rational relationship" test—the standard that is least protective of constitutional rights and most deferential to government officials—as the uniform standard of review for *all* constitutional claims by prisoners. As framed by the Court, "when a prison regulation impinges on inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."

The Court rejected reliance on *Procunier v. Martinez*, 416 U.S. 396 (1974), which had established a heightened standard of review for restrictions on inmate correspondence with outsiders. Arguments that the standard of review should depend on whether the restricted activity is presumptively dangerous and that First Amendment rights are entitled to heightened judicial protection were also rejected.

Justice O'Connor elaborated four factors in considering whether a regulation met this deferential standard. This explication makes it clear that the Court expects lower federal courts to ignore all but the most egregious or unwarranted restrictions on constitutional rights. These factors include:

1) whether the connection between the regulation and the asserted penological goal is so remote as to be arbitrary and irrational;

2) whether alternative means of exercising the right remain open to prisoners;

3) whether accommodation will have an impact on other inmates, prison guards, and prison resources generally; and

4) whether there are "obvious, easy alternatives [which] may be evidence that the regulation . . . is an 'exaggerated response' to prison concerns." Accommodations must impose no more than *de minimis* costs upon penological interests, and even costless alternatives would only be *evidence* of unreasonableness. This is the only insignificant modification of the rational relationship test traditionally applied to economic regulation, in which the availability of alternatives is generally irrelevant.

The Court then applied this highly deferential standard to the two claims, with inconsistent results. The Court found that the correspondence restrictions were promulgated primarily for security concerns and that correspondence between inmates can communicate escape plans, be used to arrange violent acts, and coordinate prison gangs. Thus, according to the Court, there was a logical connection between banning inmate correspondence and maintaining security.

In the most potentially damaging remarks in the opinion, the Court stated that the ban "does not deprive prisoners of all means of expression," but only bans all communication with a particular group. The dangers inherent in using such a generic view of "expression" as a sufficient alternative to the particular claimed right is obvious. Finally, the Court found that alternatives such as examining prisoners' mail would impose more than a *de minimis* burden on the prison system.

The Court then struck down the marriage restrictions. It rejected the security of avoiding love triangles by positing the alternative of individualized decisionmaking, which the Court considered a *de minimis* burden. It then rejected the rehabilitative concern of protecting women from dependent relationships because the regulation "sweeps much more broadly" than that goal would warrant, but failed to explain why this language was not applicable to the correspondence ban.

Justice Stevens' dissent on the correspondence ban, which highlighted the speculative and unsubstantiated nature of the government's evidence, only served to emphasize the extraordinary lengths to which the majority would go to uphold restrictions on prisoners' rights. While agreeing with the majority's result on the marriage claim, although not its reasoning, Justice Stevens did not miss the irony of the Court's conservative bloc protecting the nontextual right to marry, but not the explicit constitutional right of free speech.

In *Shabazz*, lower security inmates were assigned to outside work details to relieve overcrowding and for rehabilitative purposes. As a result of a "no-return" policy, the Moslem prisoners on these details could not attend Jumu'ah, the religion's central and only obligatory and congregational service, which is held on Friday, the Moslem Sabbath, in the early afternoon. Ironically, the maximum security inmates *could* attend Jumu'ah.

Applying *Turner*, the Court, per Chief Justice Rehnquist, not surprisingly found the outside work detail logically connected to relieving overcrowding and the "no-return" policy as reasonably related to the security problem of returning through the prison gate. Less defensible was the Court's acceptance that a rehabilitation rationale of replicating the work week could override the inmates' right to attend their central worship service, and that the prison overcrowding could be used as a basis to deny fundamental rights.

As in *Turner*, the Court found the availability of alternative means of practicing Islam sufficient, even if the inmates were banned from Jumu'ah. The Court rejected the obvious alternatives of an inside Friday work detail because it would defeat the goal of relieving overcrowding, but also because it could lead to the creation of "affinity groups," which officials testified would inevitably challenge the prison authorities.

The Court closed with a firm admonition that it would refuse, even under the First Amendment, to substitute its judgment for that of prison officials.

Justice Brennan's eloquent dissent, which, like that of Justice Stevens in *Turner*, focused on the paucity of the State's evidence, again emphasized the degree of deference the Court insists on paying to the unsubstantiated, speculative testimony of prison officials. The dissent was particularly troubled by the implausible "affinity group" claim, which carries the potential to deny prisoners an array of associational rights and of subtle discrimination.

In *Board of Pardons v. Allen*, the Court broke no new ground. It reaffirmed a 1979 decision which held that the presence of a parole system does not itself give rise to a protected liberty interest in parole release, but that the mandatory language of the Nebraska statute did not create such an interest, despite the inherently subjective and predictive nature of parole decisions.

The Montana statute at issue in *Allen* likewise used mandatory language to create a presumption that parole would be granted when designated findings were made, even though the required findings granted parole officials broad discretion. The court found that the statute sufficiently cabined this discretion to create a liberty interest subject to procedural due process protections. The Court rejected the State's suggestion that a liberty interest is created only if the statute is as explicit in its presumption as the Nebraska law.

Unfortunately, unlike *Turner* and *Shabazz*, *Allen* is of limited impact since the wording of parole statutes varies from state to state, and because the state legislature can simply change its parole statute to eliminate a protected liberty interest. ■

Death Penalty Law Still Tolerates Inequities

Katy Baird

Four years after *Furman v. Georgia* (1972) invalidated existing capital punishment schemes as arbitrarily applied, *Gregg v. Georgia* (1976) upheld statutes which provided "guided discretion" in imposing the death penalty. Such statutes separate the guilt and sentencing proceedings of capital trials. After conviction for first-degree murder, or capital murder as otherwise defined, evidence is presented in aggravation or mitigation of sentence. If the jury finds that one or more statutory "aggravating circumstance"—e.g. the murder occurred in commission of a felony—applies, they may impose the death penalty. Concurrently with *Gregg*, *Roberts v. Louisiana* and *Woodson v. North Carolina* held mandatory death sentences unconstitutional. *Jurek v. Texas* upheld a unique system where defendants convicted of capital murder must be sentenced to death if the jury answers three questions affirmatively, including whether the defendant poses a future danger to society.

Furman, *Gregg* and many subsequent Supreme Court cases entail the Eighth Amendment's ban on cruel and unusual punishment. The evolving case law exhibits a doctrinal tension created by the cases' polar mandates of "guidance" and "discretion." The "guidance" promised by the statutes upheld in *Gregg*, supposedly rendering death sentences uniform, predictable and fair, has been eroded by later cases sanctioning varying degrees of "discretion." In *Zant v. Stephens* (1983) one of several aggravating circumstances tainted the sentence. *Barclay v. Florida* and *Wainwright v. Goode* (1983) upheld death sentences where the trial courts had considered invalid or illegal factors.

Katy Baird is a graduate of Northeastern University Law School and a former NPP law intern. This article was written while she was an intern at the NAACP Legal Defense Fund.

In *Pulley v. Harris* (1984), the Court held that a state-wide proportionality review of cases where the death penalty had been imposed was not constitutionally required.

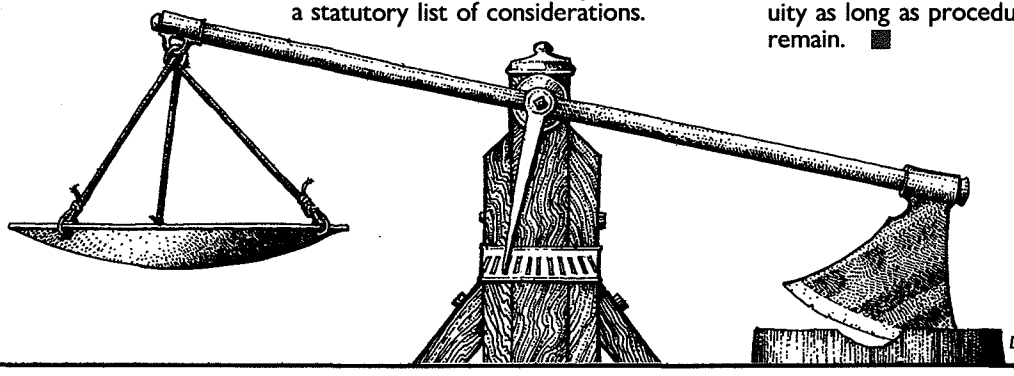
The Supreme Court's relaxation of its previous curtailments on capital punishment illustrates the fluctuating Eighth Amendment doctrine. Although *Enmund v. Florida* (1982) forbids a death sentence for one who "does not kill, attempt to kill or intend to kill the victim," *Cabana v. Bullock* (1985) allows a state trial or appellate court to determine whether such intent exists after a jury has sentenced the defendant to death. *Enmund* was severely limited this term in *Tison v. Arizona* (1987). *Tison* validates the death penalty for two boys whose father murdered a family following a prison escape. Although the boys did not participate in, anticipate or condone the killings, their aid in the escape showed a sufficient "reckless disregard for human life" to justify a death sentence.

Although a judge may instruct the jury "not to be swayed by sympathy, passion, prejudice or public opinion" in sentencing under *California v. Brown* (1987), the Court has refused to allow restraints on mitigating evidence. *Lockett v. Ohio* (1978) held that "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" must be admitted into evidence. *Eddings v. Oklahoma* (1982) found that a trial court's refusal to consider the defendant's violent family history in mitigation of sentence was constitutional error. Exclusion of prison guards' testimony regarding a death row inmate's adaptability to prison life was also found unconstitutional in *Skipper v. South Carolina* (1986). Recently, *Hitchcock v. Dugger* (1987) held portions of Florida's death penalty law unconstitutional for limiting mitigation to a statutory list of considerations.

The Court has carved some specific Eighth Amendment exceptions to the death penalty. *Coker v. Georgia* (1977) held the death penalty disproportionate and unconstitutional for the rape of an adult woman where the victim is not killed. The Court has prohibited execution of the insane as "cruel and unusual" in *Ford v. Wainwright* (1986), and heard arguments last November in *Thompson v. Oklahoma* to determine whether the Eighth Amendment likewise bans the execution of juveniles.

The thorough and exacting advocacy compelled by the threat of a death sentence has been met, ironically, with cases allowing expedited federal court review (*Barefoot v. Estelle*, 1983), dismissal of constitutional claims for 'procedural default' (*Smith v. Murray*, 1986), and a difficult standard for proving ineffective assistance of counsel (*Strickland v. Washington* 1984). The Court has at times candidly refused to burden the criminal justice system with constitutional strictures. *Lockhart v. McCree* (1986) allowed potential jurors whose attitudes toward the death penalty might influence their sentencing decision to be removed from the guilt phase of a capital trial, even though conviction-prone juries result. The alternatives to accepting juries more prone to convict than an average sampling of citizens were considered too cumbersome to be constitutionally required.

This term death penalty jurisprudence came full circle to countenance the arbitrary and discriminatory sentencing outlawed in *Furman v. Georgia* (1972). *McClesky v. Kemp* (1987) rejected proof of the racially discriminatory application of Georgia's death penalty scheme. The Court held that discretion was inherent in the criminal justice system, and the defendant had failed to prove discriminatory intent in his individual sentencing. Again, the Court refused to burden the system by applying the equal protection standards of, for example, employment discrimination suits. In forgiving the states' failure to guide the sentencer past racial bias, the Court has clarified *Gregg v. Georgia*'s legacy: "guided discretion" in death sentencing tolerates inequity as long as procedural contours remain. ■



Drawing by Martim Avillez.

Victim and Offender Participation Important to Criminal Sentencing Process

Russ Immarigeon

Generally speaking, victim and offender advocates alike see victim involvement in criminal sentencing as an integral part of a larger movement toward increasing levels of punishment meted out to criminal offenders. While a number of opinion surveys show strong evidence that victims are not as punitive or vindictive as many people believe,[1] an uneasy and unresolved tension clearly exists between prisoners' rights and victims' rights advocates over what criminal sanctions can or should offer their clients. Moreover, evidence of significant victim and public support for some alternatives to incarceration has not yet merged routinely into contemporary criminal justice policy debates.[2] However, a careful examination of the history of these two movements, and the issues which drive them, suggests that they have much to gain from one another.

The Christian Science Monitor—Peter Main

Victim assistance programs have encouraged meetings such as this one between victims, offenders and their families.

Victims and Sentence Planning

Several years ago, Joel Henderson and G. Thomas Gitchoff, sociologists from the San Diego State University, wrote a series of articles describing their experiences as private consultants preparing sentencing plans for convicted criminal offenders. Although their work focused on finding community-based alternatives to incarceration for their clients, they found that the quality of their work was improved when they asked crime victims for their views on appropriate punishments for the person(s) who victimized them.

Henderson and Gitchoff made five generalizations about crime victim participation in alternative sentence planning: victims initially want their victimizer imprisoned in many cases; victims were uninformed, however, about possible sentencing options available to the court; probation pre-sentence reports containing retributive statements from crime victims resulted when probation officers offered them no alternative choices; victims were willing to abandon retributive views if given a meaningful alternative; victims were increasingly interested in alternatives to incarceration for their victimizers as time passed after their victimization; and, lastly, victim views on appropriate punishment were influenced by how and by whom they were asked for their input.

"We have found," Henderson and Gitchoff concluded, "that when victims are interviewed directly after the crime they are much more prone to desire harsh retribution than when they are interviewed or re-interviewed several weeks after the crime has occurred. This may be due in part to a 'cooling off' period when the victim reflects on the circumstances of the offense and may have received ministerial or familial counseling. We have found that information on sentencing is crucial to obtaining victim agreement on alternative sentencing. We also found that a professional interviewing on behalf of the defendant appears to be an important factor influencing the victim's views on sentencing."[3]

> *"Our legal process does not encourage accountability on the part of offenders."*

In a later article, Henderson and Gitchoff reported some statistical evidence supporting their generalizations. In late 1979, Albert Santiago, their research associate, interviewed 20 felons serving long-term sentences in a Nevada prison for non-violent property and drug offenses. Henderson and Gitchoff interviewed more than 100 victims over a 9-year period. Together, they found that offenders were not given an opportunity to make restitution, victims were not given relevant alternative sentencing information, most victims (not young or well-to-do victims) were initially interested in incarcerating their offenders but they were less likely to press their option when given alternative sentencing arrangements were described to them. Victims were also likely to want harsh penalties when interviewed shortly after their victimization but were attracted to

—*continued on next page*

Russ Immarigeon is the Associate Editor of Criminal Justice Abstracts, *and a freelance writer specializing in criminal justice issues.*

[1]Russ Immarigeon, "Surveys Reveal Broad Support for Alternative Sentencing," *NPP JOURNAL*, Number 9, Fall 1986, pp.1-4; Nigel Walker and Mike Hough, eds., *Public Attitudes to Sentencing: Surveys from Five Countries*, Brookfield, VT: Gower Publishing Company, November 1988.

[2]The U.S. Department of Justice is trying to nip this possibility in the bud. The Bureau of Justice Statistics recently sponsored a national public opinion survey which pronounced that "Americans overwhelmingly support incarceration as the most appropriate punishment for criminals." The findings from this survey differed dramatically from a wealth of state, national and international studies, and preliminary reaction to the study suggests significant methodological and conceptual flaws. A detailed analysis of this study, and its policy implications, will appear in the next issue of the *JOURNAL*.

[3]Joel Henderson and G. Thomas Gitchoff, "Using Experts and Victims in the Sentencing Process," *Criminal Law Review*, 17(3): May-June 1981, pp.229-231.

—continued from previous page
alternatives to incarceration when given information by well-informed probation officers.[4]

Victims v. Offenders

The experiences and findings of Henderson and Gitchoff are rarely observed in political debate about crime and punishment in our society. A more dominant force is the inaccurate perception that offenders' rights and interests are inherently antagonistic to victims' rights and interests. George M. Anderson has put this dilemma in historical context:

"One of the fastest-growing movements in the 1980s has been the victims' rights movement," he recently observed. It represents a heightened indignation on the part of women and men who have been harmed through violent crime and feel ill-served by a judicial system seemingly indifferent to their anguish.

"Reacting to this anguish in a concerted manner, members of victims' rights groups around the country have successfully pressed for the enactment of statutes addressing their concerns. Many jurisdictions have made provisions for separate waiting areas for victims who must testify against their assailants in court. More significantly, a majority of states now have victim compensation funds, which help defray medical and other costs connected with injuries incurred as a result of crime.

"However beneficial such legislation may be for victim assistance," Anderson found, "there exists another underlying concern that has become a source of worry to civil libertarians. If statutes passed during the last few years have carried the message of 'help the victim,' aspects of the same legislation have, in their view, carried a parallel message: 'Punish the offender more.'"[5]

Neither Victims Nor Offenders Are Heard

Victims and their advocates have rightly decried the invisibility imposed upon them by criminal justice practitioners who are normally invested in other organizational concerns (arresting the offender, convicting the offender, defending the offender and punishing the offender). Not too surprisingly, offenders are often routinely overlooked in the criminal sanctioning process. Offender contributions are belittled because they seem to have too much self-interest. I remember well a visit to Manhattan's criminal court several years ago where I observed the work of a local community service program. The prosecutor, defense attorney and program liaison all stood before the sentencing judge who inquired about the offender's history of drug use. Neither the prosecutor nor the defense attorney knew anything about the offender's history; the community service program representative, who had at least briefly interviewed the offender, was not concerned, one way or the other, about the offender's drug use. The judge never received an answer to his question, and no one seemed innovative enough to step back several steps to ask the offender himself as he stood, silently, behind these practitioners.

With regard to victims, an important question remains what happens when victim interests differ from prosecutorial or court interests. Anecdotal evidence exists to show that courts have listened to victims wanting sentences different than prosecutors have recommended or they would have normally imposed. The Connecticut Center for Sentencing Alternatives, for instance, was recently involved in a case where a 62-year old man, convicted of manslaughter in the "crime of passion" shooting death of his wife, was returned to the custody of his family. "I loved my sister," the victim's sister told the court, "but I love (the convicted offender) very much also. We want him home." The man was sentenced to a suspended 10-year sentence, along with immediate inpatient evaluation and long-term outpatient counseling.[6]

More commonly, however, evidence suggests that victim recommendations are overpowered by prosecutorial arguments for incarceration or other harsher punishments. Paul Landkroner, the assistant director of Porter County PACT, recently recounted that a victim helped his organization prepare a non-incarcerative sentencing plan for one of PACT's offender clients. The local prosecutor, however, objected, and the offender was incarcerated by the court. This sort of thing happens repeatedly. One must consider, too, what societal benefits are lost when prosecutors consistently reject well-planned community service plans, something which happens regularly for a program operated by the Pennsylvania Prison Society.

Breaking the Victim-Offender Logjam

Several years ago, at an annual meeting of victim-offender reconciliation program (VORP) practitioners, a representative of a victims' rights advocacy group presented a keynote address which angered those in attendance who were looking for a serious discussion of what victim and offender advocates had to offer one another. The keynote speech—an unavoidably moving but overbearing recitation of various victims' pain—was an unfortunate failure because VORP practitioners are keenly sensitive to both victim and offender issues. Unlike most victim or offender advocacy organizations, they do not focus on one group to the exclusion of the other. They recognize, along lines discussed by Norwegian criminologist Nils Christie,[7] that both groups are involved in a conflict out of which comes certain needs requiring concerned attention. VORP practitioners try to address the concerns of both parties; they are organizationally and philosophically opposed to coercing the needs of one group against the other.

Several clarifications are necessary, therefore, to debunk the notion that alternatives to incarceration or other offender-oriented proposals are largely contrary to victim needs.

Offender-oriented advocates have long urged greater sensitivity to victim needs. The Prison Research Education Action Project (PREAP), for instance, wrote, in *Instead of Prisons*, a prison abolition handbook originally published in 1976, that "all physical threats of violence must be dealt with seriously by both the community and individuals." PREAP argued, moreover, that a victim empowerment approach "directed toward true solutions" to rape and other crimes of violence should "include changing values and attitudes about girls and women and creating the kinds of attitudes that provide opportunities for re-educating and resocializing rapists and other potential sexual aggressives."[8] PREAP, now renamed The Safer Society Program, has, for the past seven years, continued work on developing a caring community response to victims and offenders; this work includes a broad range of publications discussing various aspects of community-based and residential treatment programs for juveniles and adult sex offenders.[9]

---

[4]Joel H. Henderson and G. Thomas Gitchoff, "Victim and Offender Perceptions of Alternatives to Incarcertion: An Exploratory Study," *South African Journal of Criminal Law and Criminology*, 7(1): March 1983, pp.46-50.

[5]George M. Anderson, "The Victim's Rights Movement: Backlash on the Offenders," *The California Prisoner*, 16(4): September 1987, p.6.

[6]Lynne Tuohy, "Family of Slaying Victim Wins Mercy for Her Killer," *The Hartford Courant*, March 27, 1987, pp.A1, A12.

[7]Nils Christie, "Conflicts of Property," *British Journal of Criminology*, 17(1): January 1977, pp.1-19; Nils Christie, *Limits to Pain*, Oxford, U.K.: Martin Robinson, 1981.

[8]Fay Honey Knopp, et al., *Instead of Prisons: A Handbook for Abolitionists*, Syracuse, NY: Prison Education Action Project, 1976. p.137.

[9]The Safer Society Program has issued the following publications: Remedial Intervention in Adolescent Sex Offenses: Nine Program Descriptions (1982); Retraining Adult Sex Offenders: Methods and Models (1984); A Preliminary Survey of Ado-

Victim-oriented advocates have also seen that alternatives can serve the interest of their clients. A recent conversation with John Stein, deputy director of the National Organization for Victim Assistance, found articulate support for alternatives to incarceration that take seriously the needs of persons victimized by crime. Moreover, the idea that victims are antagonistic to measures that benefit offenders, even those offenders they were victimized by, belittles victims' compassion and sense of social justice.

Conclusion

In the 1960s, victim and offender interests were more clearly distinct when victims were almost entirely ignored, and when alternative sentences for criminal offenders were oriented more toward rehabilitation than punishment. In the 1980s, however, criminal sentences, even those prepared by defense attorneys or defense-oriented sentencing specialists, are increasingly punitive or incapacitative. Offenders are now commonly sentenced to victim-oriented sanctions like restitution.

In the late 1960s and throughout the 1970s, prisoners gained an unprecedented amount of legal rights through the concerted efforts of civil rights attorneys, supportive citizen groups, and prisoners themselves. While individual rights are still threatened daily in most penal institutions in the United States, the U.S. Constitution, with its Bill of Rights, at least has a foothold in the administration of these institutions as a result of these efforts. Prisoners' rights victories have been hard-fought and long overdue, and many more prisoners' rights victories are still needed, but they have at least brought us one step closer to a more democratic system of crime control and criminal sanctioning.

In recent years, attorneys, citizen groups and crime victims have created a rapidly developing victims' rights movement that has significant (although sometimes unrecognized) similarities with the prisoners' rights movement. Prisoners and crime victims, for instance, are both seeking a participatory voice in the criminal justice process. Both groups want recognition; they no longer wish to be ignored or considered insignificant in a process in which they are intimately involved.

Henry Adams once wrote that "democracy is shaking my nerves to pieces." The role of victim and offender rights in creating a more democratic system of criminal justice is far from settled, but evidence is gradually emerging that the pieces of a more democratic response to crime are falling into place. While procedural approaches to providing a full sense of justice for victims and offenders are still in the early stages of development, hope exists that victim and offender needs can take a preferential place in courtrooms across the United States.

A crucial component of such a shift in criminal justice practice concerns the way we think about criminal sanctioning. Howard Zehr, who has helped architect a grounded philosophy for emerging reparative sanctions such as victim-offender reconciliation, writes cogently on this topic.

"Victims have many needs. They need to speak their feelings. They need to receive restitution. They need to experience justice: victims need some kind of moral statement of their blamelessness, of who is at fault, that this thing should not have happened to them. They need a restoration of power because the offender has taken power away from them."

Zehr argues that the criminal justice system in this country works neither for victims nor for offenders.

"Our legal process does not encourage accountability on the part of offenders. Nowhere in the process are offenders given the opportunity to understand the implications of what they have done. Nowhere are they encouraged to question the stereotypes and rationalizations that make it possible for them to commit their offenses. In fact, by focussing on purely legal issues, the criminal process will tend to sidetrack their attention, causing them to focus on legal technical definitions of guilt, on the possibilities for avoiding punishment, and on the injustices they perceive themselves to undergo."[10]

Zehr suggests that both victims and offenders need "an experience of empowerment." An equally crucial aspect of this process is lessening reliance on incarceration as a response to crime. Writing about crime victim restitution, Dan McGillis recently found that "this goal does not appear to have been attained, and such a failure seems inevitable given the nature of the cases handled by typical restitution mechanisms. Restitution efforts typically do not focus upon cases in which incarceration is highly likely or assured, and thus a relatively low impact on prison and jail caseloads is the result."[11]

What is needed, it seems, is the merging of three goals— crime victim restitution, victim and offender reparation, and jail and prison population reduction—into a cohesive and well-coordinated criminal justice policy. ■

lescent Sex Offenses in New York: Remedies and Recommendations (1984); The Youthful Sex Offender: The Rationale and Goals of Early Intervention and Treatment (1985); Report on Nationwide Survey of Juvenile and Adult Sex-Offender Treatment Programs and Providers (1986); Treating the Young Male Victim of Sexual Assault: Issues and Intervention Strategies (1986); A Model Residential Juvenile Sex-Offender Treatment Program: The Hennepin County Home School (1987); Female Sexual Offenders: A Summary of Data from 44 Treatment Programs (October 1987); Informational Packet: Female Sexual Abusers (October 1987); and Sexual Offenders Identified as Intellectually Disabled: A Summary of Data from 40 Treatment Providers (November 1987). For information about the cost of these publications, contact The Safer Society Program, Shoreham Depot Road, Orwell, VT 95760, 802/897-7541.

[10]Howard Zehr, "Retributive Justice, Restorative Justice," Elkhart, IN: MCC Office of Criminal Justice, 1985.

[11]Daniel McGillis, *Crime Victim Restitution: An Analysis of Approaches*, Washington, D.C.: U.S. Dept. of Justice, December 1986, p.67.

NPP Celebrates 15 Years With Memories of Past, Hope for Future

Jan Elvin

Over 250 people attended the 15th Anniversary celebration of the National Prison Project on October 24, 1987 in Washington, D.C. A day of workshops and discussions on the past and future of prison litigation was capped off with a dinner, a keynote speech, and the grand finale—a roast of NPP Executive Director Alvin J. Bronstein. There was much retelling of "war stories" from the early years of prison litigation, shared memories, and personal anecdotes. Each one was a reminder of how far the movement had come and how much had been shared along the way. It was a day to rediscover how much energy and creativity people still have, and be strengthened by it.

In what Norval Morris, Kreeger Professor of Law, University of Chicago Law School, called "a uniquely American event," the Project brought together prisoners' rights lawyers from around the country, as well as advocates, academics, judges, criminal justice professionals, corrections professionals, and former colleagues and friends. Except for the prisoners, it seemed that everyone was there.

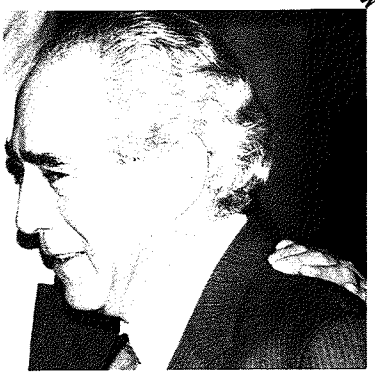
—continued on next page

Jan Elvin is the editor of the JOURNAL. The NPP staff also contributed to this article.

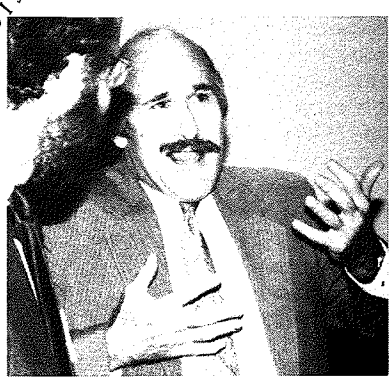
COMMEMORATION OF FIFTEEN YEARS OF PRISON LITIGATION

NATIONAL PRISON PROJECT

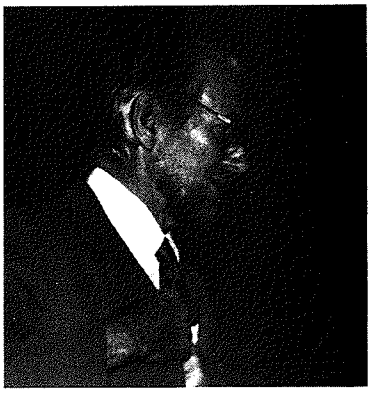
1972-1987



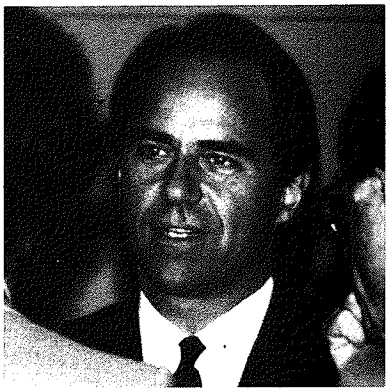
Has Al Bronstein just discovered that he's to be the focus of the Special Roast scheduled for the Anniversary's evening events?



One can only guess what Ira Glasser (c.), Executive Director of the ACLU, is saying to Randy Berg of the Florida Justice Institute.



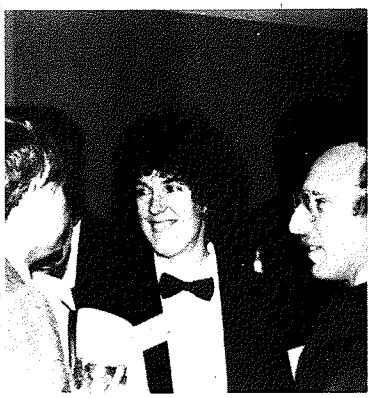
John Coleman, former president of the Edna McConnell Clark Foundation, presented the keynote speech at the Anniversary Dinner.



William Bennett Turner, lead counsel in Ruiz v. Estelle, *participated in an afternoon symposium, discussing the history of prisoners' rights litigation.*

Erik Andersen, Governor of Ringe Prison in Denmark, meets with conference guests.

Chan Kendrick, Director of the ACLU of Virginia, shares a joke with NPP's Jan Elvin.



NPP attorney Alexa Freeman (c.) and Steve Ney (r.), director of the Maryland Disability Law Center and former NPP chief staff counsel, chat with medical expert Dr. Lambert King (l.) of St. Vincent's Hospital and Medical Center.

Former NPP Associate Director, Ralph Knowles, (r.), and Randy Berg (l.) of the Florida Justice Institute, were among those who attended the Anniversary celebration.

Photos by Elizabeth Rolando.

—continued from previous page

During the morning sessions held at the Georgetown University Law Center, Claudia Wright and Elizabeth Alexander from the Prison Project led workshops on settlement and compliance issues along with guest speakers Michael Lewis and Linda Singer. Lewis and Singer are professional mediators and are well known for their work in training lawyers to negotiate effectively. They have both also served in many cases as court-appointed special masters or monitors. The highlight of the settlement workshop was a role-playing exercise in which the participants were divided into pairs and presented with a difficult factual situation to resolve by negotiation. The range of settlement solutions to a single problem was broad and prompted a spirited and thought-provoking discussion.

The compliance workshop focused on developing new methods to achieve meaningful long-term reforms after settlement. The presentation of new, experimental ideas sparked debate over the virtues of traditional consent decrees versus agreements which include the extensive use of experts, monitoring arrangements, and provisions for voluntary dismissals after compliance is reached.

Alexa Freeman of the Prison Project and Urvashi Vaid, former NPP attorney, now Public Information Director with the National Gay and Lesbian Task Force, led a workshop on the problem of AIDS in prison. Vaid presented statistics on the number of reported HIV, ARC and AIDS cases in various city jails, state prisons and in the federal system based upon data the National Prison Project has received from its first survey of AIDS in prison and preliminary results from its second survey. The numbers indicate a growing AIDS crisis in the nation's jails and prisons.

Vaid highlighted the central issues that have emerged. These include problems of AIDS testing in prison (who should be tested, whether it should be mandatory, availability of the test for those who seek it, reliability of test results, use of test results, confidentiality, cost, and availability and quality of counseling before and after testing); the housing of prisoners with HIV, ARC and AIDS (they are often segregated in conditions comparable to punitive or lock-down units); the lack of adequate medical care for prisoners with ARC or AIDS; and the rights of third parties to notification of a prisoner's health status versus the prisoner's right of privacy.

Freeman surveyed the handful of cases that have been decided dealing with issues of AIDS in prison. To date, the courts have upheld prison officials' decisions to segregate all infected pris-

oners and to test all prisoners for HIV (as well as decisions not to test and segregate in cases brought by prisoners seeking this), deferring to their expertise. However, as the crisis worsens, these and other issues necessitate continued litigation to protect prisoners from unconstitutional deprivations of their rights.

After the presentations, the audience engaged in a lively and useful discussion. Many of those in attendance were AIDS experts who contributed enormously to the exchange. At the end of the workshop all agreed that it was critical to continue to meet to share information and strategies.

Adjoa Aiyetoro of the NPP and Claudette Spencer, an attorney with the Prisoners' Rights Project of the New York Legal Aid Society, led a workshop on race discrimination in the criminal justice system. Aiyetoro gave an overview of the types of race discrimination found in prison and discussed the possibilities of mounting legal challenges to those practices.

Spencer described how to convince superiors to litigate these issues, and discussed the need to gather as many facts as possible while incorporating these facts into an appeal to the morality of the decision-makers. She also described the facts in a case involving a prison in New York which led her office to file a suit alleging race discrimination. These facts include racial segregation in housing and job assignments.

During discussion by the workshop audience, the question of the dangers of integration was raised. Some participants gave examples of conflicts between racial groups when institution housing and jobs are integrated. Others expressed the belief that it was unfair to deny prisoners of color "good" jobs if violence may erupt. The need for responsible leadership from the administration and staff of the institution including the development of a plan for integration was suggested as a solution to this problem.

The history and future of prison litigation were the topics for the afternoon's symposium, and a distinguished group of speakers led us through an account of the changes that time has brought. The Honorable Robert R. Merhige Jr., Senior Judge, United States District Court, Eastern District of Virginia, began the session with a judge's perspective on the changes in prison litigation since the 1960s. With particular reference to Virginia's prisons, he commented on the many positive changes he has seen after first describing the vile conditions he encountered there 20 years ago.

William Bennett Turner, partner in a San Francisco law firm, described the movement from the early narrow and single-issue prisoners' rights cases to the systemic challenges to an entire state system such as the one he led in Texas. A final view of history came from Lynn Walker of the Ford Foundation and former head of the Special Litigation Section, Civil Rights Division, U.S. Department of Justice. She recounted the influential role that the Justice Department played in the 1970s and spoke of the work leading to passage of the Civil Rights of Institutionalized Persons Act.

Philip Hirschkop, one of the founders of the NPP, shared his memories of the early days, as well as his role in the early stages of the prisoners' rights movement.

Addressing the more difficult topic of the future of prison litigation were Vincent Nathan, partner in a Toledo law firm and Special Master in several cases, Allen Breed, President, National Council on Crime and Delinquency, and Charles Ogletree, Adjunct Professor, Harvard Law School. All three stressed the continuing need for prisoners' rights litigation and the pressure for positive change that it creates. We need to learn how to end long-standing cases, stated Nathan, so that the pressure for change is not counterproductive. Nathan has been the special master in the Texas prison litigation, *Ruiz v. Estelle*, which has gone on for many years. The role that masters have played in moving the parties away from an adversarial relationship and into a partnership for reform was stressed.

Allen Breed closed his remarks by saying that "Even with citizen and foundation support of civil rights issues, committed attorneys who literally give their professional lives to the adversarial process of righting wrongs, and courts that are willing to make findings of fact and conclusions of law regarding unconstitutional conditions—even with all these forces—changes in prisons and jails will not take place without the partnership of concerned and professional correctional staff. Staff who, in most cases, given the resources and opportunities, can and do make conditions of confinement fair, safe and humane. . . . It is hoped that conciliation rather than litigation will be the watchword of the tomorrows."

But it was Charles Ogletree who reminded us just what it is all about. Decency—he said—the treatment of prisoners as fellow human beings, was the most important result of the movement and must continue.

We all enjoyed remarks by Erik Andersen, a visitor from Denmark. Andersen is the Governor (Warden) of the national maximum security prison at Ringe in Denmark, where criminal justice policy is much more enlightened than in this country. He spoke eloquently, saying that when prison life is so tedious, "how can we expect rehabilitation?" Recidivism is a meaningless way to measure the effectiveness of our criminal justice policies and practices, Andersen added, when we know that crime is the result of larger social problems. His views were so refreshing that Norval Morris later called Andersen a "fantasy Warden, from a make-believe land in Western Europe."

And, in the end, Norval Morris in his wonderful and humorous way, reminded us all just how fortunate we are to have jobs that are meaningful.

In his opening remarks during the evening dinner program, Al Bronstein said that "whatever we few at the Project have accomplished during these 15 years has only been made possible by the combined cooperation and support of many, many other people. Praying only that I do not overlook anyone, I want to acknowledge that help now:

"First, Herman Schwartz, Phil Hirschkop and Aryeh Neier who conceived of and put together the Project. Without them there wouldn't be any Project;

"The NPP staff over the years, 24 lawyers—consistently the most creative and hard-working group of professionals ever gathered under one roof;

"Over the years 44 support staff, talented and committed and constantly challenging the lawyers on how to do things better;

"One hundred and ten interns and law clerks who brought fresh thought and new energy to all of us;

"The ACLU staff, the board, and especially the ACLU affiliates who are, after all, our eyes and ears out there. They are what make us a truly national project, and have been a great source of help and support;

"Financial support from foundations, law firms, churches and especially the officers and trustees of the Edna McConnell Clark Foundation, which is a unique institution in charitable giving in this country. They make major, long-term commitments, and work side by side with their grantees to help make things work;

"The experts who have guided us in our litigation, guided us when we should not be litigating, helped us frame lawsuits and implement decrees;

"The local counsel, legal services lawyers, legal aid lawyers, ACLU affiliate staff and cooperating lawyers, private practitioners;

"Judges, both liberal and conservative, united in one common view—that the Constitution applies to all persons;

"Corrections professionals, people we have sued—a named defendant in one of our lawsuits is here tonight. In growing numbers, there are people who

—continued on next page

—continued from previous page
want to run humane and lawful institutions;

"And finally, our clients, the prisoners. The men and women who have been willing to step forward, to work with us, assist us, sometimes to lead and direct us—without them there would be no success for the Prison Project."

Ira Glasser, Executive Director of the ACLU, had time in between debates over the history of the Brooklyn Dodgers, to give a few remarks and to share with us a telegram he had received from Ed Meese. "Congratulations to the criminal lobby on its 15th Anniversary," it read. Glasser stated, "Al and I are having an argument over who gets to read him his Miranda rights if he gets indicted."

Glasser recounted the beginnings of the Prison Project, when Aryeh Neier merged Herman Schwartz' and Phil Hirschkop's projects. "Those people had very little to go on, but they did have a vision. What the Prison Project has accomplished to date gives us hope that what can be accomplished in the future will conform to the vision of those who began it."

Keynote speaker John Coleman, former president of the Clark Foundation, now owns and operates a country inn in Vermont. He lives in a town with "no traffic lights, no cells and one pizza parlor. There are more innkeepers in the town than all the lawyers and ministers put together." Coleman told us, "If you ever begin to lose sight of how much you have done, take the 15th Anniversary issue of the *JOURNAL* and read the parts about the doghouse in Alabama. That is all you need. That doghouse in Alabama was in *our time*. That doghouse is not there today."

He went on to tell the crowd, "You have combined head and heart. That's why I like the Project so much and could argue for it with such deep conviction in the foundation. You brought head and heart together. Al Bronstein is an outstanding example of that—a brilliant mind and a warm heart."

"You have still got a long road ahead," said Coleman. "Whatever it is that stands in your way, that too will pass." He quoted Roger Baldwin, founder of the ACLU, who said that one need only "live long enough to see what seemed like defeats turn into victories."

After pointing out that "you would have to be out of your mind to get up in front of 250 people and make fun of Al Bronstein," Glasser introduced the roasters for the evening, Matt Myers, former chief staff counsel at the Project, and Urvashi Vaid, former NPP staff attorney. Matt spoke of how, at 5'8", he wondered why he was always the tallest lawyer on the NPP staff. He soon realized that the only attribute that really mattered was that prospective attorneys be shorter than Al.

"No one has taught me more about the art of cross-examination than Al," Myers continued. During the Alabama case a warden from the diagnostic facility was brought in to testify. Myers described Billy Long as a "truly enlightened individual," who asserted vehemently on direct examination that the reason there were so much violence and so many assaults at his facility was that fully "50% of the prisoners who passed through were homosexuals."

At that, Bronstein said, "I'll do this cross-examination." Bronstein stood up, leaned over to Billy Long, and the following exchange took place:

Bronstein: Mr. Long, how is it that you know that fully 50% of those folks are homosexuals?

Long: Well, I asked them.

Bronstein: I assume it was solely out of prurient interest?

Long: Of course!

Myers could not resist a serious moment, however, and spoke to the recurring theme of Bronstein's "long-term commitment." "Over the years, hundreds of students, dozens of lawyers have passed through the Project, and not one of them has not been impacted by Al, by his spirit, his commitment to the civil rights movement, and by his legal skills."

The next roaster, Urvashi Vaid, claimed that Bronstein's ego is one of the Prison Project's secret weapons. "It has a devastating effect on corrections chiefs. Whenever we reach an impasse in negotiation we bring in Al. He walks in, stands there rocking back and forth on his heels, and growls. Attorney generals back down, judges address him deferentially, prisoners sign settlement agreements, and corrections officials feel like he's one of the guys!"

The evening ended with remarks by Ralph Knowles, former Associate Director of the Project and a friend of Al Bronstein's for many years. Knowles said, "I know that Al would not want me to get up here and simply propose a toast to Al Bronstein. As he has mentioned, there are many other people who come into the circle." He mentioned prisoners, experts, litigators, masters and monitors, foundations, and the entire group of prisoners' rights advocates. Finally, to Al, he said,"You have been in this emotional and stressful, low payoff business for years. Some of us come and go. You have remained hopeful throughout and have always maintained enormous sensitivity to the rights of all people, particularly those who other people don't have respect for. We love you. Keep on for another 15 years and we'll be back for another party." ■

For the Record

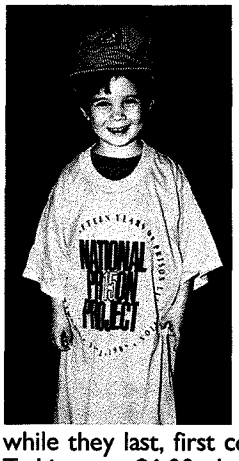
■ Joining us as a Staff Associate is *Olinda Moyd*, previously at the NAACP National Office in Baltimore where she was a paralegal and coordinator of legal research. At NAACP she worked on school discrimination, voting rights, employment discrimination and fair housing cases.

A number of staff members have recently been promoted:

Claudia Wright is now the Associate Director. She has been with the Project since 1981 and returned recently after a year at the Federal Public Defender's Office in Baltimore. In addition to assisting the Director, she hopes to expand the Project's funding base by setting up special projects in the areas of juvenile and women's facility litigation. She also hopes to explore institutional reform by using a combination of litigation and nonlitigation strategies as is currently being utilized in our juvenile case in Hawaii.

Adjoa Aiyetoro is the Director of Legislative and Community Affairs. In her 5-1/2 years at the Project she has shown an interest in involving the community in litigation efforts. Among other projects, she organized a conference on the effect of imprisonment on the black family and community, pursued a race discrimination claim in the massive Michigan case and has been successful in several non-litigation settlements. In her new position she hopes to develop a methodology for involving the community in the process of prison litigation and thereby influence legislative decisions towards an increased reliance on alternatives.

Elizabeth Alexander has been named Chief Staff Counsel. She also joined the



■ **Special edition Commemorative T-Shirts**—See how suave and debonaire you can look in the National Prison Project's 15th Anniversary Commemorative t-shirt! Sizes are XL, L, M and S (children sizes special order). The colors remaining are mostly white and yellow (L has some lt. blue; S has lt. blue and pink). Get them while they last, first come, first served! T-shirts are $6.00 plus $1.75 for handling ($7.75).

Project staff in 1981 and has successfully challenged conditions of confinement in Virginia, Alabama, Wisconsin, South Dakota and Michigan. Her new duties will include coordination of the legal work of project attorneys and the paralegals as well as improving the legal research resources available to the staff.

Dan Manville, Staff Associate, has returned to Michigan to practice law after being admitted to the bar there; he was with the Project for 5½ years.

Lynthia Gibson and *Betsy Bernat* have both been promoted to Assistants to the Director and between them will handle various financial and administrative duties.

■ The PACT Institute of Justice announces that the Annual VORP Gathering will be held June 18-22, 1988 in Toronto, Canada. Held annually since 1983, the VORP Gathering is a conference for victim-offender reconciliation and mediation programs and those with an interest in such programs. The tentative theme of the 1988 conference is: "The Needs of Victims and Offenders."

The conference attracts international attention, drawing program directors, staff and volunteer mediators of victim-offender mediation and reconciliation programs from across U.S. and Canada. Training workshops and resource exchanges are provided for those who are interested in starting a local program or learning more about the VORP concept.

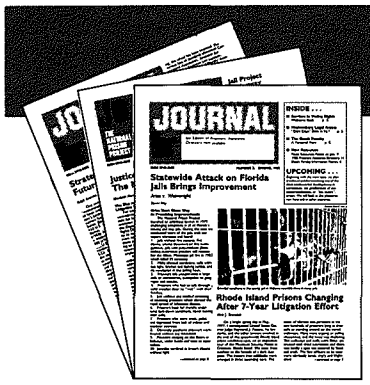
For more details, contact the PACT Institute of Justice at P.O. Box 177, Michigan City, IN 46360, 219/872-3911.

To the NPP Staff:

While it is somewhat difficult for me to express the extent of my gratitude with words regarding the [*NPP JOURNAL*, 15th Anniversary Edition], please know that I consider it a very special blessing and a high honor to be mentioned among those who refused to turn a deaf ear to the cry for assistance from the many men, women and children who are the product or by-product of inhumane treatment which derives from America's State and Federal Prison system.

Yours in the Struggle Always,
Bobby Battle
(Lead Plaintiff, *Battle v. Anderson*)

PUBLICATIONS



QTY. COST

The National Prison Project *JOURNAL,* $20/yr. $2/yr. to prisoners.

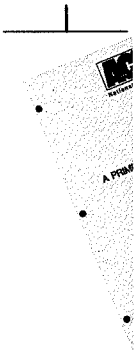
The Prisoners' Assistance Directory, the result of a national survey, identifies and describes various organizations and agencies that provide assistance to prisoners. Lists national, state, and local organizations and sources of assistance including legal, library, medical, educational, employment and financial aid. 7th Edition, published April 1986. Paperback, $20 prepaid from NPP.

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

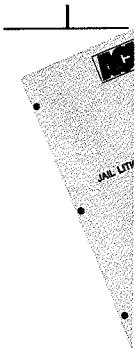
The National Prison Project Status Report lists by state those presently under court order, or those which have pending litigation either involving the entire state prison system or major institutions within the state. Lists only cases which deal with overcrowding and/or the total conditions of confinement.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

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

QTY. COST



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



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

QTY. COST

Fill out and send with check payable to

The National Prison Project
1616 P Street, NW
Washington, D.C. 20036

NAME _____

ADDRESS _____

CITY, STATE, ZIP _____

HIGHLIGHTS

The following are major developments in the Prison Project's litigation program since August 1, 1987. Further details of any of the listed cases may be obtained by writing the Project.

Abbott v. Meese—This is the national class action which challenges the mail and literature policies of the Federal Bureau of Prisons. In July, the U.S. Court of Appeals rendered its opinion and decided the publications issue in plaintiffs' favor, stating that the district court had applied the wrong standard. The Court affirmed the district court opinion on the prisoner correspondence issue and remanded the case so that the proper standard could be applied by the district judge.

Bobby M. v. Graham—This case challenges conditions and practices at three Florida juvenile training schools. In July the court approved a comprehensive settlement agreement, settling all issues in the plaintiffs' favor, including use of restraints and isolation. The agreement also incorporated a population reduction plan, and a monitoring and reporting system which went into effect in July.

Cody v. Hillard—This suit challenges conditions at the South Dakota State Penitentiary. In July, the district court held a six-day compliance hearing on all issues except overcrowding. We offered defendants a settlement agreement that recognizes continuing deficiencies and establishes an expert panel to address compliance issues; defendants tentatively approved the plan.

Epps v. Martin—This case challenges conditions at North Carolina's Craggy state prison. We secured a settlement in August which provides for improvements in fire safety, ventilation, heating, medical and mental health care, and a reduction of triple-bunking and overall overcrowding. A hearing was held in late September for approval of the settlement by the district court.

Inmates of D.C. Jail v. Jackson—This case challenges conditions, primarily overcrowding, at the D.C. Jail. In July, the D.C. City Council passed the Emergency Overcrowding Act, allowing early release of approximately 850 prisoners. The District has also tried to send newly sentenced prisoners to federal facilities, a move we oppose.

Inmates of Occoquan v. Barry—This lawsuit challenges conditions at three District of Columbia facilities. On July 30, the court rescinded a previous order for a population cap, requiring instead that the defendants reduce the population by 100 inmates a month until the population cap is achieved. The D.C. City Council approved an Emergency Overcrowding Act to ease overcrowding within the entire D.C. system (see *Inmates of D.C. Jail v. Jackson*).

Palmigiano v. DePrete—This case challenges conditions in the Rhode Island State Prison system. In July, parties agreed to a new order with respect to Medium Security and the Intake Center whereby a panel of experts will evaluate conditions at these facilities every six months or whenever the population exceeds certain limits for 30 days. If the facilities are found to be in non-compliance with court-ordered standards, defendants will have 30 days to remedy the situation or face the imposition of a population cap.

Phillips v. Bryan—This is a conditions case at Nevada's maximum security prison. In October, parties agreed to a new consent decree, settling all issues and thereby replacing the 1983 decree.

Shrader v. White—In this case challenging conditions at the Virginia State Penitentiary in Richmond, the only outstanding issue was prisoner access to scrap metals and tools which could be used to make weapons. A settlement agreement providing for adequate securing of these materials was approved by the Magistrate on August 11, 1987.

U.S. v. Michigan/Knop v. Johnson—This is a statewide Michigan prison conditions case. In August, the court issued a highly favorable decision, granting plaintiffs some relief on every issue under litigation. Relief on racial discrimination issues, however, was either very narrow or denied, and plaintiffs have moved for reconsideration on segregation in the dining halls.

Washington v. Tinney—This case challenges conditions and allegations of brutality and use of force at two Maryland state prisons. On October 2, the court approved a stipulated agreement which covers all the issues in the case. ■

National Prison Project
American Civil Liberties Union Foundation
1616 P Street, NW, Suite 340
Washington, D.C. 20036
(202) 331-0500

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