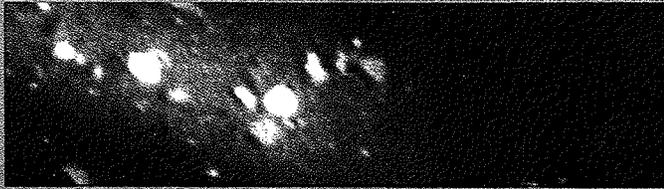


# JOURNAL

THE  
NATIONAL  
PRISON  
PROJECT



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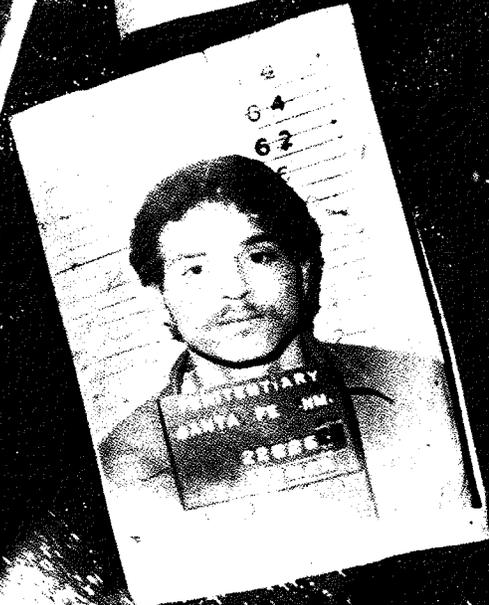
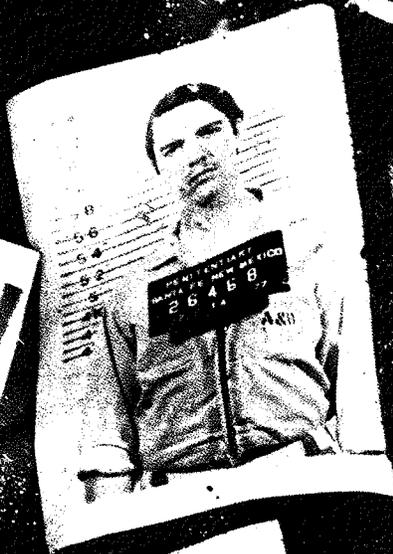
NUMBER 16, SUMMER 1988

## New Mexico Seeks to Elude Obligations Of Consent Decree

by Mark Lopez

Although 17 years have passed since the Attica uprising, the memory has hardly faded. The tragic deaths of more than 40 people during the retaking of the prison by state troopers has been chronicled and recounted thousands of times. Less well known are the events of February 2 and 3, 1980, when 37 inmates were killed in an uprising at the Penitentiary of New Mexico (PNM). Aside from the events at Attica, the PNM riot was the worst in modern American penal history. As a result of the state officials' belated recognition that conditions at PNM were grossly unconstitutional and that those conditions led directly to the riot, a comprehensive consent decree was agreed to by the parties. Unable, or unwilling, to come into compliance during the ensuing years, New Mexico prison officials ("defendants") are now seeking to escape the provisions of the decree, arguing that the Eleventh Amendment and attendant principles of comity operate as jurisdictional bars to the continued enforcement of the decree. Not surprisingly, attorney generals from six other states have joined New Mexico in this baldfaced attempt to avoid their obligations under similar decrees or court orders. The states of Hawaii, Oregon, Kansas, Washington, Utah and Wyoming have filed amicus briefs with the court in support of the New Mexico position.

—continued on page three



All photos courtesy The Santa Fe Reporter/Nancy Stone



THE  
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OF THE  
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—continued from front page

### The 1980 Riot at PNM

Before examining the defendants' argument in detail, it is important to recount the events at PNM of February 2 and 3, 1980, and to recall exactly why the defendants agreed to the comprehensive decree they now oppose. During a 36-hour period, inmates gained access to every part of the main penitentiary building. Overpowering four correctional officers during a routine inspection, and taking their keys, inmates pushed through an open door, captured more officers and freed prisoners in other units of the building. By smashing through the penitentiary's control center, and using grill gates left open through lax security procedures, prisoners obtained keys to every other part of the facility. Twelve correctional officers were taken hostage. In a terrifying show of inmate on inmate violence, 33 prisoners were killed, and at least 90 were seriously injured, many under unimaginably brutal circumstances. One prisoner died from being shot in the face at close range with a tear gas gun, and another was decapitated. "Execution squads" of inmates targeted those in protective custody for death and went looking for their intended victims. Many of those who survived were raped, beaten and stabbed, or suffered drug overdoses from narcotics obtained from the prison pharmacy. Fires were set in the psychological unit, the administrative records unit, the warden's office, and housing areas. Damage to the facility was estimated at \$2.6 million. The damage done to prisoners and prison officials, their families, and the state itself, is unquantifiable.

In seeking to set aside significant portions of the decree, New Mexico prison officials seem to have all but forgotten that the riot was directly attributable to the unconstitutional conditions at PNM, and that the consent decree specifically addressed many of the underlying problems found to have precipitated the riot. The reports of the New Mexico Attorney General, mandated by legislation passed in the wake of the riot, concluded that overcrowding, understaffing, inadequate classification procedures, inadequate medical, dental and mental health care, lack of exercise and recreation, nonprivate visitation and substandard food all helped to create the intolerable living conditions and extreme inmate frustration that led to the riots.<sup>1</sup>

—continued on next page

*Mark Lopez is a staff attorney with the Prison Project.*

<sup>1</sup>Reports of the Attorney General on the February 2 and 3, 1980 riot at the Penitentiary of New

—continued from previous page

The reports of the Attorney General concluded that enforcement of the decree would be critical to prevent future catastrophes.<sup>2</sup>

It is against this backdrop that defendants are now attempting to void major portions of the decree, including those concerning inmate programming, due process in disciplinary procedures, inmate classification, overcrowding limitations, and visitation. Their argument is that the combined holdings of the Supreme Court's decision in *Pennhurst v. Halderman*<sup>3</sup> and the Fifth Circuit's decision in *Lelsz v. Kavanagh*<sup>4</sup> preclude a federal court from enforcing a consent decree against a state beyond the guarantees contained in the federal Constitution and laws. Stated another way, defendants' position is that any portion of a consent decree not specifically grounded on federal remedies for federal violations is void as a matter of jurisdiction and cannot be enforced against the state under the Eleventh Amendment. Plaintiffs, represented by the National Prison Project, disagree, stressing that the state's argument rests on an incorrect and unsupported conception of the Eleventh Amendment and a misapplication of the principle of comity.

The extravagant contentions made by New Mexico officials have dangerous and far-reaching implications for civil rights litigants, if accepted by the courts. The obvious threat is that it will subject existing decrees to collateral attack and, as a corollary, would drastically reduce the circumstances under which future plaintiffs can settle lawsuits with state officials, since they could not rely on a state's agreement not to contest relief. The threat is particularly acute in prison and similar institutional litigation since relief is sought on a totality of conditions theory where independent conditions may not rise to constitutional levels in and of themselves. In the unlikely event that New Mexico prison officials prevail, the enforceability of literally hundreds of existing decrees in place throughout the country, which operate to ensure that prison officials conform their conduct to constitutionally acceptable standards, would be jeopardized. Thus far, New Mexico has not been successful in having the decree set aside. In a recent decision, the district court charged with the enforcement of the decree rejected the state's contention.

Mexico, I and II (June 5, 1980; September 25, 1980).

<sup>2</sup>Attorney General Report II, p. 46.

<sup>3</sup>465 U.S. 89 (1984).

<sup>4</sup>807 F.2d 1243 *reh'g. denied*, 815 F.2d 1034 (5th Cir. 1987) (seven judges dissenting from denial of rehearing *en banc*).

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*The reports of the Attorney General concluded that enforcement of the decree would be critical to prevent future catastrophes.*

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*Duran v. Carruthers*.<sup>5</sup> Although an appeal is pending, the district court throughout its opinion characterizes defendants' position as one of "fundamental confusion and misapplication of principles . . . extravagant contentions, . . . and erroneous."<sup>6</sup>

#### Legal Issues

As noted above, the defendants extrapolate from the holdings of *Pennhurst* and *Lelsz* the conclusion that a district court may not enforce a consent decree beyond the guarantees contained in the federal Constitution and laws simply because it is a consent decree. Neither of these cases can be read to stand for this proposition. In *Pennhurst*, a class of mentally retarded persons sued the Pennsylvania Department of Public Welfare and various state officials for violations of their alleged constitutional, federal, and state statutory rights to adequate habilitation while residing at Pennhurst, an institution for the care of the mentally retarded. The Supreme Court held that with respect to the *state-based* claims, the Eleventh Amendment barred the federal court from ordering the state to conform its action to state law. In *Lelsz*, a similar case brought in Texas, the Fifth Circuit construed *Pennhurst* to encompass a prohibition of a federal court's enforcement of a consent decree based solely on state law.<sup>7</sup>

In their suit against New Mexico prison officials, plaintiffs alleged violation of *federal*, not state law. Plaintiffs contended that the totality of conditions violated the Eighth Amendment's prohibition against cruel and unusual punishment. The consent decree and the relief

<sup>5</sup>678 F. Supp. 839 (D.N.M. 1988), *appeal pending*.

<sup>6</sup>*Id.*

<sup>7</sup>When *Lelsz* was decided, there was considerable ambiguity over the precise issue that was resolved. The question purported to be answered was "whether the district court could enforce a consent decree beyond the guarantees contained in the federal constitution and laws simply because it was a consent decree." This question was answered in the negative and is how New Mexico chose to frame the issue in this case. However, a more careful reading of the opinion makes clear that the precise question answered was whether a district court can enforce a consent decree based solely on state law. To the extent *Lelsz* purported to answer a broader question, that answer was later construed as *dicta*. *Ibarra v. Texas Employment Comm'n.*, 823 F.2d 873, 877 (5th Cir. 1987).

contained therein were in turn based on those allegations. This crucial fact, ignored by the defendants, is the fundamental error that undermines their argument. As recognized by Judge Burciaga in *Duran*, absolutely nothing in *Pennhurst* or *Lelsz* imposes a jurisdictional limitation on the power of the courts to vindicate the supremacy of federal law by enjoining state officials whose conduct violates federal law.<sup>8</sup> Indeed, the principle of federal supremacy animated in *Ex Parte Young* directly refutes the defendants' characterization of *Pennhurst* as a limitation on the scope of relief.<sup>9</sup> *Ex Parte Young* does not require, or even permit, a federal court to countenance constitutional violations.<sup>10</sup> Thus, to the extent the defendants construe the holdings in *Pennhurst* and *Lelsz* as a limitation on remedy in the face of a federal violation, they are simply incorrect.<sup>11</sup>

The New Mexico officials' attempt to avoid this conclusion by arguing that, analyzed independently of each other, none of the provisions in the decree serve to vindicate federal rights, and therefore the court is without jurisdiction to enforce the provisions. Under *Rhodes v. Chapman*,<sup>12</sup> for instance, the defendants complain, double-celling is not *per se* unconstitutional. Nor are inmate programming<sup>13</sup> or contact visitation<sup>14</sup> always required by the Constitution, the defendants also claim. Again, however, the defendants make a fundamental mistake in establishing their construct. Plaintiffs have not alleged that each offending condition viewed separately is unconstitutional. Rather, the claim is that *an aggregation* of offending conditions combine to violate the Eighth Amendment. This is the traditional mechanism for challenging prison conditions and is the central distinguishing feature of Eighth Amendment totality of conditions analyses, as should be known to anyone familiar with prisoner litigation.<sup>15</sup> One cannot, in a vacuum, determine that a particular condition does or does not violate the Constitution, or that a particular item of relief is necessary. Accordingly, when necessary to remedy an unconstitutional totality of conditions, particular relief not required

<sup>8</sup>*Duran*, 678 F. Supp. at 849-850.

<sup>9</sup>*Ex Parte Young*, 209 U.S. 123 (1908).

<sup>10</sup>The principle of *Ex Parte Young* is that a state inherently lacks the power to authorize one of its officers to act in a manner that violates the United States Constitution. Therefore, any officer acting in violation of the United States Constitution is acting *ultra vires* and loses his sovereign immunity under the Eleventh Amendment.

<sup>11</sup>*Duran*, 678 F. Supp. at 849.

<sup>12</sup>452 U.S. 337 (1981).

<sup>13</sup>*Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980).

<sup>14</sup>*Block v. Rutherford*, 468 U.S. 576 (1984).

<sup>15</sup>*Hutto v. Finney*, 357 U.S. 678 (1978).

independently under the Constitution may be absolutely critical to curing the overall constitutional violation.<sup>16</sup> Thus, it is irrelevant that a particular item of relief may not be universally required under the Eighth Amendment. Defendants' failure to comprehend this basic concept is fatal to their argument.

Distilled of the incorrect assumption that the Eleventh Amendment considerations discussed in *Pennhurst* and *Lelsz* are not a limitation on the scope of relief for federal violations, New Mexico's position comes down to the contention that even when federal jurisdiction exists, *nonjurisdictional* principles of comity prohibit the entry of relief, even by consent, that extends beyond the measures the court could have imposed following trial. The problem with this premise, as observed by Judge Burciaga, is that it overlooks the fact that nonjurisdictional-based objections to both liability and remedy can be waived.<sup>17</sup> Thus, by entering into the decree the state waived the right to contest plaintiffs' allegations that conditions, viewed in their totality, violated the Constitution, as well as their right to comity-based constraints in the form of equitable relief.<sup>18</sup> Indeed, judicial application of such restraints in the face of a remedy proposed by the defendants would be anomalous.<sup>19</sup> In these circumstances, to reject an agreement between the parties would arrogate the authority of duly empowered state officials to determine the proper operation of state institutions—precisely the judicial act that most offends the defendants.<sup>20</sup>

Aside from the defendants' bizarre perversion of the principle of comity, the Supreme Court has expressly rejected the proposition that a court's power to approve a decree is narrower than its power to fashion injunctive relief after a trial on the merits. In *Local Number 93 v. City of Cleveland*,<sup>21</sup> the Court observed that it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all, and therefore, in "addition to the law which forms the basis of a claim, the parties' consent animates the legal force

<sup>16</sup>*Id.* at 685-89. This conclusion is consistent with the widely accepted view that in fashioning equitable relief on the basis of a constitutional violation, remedial decrees may require actions not independently required by the Constitution if those actions are, in the judgment of the court, necessary to correct the constitutional deficiencies. *Milliken v. Bradley*, 433 U.S. 267 (1977); *Green v. County School Board*, 391 U.S. 430 (1968).

<sup>17</sup>*Duran*, 678 F. Supp. at 848. See generally, *Swift & Co. v. United States*, 276 U.S. 311, 316 (1928).

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* (emphasis in original).

<sup>20</sup>*Id.* at 852.

<sup>21</sup>106 S. Ct. 3063 (1986).

## 1988 SURVEY

# NPP Gathers Statistics on AIDS in Prison

Judy Greenspan

In 1985, the National Prison Project conducted its first survey on Acquired Immune Deficiency Syndrome (AIDS) in the nation's prisons. Since that time, the issue has become a prominent one for corrections officials, prisoners, state legislators and the public at large.

During the spring and summer of 1987, the National Prison Project conducted a second survey. We sent out a seven-page questionnaire to the medical administrators of departments of correc-

Judy Greenspan, new on the Prison Project staff, is the Project's AIDS information coordinator.

of a consent decree."<sup>22</sup> Thus, while it is conceivable that a "consent judgment secures for plaintiffs' rights greater than those directly required under the Constitution, a court is not precluded from entering the decree merely because the decree provides broader relief than the court might have awarded after trial."<sup>23</sup>

This is not to suggest that a court's power to approve a decree is unlimited, as the Court in *Local 93* was careful to point out. The Court held that a consent decree "must spring from the pleadings and serve to resolve a dispute within the court's subject matter jurisdiction. Furthermore, consistent with the foregoing, it must come within the general scope of the case made by the pleadings," and "further the objections of the law upon which the complaint was based."<sup>24</sup> This threshold was plainly satisfied in *Duran* since, as recognized by Judge Burciaga, every substantive section of the consent decree was tied to the factual allegations in the complaint, which, in turn, formed the factual predicate for plaintiffs' claim that the totality of conditions at the Penitentiary of New Mexico offended the United States Constitution.<sup>25</sup> After conducting the limited review required by *Local 93*, and in view of the presumption that the parties negotiated at arms' length and agreed that the decree was a fair resolution of their competing claims, the court concluded that there was no cognizable basis on

<sup>22</sup>*Id.* at 3077.

<sup>23</sup>*Id.*

<sup>24</sup>*Id.*

<sup>25</sup>*Duran*, 678 F. Supp. at 851.

tions in every state, the District of Columbia, and the Federal Bureau of Prisons (BOP), concerning the incidence of AIDS in their prison systems. We received 39 written responses, and 12 additional surveys were completed over the telephone. (One state, Missouri, refused to answer the survey. We relied on other written information, such as news articles and National Institute of Justice reports; for data on Missouri.) We made follow-up phone calls to 35 survey participants during the first two weeks of April 1988 to update the information.

—continued on page seven

which to alter the structure or detail of the consent judgment.<sup>26</sup>

### Correct Result

Even though the defendants are spending hundreds of thousands of dollars to litigate this issue, the result in *Duran* is unquestionably correct. As noted above, the defendants' argument, if accepted, would drastically reduce the circumstances under which plaintiffs could settle cases. Defendants' agreement not to contest relief could not be relied upon. Requiring trials of all cases involving state defendants would impose tremendous burdens on the federal judiciary, particularly because, when tried on the merits, these cases are notoriously long and complicated. Nor is it easy to see why concerns for federal-state relations should lead federal courts to enforce policies that undermine the possibility for settlement in such cases. If plaintiffs cannot have a binding settlement with state officials, then defendants, regardless of their wishes, will have no choice but to have their constitutional failings formally proven in court. In view of the Attorney General's Reports on conditions at PNM and state officials' own honest recognition of the abysmal nature of those conditions, the consent decree minimized federal court intervention in the process by which the state recognized its constitutional faults and developed a program to solve them. ■

<sup>26</sup>*Duran*, 678 F. Supp. at 852-853.

# 1988 AIDS SURVEY

	Total Number of AIDS Cases To Date	Total AIDS Deaths to Date	Current AIDS Cases	Current ARC	Current Seropositive	Testing					Housing						
						All Inmates on Entry	All Inmates on Exit	Symptomatic to Confirm Diagnosis	High Risk Population	Inmates Involved in Violence	All Pregnant Women	All Segregated (HIV +, AIDS, ARC)	AIDS and ARC Only	AIDS Only	Case by Case Basis	Mainstreamed Unless III	Is AZT Available?
Alabama*	70	0	0	0	0	✓	✓				✓	✓				✓	
Alaska	2	1	0	0	6			✓	✓				✓	✓		✓	
Arizona	3	2	0	0	6			✓				✓					
Arkansas	3	0	2	0	18			✓	✓								
California*	110	30	47	45	63			✓				✓				✓	✓
Colorado	2	0	1	1	36	✓		✓	✓		✓	✓					✓
Connecticut*	45	24	5	0	325			✓					✓			✓	✓
Delaware	5	5	0	1	6			✓							✓		
District of Columbia	17	12	3	0	213			✓								✓	
Florida	131	73	26	0	0					✓			✓				
Georgia	25	18	7	37	131	✓		✓		✓	✓	✓				✓	
Hawaii	0	0	0	0	12			✓								✓	
Idaho	0	0	0	1	1	✓	✓	✓	✓					✓			
Illinois	15	10	4	10	0			✓	✓	✓						✓	✓
Indiana	2	0	2	0	8			✓	✓				✓				
Iowa	4	1	1	0	6	✓		✓		✓					✓	✓	
Kansas	4	4	0	3	9			✓	✓					✓		✓	✓
Kentucky	0	1	1	0	2			✓							✓	✓	✓
Louisiana*	3	3	0	8	90			✓							✓		
Maine	2	2	0	0	1			✓					✓				
Maryland	18	8	5	0	0			✓					✓			✓	
Massachusetts	20	9	5	8	50			✓			✓		✓			✓	
Michigan	14	10	4	23	46			✓	✓	✓	✓			✓		✓	✓
Minnesota*	2	1	1	4	4			✓			✓			✓		✓	✓
Mississippi	3	2	1	0	14		✓	✓	✓			✓					✓
Missouri**	0	0	34	0	47	✓											
Montana	1	0	0	0	0			✓	✓				✓				
Nebraska*	0	0	0	2	3			✓								✓	
Nevada	3	0	0	4	83	✓		✓		✓		✓					
New Hampshire*	1	1	0	1	3	✓	✓	✓			✓						
New Jersey	246	134	48	23	0			✓		✓	✓		✓	✓		✓	
New Mexico	1	0	0	0	6	✓		✓		✓						✓	✓
New York*	597	346	99	136	0			✓	✓	✓		✓	✓		✓	✓	✓
North Carolina	26	18	7	7	86			✓								✓	
North Dakota*	0	0	0	0	0			✓	✓				✓				
Ohio*	8	6	0	4	4			✓								✓	
Oklahoma	0	0	0	1	42	✓		✓		✓		✓					
Oregon	2	0	2	0	0			✓				✓					✓
Pennsylvania	21	12	7	6	63			✓					✓		✓	✓	✓
Rhode Island*	1	1	0	4	17			✓					✓			✓	✓
South Carolina	6	4	2	0	58			✓			✓				✓	✓	
South Dakota	0	0	0	0	2	✓		✓			✓		✓				
Tennessee	1	1	0	8	0			✓			✓						
Texas	64	22	15	136	46			✓	✓	✓	✓		✓			✓	✓
Utah	3	2	1	2	6			✓		✓					✓		
Vermont	0	0	0	1	2			✓									✓
Virginia	13	9	4	2	30			✓		✓							
Washington	0	1	0	0	15			✓	✓	✓					✓	✓	
West Virginia	0	0	0	0	2	✓	✓	✓	✓				✓				
Wisconsin	2	0	1	8	31			✓				✓				✓	
Wyoming*	0	0	0	0	3			✓				✓				✓	
FBOP	153	50	61	130	352		✓	✓	✓			✓			✓	✓	

\*Telephone response obtained

\*\*Information obtained from other sources

—continued from page five

The NPP survey focused on the following areas: (1) demographics; (2) testing and confidentiality; (3) housing and medical care; (4) education of prisoners and staff; and (5) written institutional policies and protocol. More specific questions were asked under each major topic. For example, under demographics, we sought information concerning the sex, race and risk group of those prisoners with AIDS. In the testing category, a long list was presented of various testing programs that institutions may have adopted for both prisoners and staff. Questions concerning the segregation of prisoners with AIDS, ARC (AIDS Related Complex), and those testing positive to exposure to the Human Immunodeficiency Virus (HIV), as well as their access to prison facilities and programs, fell under category 3. We asked department of corrections officials to elaborate on educational programs and materials being used for prisoners and staff throughout their system under category 4. Finally, 29 states, the District of Columbia, and the BOP provided us with copies of their printed materials regarding policies and educational programs.

### AIDS Population Increases

There has been a dramatic increase in the number of prisoners with AIDS since our last survey in 1985. See Table, page six. At that time, we reported only 420 AIDS cases in the nation's prisons. As of April 1988, that number has climbed to at least 1,650; this figure does not include statistics from county or city jails. (A recent study by the National Institute of Justice shows 644 cases of AIDS among prisoners in the 30 largest jails.) This increase is not due to an epidemic of AIDS in the nation's prisons. It is our opinion, based on the survey results, that the increase results from more intensive screening and testing.

As in 1985, the majority of the cases are found in the Middle Atlantic region—New York, New Jersey, and Florida, with the next largest concentration of cases occurring in California. There are still a few states which report no AIDS cases, such as West Virginia, Vermont and North Dakota. Unlike in 1985, most states now use the Centers for Disease Control's criteria to categorize prisoners with AIDS, and ARC, thus developing a more uniform definition of the disease. These criteria define AIDS as an illness characterized by one or more of the following 'indicator' diseases: Candidiasis of the esophagus, throat or lungs, Herpes Simplex Virus, and Kaposi's Sarcoma.<sup>1</sup>

While the number of cumulative AIDS deaths in the system has also increased greatly since 1985, the percentage of deaths is still the same—about 50% of the total cumulative cases. The reporting of prisoners with ARC is now more accurate. In 1985, most prisons did not report the prisoner ARC population and did not use a medical definition. Now, with updated medical information, most report the number of prisoners with ARC. A person with ARC displays clinical features such as continuous fever, diarrhea or weight loss, and laboratory abnormalities regarding a reduction of the Helper T Cells or an increase of Suppressor T Cells.

Statistics citing sex and race breakdown are incomplete. However, statistics from some of the larger states show a very low incidence of women prisoners with AIDS: California—110 total, 1 female; New Jersey—246 total, 12 female; Massachusetts—20 total, 2 female; and Texas—64 total, 4 female. In New York women make up 3% of the current prisoners with AIDS population. In Florida, less than .5% are women. Statistics compiled by the National Institute of Justice show that approximately 5% of both federal and state prisoners with AIDS are women.<sup>2</sup>

It was difficult to obtain an accurate racial breakdown of prisoners with AIDS because some states either do not collect that information or would not give it out. Information from New York State shows that 45% of prisoners with AIDS are Hispanic and 45% are Black. In Ohio, with a cumulative total of eight AIDS cases, one prisoner is white, four are Black and three are Hispanic. In Texas, with a cumulative total of 64 cases, 24 are white, 34 Black and 3 Hispanic. Other demographic data on risk group membership was even harder to obtain. However, with the exception of California which reported a large number of homosexual male prisoners, the other systems reported that most prisoners with AIDS have a history of IV drug use.

### AIDS Prevalence Studies

Several prisons reported the recent completion of prevalence studies concerning the number of prisoners testing positive with the HIV infection (also known as seropositivity). Washington, Michigan, Maryland, Virginia, New Mexico, Mississippi and Illinois reported their findings in this survey. All these states

<sup>1</sup>"Revision of the CDC Surveillance Case Definition for Acquired Immunodeficiency Syndrome," *MMWR*, Vol. 36 No. 15 (1987).

<sup>2</sup>"AIDS in Correctional Facilities: Issues and Options," National Institute of Justice, (January 1988) (pre-publication copy).

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*By far, the most controversial issue in the nation's prisons is that of forced or mandatory HIV testing of prisoners.*

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did a blind testing of between 500-1000 consecutive incoming prisoners, and results showed a very low prevalence of HIV infection. New Mexico, for example, reported having .8% of seropositive prisoners and Michigan reported less than 1%.

### Testing Policies

Whereas in 1985 the states were still developing their policies on AIDS in prison, most now have policies on testing, housing, and staff and inmate education. By far, the most controversial issue in the nation's prisons is forced or mandatory HIV testing of prisoners. Medical experts agree that at the present time there is no test for AIDS. What is available is the ELISA (Enzyme Linked Immuno-Sorbent Assay) test, designed to screen donated blood for the presence of antibodies or exposure to HIV, the virus believed to cause AIDS. The ELISA test, along with the confirmatory Western Blot (which tests for presence of antibodies against major proteins that make up the AIDS virus), are the two tests used to detect exposure to HIV infection. According to Dr. Robert L. Cohen, former director of the Montefiore Rikers Island Health Services in New York City, HIV antibody testing should not be performed in prison.<sup>3</sup> Diagnosis of AIDS or ARC, says Cohen, is best made by clinical evaluation, not by two blood tests that have been plagued with high rates of false positives and negatives.

Twenty-nine state corrections systems and the BOP use two ELISA tests and a confirmatory Western Blot. Seventeen states use one ELISA and the Western Blot, in accordance with CDC recommended protocol.

Across-the-board testing of prisoners for HIV antibodies upon entry into the system is becoming the trend. Thirteen states (Alabama, Colorado, Idaho, Iowa, Nebraska, Missouri, Nevada, New Hampshire, New Mexico, Oklahoma, South Dakota, West Virginia and Georgia—effective July 1, 1988) have adopted policies of mandatory testing upon entry. After a controlled period of entry testing, the Federal Bureau of Prisons now tests all prisoners before they are released. Arizona, Mississippi, Ore-

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<sup>3</sup>"Medical Expert Views Potential for Abuse in AIDS Screening," *NPP JOURNAL*, Number 6, (Winter 1985).

—continued from previous page

gon and Louisiana have bills pending in their state legislatures which, if passed, would initiate such testing.

The push toward massive prisoner testing in the states has come from legislatures and state executive offices rather than from state department of corrections officials. A recently completed draft report on AIDS in Oregon's prison system, written by a committee comprised of officials from the state department of corrections and the state health division, opposed mandatory testing of inmates. Similarly, in Mississippi, Dr. Dave Newton, the state department of corrections medical director, spoke out against mandatory testing before the state legislature's appropriations committee in March 1988.

Illinois has recently required testing of all couples wishing to be married. According to Dr. Ronald Shansky, medical director of the Illinois corrections system, Illinois will test several hundred prisoners and their outside prospective spouses each year. Several states, including Wisconsin and Washington, have bills pending to test prisoners convicted of sex crimes. In addition, 12 states do across-the-board testing of incarcerated pregnant women.

Most states (44 plus the Federal Bureau of Prisons) test inmates with symptoms to confirm the diagnosis. Only 27 states and the BOP said they offered testing for inmates who requested it.

### Confidentiality

Confidentiality of medical records raises important concerns for prisoners and corrections officials. Almost half of state departments of corrections reported that they release the HIV status of the prisoner to the medical staff and the warden/superintendent of the prison. At least eight prisons give that information routinely to all line correctional staff who might come into contact with the prisoners. Despite a study by the Nevada Attorney General's office that wholesale disclosure of AIDS carriers to state prison correctional officers would violate state confidentiality laws, Nevada recently decided to provide lists of HIV positive prisoners to corrections officers, who were threatening to strike over the issue.<sup>4</sup> Wisconsin's strict guidelines provide that medical information will only be released on a "need-to-know" basis, and that "negligent or intentional disclosure of test results may result in civil or criminal penalties."<sup>5</sup>

<sup>4</sup>Las Vegas Review-Journal, Friday, March 25, 1988, p. 2C.

<sup>5</sup>"AIDS Case and HTLV-III Antibody Test Reporting," State of Wisconsin Department of Health and Social Services, (May 1986).

### Increased testing has made the issue of confidentiality of medical records an important concern for prisoners and corrections officials.

According to Dr. Peter A. Selwyn, of the Albert Einstein School of Medicine, "Of primary importance in any successful testing and notification program is confidentiality of test results."<sup>6</sup> Confidentiality is difficult to guarantee in prison because of the lack of uniform confidentiality practices and pressure from corrections officers for the information.

### Housing

HIV infection is not transmitted through "casual contact." This fact has been documented in a study published in the *New England Journal of Medicine* 1986, entitled, "Lack of Transmission of HTLV-III/LAC Infection to Household Contacts of Patient with AIDS or AIDS-Related Complex with Oral Candidiasis."<sup>7</sup> However, most states place prisoners with AIDS and ARC in segregated housing. At least ten states (including Alabama, California, Colorado, Nevada, Arizona, Georgia, Oregon, Wisconsin, New Hampshire and Tennessee) house seropositive prisoners with AIDS and ARC inmates in separate prison units. Fourteen states noted that they kept prisoners with AIDS, ARC and HIV infection in the general population unless the prisoners were ill and needed to be hospitalized. Eleven states reported that they segregate prisoners with AIDS and ARC on a case-by-case basis.

Most states reported allowing prisoners with HIV infection and ARC the same privileges as other prisoners. However, visitation privileges differ even for these prisoners. Delaware, Montana and North Dakota do not allow any visits. Alabama, Alaska, Arizona, Illinois, Maryland, Michigan, New Hampshire, New Jersey, Rhode Island and West Virginia allow noncontact visits only. A handful of the prisons do not allow HIV infected inmates or prisoners with AIDS and ARC access to prison recreation equipment or law libraries.

### Legal Cases

In a recent New York state opinion, the Court of Appeals ruled that prison officials may refuse to allow a prisoner with AIDS conjugal visits with his wife. The prisoner, who had been enrolled in the Family Reunion Program,

<sup>6</sup>Peter A. Selwyn, M.D., *AIDS: What is Now Known*, Albert Einstein College of Medicine, HP Publishing Co., (1986).

<sup>7</sup>314 *New England Journal of Medicine* 344 (1986).

was denied a conjugal visit after being diagnosed as having AIDS. He and his wife sued the prison on three constitutional claims: the denial of visits violated their rights to marital privacy, due process, and equal protection under the law. The court, by a narrow 4-3 margin, ruled against the prisoner on all issues.<sup>8</sup>

Five Alabama prisoners have brought the first system-wide, class action suit to challenge mandatory testing and segregation of prisoners testing positive to the HIV. The prisoners' suit, viewed as a nationwide test case, asks the court to declare the testing and segregation policies illegal and to prevent the Alabama Department of Corrections from enforcing them. The case was filed on behalf of the prisoners by the National Prison Project, the Southern Prisoners' Defense Committee in Atlanta, Georgia, and Alabama lawyers Rick Harris, Stephen Glassroth, and Howard Mandell.<sup>9</sup>

The quality and accessibility of medical care for prisoners with AIDS differs from state to state. Approximately one-fourth of the states said that prisoners with AIDS received the same medical care as the rest of the prison population. A little more than half indicated that more intensive follow-up care was available as needed.

However, as noted in the Spring 1988 *NPP JOURNAL*, inadequate medical care within the New York State prison system is partially to blame for the high mortality rate of prisoners with AIDS. According to a study conducted by the New York State Commission of Correction, prisoners with AIDS live only half as long as people with AIDS who are not incarcerated.

### Education of Staff and Inmates

Many of the department of corrections medical administrators said that education of the prisoner population and the prison staff was underway. (Alabama was the only state to report that they conducted no staff education on AIDS.) According to the survey results, most states provide educational materials such as pamphlets and videotapes to all staff. Education about AIDS has been incorporated into most staff orientation lectures. More than half of the state correctional systems also conduct follow-up educational sessions on AIDS for the medical staff.

Drawing upon the National Institute of Justice's *AIDS in Correctional Facilities: Issues and Options* and the National Sheriffs' Association publication,

<sup>8</sup>*Doe v. Coughlin*, New York Court of Appeals, No. 219, (November 24, 1987).

<sup>9</sup>*Harris, et al. v. Thigpen, et al.*, Civil Action No. CA-87-V-1109-N.

# Health Professionals and a Preventable Death at Butner

by Steven H. Miles, M.D.

*Medical personnel who work in a prison setting serve two masters: the prison administration which employs them, and their patients, the prisoners whose health they are assigned to protect.*

*In the following case, most of the focus has been on the correctional officer who placed an Ace bandage over Mr. Harris' face for punishment purposes, causing his death by asphyxiation. Dr. Miles, however, a medical ethicist, narrows the issue to look at the conduct of the particular physician's assistant who allegedly failed to intervene in the abuse of Mr. Harris, thus*

Prison health workers occasionally see prisoners who have been mistreated or injured by prison security personnel. Torture is not systematically practiced in American prisons, though isolated instances of prisoner abuse by police, or state or federal prison staff, have been reported.<sup>1</sup> In March of 1986, a prison health worker in North Carolina, called

Steven Miles, M.D., is the associate director of the Center for Clinical Medical Ethics at the University of Chicago Hospitals.

*AIDS: Improving the Response of the Correctional System*, some states, like North Carolina, have developed their own pamphlets for officers and staff.<sup>10</sup> The prison medical administrators of Alaska and Minnesota both volunteered that the critical task in their prisons is the education of correctional staff to counter common misconceptions about AIDS.

At least 31 prisons are offering safe sex education to prisoners. For the most part, these educational sessions are being conducted in-house or by the state department of health. However, the District of Columbia utilizes the expertise of the Whitman-Walker Clinic, a gay health clinic with a wide range of educational materials about AIDS and safe sex.

Educational materials and information on how to clean needles are not readily available in the prisons. Only 11 states have incorporated such information into their prisoner education sessions or brochures.

## Condoms in Prison

Whether or not the prison system

<sup>10</sup>"AIDS Techniques and Recommendations for Correctional Officers," North Carolina Department of Corrections Division of Prisons.

*failing to "ground his actions on the prisoner's medical need."*

*Dr. Miles discusses the professional standards which are required of physician's assistants by the Federal Bureau of Prisons and the lack of any professional sanctions for behavior such as that allegedly exhibited by the Butner F.C.I. physician's assistant.*

*The NPP JOURNAL will continue to explore this subject in the Fall issue in a special collection of three articles entitled "Do No Harm," about the involvement of health care professionals in executions.*

to examine a federal prisoner who was being mistreated, allegedly failed to intervene in abuse which resulted in the prisoner's death. The case highlights the need for administrative and professional safeguards to prevent prisoner abuse.

<sup>1</sup>Report 1986, Amnesty International (1986), p. 200; *Allegation of Mistreatment in Marion Prison, USA*, Amnesty International (London 1987); T. Murton, "Prison Doctors," *Human Perspective in Medical Ethics* (Buffalo: Prometheus Press, 1972), pp.249-265.

should provide condoms to prisoners is still controversial. Only seven states allow condoms: California, Colorado, Connecticut, Minnesota, Mississippi, New Mexico and Vermont. Most of these states specified that condoms were dispensed for conjugal visits only. However, Vermont's medical staff dispenses condoms to prisoners and Mississippi sells them in the prisoner commissary. San Francisco Sheriff Michael Hennessey has asked the California Attorney General for permission to distribute condoms in his county jail to combat the spread of AIDS.

A majority of states attached copies of their policies and protocols to the completed surveys. The Prison Project will make these available for the cost of postage and copying. A handful of states also attached copies of the educational materials they use.

State corrections departments, as well as the Bureau of Prisons, have done a great deal of work since our 1985 survey. Most states have developed policies in regard to the care and treatment of prisoners with AIDS, but there is still a lack of understanding and uniformity in the overall approach to AIDS in prison. ■

## History of the Case

The 31-year old federal prisoner, Vinson Harris, was being transferred on March 4, 1986, from a county jail in North Carolina to a federal prison in Pennsylvania. According to news reports, jail guards at the Mecklenburg County Jail described him as "talkative, relatively content" and "calm and uncomplaining" on the day of the transfer. Prisoners report that he was singled out for abuse by federal correctional officers supervising the transfer. He was one of two men forced to wear a hard box on his wrists designed to prevent him from reaching the handcuff lock. This box forces the inmate to hold his arms in a rigid position, causing pain and swelling of the hands. During the trip, Harris and one of four correctional officers argued over the prisoner's request to urinate. The prisoner's mouth was covered with tape and he was chained to the bus seat by a chain that was wrapped around his chest and legs.

When the bus arrived at the federal prison in Butner, North Carolina, prison officials watched the prisoner urinate before he was again chained to the seat. Correctional officer Gerry A. Dale, employed at Talladega F.C.I. in Alabama, was one of the officers accompanying the prisoners on their trip. Lieutenant Dale obtained a six-inch wide Ace bandage from inside the prison and then wrapped the bandage several times around the prisoner's head and neck, leaving only a small opening for the nose. Duct tape was placed over the bandage. Harris gestured for help and began to writhe. Although there were ten prison staff members nearby, none intervened as prisoners shouted for them to release Mr. Harris.

Robert Fox, a physician's assistant (PA), was then summoned by Lt. Dale. According to witnesses, he examined the bandaged prisoner and told the guard that there was "nothing wrong" with him. The PA did not remove the Ace bandage but reportedly suggested that a small hole be made in the tape. Lt. Dale made a small incision with a knife. Moments later, the prisoner collapsed. A physician was called, who immediately removed the bandage and began CPR. Mr. Harris was then transferred to a hospital on "basic life support systems" and was pronounced dead a short time later.

The coroner found that the prisoner had died of homicide by asphyxiation. There were abrasions on Harris' wrists from the handcuffs and pressure marks on his ankles. The coroner believed that his nose had also been covered, although a federal investigation concluded that it had not been. The indictment later

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stated that "substantially" all of the head and face were covered. The coroner commented that the prisoner was in otherwise "excellent physical condition."

In December 1986, a federal grand jury indicted Officer Gerry Dale on two felony charges of assault causing injury, and homicide. In March 1987, Dale pled guilty to the lesser charge and the homicide charge was dropped. Neither Mr. Fox nor other prison staff alleged to have participated in or observed the death were indicted. A prisoner-witness who discussed this case with the press was beaten by correctional officers. Citizens groups, Amnesty International, and a subcommittee of the House of Representatives Judiciary Committee are investigating this death.<sup>2</sup> (Editor's note: These investigations ended when Officer Dale was indicted. For further details see note at end of article.)

Mr. Fox is identified as a PA by prisoners, the Federal Bureau of Prisons, the state coroner and the prison administration. The Bureau of Prisons has also referred to him as an Assistant Health Services Administrator. He completed an approved PA training program in 1973 but is not a member of the American or North Carolina Academy of Physician Assistants. He is not registered with the North Carolina Medical Board, which does not require registration of PAs who only work in federal facilities. Mr. Fox is not certified by the National Commission on the Certification of Physician Assistants. The Bureau of Prisons will not comment on his certification or license.

### Prevention of Mistreatment

This case raises several issues relating to the prevention of mistreatment of prisoners in American jails and prisons: 1) the responsibility of health professionals who become aware of mistreatment, 2) the responsibility of professional organizations to advocate policies that might deter mistreatment, and 3) the

<sup>2</sup>See S. Jacobs, "Inmate's Mysterious Death Being Investigated by Authorities," (3/12/86), "Two Inmates Say Guard's Action Led to Death," (4/27/86), "Inmates Give Versions of How Vinson Harris Died on Prison Bus," (8/26/86), "Officials Given Permission to Exhume Inmate's Body," (7/29/86), "Case of Inmate Death Moves to Grand Jury," (8/24/86), "Ace Bandage Gag Killed Prisoner, Medical Examiner Rules," (3/26/86), "Federal Prison Guard Indicted in Inmate's Death," (12/19/86), "House Panel Investigating Death of Inmate on Bus," (9/11/86), "Gagged Prisoner's Sister Questions Authorities' Silence About Death," (5/17/86), *Raleigh, North Carolina News and Observer*. See also E. Bunker, "The Lynching of Vinson Harris," *Nation* (5/17/86); Editor, "Follow-up," *Nation* (8/26/86); and *Medical Examiner of North Carolina: Report of Autopsy and Investigation on Decedent Vinson P. Harris* (March 5, 1986).

need for prison policies to decrease the likelihood of mistreatment.

### Health Professional Responsibility

Prison health care is a form of occupational medicine in that its practitioners are accountable both to patients and to their employers—the prison administration. Despite this dual accountability, occupational health professionals must give "highest priority" to their patient's welfare.<sup>3</sup> Thus, prison health professionals should be independent from the prison's security or penal functions.<sup>4</sup> In so doing, they must be prepared to ground their actions solely on the prisoner's medical need. Major American medical associations, for example, have said that health professionals should not perform rectal or vaginal searches for contraband unless the search is medically indicated.

Prison health professionals have unique access to persons who are vulnerable to mistreatment. Amnesty International estimates that a third of the world's countries systematically mistreat or torture prisoners.<sup>5</sup> Though systematic abuses are not practiced in the United States, isolated instances of mistreatment by police or prison staff are reported.<sup>6</sup> Health professional involvement in these abuses is rare. Misuse of psychiatric drugs has, at least one instance, contributed to an inmate's death.<sup>7</sup> In Arkansas, in the 1950s, a physician designed a device to administer electric shocks to prisoners.<sup>8</sup>

Such mistreatment violates basic tenets of medical ethics: the professional duty to do no harm, to respect patients' dignity, and to serve patients' welfare regardless of race or political status. Health professionals may not participate in mistreatment, certify prisoners as fit for such punishment, provide instruments for abuse, or fail to record injuries that are observed in the course of providing medical care.<sup>9</sup> Health professionals' expertise in assessing the symptoms and signs of physical or mental injury is a unique expertise that, if used, can interrupt or prevent such abuses.

<sup>3</sup>A.R. Jonsen, M. Siegler, W.J. Winslade, "Clinical Ethics," *American Society for Occupational Medicine: Code of Ethics*, 1st ed. (New York: Macmillan Publishing Company, 1982), p. 175.

<sup>4</sup>*Standards for Health Services in Prisons*, National Commission on Correctional Health Care (Chicago, Ill., January 1987).

<sup>5</sup>*The Breaking of Bodies and Minds*, American Association for the Advancement of Science, E. Stover and E.O. Nightingale, eds. (New York: W.H. Freeman Co., 1985).

<sup>6</sup>Amnesty International, *op.cit.*

<sup>7</sup>E. Kaufman, "The Violation of Psychiatric Standards of Care in Prisons," *American Journal of Psychiatry* 137 (1980), pp.566-570.

<sup>8</sup>T. Murton, "Prison Doctors," *op.cit.*

<sup>9</sup>American Association for the Advancement of Science, *op.cit.*

In this case, as alleged, the PA, Mr. Fox, did not fulfill his responsibility for the prisoner's health. While examining a patient being mistreated, witnesses report that he did not remove an obviously dangerous and misused medical device, and that he delivered an opinion that the patient's health would allow the mistreatment to continue. Such actions would directly violate codes of professional conduct endorsed by the World Medical Association,<sup>10</sup> the United Nations,<sup>11</sup> and other American professional bodies.<sup>12</sup>

### Health Professional Organizations

Physician's assistants are a major group of prison health care providers.<sup>13</sup> In support of their profession and to decrease the possibility of these abuses, PA professional bodies might: 1) endorse codes of conduct for such situations, 2) address such situations in professional training, and 3) establish procedures to review the certification, licensure, or professional association of a PA collaborating in the abuse of prisoners.

**Professional Codes.** Professional oaths and codes have long been used to affirm practitioners' fundamental responsibilities. Anti-torture codes summarize health professionals' duties to prisoners and have supported physicians in countries where torture is systematically practiced.<sup>14</sup> The American Medical Association has endorsed the World Medical Association's Declaration of Tokyo, which states that physicians should not condone or participate in torture, provide the instruments of torture, or be present during torture. It further provides that the physicians must have complete independence in deciding on the care of a person for whom they are medically responsible.

<sup>10</sup>World Medical Association, "Declaration of Tokyo: Guidelines for Medical Doctors Concerning Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in Retaliation to Detention and Imprisonment," *JAMA* 255 (1986), p. 2800.

<sup>11</sup>United Nations, "Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment," *The Breaking of Bodies and Minds*, E. Stover and E.O. Nightingale, eds. (New York: W.H. Freeman Co., 1985), pp.254-270.

<sup>12</sup>American Medical Association House of Delegates (June 19, 1986); J.H. Sammons, "Medical Ethics and the Issue of Torture," *JAMA* 255(20) (1986), pp.2798-2799; see also Kaufman, *op.cit.*

<sup>13</sup>J.F. Cawley, J.E. Ott, C.A. Deatley, "The Future for Physician Assistants," *Ann. Int. Med.* 98 (1983), pp.993-997.

<sup>14</sup>E.O. Nightingale, E. Stover, "A Question of Conscience. Physicians in Defense of Human Rights," *JAMA* 256(20) (May 23/30, 1986), pp.2794-2797; E. Stover, E.O. Nightingale, "The Medical Profession and the Prevention of Torture," *NEJM* 313 (October 24, 1986), pp.1102-1104.

**Ethics Education.** Stover and Nightingale, writing in the *Journal of the American Medical Association*, and a recent international congress recommend that medical schools and health care facilities should expand medical ethics education to address professional duties in situations where medical expertise is misused.<sup>15</sup> It is possible that such education might help a prison health worker to more clearly recognize a duty to intervene to stop mistreatment, such as in the reported case.

**Licensing.** Professional bodies might hold practitioners accountable by reviewing or revoking the certification, licensure, or professional affiliation of those who fail to adhere to explicit standards of professional conduct. If required of federal prison health workers, loss of certification or licensure could remove a practitioner from practice and would emphasize to health professionals and their employers the importance of these standards. The possibility of such sanctions would back up prison health staff confronted with such situations. Knowing that health workers were obliged to intervene or report such abuses might deter correctional officers from inflicting corporal punishment. It is possible that the federal prison system's use of an uncertified, unlicensed, and professionally unaffiliated PA contributed to his alleged reluctance to intervene in this case. The fact that federal prison health care staff do not need state licensure was interpreted by the North Carolina Medical Board to mean that it had no standing to intervene in this case.

### Prison Health Care Regulations

The National Commission on Correctional Health Care (NCCCHC), representing the American health care professions, has recommended standards that have improved prison health care.<sup>16</sup> The expert interest of bodies like the NCCCHC is especially important in view of the reluctance of American courts to interfere with prison health care.<sup>17</sup> Professional groups like the Colegio Medico de Chile, the Medical Association of South Africa, and Amnesty International, have advocated prison policies to improve prison staff supervision and accountability and to improve access for independent medical staff to decrease

<sup>15</sup>"The Medical Profession and the Prevention of Torture," *op.cit.*; "Proceedings of the International Meetings on Doctors, Ethics, and Torture," *Danish Medical Bulletin* 34(4) (1987), pp.185-216.

<sup>16</sup>K.M. Sandrick, "Upgrading Health Services in the Nation's Jails," *QRB* 7 (1981), pp.22-25; B.J. Anno, "The Role of Organized Medicine in Correctional Health Care," *JAMA* 247 (1982), pp.2923-2925.

<sup>17</sup>P. Gunby, "Health Care Reforms Still Needed in the Nation's Prisons," *JAMA* 245(3) (1981), pp.211-214; Sandrick, *op.cit.*

torture in prisons.

The NCCCHC has issued 71 voluntary standards for prison health practice. These standards do not address the duty to report or intervene in torture but do prohibit medical staff from participating in the disciplinary use of restraints. These standards should be reconsidered in light of this case and recent literature on health professionals and abuse of detainees. Revised standards might address health worker training and the design of policies supporting staff intervention in mistreatment. Such standards might improve the care of prisoners and would also support American health professionals who are advocating similar policies to prevent comparable, though more widespread, abuses in other nations.<sup>18</sup>

The Bureau of Prisons is at variance with other federal agencies and the laws of many states in its use of uncertified and unlicensed PAs. State regulations typically require that a PA graduate from an accredited training program, successfully complete the NCCPA certifying examination, and be directly supervised by a physician. The Veterans Administration, Coast Guard, and Defense Department have adopted similar standards for PAs within their facilities. Inadequate federal standards may have contributed to this death if they permitted employment of a worker who did not meet the degree of professionalism and accountability ordinarily found in certified and licensed PAs.

### Conclusion

Health professional participation in the mistreatment of prisoners is unethical. When physicians, nurses, or physician assistants observe mistreatment, they are professionally obliged to intervene and to act to prevent future occurrences. Professional associations should promote standards for conduct and training to address this important issue. Government agencies, prison administrations, and professional groups should devise means to hold practitioners accountable to these standards. ■

*The factual allegations in Dr. Miles' article are based, in large part, on news accounts in a series written by Sally Jacobs, a reporter for the Raleigh, North Carolina News Observer. Jacobs, now reporting for the Boston Globe, won a George Polk award for the Vinson Harris series.*

*In June of 1987, Lt. Dale was sentenced to nine years in federal prison after being convicted of assault resulting in serious bodily injury within a U.S. jurisdiction.*

*Mr. Fox, the PA, is still working at But-*

<sup>18</sup>See Nightingale and Stover, "A Question of Conscience," *op.cit.*; and Stover and Nightingale, "The Medical Profession and the Prevention of Torture," *op.cit.*

*ner, F.C.I. In September of 1987, he was reassigned from his PA duties to serve as community programs coordinator, a non-medical position.*

*The family of Vinson Harris has filed suit against the Federal government under the Federal Tort Claims act.*

*The Federal Bureau of Prisons responded to our request for comment on Dr. Miles' article, by saying:*

Dear Ms. Elvin:

As you may be aware, the family of Mr. Harris has filed suit regarding his death. Under Department of Justice guidelines, the Bureau of Prisons cannot comment specifically on a matter currently in litigation.

The standards for government employment as a physician's assistant are set by the Office of Personnel Management (OPM). OPM requires that an applicant must have successfully completed a course of study of at least twelve months, including clinical training or preceptorship to be considered for employment by the federal government. The course of study or training must be approved by a nationally recognized professional medical body such as the American Medical Association or the Association of American Medical Colleges, or by a panel of physicians established by a federal agency for this purpose. The physician's assistant met the required standards for employment. There have been no changes in employment policies regarding physician's assistants since, or as a result of, the death of Mr. Harris.

We note, in reviewing the article which you supplied, that there are several factual errors, particularly in regard to the sequence of events surrounding the death of Mr. Harris. As mentioned above, the appropriate forum for matters in litigation must be the court, which will examine the issues closely and make a final determination.

The Bureau of Prisons has a strong commitment to the provision of quality health care for inmates. Any death which occurs in our system is of concern to us. We concur with the author's conclusion calling for professional standards for the treatment of inmates. We believe that the policies of the Bureau of Prisons and the accreditation standards to which we voluntarily submit are, and will continue to be, appropriate to insure the maintenance of a standard of care commensurate with that available in the community at large.

Thank you for your letter and for the opportunity to comment.

Wallace H. Cheney  
Deputy Assistant Director Health  
Services Division  
Federal Bureau of Prisons

# NPP Lawyer Ed Koren: Attica Started It All

Betsy Bernat

Ed Koren is holding up a copy of a Supreme Court brief. "We have Warren Burger to thank for the orange cover," he explains. "It was his idea to color code the covers."

The brief is an opposition to *certiorari*, which Koren recently filed for the National Prison Project in *Abbott v. Meese*.<sup>1</sup> Sometimes he refers to it as *Jarndyce v. Jarndyce*, the interminable lawsuit in Dickens' *Bleak House*. And why not? He's been working on *Abbott* as long as he's worked at the Prison Project: fourteen years.

Add to that the four years he worked in prisoners' rights before joining the Project and you've got a career that spans 18 years. Not too many people in this field can make that claim. Since the early 1970s, when his work focused on the New York State prison system and the post-Attica defense effort, his commitment to inmate rights has remained unshaken.

What experiences kindle such a strong and long-term commitment? In a series of interviews with the *JOURNAL*, Koren shed some light on this question. In doing so, he offered a personal tour of two decades of prisoners' rights history.

## The Early Years in Buffalo

Koren was graduated from the State University of New York at Buffalo Law School in 1968 and went to work as a lawyer for the Niagara Chapter of the New York Civil Liberties Union. The majority of his clients there were students seeking representation before student disciplinary boards and in city court.

When Koren had been at the CLU for nearly two years, he was contacted by Herman Schwartz, one of his professors at law school. Schwartz had just returned to Buffalo after a year in Ann Arbor, and "one of the first things he wanted to do was get involved in prisoners' rights," Koren explains. "He wanted to bring the Constitution to the New York State prison system."

With the support of Aryeh Neier and the New York Civil Liberties Union, Schwartz established the Prisoner Rights Project of the ACLU. Koren volunteered to join his staff, although he says

Betsy Bernat is the editorial assistant for the *NPP JOURNAL*.

<sup>1</sup>See 824 F.2d 1166 (D.C. Cir. 1987).

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*"One word—Attica—became the code word for the kinds of problems we've seen with prisons in America."*

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that at that time he knew "zero" about prisons and prisoners' rights.

"The first thing we did was drive to Auburn State Prison," he says, "and we arrived during a demonstration in the yard by the activist prisoners." It was his first encounter with prisoners, and he was surprised to find many of them to be politically active. "It was a revelation," he says. "I hadn't assumed that what was going on outside of the prison was a factor of what was going on inside, but it made a lot of sense."

After several weeks of interviews, Schwartz and Koren were close to bringing suit against Auburn. Before they could file anything though, their main plaintiffs were shipped off to the segregation unit at Attica state prison. "What they'd done, which was typical," Koren explains, "was transfer the problems. They'd transferred the more politically aware, organized people to Attica." Koren and Schwartz challenged these punitive transfers with a series of lawsuits.

The *JOURNAL* asked Schwartz

■ Koren's 14 years of work with the Prison Project have generated a sizable docket of cases, covering a range of issues. Some of the more notable ones are:

■ *Abbott v. Meese* (*Abbott v. Richardson*) was filed in 1973 to challenge mail and literature censorship in the federal prison system. 824 F.2d 1166 (D.C. Cir. 1987). This case is still pending; the Solicitor General's petition for *certiorari* was granted by the Supreme Court on April 25, 1988.

■ *Palmigiano v. DiPrete* challenged totality of conditions and overcrowding in the Rhode Island prison system. 443 F.Supp. 956 (D.R.I. 1977).

■ *Trigg v. Blanton*, filed in state court, was a conditions case against the Tennessee state prison system. No. A-6047 (Dav. Ch. 978) retired on grounds of state abstention, *sub nom.*, *Trigg v. Alexander* (Tenn. July 2, 1981).

about working with Koren in those early years. "He worked for nothing at all, bread and water," he recalls. "He was, and still is, a tremendous tough bird dog when digging up what happened, tougher with prison administrators than even I. He wouldn't take any stonewalling from them."

## Attica Explodes

"At that time," Koren explains, "the old school was running the system. All they knew was that they had to keep the lid on, and they weren't doing a very good job of it.

"We felt that we had to open up these places. We knew that litigation would be here today, gone tomorrow. In order to be successful, we had to make prisons into fishbowls: the brutality and misconduct that had been going on for many years could not survive the light of day. That was our strategy: freedom of expression, contact with the outside world." To that end, he and Schwartz filed a series of actions involving media contact with inmates. Eventually, Schwartz argued this issue in the Supreme Court [*Pell v. Procunier*, 417 U.S. 817 (1974)]. *Jackson v. McGinnis* involved the rights of prisoners to receive books, magazines and publications [later decided as *Jackson v. Ward*, 458 F.Supp. 546 (W.D. N.Y. 1978)].

"In August of 1971," Koren says, "Commissioner Oswald came to Attica and made a speech that was broadcast over the public address system, saying that they would bring improvements. They wouldn't be abrupt, but there would be changes."

■ *Picariello v. Fenton* was a brutality case filed in 1979 against federal prison officials on behalf of a group of prisoners at the Lewisburg Federal Penitentiary. Plaintiffs were not granted the damage awards they sought; however, the defendants were found guilty of violating the inmates' Eighth Amendment rights. 491 F.Supp. 1020, 491 F.Supp. 1026 (M.D. Pa. 1980).

■ *Terry D. v. Rader* challenged conditions and practices in the Oklahoma juvenile detention system and was the Project's first juvenile case. No. Civ. 78-0004-T, consent order entered May 31, 1984.

Koren has also lent his legal wisdom to an extensive list of amicus briefs in the Supreme Court, i.e., *Carlson v. Green*, *Bell v. Wolfish*, *Rhodes v. Chapman*, and *Whitley v. Albers*.

Oswald's assurances weren't enough for the inmates. On September 9, 1971, Attica fell under inmate seige. They gained access to "Times Square," the prison's control center, and took over virtually the entire prison.

On September 13, state troopers stormed Attica, seizing control from the inmates. Thirty-nine people, including ten hostages, were killed in just two minutes of gunfire.

"We had heard that the troopers were making ready to go in there and blow people away," Koren says. "This is our time," they were saying. Racism and anti-prisoner feelings came together under the mantle of reasserting governmental authority."

When the troopers entered the prison, "they shot at anything that moved," he continues. "Afterwards, we finally got access to the prisoners in the hospitals. I vividly remember going to this large ward, 30 to 40 prisoners swathed in bandages and in traction. It was a wartime scene."

Before the inmates were returned to their cells, they were made to run naked over glass, passing through gauntlets of correctional officers and state troopers who beat them with sticks, clubs and gun butts. An action was brought by Schwartz and Koren, along with the Prisoners' Rights Project of the New York Legal Aid Society and other groups, to prevent further retaliation. They also sought to gain access to their clients which the authorities had denied them. In spite of an order for access signed by Judge John Curtin, prison authorities refused the lawyers entry.

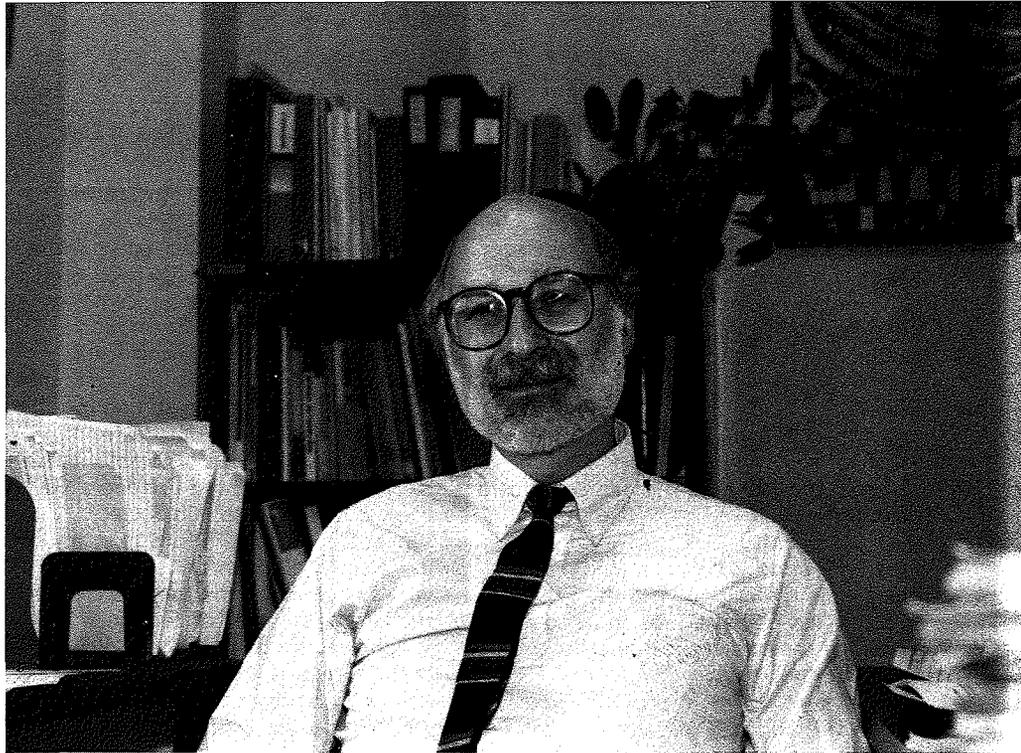
Koren sums up the Attica experience with a dry laugh. "That was really my trial by fire into prisons and prisoners' rights."<sup>2</sup>

### The Attica Defense Effort

The next few years saw the growth of a vigorous defense effort on behalf of those inmates who had been indicted for crimes which occurred during the uprising. It was a cause that attracted people from across the country, many of whom continue to be part of an active civil and prisoners' rights network today.

Schwartz introduced Koren to Ramsey Clark, Attorney General under President Lyndon Johnson. Clark had come to Buffalo from Harrisburg where he had been working defending the Berigan brothers against the government's conspiracy charges. For over two years he and Koren worked on the defense of a prisoner who was accused of killing a

<sup>2</sup>A detailed account of the Attica uprising can be found in *Attica: The Official Report of the New York State Special Commission on Attica*, (Praeger Publishers, 1972).



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*"Attica was really my trial by fire into prisons and prisoners' rights."*

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guard in Attica's control center the first day of the uprising.

Clark, now in private practice in New York, discussed the working climate when trial began in 1975. "The mood was very much like the weather, cold and hostile. Even though it was over three years after the prison uprising, the hostility, not just in law enforcement—which was intense—but in the community as well generally remained extremely high. It was not only the bloodiest episode among Americans in this century on U.S. soil, it was the most traumatic event, certainly, in Wyoming County's history."

He adds that, "Ed was incredibly good. He's so committed, so low-key but persevering, and so thoroughly supportive of everybody. No person ever had a better champion or friend than Ed Koren."

Attica's most important legacy, though, was its national impact. "What we've seen over the last fifteen years is a direct result of Attica," Koren points out. "It raised people's consciousness. It made one word—Attica—a code word for the kinds of problems we've seen with prisons in America. When people think of prisons, they think of Attica."

"You couldn't walk down a street in New York City without seeing graffiti on the wall that said simply 'ATTICA' or 'ATTICA LIVES.' It's not just about prisons, it's one of those institutions that people feel oppressed by. You just had to mention Attica and people knew what it meant."

By 1974, the National Prison Project had opened its doors in Washington, D.C., under the direction of Alvin J. Bronstein. Koren was commuting to Washington on weekends to be with his wife, and so began working for the Project part-time. His current work on the *Abbott* case dates back to this point.

### The Bureaucratic Life

In 1975, Herman Schwartz was appointed chairman of the New York State Commission on Corrections and Koren joined his staff in Albany.

"We became bureaucrats," he says, cracking a grin. "We were on the 21st floor of the tallest office building in Albany. On one side was the Hudson River and Massachusetts and to the South you could see the Catskills. It was another world."

Schwartz assembled a group of people, including Scott Christiansen, Dan Pachoda and John Seymour, and "proceeded to turn the place upside down." They set to work developing a number of written correctional standards and policies that are still on the books today. They also obtained a commutation for Martin Sostre, an activist prisoner best known for the segregation case *Sostre v. McGinnis*.<sup>3</sup>

The stint at the Commission came to an end nine months later, however, when the New York State Senate refused to accept Schwartz's nomination. When Schwartz left, Koren did also, along with a number of other staffers. "We were booted out, but we wore that as a badge of honor," Koren says.

—continued on next page

<sup>3</sup>442 F.2d 178 (2d Cir. 1971).

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## The National Prison Project

In 1976, after Koren left the Commission, he joined the staff of the Prison Project full time.

At this point he had been involved in prisoners' rights for five years. When asked why he decided at that time to stay in the field, he replied, "It had gotten in my blood. It's a wonderful community of people, interesting issues. It was an opportunity to work with friends, and it wasn't that far away from the Sixties."

Al Bronstein, Executive Director of the NPP since it began, stated, "Ed's long-time association with the Prison Project has played a substantial role in creating the stability and excellence of our efforts."

Matt Myers, a former NPP attorney, told the *JOURNAL* that "Ed has a quality that almost nobody else has: he

seems incapable of burn-out. I hold him in awe for that."

Is Ed Koren really "incapable of burn-out?" Is he going to be in this fight five years, ten years from now? If not, he probably won't have strayed very far. When asked how he imagines himself retired, he replies, "I don't know. I'll probably volunteer to work for a whacko underdog outfit. I'd find something, or something would find me. There's plenty to do out there."

As for what he's accomplished so far, John Boston of the Prisoners' Rights Project of the Legal Aid Society, summed it up best. "More than any of us," he said, "Ed Koren is somebody who's been in for the long haul. He is the leading survivor of prisoners' rights. It may well be that Ed is the oldest tree in the forest—God only knows what's nesting in his branches—and he casts an enormous amount of shade." ■

## For The Record

■ Judy Greenspan, a paralegal, is a new addition to the Prison Project staff. Greenspan, former national logistics coordinator for the October 11 National March on Washington for Lesbian and Gay Rights and a long-time activist in the movements for social justice and prisoners' rights, will focus on prisoners and AIDS. She has completed the Prison Project's second survey on the incidence of AIDS in the nation's prisons, thanks to a grant from the Public Welfare Foundation. She will be updating the Project's "Resource Bibliography on AIDS Among Prisoners," and will work with NPP attorney Alexa Freeman on upcoming litigation involving discrimination against prisoners with AIDS.

■ The National Institute of Corrections (NIC) is pleased to join with the Robert J. Kutak Foundation in announcing a new series, **Research in Corrections**, which will provide high-quality summaries of research for corrections administrators and practitioners. Each monograph conveys research findings on selected topics, and includes the reactions of correctional practitioners to issues which arise in real-life agency operations.

The first monograph is entitled "Statistical Prediction in Corrections," written by Dr. Todd Clear, who presents a critical assessment of the uses of statistical prediction. Billy Wasson, director of the Marion County, Oregon, Department of Corrections, and James Rowland, director of the California Department of Corrections, highlight the

significance of those findings to agency operations. Persons wishing to receive a complimentary copy of the publication should contact the NIC Information Center, 1790 30th Street, Suite 130, Boulder, CO 80301.

**Research in Corrections** is edited by Joan Petersilia at the RAND Corporation, and will be published three to four times a year. The remaining issues planned for 1988 will address the relationship between diet and criminal behavior, pretrial release, and correctional costs.

Articles are now being commissioned for 1989, and anyone wishing to contribute research papers or serve as practitioner respondents should contact Joan Petersilia, RAND, 1700 Main Street, Santa Monica, CA 90406.

■ In our last issue of the *NPP JOURNAL*, we advertised the cost of the new edition of the ACLU handbook *The Rights of Prisoners* as \$6.95, its bookstore cost. To order the handbook directly, please send a check or money order for \$7.95 (\$6.95 plus \$1.00 postage and handling) to the ACLU, 132 West 43rd Street, New York, N.Y. 10036. The book is available to prisoners free of cost.

■ The National Sheriffs' Association (NSA) has announced publication of *Food Service in Jails*, a completely new and revised handbook for the jail administrator and food service manager, who are responsible for every aspect of their facility's food service operation.

Designed for both new and experienced correctional food service professionals, the comprehensive book provides practical, step-by-step guidelines for meeting the goal of today's critical food service operation: to provide three balanced, nutritionally adequate meals a day, prepared under sanitary conditions, within the established budget.

*Food Service in Jails* is an indispensable resource for today's food service professional, providing detailed guidelines for maintaining the highest nutritional, sanitation, and safety standards. Specific topics include:

- Supervision and training for both food service staff and inmate workers;
- Security requirements for the jail's food service;
- Effective food purchasing;
- Receipt, inspection, and storage of food;
- Sanitation and safety;
- Menu planning for nutrition and appeal;
- Equipment trends for today's food service.

Cycle menus are included as well, based on the Recommended Dietary Allowances (RDAs) established by the Food and Nutrition Board of the National Academy of Sciences, National Research Council.

*Food Service in Jails* is available for \$15.00 from: The National Sheriffs' Association, 1450 Duke Street, Alexandria, VA 22314. For further information, please call 703/836-7827 or 800/424-7827.

■ "The Role of Measurement in Public Policy Development" is the theme of a two and one-half day conference sponsored by the Criminal Justice Statistics Association (CJSA), in cooperation with the Bureau of Justice Statistics. The conference will draw on the research and experience of state Statistical Analysis Centers and key government decision-makers to examine issues concerning measurement, such as: What are the incidences of bias crime, domestic violence, and white collar crime? How is the impact of these crimes measured? What information is critical for developing effective policy in these areas? What is the current state of prison and jail overcrowding?; the impact of intermediate sanctions?; international perspectives on sanctioning policy? What is the role of the public attitude survey in policy development?

Invited speakers include Georgette Bennett, sociologist and author of *Crime Warps: The Future of Crime in America*; Dr. Charles M. Friel, Criminal Justice Center, Sam Houston State University; Don Gottfredson, Dean, Temple University; Judy Greene, Director of Court

Programs, Vera Institute of Justice; and Sam Saxton, President, American Jail Association. The conference will be held August 23-26, 1988 at the Washington Hilton and Towers in Washington, D.C. For further information, contact Adele Ellis at CJSA, 444 North Capitol Street, N.W., Suite 606, Washington, D.C. 20001; 202/624-8560.

■ PEN American Center sponsors annual writing awards for prisoners. Any one incarcerated in a federal, state or county prison, between January 1, 1988 and September 1, 1988, is eligible to enter.

Prizes of \$100, \$50 and \$25 are awarded for first, second and third places in each of the following categories:

**Poetry**—Poem not to exceed 100 lines; **Fiction**—Short story or excerpt from a longer piece, not to exceed 5,000 words; **Non-Fiction**—Essay (journalistic, personal or literary) not to exceed 5,000 words; **Drama**—Play-script not to exceed 5,000 words.

Entries for the annual competition may be submitted between January 1 and September 1, 1988. Winners will be announced late in the Fall.

Selected winning entries will be published by The Fortune Society in *The Fortune News*.

Manuscripts should be in English only. They should be typewritten whenever possible, or legibly handwritten on 8 1/2 x 11 inch paper.

Authors may not submit more than one entry in each category.

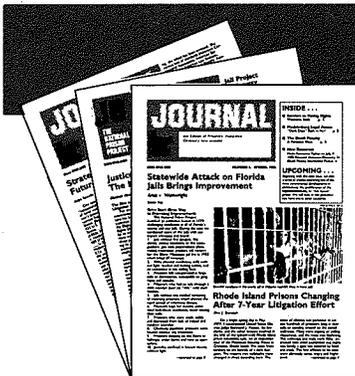
Authors are urged to keep copies of each manuscript sent, because *entries cannot be returned*. Unclaimed poetry manuscripts are given to the Cathedral of St. John the Divine in New York for display at their Poetry Wall, where they are read and admired by many visitors each year.

Only unpublished manuscripts will be considered, with the exception of pieces that have appeared in publications for the prison population only.

Winners and all Honorable Mentions in each category will receive a one-year subscription to *American Poetry Review*.

Send entries to: PEN Writing Awards for Prisoners, 568 Broadway, New York, NY 10012, ATTN: Leonie Garrigues.

# PUBLICATIONS



**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*

QTY. COST



**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 incarcer-

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ated mothers, health care, and general articles and books. \$5 prepaid from NPP.

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



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

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# HIGHLIGHTS

The following are major developments in the Prison Project's litigation program since January 1, 1988. 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. We received a favorable opinion from the Court of Appeals. In January, the Solicitor General filed a petition for *certiorari* in the Supreme Court. The Prison Project filed its opposition on April 1, 1988. *Certiorari* was granted April 25, 1988.

**Cody v. Hillard**—This suit challenges conditions at the South Dakota State Penitentiary. In response to an unfavorable decision by the Eighth Circuit Court on the issue of overcrowding, the Prison Project filed a petition for a writ of *certiorari* in early January. The Supreme Court has since denied that petition.

**Palmigiano v. DiPrete**—This case challenges conditions in the Rhode Island state prison system. The special master made a presentation at a January status conference which demonstrated general compliance except for some medical care issues. It was agreed that the court would enter a new order which would discharge the special master and remove the court from active monitoring.

**U.S. v. Michigan/Knop v. Johnson**—This is a statewide Michigan prison conditions case. In *Knop*, the Sixth Circuit denied a stay of the order requiring the defendants to prepare remedial plans and dismissed the defendants' attempted appeal of the order as premature. At the beginning of March 1988, the trial court held a hearing on the parties' remedial plan proposals and in May issued an order essentially granting all our requested remedies. In *U.S. v. Michigan*, the trial court held a compliance hearing

on overcrowding, sanitation and fire safety issues and will be issuing some further remedial orders.

**Maryland Jails: Hendrickson v. Welch, Macer v. DiNisio, Dotson v. Satterfield**—These cases, filed by the Prison Project and the Maryland ACLU, challenge conditions and practices in three jails on Maryland's Eastern Shore. In *Hendrickson*, which challenges conditions at the Wicomico County Jail, a settlement was reached just two days before the scheduled hearing. It provides for improvement in living conditions and the implementation of a pretrial release program. A preliminary injunction hearing on First Amendment issues was held in *Dotson*, the case challenging conditions in the Dorchester County Jail.

**Inmates of Occoquan v. Barry**—This case seeks to improve conditions and relieve overcrowding at the District of Columbia's Occoquan facility. The case was argued in the Court of Appeals on January 14, 1988, and remanded to the trial court in late April. A petition for rehearing *en banc* was filed in early May.

**Duran v. Carruthers**—This case challenges conditions in the New Mexico state prison system. In February 1988, we received a favorable decision denying the defendants' motion to vacate or modify the consent decree on Eleventh Amendment grounds. The defendants appealed the decision in March. We also received a favorable decision on attorneys' fees for compliance work and then successfully moved to dismiss defendants' appeal of the decision. They have since filed a petition for *certiorari* in the Supreme Court. We filed a brief in opposition in March.

**Nelson v. Leeke**—This case challenges overcrowding and conditions in the South Carolina prison system. In January 1988, the district court denied the de-

fendants' motion to modify the consent decree and ordered them to reduce the population at certain facilities. The order was stayed by the Court of Appeals pending an expedited appeal by the defendants. The case was argued in the Court of Appeals in February and an unfavorable decision was handed down on April 27. A petition for rehearing *en banc* was filed in early May and was denied in late May.

**Harris v. Thigpen**—This is a new case which challenges the policy of the Alabama Department of Corrections to test all prisoners for HIV antibodies. Originally filed *pro se*, the case claims that the tests subject those inmates who test positive to segregation in special AIDS units and other discriminating treatment. The Prison Project, along with local counsel, filed an amended complaint in March seeking injunctive and declaratory relief. Class certification is pending. Plaintiffs are contesting the efforts of defendants to consolidate *Harris* with several other prisoner cases. A hearing was held on all open motions in May.

**Baraldini v. Meese**—In this new case, the Prison Project, along with several co-counsel, represents inmates of the High Security Unit in the Federal Penitentiary at Lexington, Kentucky. The case, filed on March 22, 1988, alleges that the Federal Bureau of Prisons assigned the plaintiffs to the unit in violation of their First Amendment right to hold certain beliefs or ideologies; their Eighth Amendment right to be free from cruel and unusual punishment; and their Fifth Amendment rights to due process and equal protection. In March, the plaintiffs filed a motion for preliminary injunction and a motion to expedite discovery. A hearing was held on the preliminary injunction motion in early June. ■

## National Prison Project

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