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High-tech house arrest
see page 5

ISSN 0748-2655 NUMBER 21, FALL 1989

CASE REPORT
NEWS IN LITIGATION
see

INSIDE . . .

Directs Bail Fund to Be Provided

Court Fines Rhode Island Officials Over Non-Compliance

Mark Lopez

Of all the prisons and jails throughout the country straining under the impact of the move toward longer and/or mandatory sentencing, tiny Rhode Island's unified prison and jail system is feeling the heat the most. In 1988, its incarceration rate grew by an unprecedented 34%, nearly double the national average. No relief appears in sight for 1989 either, as growth is expected to exceed 40%, according to the Bureau of Justice Statistics. Prison officials are at wit's end trying to find bedspace and provide services for their bloated population. Under pressures from the Department of Corrections, the public and the court, Rhode Island's elected officials promise relief, yet seem paralyzed when it comes time to deliver. Whatever headaches this causes Rhode Island officials, however, it cannot compare to the inhumanity suffered by 500 or so pretrial detainees who are forced to live in facilities and under conditions designed for one-third as many people. On April 6, 1989, the matter came to a head.

Senior U.S. District Judge Raymond J. Pettine held that Rhode Island officials had failed to purge themselves of a previously entered contempt order[1] by bringing their pretrial facility, the Intake Service Center (ISC), into compliance with the court's longstanding orders limiting its population. Substantial fines were imposed, and the defendants were directed to use the accumulated monies to provide bail for indigent low-risk pretrial detainees, thereby effecting an immediate reduction in the population at ISC.[2]

Only an order holding [Rhode Island] officials in contempt would spur them out of the bureaucratic quicksand in which they had become mired.

The state immediately appealed and was granted a stay by the First Circuit Court of Appeals. On the appellate court's own motion, the appeal was expedited and argument was heard in early June. The stay was dissolved by the court of appeals shortly after the appeal was argued. The state raised the usual federalism complaints about the scope and intrusiveness of the relief granted by the district court. In the ordinary case, perhaps they might have cause to complain. But, no one who carefully studies the long history of this case can fail to see how flexibly the district court has treated its orders, precisely because it has the utmost respect for the varying competencies of different branches of government as well as the differing needs and interests of the parties. For these reasons, it has repeatedly modified and amended the orders at issue in response to the state's pleas for flexibility.

There comes a time, however, when flexibility must give way to enforcement lest one party's failure to comply undermines the viability of the agreement which the parties reached and the court approved as a workable solution to the problems presented.[3]

The district court's decision to adjudge Rhode Island officials in contempt was necessary to head off a "societal disruption" of serious magnitude, according to Judge Pettine. Only an order holding these officials in contempt would spur them out of the bureaucratic quicksand in which they had become mired, and force them to take the action necessary to meet the standards established in the consent decree.[4]

On August 17, 1989, in a *per curiam* opinion, the First Circuit affirmed Judge Pettine's order in all respects for the reasons set out in the district court's two comprehensive opinions, *supra*.[5]

History of the Case

Anyone remotely familiar with the history of the Rhode Island Adult Correctional Institutions (ACI) knows that until the litigation of the late 1970s it ranked as one of this country's most antiquated and poorly managed prison systems. By most accounts, prison officials had lost control as violence and squalor beset the prison. Nowhere was the impact felt more harshly than on the lives of pretrial detainees:

> *The conclusion is inescapable that pretrial inmates are not provided minimally adequate protection against assault, that they are exposed to punishment even worse than that endured by other inmates, and that they are incarcerated under conditions far harsher than anything necessary to guarantee their presence at trial.*
>
> *Palmigiano v. Garrahy*, 443 F.Supp. 956, 971 (D.R.I. 1977).

To alleviate the fear and suffering of pretrial detainees, the 1977 order required the state to remove all such per-

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[1] *Palmigiano v. Garrahy*, 700 F.Supp. 1180 (D.R.I. 1988).

[2] *Palmigiano v. Garrahy*, 710 F.Supp. 875 (D.R.I. 1989).

[3] 700 F.Supp. at 1193.

[4] *Id.*

[5] *Palmigiano v. DiPrete*, No. 89-1440 (1st Cir. 8/17/89).

—continued from front page
sons from the existing Maximum Security Facility within three months and to house them separately thereafter, with no subsequent intermingling or contact between detainees and sentenced prisoners.

The Emergence of Overcrowding at the ISC

Despite the explicit terms of the 1977 Order and the three-month timetable that it announced, it was not until five years later, in July 1982, that the state succeeded in achieving full compliance with the order's requirements for the housing of pretrial detainees. With the opening of the ISC in 1982, however, detainees were at last no longer intermingled with sentenced offenders and the constitutionally required physical conditions imposed by the 1977 order were momentarily met. Nevertheless, old problems persisted and new problems loomed. In a "final report" on compliance with the 1977 order issued on October 20, 1983, the Special Master appointed by the court to monitor the ACI noted the overcrowding in the newly opened facility. On the day it was first occupied, one hundred of the ISC's 168 single occupancy cells were already fitted with double bunks, and the facility's population consistently topped 200. At the time of the Special Master's report, nearly 250 detainees were being held in the ISC, and all concerned conceded that the magnitude of the overcrowding problem would only continue to worsen.

[The state] fell into a frustrating pattern of doing too little too late.

Despite these early indications that overcrowding would grow dramatically worse, the state repeatedly failed to try to solve the problem. Instead, it fell into a frustrating pattern of doing too little too late, and only after prodding by the district court's many subsequent orders designed to ameliorate the devastating impact of overcrowding at the ISC. In 1985, for example, the court held an evidentiary hearing to examine the overcrowding crisis at the ISC and its impact on the basic conditions of confinement at the facility. The evidence adduced at the hearing painted a disturbing portrait of life inside the overstuffed facility.[6]

The court's frustration with the state's intransigence was unmistakenly

Senior U.S District Judge Raymond J. Pettine presided over the Palmigiano case from 1976, when it was first filed, until 1989. He repeatedly urged state officials to remedy the hazardous overcrowding in Rhode Island's prisons.

"I have cajoled and waited as though for Godot."—Judge Raymond J. Pettine

expressed in its order growing out of that hearing and imposing a 168-person limit on the number of detainees in the ISC:

> *The record shows that for nine years this Court has employed all the artifices it could conceive to have the defendants cure the many constitutional violations it found. I have been imperious, didactic, and supplicatory; I have cajoled and waited as though for Godot. I have ever been reluctant to interfere with the operation of the prison. However, the pattern is always the same: without monitoring, prison officials permitted the kitchen to get into a deplorable state . . . they failed to provide adequate medical staff for an increase in population of which they have been aware for years; indeed, repeated warnings from the Special Master have been in vain . . . even in the areas that could easily have been corrected, nothing has been done . . . the veritable fortune that has been poured into that institution will all be for naught if positive firm steps are not immediately invoked.*
>
> *The overcrowding must be confronted before it becomes uncontrollable. A delay under the present conditions can give rise to problems of staggering magnitude.*[7]

Current Overcrowding at ISC

Today, 12 years after the original order, years after overcrowding was first identified as critical at the ISC, and more than three years after the 1986 reaffirmation of the court's entire course of dealing in this case, Rhode Island officials are still frozen in place, unable or unwilling to generate an effective response.

The overcrowding at the ISC in recent months is more serious than it was in December 1985, when the court heard the testimony which resulted in its May 12, 1986 Opinion and Order. On December 1, 1985, the population was 289, while on June 12, 1988, the population went up to 394. On February 20, 1989, the most recent deadline imposed by the court, it still hovered at 390, and on March 29, 1989, just days before the court sanctioned the state, the population stood at 473. Since that time it has housed an average population of 500 or more. Thus, the present population at ISC is three times the design rated capacity of 168, and double the population ceiling of 250 agreed to by the parties.

1988 and 1989 Orders of Contempt

Confronted by the rising population, the plaintiffs moved the court to adjudge the defendants, the Governor of Rhode Island, and the director of the Rhode Island State Department of Corrections, to be in civil contempt of three standing orders of the court governing the housing of pretrial detainees at the ISC. Plaintiffs' essential complaint was that the Rhode Island officials were grossly exceeding the population limit of 250. As a coercive sanction, the plaintiffs sought the imposition of fines and the establishment of a bail fund, using these funds to provide bond for the hundreds of low-bail pretrial detainees who were choking the system.

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[6] *Palmigiano v. Garrahy*, 639 F.Supp. 244 (D.R.I. 1986).

[7] *Id.* at 258; the cap was later increased to 250 persons by agreement of the parties.

William K. Daby/Providence Journal-Bulletin Photo

The recreation area for the A block at the Adult Correctional Institution in Rhode Island also contains beds for prisoners because of the severe overcrowding.

In support of its position, plaintiffs were able to point to the numerous cases in which federal courts, in recent years, had not hesitated to exert the power of contempt to coerce recalcitrant jail and prison officials to comply with overcrowding orders. These cases are testaments to the severe overcrowding crisis in this country, and are at the same time evidence that the limits of judicial tolerance have been reached.[8]

The defendants countered that the court should stay its hand because compliance with the population orders was impossible given the unprecedented growth caused by stricter bail and sentencing laws and the failure of the legislature to create new bedspace.

The state completely neglected to use less burdensome measures . . . to alleviate overcrowding.

The Court's Response

While it is true that a finding of civil contempt can be deflected by a showing that compliance with the court's order is factually impossible,[9] the record in this case belies the state's claim. The evidence showed that Rhode Island officials failed to achieve substantial and diligent compliance with the district court's orders. For years Rhode Island had been aware of recurrent overcrowding at ISC, and had not taken steps to eradicate the problem. Not only had the state failed to create sorely needed new space in spite of its already swollen population and projections for dramatic population increases, it completely neglected to use less burdensome measures available to it to alleviate overcrowding. Most notably, no pretrial diversion services are available to Rhode Island courts. These services would significantly reduce the number of detainees without creating a risk to the public.

As a result of the state's inertia, there are large numbers of persons detained on bonds so insignificant that it seriously calls into question the justification for their confinement, except that they are too poor to make bail. As hoped by the plaintiffs, the district court's response to the state's request for yet another chance was short, but to the point:

Given this long history of delay, it is disingenuous for defendants to continue to plead that the problem has grown too overwhelming to deal with after systematically refusing to address this visibly brewing crisis for so long. Such a blatant

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[8] *Inmates of Allegheny County Jail v. Wecht*, 874 F.2d 147 (3rd Cir. 1989); *Twelve John Does v. District of Columbia*, 855 F.2d 874 (D.C. Cir. 1988); *Badgley v. Santacroce*, 800 F.2d 33 (2nd Cir. 1986); *Morales Feliciano v. Hernandez-Colon*, 697 F.Supp. 26 (D.P.R. 1987); *Albro v. Onondaga County, N.Y.*, 681 F.Supp. 991 (N.D.N.Y. 1988); *Tate v. Frey*, 673 F.Supp. 880 (W.D. Ky. 1987); *United States v. State of Michigan*, 680 F.Supp. 928, 1047-1054 (W.D. Mich. 1987) (bench opinion of May 22 and May 28, holding defendants in contempt); *Jackson v. Whitman*, 642 F.Supp. 816 (D.La. 1986); *Ruiz v. McCotter*, 661 F.Supp. 112 (S.D. Tex. 1986); *Toussaint v. McCarthy*, 597 F.Supp. 1427 (N.D. Ca. 1984); *Mobile County Jail Inmates v. Purvis*, 581 F.Supp. 222 (S.D. Ala. 1984); *Miller v. Carson*, 550 F.Supp. 543 (M.D. Fla. 1982).

[9] *U.S. v. Rylander*, 460 U.S. 752, 757 (1983). If the party sought to be held in contempt is literally unable to comply because compliance is not presently within his power, the attempt at coercion embodied in a finding of contempt is meaningless. *Shillitani v. U.S.*, 384 U.S. 364, 371 (1966).

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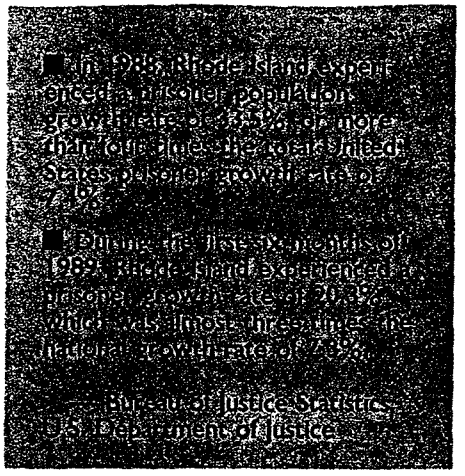
attempt to avoid responsibility for their own patently apathetic behavior will not, at this late date, rescue them from its consequences.[10]

The district court's conclusion is directly supported by the holdings of three recent court of appeals decisions, applying the test of impossibility to the conduct of state officials in prison overcrowding cases. These courts have been particularly strict in their interpretations of this defense. The Third Circuit interpreted the defense of impossibility to mean "physical impossibility beyond the control of the alleged contemnor."[11] "[T]he suggestion that it was physically impossible for the Allegheny County to obey the order in the respects in which they were held to be in contempt is sophistical. The county officials simply chose to take no steps to provide the warden and his staff the wherewithal to comply."[12]

Similarly, the Second Circuit has held that the impossibility defense is not available where county defendants' compliance is hindered by political difficulties, rather than physical impossibilities, in alleviating jail overcrowding.[13] The court held that the defendant county officials could comply with a court-ordered cap simply by refusing to accept more prisoners, and rejected the officials' argument that a refusal to accept new prisoners might place them in contempt of sentencing state courts. The court stated that the federal court's order regarding prison population would be entitled to obedience under the Supremacy Clause, and that if a state court attempted to hold the county in contempt, the federal judgment "would provide a complete defense." The court found this to be true even though the judgment had been entered by consent.[14]

In concert with the Second Circuit, in *Twelve John Does v. District of Columbia*,[15] the D.C. Circuit held that it would be inappropriate to allow prison officials to escape their obligations to reduce the prison population by pleading impossibility. The court brushed aside the defendants' claim that significant increases in the numbers of arrests and inmates precluded it from staying within the population limits. It also showed no sympathy for the claim that political difficulties prevented the construction of new prisons. In the end, the court held that conditions such as these do not establish a



lack of power to alleviate the overcrowding, even if that means release of or refusal to accept prisoners.[16] Judge Pettine found no basis for departing from this persuasive line of authority.[17]

The Sanctions

There is no question the federal courts are authorized to impose heavy fines for failure to comply with prison overcrowding orders,[18] and in the ordinary case, the prospect of being confronted with heavy fines might compel compliance with a court order imposing a population ceiling.[19] This is not an ordinary case, however, and the history and record of this litigation indicates that fines alone would not suffice to reduce the population. Rhode Island officials have been admonished and threatened with heavy fines before, and have chosen to ignore the warnings. For this reason, the district court directed that any fines collected from the state officials as a result of further dilatory conduct in reducing

125 persons have been released under the [Rhode Island] bail release program.

the population be set aside to finance a bail fund to be used for pretrial detainees under certain terms and conditions to be developed later.[20]

The Supreme Court has recently recognized the authority of a district court to utilize fines collected under a contempt sanction to assure compliance with the court's orders. In *Local 28 of Sheet Metal Workers v. E.E.O.C.*,[21] the Court upheld the district court's imposition of contempt sanctions, including a fine to be used in a fund designed to increase nonwhite membership in a union apprenticeship program. The Court noted that the district court had "carefully considered" the proper standard in exercising its broad remedial powers and imposing the fines, and that the district court had properly concluded "that the Fund was necessary to secure [defendants] compliance with its earlier orders."[22]

Even before *Local 28* was decided, federal courts have ordered the payment of funds into a bail fund to relieve overcrowding of pretrial detainees. For instance, in *Mobile County Jail Inmates v. Purvis*,[23] an Alabama federal district court ordered the county officials to pay into the court accumulated contempt fines, and the court used the fines to provide fees to pay bail bonds for low-bond pretrial detainees. The court noted that, despite its reluctance to involve itself in such matters, it "must find some way to achieve compliance with its orders. Although the court has given the defendants over two years in which to find and implement the solution, they remain far from compliance."[24] Significantly, in deciding to establish the bail fund with accumulated fines, the court relied on U.S. District Judge Morris Lasker's order in the Rikers' Island case, *Benjamin v. Malcolm*,[25] in which he ordered $2,000,000 in accumulated fines to be used to pay for certain low-bond pretrial detainees not charged with violent crimes.

The success of this approach is perhaps no more evident than in Philadelphia where city officials have been required to provide bail for the largest numbers of low-bond detainees.[26] The

[10]700 F.Supp. at 1197.
[11]*Inmates of Allegheny County Jail v. Wecht*, 874 F.2d at 152.
[12]*Id.*
[13]*See Badgley v. Santacroce*, 800 F.2d at 36-38.
[14]*Id.* at 37-38.
[15]855 F.2d 874.
[16]*Id.* at 877.
[17]Rhode Island's attempt to introduce evidence of good faith, diligence and Eighth Amendment considerations by arguing that conditions were constitutional despite the overcrowding proved equally unavailing. The district court correctly opined that good faith is not a defense to civil contempt, *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949), and that contempt proceedings do not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. 700 F.Supp. at 1195, citing *Maggio v. Zeitz*, 333 U.S. 56, 69 (1949). Prison overcrowding cases supporting this proposition include *Twelve John Does v. District of Columbia*, 855 F.2d at 878, n.30; *Badgley v. Yarelas*, 729 F.2d 894, 899 (1984); *Ruiz v. McCotter*, 661 F.Supp at 125.
[18]*See Inmates of Allegheny County Jail*, 874 F.2d at 152 ($25,000 fine); *Twelve John Does*, 855 F.2d at 875-876 (imposition of population cap and fine of $250 per day for each dorm at which the limit was surpassed); *Badgley*, 800 F.2d 33 (fine of not less than $5,000 for each inmate admitted over population cap).
[19]Numerous district court decisions have done the same. See cases cited n.8, *supra*.
[20]710 F.Supp. at 887.
[21]478 U.S. 421, 106 S.Ct. 3019 (1986).
[22]*Id.*
[23]581 F.Supp. 222 (S.D. Ala. 1984).
[24]*Id.* at 225.
[25]No. 75 Civ. 3073 (S.D.N.Y. 1983).
[26]*See also, Harris v. Pernsley*, No. 82-1847 (E.D. Pa. 6/6/88) (instructing Philadelphia officials to provide

BailCARE screening process in place there is comprehensive. All inmates released through the program have to satisfy requirements relating to lack of serious criminal record, references, verified residence and surety. If the bailee does not comply with the terms of release, such as drug, alcohol or employment counseling, bail is revoked and the inmate is returned to prison pending trial. The BailCARE program has been working extremely well. As of January 31, 1989, 22,059 cases were reviewed and 1,321 inmates were released by BailCARE. The program has placed 1,288 inmates in treatment, training and education programs. The rate of appearance in court of those released through the program through December 31, 1988 was 88%. Upon appearance in court, only 39% of BailCARE cases have resulted in conviction.[27]

The evidence is not all in yet in Rhode Island where 125 persons have been released under the bail release program. The experience in Philadelphia, however, is compelling evidence of how safe and effective this sanction is for achieving compliance with court-ordered population limits. We are hopeful that this success can be repeated in Rhode Island.[28]

Conclusion

During the long and tortuous history of this case, Rhode Island officials have done nothing to remedy constitutional violations except when they were coerced into doing something by the court. Left to their own devices, they have exceeded the design capacity of 168 at the ISC, they have exceeded the cap of 250 that they agreed to, they have gone to 300, 350, 400, 450, and 500, and, unless reigned in, they will surely go above 600 in the foreseeable future. They will continue to jam human bodies into this facility until, like the overstuffed suitcase, it bursts at the hinges. Judge Pettine unquestionably acted correctly in an effort to enforce his order and to prevent the situation from ending in tragedy. ■

funds sufficient to obtain the release of low-bond pretrial detainees).

[27]*Harris v. Pernsley*, No. 82-1847 (available on Westlaw: WL 16269) (order expanding pool of eligible detainees).

[28]Similar court-ordered bail programs to alleviate overcrowding in county jails are also in place in Puerto Rico and Newark, New Jersey. *Morales Feliciano v. Hernandez Colon*, No. 79-4 (PG) (D.P.R. 4/28/88); *Essex County Jail Inmates v. Fauver*, Civ. No. 81-1945 (D.N.J. 5/10/89).

Electronic Monitoring: Humane Alternative or Just Another "Gizmo"?

Russ Immarigeon

"Opposition to the beepers has been sparse. Civil libertarians seem split on the issue. At a national ACLU convention, I took an unscientific, informal poll among activists I met. Though many said beepers herald an Orwellian state of affairs, others argued that beepers represent a humane alternative to institutional confinement. Such ambivalence is understandable. One can hardly second-guess the prisoner who would rather surrender a modicum of privacy at home than lose all privacy. At the same time, though, beepers appear beneficent only because our existing correctional system is so horrible. Beepers can be justified only because Americans have not embraced solutions to crime that go beyond isolating criminals in metal cells."

—Keenen Peck, former chairperson, Capital Area Chapter of the ACLU of Wisconsin[1]

The electronic monitoring of criminal offenders, first proposed in the mid-1960s as a visionary method of keeping certain offenders from being imprisoned, never really caught on until twenty years later when states such as Florida, Georgia, Michigan and Texas, mired deeply in skyrocketing prison populations, began using it to augment their intensive and community supervision programs.

Georgia Report Calls for Halt in Use of Electronic Monitoring

In the 1980s, Georgia became a bellwether state for criminal justice reforms through its use of intensive supervision, boot camp, and other initiatives. Like many Southern states, Georgia has always relied heavily on imprisonment. However, overwhelming prison populations, the threat of court intervention, several state study commissions, and an innovative probation division have turned Georgia into a state which everyone, including many Northern states, listens to when it acts.

Georgia started using electronic monitoring several years ago to augment its intensive probation supervision (IPS) program. Recently, an internal department of corrections management information paper found that probation officers did not perceive electronic monitoring "to improve the level of supervision over the surveillance provided by IPS in any meaningful way, since curfew checks routinely performed by IPS officers was thought to be very effective in keeping track of probationers' whereabouts."[2] The report recommended that electronic monitoring not be used as an additional form of surveillance in IPS cases.

Community supervision was often seen as nothing more than a slap on the wrist.

Georgia has not yet decided to abandon its use of electronic monitoring. Nonetheless, the report is important because it is the first empirical evidence expressing dissatisfaction about the social policy of using electronic monitoring as a method of meeting particular program objectives. Previous research findings placed heavy emphasis not on its appropriateness or even its effectiveness but on the technical adequacy of monitoring devices manufactured by various vendors.

Strong support still exists for electronic monitoring. At the federal level, for instance, the U.S. Sentencing Commission, the National Institute of Justice, the Federal Bureau of Prisons, and the U.S. Parole Commission are all now encouraging, implementing, and/or evaluating its use. Some states, like New Jersey and Utah, remain committed to using it. Other states, such as Maine and New York, are either considering using it, or have demonstration projects which they are evaluating to see if further use is warranted.

However, because of Georgia's leadership in recent years in criminal justice innovations, this finding is likely to spark discussion about the relative merits and further use of electronic monitoring devices.

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Russ Immarigeon, a regular contributor to NPP JOURNAL, lives in Portland, Maine.

[1]Keenen Peck, "High-Tech House Arrest," *The Progressive*, 2(7), (July 1988), p.26.

[2]Billie S. Irwin, "IPS with Electronic Monitoring Option," (Atlanta, GA: Georgia Department of Corrections), (April 1989), p.16.

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Electronic Monitoring Spreads Across the Country

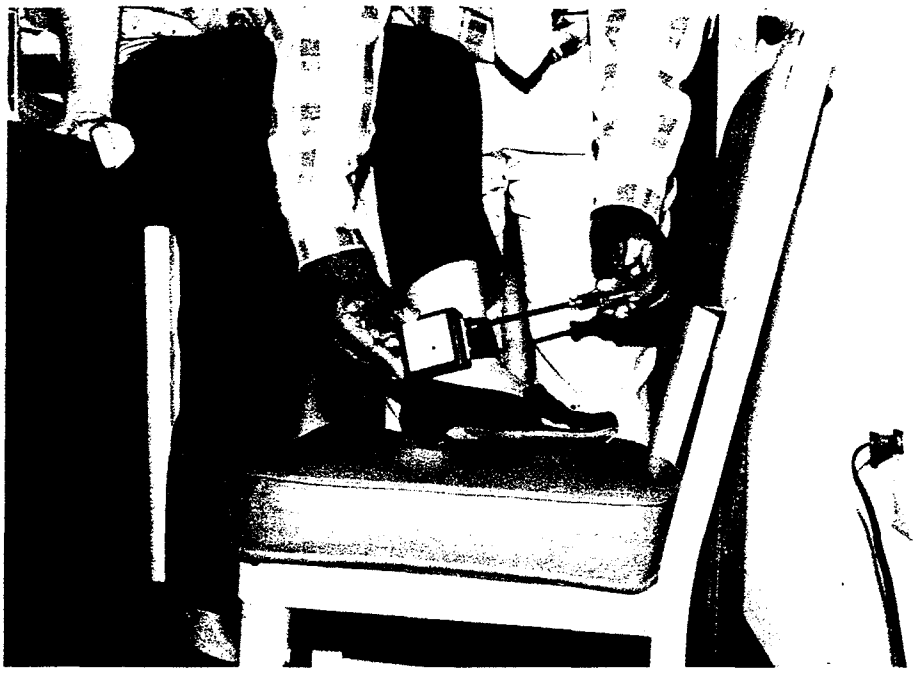
In the 1980s, criminal justice policymakers were forced to take a careful look at how probation and parole agencies could help alleviate prison overcrowding. In the process, these agencies were frequently put on the defensive. Long ignored, community supervision was often seen as nothing more than a slap on the wrist and, right or wrong, efforts were set in motion to strengthen (or "toughen up") the image and services of these agencies.

This "credibility crisis" provided fertile soil for electronic monitoring. According to the National Institute of Justice, which has closely monitored its growth, 21 states used electronic monitoring to supervise 826 offenders in 1987; by 1988, electronic monitoring expanded to 33 states supervising 2,277 offenders, a three-fold increase from the previous year. Florida and Michigan alone account for nearly one-half of these electronically-monitored offenders.

Electronic monitoring is used under a variety of arrangements: in federal, state, county and private agencies; by pretrial, probation, and parole agencies; and by adult as well as juvenile offenders. It is never used as a sole sanction; instead, it always accompanies another form of correctional intervention (house arrest, home confinement, intensive supervision, urine testing, etc.). Indeed, some observers argue that electronic monitoring should be viewed as just a surveillance technology, used to support another sanction, and not as an intermediate or other type of sanction. In any case, offenders are monitored by either active or passive systems and, on average, they are supervised for a short period of time (in 1988, slightly more than half of these offenders were supervised for six weeks or less). In most programs, offenders pay various fees or charges (up to $15 per day). In some programs, as many as half its clients fail to meet program requirements; however, infractions of program rules, rather than new crimes, are the most common reason for violation.[3]

Research Findings on Electronic Monitoring

Comprehensive research on electronic monitoring is scarce. A number of individual programs have conducted or sponsored evaluation research concerning program implementation, and the National Institute of Justice has funded evaluations of electronic monitoring use in Indiana and Oklahoma. However, no evidence currently exists telling us if electronic monitoring prevents or deters crime, decreases or increases the severity of imposed sanctions, or affects public safety.



Electronic monitoring, in use in 33 states, always accompanies another form of correctional intervention such as house arrest or intensive supervision.

Researchers found that jail overcrowding was not reduced by the [electronic monitoring] program.

"The limits of electronic monitoring are evident," a recent New York study reported. "No EM system can give information on a defendant's activities within the house. No system can track what the defendant is doing during the time he is scheduled to be at work. Further, a passive monitoring system allows the real chance that a defendant may leave his home without authorization and never be detected."[4]

A brief review of several other studies suggests some of the limits and contradictions of electronic monitoring.

Offenders participating in a home incarceration/electronic monitoring program in Kenton County, Kentucky between May 1985 and December 1986 were primarily male, nonviolent property offenders. Researchers found that jail overcrowding was not reduced by the program; only three of 35 offenders were terminated from the program but none were violated for new crimes; district court judges reported they did not use home incarceration as an alternative to jail; and, nevertheless, the program was not used as a method of "widening the net of social control."[5]

Offenders participating in a house arrest/electronic monitoring program in Clackamas County, Oregon were monitored, on average, for 33 days. They achieved a highly successful completion rate (90%) and only one of the ten program violators committed a new crime. The study found that electronically monitored offenders were less likely to recidivate than work release offenders. However, post-treatment periods of observation were different for both groups and nearly all of the re-arrests were for petty crimes, i.e., probation violations, misdemeanor disturbances, and traffic offenses. The cost of electronic monitoring fell in between regular probation and jail incarceration.[6]

In short, these studies have no comparison group and they rely on information from a small number of cases in-

[3]Annesley K. Schmidt, "Electronic Monitoring of Offenders Increases," *NIJ Reports*, No. 212 (January/February 1989), pp.2-5.

[4]Martin B. McIndoe and Patrice DIhopolsky, "Suffolk County Probation Department Electronic Monitoring Demonstration Grant: First Year Evaluation (1988-89)," (Yaphank, NY: Suffolk County Probation Department), (1989).

[5]J. Robert Lilly, Richard A. Ball, and Jennifer Wright, "Home Incarceration with Electronic Monitoring in Kenyon County, Kentucky: An Evaluation," in Belinda R. McCarthy (ed.), *Intermediate Punishments: Intensive Supervision, Home Confinement, and Electronic Monitoring*, (Monsey, NY: Criminal Justice Press), (1987), pp.189-203.

[6]Annette Jolin, "Electronic Surveillance Program Clackamas County Community Corrections Evaluation," (Oregon City, OR: Clackamas County Community Corrections), (1987).

volving low-risk offenders. Nevertheless, research on electronic monitoring, like the intervention itself, raises some curious questions. On the one hand, we still know very little about the effects of electronic monitoring. The Georgia study mentioned earlier is perhaps the only investigation which uses control group data (data for this study were collected as part of a multi-state study of intensive supervision programs being conducted by The Rand Corporation). It suggests direct supervision by probation officers is potentially more effective than supervision by technological device. This fits well with what many practitioners are saying. "Frankly stated," a probation official in New York recently argued, "the primary need for improving probation outcomes is to increase human resources—more officers, not just more gizmos."

On the other hand, because electronic monitoring seems to offend our sense of civil liberties in a way that human forms of intervention do not, questions (such as the influence of electronic monitoring on the families of offenders or even the clarity of purpose of this form of supervision) are being raised simply because of this discomfort. While this is true for other interventions as well, observers are asking questions which have not yet been answered. Electronic monitoring is being used in vastly different circumstances, and sufficient comparative research has not yet been done.

We don't know if electronic monitoring is producing more problems than it may be solving.

We do not yet know if electronic monitoring is needed to change criminal behavior. Moreover, we don't know if electronic monitoring is producing more problems than it may be solving. With increased surveillance, more offender violations (not necessarily new crimes) will naturally occur. Do we want to have a system which measures success by the number of immediate failures it captures rather than the number of long-term successes it produces?

The future role of electronic monitoring in the administration of criminal justice remains uncertain. What *can* be said is that electronic monitoring has neither reduced correctional crowding nor lessened U.S. emphasis on incapacitation.

At present, few clear statements of policy exist concerning the use of electronic monitoring. The American Civil Liberties Union, the American Correctional Association, and the American Probation and Parole Association have discussed or are working on policies but none currently exist. The American Bar Association is apparently the only national criminal justice organization to have promulgated any standards for the use of electronic monitoring. Following lines set by the ABA *Standards for Criminal Justice*, the ABA Section on Criminal Justice cautiously posits that 1) electronic monitoring be the least restrictive alternative, 2) it not be required as a condition of probation, and 3) a person should not be forced to pay for it.[7]

State-level advocacy organizations are also wary about using electronic monitoring. The New York Campaign for Common Sense in Criminal Justice, for instance, suggests that electronic monitoring should not be used for pretrial defendants, for offenders who would not ordinarily receive an incarcerative sentence, or without "support services that can help participating offenders develop the skills and personal resources needed to lead a crime-free life."[8]

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[7]American Bar Association Criminal Justice Section, "Principles for the Use of Electronically Monitored Home Confinement as a Criminal Sanction," (August 1988), pp.1-2.

[8]The Campaign for Common Sense in Criminal Justice can be reached at the Correctional Association of New York, 135 East 15th Street, New York, NY 10003, 212/254-5700.

A Brief History of Electronic Monitoring

The use of electronic monitoring for the supervision or surveillance of criminal offenders was first championed in law and behavioral science journals just more than twenty years ago. Ralph K. Schwitzgebel, the best-known early advocate, saw these devices as an innovative method of reducing reliance on imprisonment. The United States imprisoned people far too long, he argued, and imprisonment was of no humanitarian and dubious therapeutic value.

"Recent developments in electronic technology," Schwitzgebel noted in mid-1968, "greatly increase the possibility of deterring the commission of certain types of offenses in the community. When specific, offending behaviors can be prevented, it will no longer be necessary to imprison an offender in order to protect the community."[1]

Schwitzgebel recognized, however, that civil liberties and other concerns were of great importance. In fact, he argued that "effective administrative safeguards" should be developed before electronic devices were widely used in public. Monitoring, he suggested, might require joint approval by criminal justice release agencies and independent civil liberties groups or be permitted only when the process of using these devices could show "long-term therapeutic benefits."

Ralph Schwitzgebel's electronic monitoring device never caught on. By the mid-1980s, however, rapidly rising jail and prison populations loomed large in most jurisdictions. Criminal justice policies, particularly on volatile issues like prison use, have centered on politically safe solutions. In this context, electronic monitoring became very attractive because state and local governments could still promise their constituencies that they were incapacitating criminals at less cost.

In April 1983, Judge Jack Love, of the State District Court in Albuquerque, New Mexico, sentenced four minor offenders to wear small electronic transmitting devices instead of going to jail or paying a fine. Judge Love felt that the monitors would allow probation officers to keep track of these offenders, thereby assuring that they wouldn't commit further crimes. Judge Love also was hesitant about jailing minor offenders and felt that these devices could help alleviate jail crowding.

Judge Love's experiment was generally accepted in Albuquerque, and it received considerable local and national media coverage. But it also received some criticism. Judge William Short, who presided over Albuquerque's Metropolitan Court, told a reporter that the devices could be applicable in some situations but shouldn't be used as an alternative to jail. "If a person's crime and record are such that he should get probation," the judge said, "then he should have an honest chance to prove to society that he can behave on his own. If he deserves jail, he should go to jail."[2] ■

[1]Ralph K. Schwitzgebel, "Electronic Alternatives to Imprisonment," *Lex et Scientia*, 5(3), (July-September 1968), p. 99. A more recent account of Schwitzgebel's views is contained in Ralph Kirkland Gable, "Application of Personal Telemonitoring to Current Problems in Corrections," *Journal of Criminal Justice*, 14(2), (1986), pp.167-176.

[2]Information in this section comes from an article, "Electronic Monitor Turns Home Into Jail," *The New York Times*, (February 2, 1984).

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Because electronic monitoring is generally used on a catch-as-catch-can basis, there is little sense of how this method of responding to criminal offenders affects the way we respond to criminal offending in general.

A recent British experiment, however, suggests that electronic monitoring could potentially affect the way sentencers align criminal penalties. The experiment attempted to assess how the use of electronic monitoring could affect the proportional use of imprisonment.

Electronic monitoring is generally used on a catch-as-catch-can basis.

Participants in the study indicated that electronic monitoring was more appropriate for accused offenders awaiting trial than as a sentencing option and that the use of electronic "tagging" would affect the comparative use of other sanctioning options. Specifically, the study suggested that the use of fines (more commonly used in the U.K.) would increase as a replacement for both probation and imprisonment when electronic tagging was also used. Moreover, the study found that such monitoring would generally be used as an intermediate option between "lenient" release and "restrictive" incarceration.[9]

The whole business of a hierarchy of penalties is probably more widely accepted within the British context, however. The British concept of a sentencing tariff, the development of a proportional and escalating range of penalties, is largely unknown in this country. The American concept of a "going rate" for criminal penalties based on local legal culture emerges informally and rather conveniently within a larger court and legislative context undefined by conscious sentencing policy.

In the United States, the phrase "intermediate sanction" or "intermediate punishments" will likely gain further currency in the next few years.[10] However,

Policymakers are still unsure: will electronic monitoring alleviate prison overcrowding or widen the net of social control?

intermediate sanctions, like the original presumptive sentencing proposals made in the late 1970s, are undoubtedly subject to the same sort of misapplication that effectively co-opted and abated most attempts at implementing the guiding principles of this earlier effort to reform sentencing practices.

Presumptive sentencing, as originally proposed, promised to shorten terms of imprisonment as well as reduce disparity among imposed sentences. In general, longer sentences resulted. Significantly, early proponents of intermediate sanctions are far from knee-jerk supporters of innovations such as electronic monitoring.

Conclusion

"At present," Michael Tonry and Richard Will wrote in a report for the National Institute of Justice, "electronic monitoring is too often used in house arrest and intensive supervision probation programs to monitor persons convicted of minor crimes and who present few meaningful risks to public safety. For such offenders, electronic monitoring is an expensive redundancy whose justifications must be political and public relations and not prophylactic."[11]

Early electronic monitoring programs were clearly centered on intensifying official supervision of defendants and offenders, not displacing these people from imprisonment. More recent applications of electronic monitoring, however, are stressing decarceration. Oklahoma, for instance, is now using monitoring devices to supervise persons who are released from prison early because of overcrowding.

More to the point, Edmund B. Wutzer, director of the New York State Division of Probation and Correctional Alternatives, recently told a legislatively-sponsored public hearing on the role of electronic monitoring in the criminal justice system that "electronically monitored house arrest should be utilized exclusively as a post-dispositional alternative to incarceration and its application should be restricted to felony offenders for whom no other alternative, or combination of alternatives, would suffice to divert the individual from confinement."

Furthermore, Wutzer observed that "our perspective that electronic monitoring be employed as an alternative of last resort is founded largely on the concept that electronically monitored home confinement must be implemented in a manner consistent with proportionality in sentencing and in a way that does not denigrate the value of other, already operational alternatives. If this new sanction is imposed in cases where other alternatives are now or could be applied,

—continued on page sixteen

[9]Sally M. Frost and Geoffrey M. Stephenson, "A Simulation Study of Electronic Monitoring as a Sentencing Option," *The Howard Journal*, 28(2), (May 1989), pp.91-104.

[10]Michael H. Tonry and Richard Will have written a monograph, *Intermediate Sanctions*, which will be published shortly by the National Institute of Justice. In addition, Tonry, who has written extensively about sentencing reform, has teamed up with Norval Morris of the University of Chicago Law School to write a book, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System*, which will be published by Oxford University Press in January 1990.

[11]Michael Tonry and Richard Will, *Intermediate Sanctions*, (Castine, ME: unpublished report prepared for the National Institute of Justice), (1988), p.19.

HIGHLIGHTS OF MOST IMPORTANT CASES

Remedies—Closing of Facilities/Pretrial Detainees/Contempt/Totality of Conditions/Crowding

Despite doctrines of deference to prison authorities, federal courts remain willing to use their wide-ranging equitable powers to ensure minimally decent conditions of confinement. In *Inmates of Allegheny County v. Wecht*, 874 F.2d 147 (3rd Cir. 1989), the Court of Appeals upheld an order that the jail be closed. Although conditions had improved since the beginning of the 13-year-old litigation, the district court had concluded that its prior orders had been "ineffective" to ensure constitutional conditions and that "more stringent remedies" were required, adding, "As a jail, time has passed this building by." 699 F.Supp. 1137, 1146-48 (W.D. Pa. 1988). On appeal, the court held that the order was to be reviewed by the usual abuse of discretion standard as long as the record supported the finding of constitutional violations. It added (at 153): "When the totality of conditions in a jail violates the Constitution a district court need not confine itself to the elimination of specific conditions. ... Rather, the nature of the overall violation determines the permissible scope of an effective remedy. ... A remedy cannot, however, go beyond the constitutional violations found." [Citations omitted.] The court also upheld contempt fines for violations of population caps and mental health staffing requirements, holding that the impossibility defense to contempt refers to "physical impossibility beyond the control of the alleged contemnor." That standard was not met here because the orders were directed to all the defendants, including county officials, who "simply chose to take no steps to provide the Warden and his staff with the wherewithal to comply." (152)

In an even longer-running case, *Palmigiano v. DiPrete*, 710 F.Supp. 875 (D.R.I. 1989), the district court held that the Governor and the director of the Department of Corrections had failed to purge themselves of contempt by complying with prior orders, including population limits, governing detention conditions. Their long-term proposals were not responsive to the court's demand for immediate population reductions to remedy long-standing violations of those orders.

The court held that the state executive branch may be held accountable for implementing court orders regarding state prison conditions, brushing aside their arguments that they lack "plenary power to appropriate funds or enact legislation ..." (n.14). It gave equally short shrift to their "unforeseen circumstances" argument, which it said "shocks the sensibilities of this Court" in view of the long history of overcrowding and failure to address it. "This Court simply fails to grasp the logic by which a problem recognized for years is rendered unanticipated because it has worsened." (884)

The court proceeded to levy the fines set prospectively in its previous order of $50 a day per person held over the population cap. At 887: "A federal court may, in the exercise of its equitable power, order that fines it has imposed as sanctions for civil contempt be used to remedy the problem underlying the contempt finding. ... Even more to the point, federal courts faced with prison overcrowding of crisis proportions have exercised their equitable powers to order that fines collected as contempt sanctions be used to pay the bail of indigent detainees, thereby effecting an immediate reduction in the population." The court therefore ordered that $164,250 of the accrued $289,000 in fines be used as a bail fund. The remaining fines were suspended, to be levied if full compliance is not obtained. (*Ed. note*: The Court of Appeals affirmed this decision on August 17, 1989, C.A. No. 89-1440.)

Procedural Due Process—Administrative Segregation

A California federal court has set a constitutional standard for the frequency of periodic review of placement in administrative segregation. In *Toussaint v. Rowland*, 711 F.Supp. 536 (N.D. Cal. 1989), the court held that the necessity for continued segregation must be reassessed every 90 days and that a 120-day delay between reviews denies due process. This decision appears to be the first to set a firm constitutional standard on the question. Previous decisions had upheld periods ranging from a month to 90 days without expressly disapproving any interval much shorter than a year. *See McQueen v. Tabah*, 839 F.2d 1525, 1529 (11th Cir. 1988) (eleven months without review stated a due process claim); *Tyler v. Black*, 811 F.2d 424, 429 (8th Cir. 1987) (90 days "approaches constitutional limits"); *Toussaint v. McCarthy*, 801 F.2d 1080, 1101 (9th Cir. 1986) (twelve months without review denied due process); *Clark v. Brewer*, 776 F.2d 226, 234 (8th Cir. 1985) (weekly hearings for two months and monthly hearings thereafter upheld); *Mims v. Shapp*, 744 F.2d 946, 952-54 (3rd Cir. 1984) (30-day review adequate). The court made additional rulings concerning due process in administrative segregation discussed below.

The defendants have appealed, but no decision is expected until well into 1990.

Religion

Recent federal appellate decisions on prisoners' religious rights reveal deep divisions in the application of the Supreme Court's decision in *O'Lone v. Shabazz*. The Sixth Circuit, in *Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989), struck down as unconstitutional a *de facto* prohibition on congregate Passover Seders and on Sabbath services that resulted from newly imposed movement restrictions in a Michigan prison.

The *Whitney* court held that the Passover Seder claim "may easily and significantly be distinguished from *O'Lone*" because it involved six inmates and a ceremony that takes a few hours once a year, as opposed to the larger number of Muslim inmates in *O'Lone* who wished to be released from work for Jumu'ah services every Friday. Regarding the Sabbath service claim, on which the district court had ruled for prison officials, the court considered and directly rejected prison officials' security arguments. They had asserted that the Jewish inmates were in danger of attack and there was potential for escape or the smuggling of contraband. However, the court noted that there was no evidence in the record of escape attempts or of any unusual vulnerability of these inmates to attack, and that inmates found with contraband had been disciplined individually. Since there was much movement of inmates from complex to complex for other purposes, the court termed it "inconsistent and irrational" to prohibit a few inmates to travel to Sabbath services, and also stressed the "glaring inconsistency" of the defendants' practice of letting prisoners in the maximum security complex

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CASE LAW REPORT

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Since September of 1984, attorneys and other criminal justice practitioners have turned to the National Prison Project *JOURNAL* for timely, comprehensive, and accurate coverage of prison issues.

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Case Law Report is prepared by John Boston, a staff attorney at the Prisoners' Rights Project, Legal Aid Society of New York. A graduate of New York University Law School, Boston has co-authored *Counsel for the Poor: Criminal Defense in Urban America*, and edited the revised second edition of the *Prisoners' Self-Help Litigation Manual*.

Boston, who has been involved in prisoners' rights litigation since the early 1970s, is "a lawyer's lawyer," according to Ed Koren of the National Prison Project. He is well known as someone to whom experienced lawyers will go for information and advice. We guarantee that his concise, authoritative reports on recent court decisions will become an indispensable source of important new legal developments for you and your colleagues.

assemble a *minyan* by having an outside rabbi bring in civilian volunteers while prohibiting attendance by prisoners from other complexes.

More generally, the court stated (at 1074): "Perhaps the greatest weakness in the prison officials' arguments is their misunderstanding of *Turner* and *O'Lone* as holding that federal courts will uphold prison policies which can somehow be supported with a flurry of disconnected and self-conflicting points. They seem to read *Turner* and *O'Lone* as saying that anything prison officials can justify is valid because they have somehow justified it. In an argument typical of their conclusory approach to the problem, the prison officials maintain that the Passover Seders should be banned because '[a]ny time the normal routine of an institution is altered, the good order and security of that facility are potentially compromised.' ... The fact remains, however, that prison officials do not set constitutional standards by fiat."

The Second Circuit took a very different analytical approach in *Fromer v. Scully*, 874 F.2d 69 (2d Cir. 1989), which upheld a rule limiting beards to one inch in length as applied to an Orthodox Jewish prisoner. The court stated, "We believe that *Turner* and *O'Lone* call for greater deference to the judgment of prison officials than was given by the district court." (73)

The district court had held that it was "not persuaded" of the logical connection between the prison officials' concern for identification and the beard rule; the appellate court stated that there was no burden of persuasion on the defendants. The Circuit also rejected the plaintiffs' arguments concerning inconsistencies in the prison officials' security arguments. The plaintiff had argued that the rule was irrational because only a complete prohibition on beards would serve the defendants' interest in identification; the court "reject[ed] that approach as leading to perverse incentives for prison officials not to compromise with inmate desires lest all future demands be compared with the compromise rather than with minimal constitutional requirements." (74) The court also rejected the argument that defendants' concern about contraband hidden in beards was irrational as long as prisoners could hide contraband in their clothing, and was unmoved by the fact that the defendants produced no evidence of contraband found in beards, holding that it could not "second-guess reasonable efforts" at anticipating future security problems. (75) It held that the plaintiff had alternative means of religious observance, such as obeying dietary laws. It disapproved the district court's unsupported assumption that there are few Orthodox Jews in state prisons, holding that the defendants had no burden to produce evidence on that point. Finally, it found that the alternative of periodically rephotographing inmates who grow beards had more than *de minimis* costs, financially and administratively.

Ironically, the *Fromer* court relied in part on the Sixth Circuit's prior decision in *Pollock v. Marshall*, 845 F.2d 656 (6th Cir. 1988), in which short shrift was given to a Native American prisoner's religious objection to haircutting.

Other post-*O'Lone* Circuit decisions addressing religious rights in the context of a factual record include: *McCorkle v. Johnson*, 881 F.2d 993 (11th Cir. 1989) (restrictions on Satanic literature upheld); *Siddiqi v. Leak*, 880 F.2d 904 (7th Cir. 1989) (screening mechanism for outside religious organizations upheld); *Johnson-Bey v. Lane*, 863 F.2d 1308, 1312 (7th Cir. 1988) (inmate-led religious services could be prohibited); *SapaNajin v. Gunter*, 857 F.2d 463 (8th Cir. 1988) (Sioux prisoner's rights were violated where only available medicine man was a member of a sect of "institutionalized deviants"; defendants required to provide some services by other medicine men); *Cooper v. Tard*, 855 F.2d 125 (3rd Cir. 1988) (ban on unsupervised group prayer in high-security unit upheld); *Williams v. Lane*, 851 F.2d 867, 877-78 (7th Cir. 1988) (denial of group worship and other religious rights to protective custody inmates was unconstitutional); *Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988) ("conjecture" concerning violence resulting from wearing of dreadlocks did not justify ban; plaintiffs' evidence of arbitrary enforcement of the ban shifted the burden of justification to the defendants); *Kahey v. Jones*, 836 F.2d 948 (5th Cir. 1988) (prison officials need not accommodate plaintiff's request for an individualized religious diet).

Communication and Expression

The federal courts continue to defend a prisoner's right to criticize his keepers. In *Meriwether v. Coughlin*, 879 F.2d 1037 (2d Cir. 1989), damages were affirmed for inmates who were transferred for complaining publicly about alleged mismanagement and corruption and airing their grievances at a meeting with the Superintendent. The court stated, "Prison officials have broad discretion to transfer prisoners ... They may not, however, transfer them solely in retaliation for the exercise of constitutional rights." 879 F.2d at 1046. The jury rejected the officials' claim that the transferred inmates had been involved in planning an insurrection. The prisoners also received damages for assaults by guards in the course of their transfers.

This post-*Thornburgh v. Abbott* decision is consistent with the approach of numerous recent pre-*Abbott* decisions in First Amendment retaliation cases. *See Todaro v. Bowman*, 872 F.2d 43 (3rd Cir. 1989) (discipline for letters complaining about jail); *Cale v. Johnson*, 861 F.2d 943 (6th Cir. 1988) (discipline for complaints about food); *see also Frazier v. King*, 873 F.2d 820 (5th Cir. 1989) (nurse's disclosure of prison nursing standards violations was protected expression). Complaints made through official grievance processes are particularly worthy of protection. *See Sprouse v. Babcock*, 870 F.2d 450, 452 (8th Cir. 1989) (analogizing grievances to lawsuits); *Jackson v. Cain*, 864 F.2d 1235, 1248-49 (5th Cir. 1989); *Wildberger v. Bracknell*, 869 F.2d 1467 (11th Cir. 1989); *but see Williams v. Smith*, 717 F.Supp. 523 (W.D. Mich. 1989) (retaliatory disciplinary charge of which the prisoner was cleared did not violate substantive due process).

Municipalities/Training

In an important early application of the *Canton v. Harris* standards for municipal liability, the Eleventh Circuit has upheld a jury verdict against a city based on inadequate police training. In *Kerr v. City of West Palm Beach*, 875 F.2d 1546 (11th Cir. 1989), the court held that a jury could have concluded that police officers were inadequately trained in the use of "canine force" based on evidence "that police dogs must be subject to continual, rigorous training in law enforcement techniques," that officers "resorted to the use of canine force more frequently than did canine units in other municipalities," that the city's ratio of bites to apprehensions was viewed as an indicator of an "irresponsible use of force," and that canine officers "often used excessive force to apprehend individuals suspected only of minor misdemeanor offenses." (1556)

A jury could have concluded that this inadequate training reflected city policy because canine force frequently resulted in injury to the suspect, force reports were filed in each such case, these reports were "then reviewed by supervisory officials—including the municipality's former chief of police—to whom the City had delegated policymaking authority."

The court also held that the exclusion of evidence of pending lawsuits alleging excessive force was "almost certainly erroneous" since these were relevant to the question of the City's notice of the unconstitutional conduct.

Other Cases Worth Noting

U.S. Court of Appeals

Attorneys' Fees and Costs/Transportation to Courts/In Forma Pauperis

Sales v. Marshall, 873 F.2d 115 (6th Cir. 1989). Writs of *habeas corpus ad testificandum* are generally issued under the *habeas corpus* statutes and not the All Writs Act, and there is no authority for imposing the costs of transportation to court on a prisoner-plaintiff. (But these costs may be awarded against the plaintiff for transportation of prisoner *witnesses*.) Expenses of the defendants' deposition of the plaintiff may be taxed as costs against the *in forma pauperis* plaintiff, subject to a determination that the plaintiff is able to pay the costs.

When a prison is required to produce an inmate for proceedings in which the prison is not a party (here, a state prisoner's suit based on events in the county jail), the prison may not seek transportation costs without having timely intervened.

Habeas Corpus

Sheppard v. State of La. Board of Parole, 873 F.2d 761 (5th Cir. 1989). The plaintiff's parole was revoked because he failed to pay $43 a month in parole supervision fees. His challenge to the constitutionality of the fee statute's application to him was barred by *Preiser v. Rodriguez*, even though he sought damages and a declaration and not release, because if he were successful the basis for his incarceration would be undermined.

In Forma Pauperis

In re Funkhouser, 873 F.2d 1076 (8th Cir. 1989). If a prisoner is required to pay a partial filing fee, the court should treat the case in the same manner as one not filed *in forma pauperis*. There should be

no further proceedings concerning whether the complaint is frivolous; this determination should be made before a partial filing fee is required. The court of appeals chastises the magistrate ("We deem it extraordinary . . .") for a 17-month delay in determining the plaintiffs' eligibility for IFP status, in a case involving serious constitutional claims in which the *pro se* plaintiffs had filed a motion for a preliminary injunction. The magistrate is directed to consult with the chief judge "to adopt procedures which would ensure immediate processing of all motions of prisoners to proceed *in forma pauperis* in a reasonable and timely manner."

Discovery

Greenberg v. Hilton International Co., 875 F.2d 39 (2d Cir. 1989). At 42: "In the future, requests for costly statistical compilation useful only for professional analysis should be accompanied by reasonably precise representations as to counsel's intentions with regard to preliminary analysis and to retention of an expert. Those resisting such discovery can then be given the option of producing only that data necessary to preliminary analysis with more elaborate production to follow if the preliminary analysis indicates that more sophisticated examination would be useful."

Procedural Due Process—Disciplinary Proceedings/Habeas Corpus/Federal Officials and Prisons

Greene v. Meese, 875 F.2d 639 (7th Cir. 1989). The plaintiff, a federal prisoner, alleged that he had been subjected to repeated disciplinary sanctions in retaliation for rejecting guards' homosexual solicitations and resisting searches that had "homosexual overtones," and sought damages, restoration of good time and parole eligibility.

Because the relief sought by the plaintiff would shorten his confinement, he was required to exhaust his administrative remedies with respect to each disciplinary conviction he challenged, even if it was likely that he would lose.

The fact that the plaintiff also sought damages did not alter this result. At 642: "A prisoner may not circumvent the requirement of complete exhaustion by first suing for damages or a declaratory judgment and then using a favorable judgment in that suit as a basis for requesting a reduction in the length of his imprisonment."

Remedies/Attorneys' Fees and Costs

Muckleshoot Tribe v. Puget Sound Power & Light Co., 875 F.2d 695 (9th Cir. 1989). For a settlement to waive attorneys' fees, the waiver must appear in the settlement and must "clearly accomplish" that purpose. It is not necessary for the plaintiff to reserve the fees question. If poor draftsmanship frustrates that purpose, the defendant may resort to extrinsic evidence and prevail "if it can show clearly that the parties mutually intended" a fee waiver. (698) Dismissal of the complaint with prejudice does not serve as a fee waiver.

Statutes of Limitations/Municipalities/ Staffing—Training

Merritt v. County of Los Angeles, 875 F.2d 765 (9th Cir. 1989). Where the plaintiff in a police misconduct case sued the city within the limitations period but only identified the individual officers after the statute had run, state law "John Doe" tolling rules which did not require notice to the officers during the limitations period should have been applied.

The evidence did not support municipal liability for inadequate use of force training. "Each prospective deputy is given, prior to his academy training, a two-day training session regarding the department's policies on the use of force. Twenty percent of the academy training, which may last from four to six months, addresses the use of force. Some ten percent of specialized post-academy training continues the deputy's education regarding use of force." (770) The omission to train regarding a "very rare" situation does not amount to deliberate indifference.

Personal Integrity/Clothing

Felts v. Estelle, 875 F.2d 785 (9th Cir. 1989). Where a jailed criminal defendant was not provided with civilian clothes until six days into his trial, due process was denied. At 786: "[T]he state is under an affirmative duty to provide civilian clothing in a timely fashion and, if no such clothing is in its possession, to provide reasonable funds for the purchase of acceptable attire." The court reserves the question of what constitutes "suitable clothing" and whether the answer is different if the defendant is representing himself.

Medical Care/Suicide Prevention/Qualified Immunity

Danese v. Asman, 875 F.2d 1239 (6th Cir. 1989). Jail officials were entitled to qualified immunity in a jail suicide case. Although the rights to be free of deliberate indifference to medical needs and of unjustified intrusions on personal security were clearly established, these are not "particularized" enough to put the defendants on notice of their obligations on these facts. At 1244: "The 'right' that is truly at issue here is the right of a detainee to be screened correctly for suicidal tendencies and the right to have steps taken that would have prevented suicide." This is different from medical care cases involving deliberate indifference to prisoners who request care.

Prior case law "only establishes the general principle that supervisors are liable for grossly negligent or nonexistent training that leads to the violation of constitutional rights. It does not say that suicide procedures and training must be provided." (1245)

Management, Safety and Security/Use of Force/Personal Involvement and Supervisory Liability/Damages/Emergency

Bolin v. Black, 875 F.2d 1343 (8th Cir. 1989). After a disturbance in which an officer was stabbed to death, officers engaged in retaliatory beatings.

The assistant corrections director could be held liable based on testimony that placed him in clear view of the beatings and the fact that he took no action. The facts establish both deliberate indifference and tacit authorization, either of which is sufficient to support liability.

The associate warden could be held liable based on evidence that he "knew or should have known that flaring tempers among the prison guards would lead them to retaliate against the inmate" and that he did nothing to prevent it (e.g., ride on the inmate bus and supervise it). (1347)

A captain who saw the beatings, who told the Highway Patrol "I've seen a lot more ass kicking than was done in there," and who directly participated in at least one beating could be held liable for all the beatings; "by virtue of his supervisory authority, [he] invited other corrections officers to follow his example," constituting tacit authorization. (1348).

Compensatory damages of $9,500 to $14,500 and punitive damage awards of $2,000 to $10,000 per defendant (aggregating to up to $74,000 for some plaintiffs) are upheld.

Transfers/Access to Courts—Punishment and Retaliation

Adams v. Wainuright, 875 F.2d 1536 (11th Cir. 1989). The court refuses to hold that a prisoner in a retaliatory transfer case must prove that he or she would not have been transferred "but for" an assertion of constitutional rights. The court does not explain what standard it does utilize. (Since this brief opinion begins by observing that the plaintiff's evidence refuted his allegations and there was no material issue of fact, this comment is *dictum* anyway.)

Procedural Due Process—Administrative Segregation/Pro Se Litigation/ Amendment of Pleadings

Thompson-El v. Jones, 876 F.2d 66 (8th Cir. 1989). The district court properly denied leave to amend the complaint two weeks before the trial and eighteen months after the case was filed, even though the initial complaint was drafted *pro se*. The plaintiff and his lawyer claimed that they did not know of the need for an amendment until they obtained certain discovery materials, but they had been dilatory in seeking those materials. In *dicta* (n.6), the court observed that the plaintiff's claims might have had merit because he was placed in administrative segregation for investigative purposes for six months and there was "little or no investigative activity for much of the period between July and December . . . [T]he fact that an investigation is characterized as 'ongoing' will not automatically justify keeping the inmate in administrative segregation," and the longer it goes on the more likely it is to be pretextual.

Procedural Due Process—Temporary Release/Qualified Immunity

Lanier v. Fair, 876 F.2d 243 (1st Cir. 1989). A Massachusetts prisoner had no constitutionally based liberty interest in staying in a halfway house. State regulations providing for termination if "the individual is not suited for that program or . . . the program is not meeting the individual's needs" (247) do not create a liberty interest because they do not contain substantive standards either for termination or for reclassification to a higher security level. However, a "Manual of Operations" and "Program Standards," which contain standards binding under the contract between the Department of Corrections and the private operator of the halfway house, contained more specific standards for termination that created a liberty interest.

A prisoner removed from a halfway house is entitled to the procedural protections prescribed by *Wolff v. McDonnell* for disciplinary proceedings. For security reasons, this prisoner, who was suspected of an escape attempt, could be given a hearing after and not before his return to higher custody.

There was a state-created interest in avoiding the rescission of a parole date, but the defendants were entitled to qualified immunity.

Management, Safety and Security/Use of Force

Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989) (*en banc*). Applying the Supreme Court's recent holding in Graham v. Connor, ___U.S. ___, 109 S.Ct. 1865 (1989), the court holds that a constitutional excessive force has three necessary elements (at 480):

a) a significant injury, which

b) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was

c) objectively unreasonable.
(footnote omitted)

The omitted footnote (n.1) terms it "unlikely" that there will be "significant injury" without "significant *physical* injury," but the court does not decide whether a "significant but non-physical injury would be legally sufficient." The court does not define "significant" but holds that the plaintiff, who was handcuffed so tightly as to leave permanent scars and cause him to miss two weeks of work, raised fact issues barring summary judgment.

Seven out of fifteen judges join in an opinion rejecting the "significant injury" requirement and also object to the "directly and only" causation requirement.

Although the majority holding is stated in broad terms, the case involved police misconduct and the court does not address its applicability in prisons and jails.

Pretrial Detainees/Rights of Particular Groups/Communication and Expression/ Qualified Immunity

Franco-De Jerez v. Burgos, 876 F.2d 1038 (1st Cir. 1989) at 1042: "Indeed, counsel or no counsel, the Constitution does not permit the government to hold a criminal defendant incommunicado to the point where she must contact her husband by throwing a rock with a message out the window." The plaintiff was detained by the Immigration and Naturalization Service.

Because of "the possibly egregious nature of [plaintiff's] detention," the defendant was not entitled to qualified immunity.

Good Time

Raske v. Martinez, 876 F.2d 1496 (11th Cir. 1989). Modification of the statutory provisions for "incentive gain time" was an unconstitutional *ex post facto* law as applied to prisoners convicted of crimes committed before the statutory amendment.

District Courts

Pretrial Detainees/Crowding/Modification of Judgments/Intake

Benjamin v. Koehler, 710 F.Supp. 91 (S.D.N.Y. 1989). At 93: "[A] defendant seeking modification of a decree, even in circumstances of institutional reform litigation, where such modification is considered on a more flexible and generous basis, bears the burden of establishing that the relief requested will further, rather than frustrate, the purposes of the decree." The burden is heavier where full compliance with the decree has never been achieved.

The court refuses to modify prior overcrowding orders because of inevitable strains on service delivery. Defendants' claims that they would add enough resources to provide services are "too general in nature to give confidence that the enormous problems which an increase in population would aggravate can be successfully overcome."

Protective Custody/Equal Protection

Crozier v. Shillinger, 710 F.Supp. 760 (D. Wyo. 1989). Differences in conditions of confinement between general population and protective custody did not violate the Eighth Amendment. At 764: "Any inequalities between protective custody inmates and prisoners in the general population are brought about by security concerns and, hence, do not give rise to an equal protection argument."

Environment/Medical Care/Protection from Harm

Gorman v. Moody, 710 F.Supp. 1256 (N.D. Ind. 1989). The failure to segregate smokers from nonsmokers in prison should be governed by the "deliberate indifference" standard, except that the plaintiff must show "the *most* deliberate indifference," i.e., "that prison officials intentionally exposed him to a known risk of harm and actually intended to harm him." (1260) (emphasis supplied). The plaintiff here did not allege that second-hand smoke exacerbated an existing serious medical condition. At 1262: "Because the Eighth Amendment draws its meaning from the evolving standards of decency in society as a whole, it is particularly relevant that this society cannot yet completely agree on the propriety of nonsmoking areas and a smoke-free environment."

Indiana's "Clean Indoor Air Law" prohibiting smoking in designated areas, and requiring that officials in charge of public buildings designate nosmoking areas, does not create a liberty interest protected by due process because it does not identify prisons as public buildings, it permits waivers by the state board of health, and because prisons have never been thought of as public buildings.

Procedural Due Process—Visiting/Consent Judgments and Settlements/Modification of Judgments

Kozlowski v. Coughlin, 711 F.Supp. 83 (S.D.N.Y. 1988), *aff'd.*, 871 F.2d 241 (2nd Cir. 1989). An appendix containing a penalty schedule of deprivation of visits was an integral and bargained-for part of a consent judgment establishing procedural protections for such deprivations.

The fact that the penalty schedule might not have been required by the Constitution did not mean that the Eleventh Amendment barred its enforcement. As long as consent decree provisions "spring from and serve to resolve a dispute within the Court's subject matter jurisdiction" and "come within the general scope of the case made by the pleadings, and ... further the objectives of the law upon which the complaint was based" (86), the court may enforce them. Here, the case was about procedural due process and the procedural protections varied according to the severity of the sanctions.

Permitting defendants to alter one part of the decree would result in denying plaintiffs a full and fair hearing on their federal rights, since no one knows what the court's findings of remedy might have been had the case been tried.

Management, Safety and Security/Protection from Assault/Personal Involvement and Supervisory Liability

Heine v. Receiving Area Personnel, 711 F.Supp. 178 (D. Del. 1989). The plaintiff was admitted to jail and turned over to an inmate worker for delousing and a shower, contrary to jail policy regarding the supervision of this process by officers. The inmate worker sexually assaulted him. The officer responsible had previously been reprimanded for his failure to supervise inmate workers during intake processing. The officer is not liable becasue there was no evidence that the assailant "presented a specific risk of violent homosexual attack to new prisoners in the BARC area." (184)

The warden could not be held liable because he had drafted proper procedures and had tried to enforce them before the incident. The captain who supervised the defendant officers could not be held liable because he had told them what to do. The commissioner could not be held liable based on the lack of audio or visual monitoring in the shower area because he played no role in the planning or development of the prison.

Verbal Abuse/Personal Hygiene/Use of Force/Privacy

Gilson v. Cox, 711 F.Supp. 354 (E.D. Mich. 1989). At 355: "It is well established that verbal harassment or abuse—standing alone—is not sufficient to state a constitutional deprivation under section 1983."

The failure to provide toilet paper on request did not violate the Constitution.

Sworn allegations that an officer reached for a prisoner's groin area and grabbed his buttocks raised issues of material fact based on his interest in "personal bodily integrity," including "the right to be free from sexual abuse."

Remedies/Judicial Disengagement/ Procedural Due Process—Administrative Segregation/Monitoring

Toussaint v. Rowland, 711 F.Supp. 536 (N.D. Cal. 1989). The court adopts the monitor's recommendation that its "continuing jurisdiction to review due process" end in one year, unless there is a finding that due process violations are "continuing to occur with regularity," rejecting plaintiffs' request for two and a half years without violations. It appears, but is not completely clear, that the court contemplates that the substantive terms of the injunction would terminate upon one year of compliance.

Where inmates are segregated based on alleged prison gang membership, there must be a procedure for prompt determination whether they actually are gang members.

Due process forbids defendants from relying on a polygraph examiner's opinion as to the truthfulness of a prisoner's denial of prison gang membership or his answer to any related question as the basis for imposing segregation.

Due process requires that defendants, when relying on confidential information, "must inform the inmate of as much of the relevant content of that information as possible consistent with the nondisclosure of the source of information." (542)

Continued monitoring of defendants' performance is supported by the monitor's conclusion that individual lawsuits have little potential for curing due process violations. The court via the monitor will continue to review individual inmates' requests for review of their placement in segregation.

Modification of Judgments

United States v. State of New York, 711 F.Supp. 699 (N.D.N.Y. 1989). A consent decree provided for a 40% goal of minority hiring and a 10% goal of hiring of women in the state police. The state asked for a less demanding standard for minorities and the United States said the standards should be abolished entirely. The court abolishes the percentage standards but directs further relief concerning selection procedures that do not have adverse effects on minorities and women. It relies on race discrimination cases rather than on Rule 60 cases.

Nobody represents minorities and women in this case!

Procedural Due Process—Disciplinary Proceedings

Sanders v. Borgert, 711 F.Supp. 889 (E.D. Mich. 1989). The plaintiff was validly convicted of "major misconduct" in a disciplinary hearing even though a state court had invalidated the document defining that term because the state court decision was not

retroactive. The court does not address the question of whether a constitutional question would have been presented in any case.

Transfer to segregation after a finding of major misconduct does not deny due process; this conclusion follows the interpretation of prison policies and regulations of *Walker v. Mintzes*, 771 F.2d 920, 933-34 (6th Cir. 1989).

A limit of six months on the amount of good time that can be forfeited for a single infraction creates a liberty interest protected by due process. If a prisoner receives a hearing on the underlying disciplinary charge, due process does not require a second hearing to determine whether good time will be forfeited.

Protection From Harm—Accidents/Theories—Due Process/Theories—Cruel and Unusual Punishment

Denz v. Clearfield County, 712 F.Supp. 65 (W.D. Pa. 1989). An allegation of a slip and fall caused by moisture accumulated because of inadequate ventilation did not state an Eighth Amendment claim. At 66: "Dank, hot and humid cell conditions do not constitute cruel and unusual punishment; the occurrence of a slip and fall injury as a result does not transform this into the 'wanton infliction of unnecessary pain.'" (66) Substantive due process rights are no greater than Eighth Amendment rights. The plaintiff has no procedural due process claim because of the availability of a state tort remedy, even if recovery would be precluded by an immunity doctrine.

Evidentiary Questions/Damages

Ismail v. Cohen, 712 F.Supp. 416 (S.D.N.Y. 1989). Evidence concerning a prior excessive force incident involving the same police officer was admissible to prove a relevant pattern and the officer's intent. (See prior opinion at 706 F.Supp. 243 for a more extensive discussion.)

Damages of $650,000 for a police arrest and beating resulting in various continuing painful consequences of excessively tightened handcuffs plus a broken rib, none of which actually required treatment, were excessive. The court reduces the award to $200,000. Punitive damages are reduced from $150,000 to $1,000.

Law Libraries and Law Books/Confiscation and Destruction of Law Materials

Hadix v. Johnson, 712 F.Supp. 550 (E.D. Mich. 1989). A consent judgment provided that limits on personal property would not apply to legal papers and law books unless they presented a security or fire hazard. The prison then limited all property to one duffel bag and one footlocker. The court holds this role not to be inconsistent with the consent judgment.

When a prisoner has more than one footlocker of legal materials, officials may not seize all the legal materials, but just those that don't fit into the footlocker.

Property limitations may only be imposed on materials that are not "reasonably necessary to pending litigation" under the terms of a consent judgment. Prison officials cannot use this rule to forbid prisoners from possessing law books that are also available in the law library, since books that are theoretically available are often lost and great difficulty attends using the library.

Pens, pencils, "whiteout," legal pads, and other writing supplies may be treated as general personal property and not as legal materials for purposes of property limitation.

Remedies/Attorneys' Fees and Costs

Knop v. Johnson, 712 F.Supp. 571 (W.D. Mich. 1989). The National Prison Project is entitled to $1.5 million in attorneys' fees.

Where a claim is partly successful, plaintiffs need not be able to identify all the hours spent on the successful and unsuccessful parts. The court uses a percentage reduction method.

At 578: "Many hours claimed were spent in conferences between attorneys and law clerks. It is within the Court's discretion to grant attorneys' fees for time spent conferring with co-counsel and with subordinates, and I will do so here."

At 578: "Obviously, plaintiffs' counsel had an ethical duty to communicate with their clients, and time spent on that task is compensable. The time spent proofreading was time well spent, and the court sincerely wishes counsel for the defense had been as conscientious in that regard during the course of this litigation."

At 579: "Although most document identification can be handled by support staff or less experienced attorneys, the attorney with primary responsibility for conducting deposition or trial testimony must also spend some time compiling and reviewing the pertinent documents. Similarly, someone with knowledge of the case and the trial schedule had to assume responsibility for identifying the prisoner witnesses and coordinating their appearances."

At 579: Billing more than eight hours for a day is not "evidence of duplication or inefficiency." At n.5: "Perhaps the defendants' attorneys are not used to working such lengthy hours."

At 581: Hours spent on a successful Rule 11 motion are compensable even though the sanctions imposed included attorneys' fees; otherwise, the Rule 11 sanctions would be meaningless. In other words, plaintiffs get paid twice.

Plaintiffs' counsel are not limited to the median rate for legal services in the community. At 583: "These attorneys are nationally recognized experts in a complex field of federal practice. They are by no means the median member of the bar, and their hourly rates should be adjusted upward to reflect both their specialization and the extremely high quality of the representation they provided to the plaintiff class." Also, the National Prison Project is a small part of the ACLU and should be regarded as a department of a large law firm rather than as a separate law firm. A national project is also entitled to charge higher rates for practice outside a local community.

At 583: "It has been my experience that prisoners are generally unable to retain attorneys in private practice."

At 585: An enhancement of the lodestar figure is appropriate because the complexity and expense of the litigation made it impossible to find counsel locally. At 586: Enhancement is also necessary "to compensate plaintiffs' counsel for the unpleasantness, stress, and gross inconvenience of litigating against counsel who repeatedly ignored deadlines imposed by Federal Rules and by the Court, required plaintiffs' counsel to return to Court again and again in order to accomplish adequate discovery, and who launched improper attacks on both plaintiffs' counsel and witnesses." Prison officials' refusal to produce prisoners promptly for interviews is also cause for an enhancement.

Expert witness fees are not compensable under the fees statute; plaintiffs may recover only their travel expenses (including food and hotel) and statutory witness fees. Photocopying, travel, telephone and other extraordinary expenses (including postage) may be awarded. Transcript and deposition costs are allowed.

Modification of Judgments/Judicial Disengagement

Lamphere v. Brown University in Providence, 712 F.Supp. 1053 (D.R.I. 1989). At 1055: "... a consent decree is to remain in effect so long as its continued enforcement is necessary to effectuate its purposes ... " At 1060: The decree terminates upon the achievement of "substantial compliance"; for this purpose the decree's terms must be considered as a whole.

Marriage/Equal Protection

Langone v. Coughlin, 712 F.Supp. 1061 (N.D.N.Y. 1989). The right of prisoners to marry is fundamental. The *Turner* rational basis standard applies to the evaluation both of prison regulations and statutes restricting prisoners' rights. After *Fromer v. Scully*, it is the plaintiffs' burden to show that the governmental interests asserted by the defendants are irrational.

At n.6: The court questions whether the regulation of marriage and support and the clarification of marital status are "legitimate *penological* objectives" but assumes they are for analytical purposes (emphasis supplied).

A New York statute forbade prisoners with life sentences to marry but did not invalidate marriages that they had entered into before sentencing. The statute was not supported by the state's interests in punishment, the regulation of marriage and support, or the clarification of marital status. The court relies primarily on the underinclusiveness of the prohibition and the irrationality of the distinction between the already married and those who wish to marry, without clarifying to what extent it is ruling on equal protection grounds or on substantive due process grounds. There are no alternate means to exercise the right to marry other than marrying. The court observes that the Department of Correctional Services itself has supported the right of inmates with life sentences to marry.

FEDERAL RULES

Discovery

Mueller v. Walker, 124 F.R.D. 654 (D. Ore. 1989). Factual information in a police investigative file is ordered produced in a use of force case, but "evaluative or summary portions" are not ordered produced. Witness statements are to be produced. Records of prior incidents of excessive force are to be produced because of their relevance to the claims of improper supervision and training, but evaluations, other portions of the personnel files and non-force-related disciplinary matters need not be disclosed. Results of psychological tests are to be disclosed. A protective order will be required. The court reaches these results by *in camera* review of the documents.

Demary v. Yamaha Motor Corp., 125 F.R.D. 20 (D. Mass. 1989). Failure to respond to discovery timely resulted in a waiver of all objections.

AIDS UPDATE

Judy Greenspan

No Uniformity Nationwide on AIDS

No nationwide corrections policy has been formulated in response to the AIDS epidemic within prison walls. Each sector—federal, state, or county—follows its own procedures. And, according to one state corrections health director, these procedures have often been made up as they go along.

Recently, corrections officials in Connecticut agreed in a court settlement to stop segregating prisoners with AIDS, the first time a state has rescinded an AIDS quarantine policy. The Connecticut Department of Corrections had segregated all prisoners with AIDS into a special unit at the Somers Correctional Institution. Prisoners were confined to this small housing unit for 23 hours a day, and allowed no contact with the prisoners housed in general population. Prisoners with AIDS had no job, educational or programming opportunities.

At least 20 states currently segregate prisoners who have AIDS, despite the absence of medical justification for the practice. Approximately 14 states force HIV testing, and six segregate all prisoners who test positive to the Human Immunodeficiency (HIV) test, which reflects exposure to the virus known to cause AIDS.

In our view, the worst scenario in corrections today is the system which requires HIV testing, then segregates those whose test results are positive. Many medical administrators admit that segregation is more for the appeasement of state legislators than for penological or medical purposes.

The most progressive, informed response to the AIDS epidemic is a system which offers voluntary testing and counseling for seropositive prisoners, mainstreaming seropositive prisoners and those with AIDS into the general prison population until they become ill. There is a slow but growing trend in this direction. Arizona and Colorado have now begun mainstreaming after segregating for several years. Georgia is beginning to move towards mainstreaming HIV-positive prisoners in some of its institutions.

Some more enlightened health educators and prison administrators have recognized that the only way to combat AIDS and HIV infection in prison is through education and counseling. However, letters received at the National Prison Project from hundreds of prisoners around the country and from many AIDS activists clearly reveal that neither the Bureau of Prisons nor the state departments of correction are doing an adequate job on either count. Some prisoners complain that their AIDS education program amounts to distribution of the Surgeon General's pamphlet on AIDS. Others say that the one video they are shown is already out of date. Counseling and support groups are almost nonexistent in prisons and jails. Prisoners point out that there are no educational sessions for those already infected with HIV.

A recent National Institute of Justice report, *Update 1988: AIDS in Correctional Facilities*, stated that "only through regular live training can the persistent misinformation about AIDS be effectively countered." Unfortunately, since 1987 there has been little movement in that direction by state corrections officials.

Prisoners Form Self-Help Groups

In response to the need for meaningful AIDS education, groups of prisoners in institutions across this country are beginning to develop their own AIDS education and peer counseling programs:

■ *Prisoners in New York State*, which has the largest number of HIV-positive prisoners and prisoners with AIDS, were the first to come together to develop these programs. The New York State prison system does not conduct mandatory HIV testing but offers voluntary testing with some counseling. While it is impossible to know exactly how many prisoners in New York State are HIV-infected, a blind seroprevalence study (to determine what percentage are HIV-positive) conducted in 1988 found that 17% of the men entering Brooklyn's Downstate Correctional Facility were seropositive. Corrections health educators and peer counselors believe that number to be much higher since many people entering the prison system are IV drug users.

■ *Members of Hispanics United for Progress* and other prisoners at Green Haven Correctional Facility in Stormville, New York, have formed their own Health Crisis (AIDS) Action Committee in response to the AIDS epidemic. This committee has been instrumental in developing peer counseling, buddy programs and risk reduction sessions. The Green Haven prisoners have hosted two AIDS seminars at the facility. The most recent one was held in June 1989 on the critical topic of medical clemency for prisoners with AIDS.

■ *The AIDS Counseling and Educational Program (ACE)* is a project developed by women prisoners at Bedford Hills Correctional Facility in New York. The women of ACE are actively involved in education, peer counseling and buddy support services. ACE also provides legal assistance and has incorporated a "creativity workshop" into their activities.

Prisoner-run programs face an uphill battle. Prison and jail administrators have not generally welcomed these educational initiatives on the part of prisoners. In one instance, the prisoner-organizer of an AIDS education program was abruptly transferred to another prison. In another case, the AIDS education program was forced to go underground for over a year because of political pressure from the state administration. At an East Coast adult diagnostic center for men, a group of prisoners had their AIDS educational material from the Centers for Disease Control confiscated by prison authorities who insisted it was contraband.

Despite these obstacles, many programs are now off the ground and running, and can begin to serve as examples for prisoners and health educators around the country. As Cruz Salgado, a prisoner at Green Haven wrote, "I think it's time for society and prison administrators to recognize the concerns and efforts of prisoners and our willingness to do what staff can't, won't, or are unprepared to do. I have made that commitment to the cause of alleviating the grueling effects of this 'monster.' I invite all prisoners to unite in the struggle against AIDS in prison and help calm the echoing scream of frustration, despair and fear of our fellow PWAs (people with AIDS) within the 'belly of the beast.'"

Judy Greenspan is the AIDS information coordinator at the National Prison Project, and contributes a regular column to the NPP JOURNAL on AIDS.

FOR THE RECORD

■ Alvin J. Bronstein, executive director of the National Prison Project, has been awarded a MacArthur Foundation Fellowship. The fellowship was given to Bronstein for his significant contributions in the development of prisoners' rights and correctional case law. Bronstein has

headed the National Prison Project since 1972.

■ The PACT Institute of Justice has published a new resource list. Published by the Institute since 1982, "Resources" provides information on useful books, video tapes, and research reports covering such areas as crime victims, prison overcrowding, community-based corrections programs, alternatives to incarceration, and victim-offender reconciliation programs. Those who find the list helpful include practitioners within the criminal justice system, educators and students, as well as the general public.

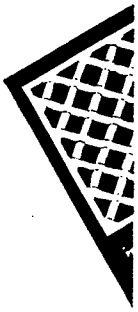
Copies of "Resources" are available by contacting the PACT Institute of Justice, 254 S. Morgan Boulevard, Valparaiso, Indiana 46383, 219/462-1127. Multiple quantities are also available, free upon request.

■ The Centers for Disease Control has released recommendations for the prevention and control of tuberculosis in correctional institutions. These recommendations were developed to assist health care workers involved in screening, treatment, prevention and control of tuberculosis in correctional facilities. The incidence of tuberculosis in prisons and jails is much higher than among non-incarcerated adults. Furthermore, the transmission of tuberculosis among inmates presents a health problem in the community upon the inmates' release. For copies of the recommendations, contact: Ms. Landis Brown, Technical Information Services, Center for Prevention Services, Mailstop E-06, Centers for Disease Control, Atlanta, GA 30333.

PUBLICATIONS

_____ **The National Prison Project *JOURNAL,*** $25/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. 8th Edition, published December 1988. Paperback, $25 prepaid from NPP.

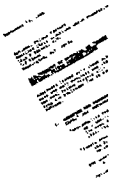


_____ **Offender Rights Litigation: Historical and Future Developments.** A book chapter by Alvin J. Bronstein published in the **Prisoners' Rights Sourcebook** (1980). Traces the history of the prisoners' rights movement and surveys the state of the law on various prison issues (many case citations).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

QTY. COST

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

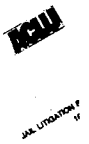
_____ **Bibliography of Women in Prison Issues.** A bibliography of all the information on this subject contained in our files. Includes information on abortion, behavior modification programs, lists of other bibliographies, Bureau of Prison policies affecting women in prison, juvenile girls, women in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



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

QTY. COST

_____ 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 nationwide compilation of litigation involving jails. 1st Edition, published September 1985. $15 prepaid from NPP.



_____ **AIDS in Prison Bibliography** lists resources on AIDS in prison that are available from the National Prison Project and other sources, including corrections policies on AIDS, educational materials, medical and legal articles, and recent AIDS studies. 31 pages. $5 prepaid from NPP.

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

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Fill out and send with check payable to

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

NAME _____

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HIGHLIGHTS

The following are major developments in the Prison Project's litigation program since June 15, 1989. Further details of any of the listed cases may be obtained by writing the Project.

Baraldini v. Thornburgh—The D.C. Circuit Court of Appeals reversed the District Court's opinion and held that prison officials could consider prisoners' political affiliations in determining assignments to the high security facilities.

Harris v. Thigpen—This case challenges the Alabama Department of Corrections' program to test all prisoners for HIV antibodies, and to segregate those who test HIV-positive. The second phase of a two-part trial was held in Montgomery, June 12-26, and covered medical and mental health care for HIV-positive prisoners, the HIV testing program, and housing segregation and program exclusion policies.

Inmates of Occoquan v. Barry—This case challenges the conditions of confinement at the District of Columbia's Occoquan prison facilities. On June 30, 1989, the district court, on remand from the court of appeals, issued an opinion and order, holding the facilities to be unconstitutional, as it had in its 1986 opinion, and ordered defendants to develop a plan to remedy violations. The court also ordered the removal of asbestos from living areas.

Knop v. Johnson—This is a statewide Michigan prison conditions case in which defendants have appealed a decision favorable to us. In August, we argued the merits of the case in the Sixth Circuit Court of Appeals, addressing all issues including racism, winter clothing, toilets and legal access.

Palmigiano v. DiPrete—This case challenges conditions in the Rhode Island state prison system. On August 17, 1989, the First Circuit affirmed "in all respects" two district court rulings, the first of which in October 1988 found defendants in contempt for violating earlier orders limiting population; and the second, dated April 1989, imposed fines of $289,000 on state officials to be used to create an Emergency Bail Fund.

Robinson v. Phelps—This case challenges conditions at the Orleans Parish Prison in New Orleans, Louisiana. The case was referred by the district judge to a magistrate who has decided first to seek a speedy resolution on medical issues and also plans to recommend our request for class certification.

Tillery v. Owens—This case, filed against the Western State Penitentiary in Pittsburgh, Pennsylvania, challenges double-celling, environmental conditions and improper housing of mentally ill inmates, among other issues. On August 15, the district court handed plaintiffs a sweeping victory, abolishing double-celling, ordering mentally ill inmates to be removed from general population, and granting a favorable decision on all other issues. We will be filing for attorneys' fees soon. ■

Electronic Monitoring —*continued from page eight*

its impact will be to reduce the value of these other alternatives and to inflate the sentencing structures in the jurisdictions where this occurs. Ironically, the long-range impact of such disproportionate applications would be to increase correctional populations rather than reduce them."[12]

The recent research findings in Georgia are also significant in another way. The Georgia researchers found that urine testing for drug use was far more effective in identifying offender violations of the conditions of probation release. Technological devices which focus on offender behavior which contributes to criminality may be used more widely in coming years than monitors which simply record if someone is someplace at a particular point. As criminal justice systems take a more proactive approach toward substance abuse, interest in electronic monitoring may wane simply because its benefits, regardless of any of its negative aspects, are few and its financial costs are relatively high. In Georgia, a Governor-appointed commission is now examining the use of alcohol and drug treatment programs as an alternative to incarceration.

In the meantime, electronic monitoring appears more symbolic than substantive. Although little evidence suggests that these devices prevent or deter further criminality, they are seen, particularly by traditionally overcautious legislators and policymakers, as a method of insuring that community-based supervision can be safe. By arguing that electronic monitoring enables the expansion of imprisonment into the community, little impetus exists to change the nature of how we speak about appropriate criminal sanctions. Instead, this country's firm reliance on incarceration remains intact. ■

[12]Edmund B. Wutzer, "Testimony Before the Assembly Standing Committee on Correction and Assembly Standing Committee on Codes," (Albany, NY: The NYS Division of Probation and Correctional Alternatives), (May 19, 1989), pp.3-5.

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