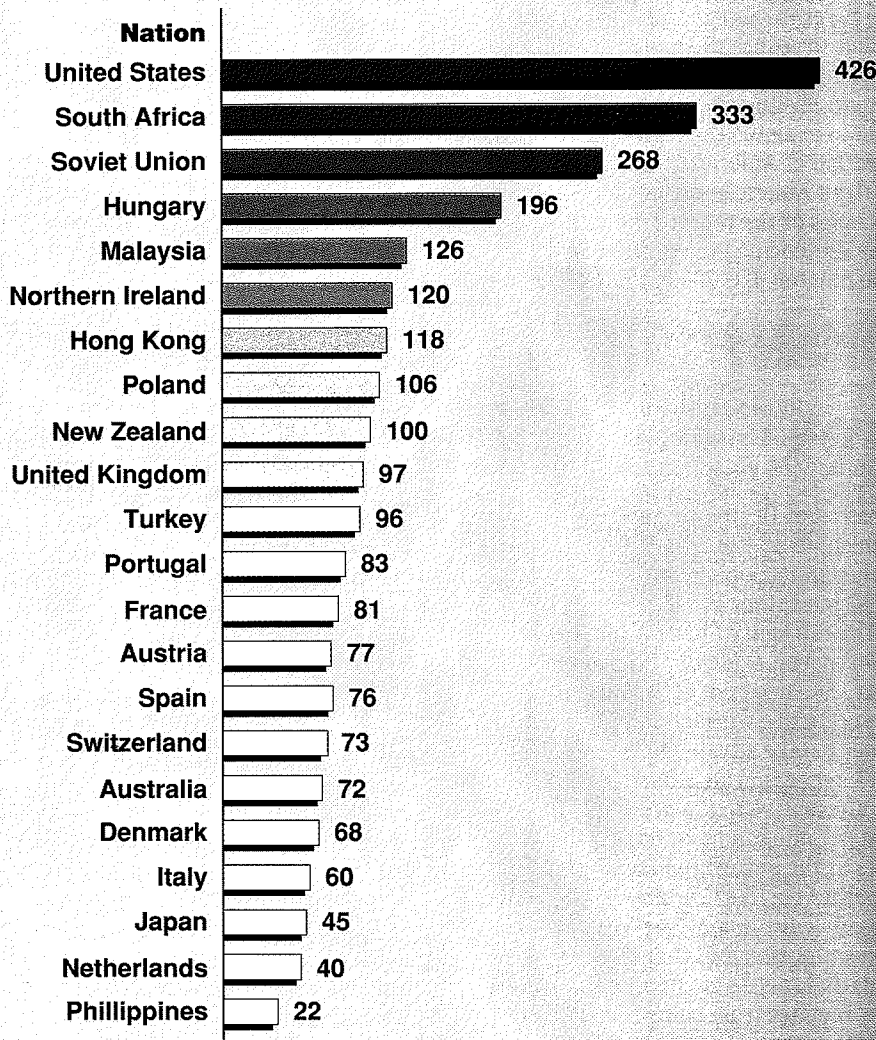


U.S. Now Leads World in Rate of Incarceration

BY JAN ELVIN

Incarceration rates for the United States, South Africa, and the Soviet Union in comparison to Europe and Asia



Rates of Incarceration per 100,000 Population

Source: Penal Reform International, using data from the Council of Europe and the Australian Institute of Criminology

Striving to be Number One is an honored American tradition. While only ten years ago the United States' incarceration rate was third in the world, we have now moved into first place. A new study by the Sentencing Project reports that with more than one million people behind bars, the United States has now surpassed South Africa and the Soviet Union in punitiveness.

Of every 100,000 Americans, 426 live behind bars. In South Africa, 333 of every 100,000 are in prison; in the Soviet Union, 268; Great Britain, 97; Spain, 76; the Netherlands, 40.

Perhaps even more shocking is the finding that Black males in the United States are imprisoned at a rate of four times that of Black males in South Africa: 3,109 per 100,000 compared to 729 per 100,000.

The study, *Americans Behind Bars: A Comparison of International Rates of Incarceration*, was written by Marc Mauer, assistant director of the Sentencing Project.

The incarcerated population in the

INSIDE . . .

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United States has more than doubled in the last decade, rising from just over 500,000 in 1980 to one million today. The study stresses that incarceration rates, however, do not rise and fall with crime rates. "Although the crime rate has dropped by 3.5% since 1980, the prison population has doubled in that period," it notes. "Breaking down these figures further, we see first that crime dropped by 15% from 1980 to 1984, while the number of prisoners increased by 41%; then, from 1984-1989 crime rates climbed by 14%, while the number of prisoners rose by 52%. Any cause and effect relationship is difficult to discern." The statistics are furnished by the F.B.I.

Fear of crime and increasingly punitive attitudes in recent years have led to mandatory sentencing laws and tougher sentencing guidelines. Mauer suggests that these new laws reflect counterproductive and inappropriate policy choices. "The choice for policy makers in responding to our high national crime rate... was very stark. The first option was to continue to build new prisons and jails at a cost of \$50,000 a cell or more, and to spend \$20,000 a year to house each prisoner, or to spend these same tax dollars on prevention policies and services—programs designed to generate employment and to provide quality education, health care, and housing,

along with alternatives to incarceration rather than new prison cells...

"Overwhelmingly, the punitive policies of the first option were the ones selected at both a national and local level," says the report. "Had the punitive policies resulted in dramatically reduced crime rates, one could argue that their great expense was partially justified by the results. But as the 1990s begin, we are faced with the same problems as in 1980, only greater in degree."

The Sentencing Project recommends:

- repeal of mandatory sentencing laws;
- expansion of alternatives to incarceration;
- treatment of drug abuse as a health problem rather than a criminal justice problem;
- redirection of the focus of law enforcement to address community needs and to prevent crime;
- government funding of pilot programs to reduce the high rate of imprisonment of African American males; and
- establishment of a national commission to examine the high rate of incarceration of Americans, particularly African American males.

Copies of the report are available from The Sentencing Project, 918 F St., NW, Washington, D.C. 20004 for \$5. ■

Jan Elvin is editor of the NPP JOURNAL.

THE NATIONAL PRISON PROJECT
JOURNAL

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

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

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

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

LETTERS TO THE EDITOR

In his article in the Summer 1990 issue of the NPP JOURNAL, Russ Immarigeon discussed alternative punishments to the death penalty, noting that anti-death penalty efforts which fail to suggest alternatives are incomplete! The most popular alternative, life without parole, he wrote, was an unsatisfactorily broad "political ameliorative." Drawing from recent studies and surveys, he instead proposed alternatives such as increased victim services programs, the demystification of violence through education, broader use of defense-based sentencing advocacy services, and penalties which coordinate safety and victims' needs with social services and treatment. Two death penalty opponents respond to his article in the following letters.

To the Editor:

I appreciate the use of our article in your story by Russ Immarigeon on alternatives to capital punishment,

"Instead of Death: Alternatives to Capital Punishment," Vol.5, No.3 (Summer 1990), although its publication year was not 1990, but rather 1989.

The difficulty I have is that Mr. Immarigeon evidently fails to recognize that... one need not affirmatively advocate life without parole ("LWOP") in order to take advantage of the public's preference for some version of LWOP as an alternative to the death penalty. Instead, one can point out (as the article does at the outset) the fact that—whether we like it or not—LWOP *does* already exist in most jurisdictions, and hence the assertion that the death penalty is needed to incapacitate death row inmates from being released speedily to kill again is simply untrue.

To me, that is the key point. It is a factual point which does not require us to come up with some other theoretical alternative to the death penalty now. What's crucial is to explain that an alternative that is preferable to the

public *already exists*. Once the public knows that, many fewer sentences of death will be imposed, and we may be able to abolish capital punishment. Thereafter, we can come up with the other sorts of alternatives hypothesized by Mr. Immarigeon.

Ronald J. Tabak, Esq.
Skadden, Arps, Slate, Meagher & Flom,
New York

To the Editor:

As a matter of prudence, Mr. Immarigeon is right in suggesting that we need to propose alternatives to the death penalty, but only as a matter of political prudence. Those who advocated the end of burning at the stake or drawing and quartering were hardly obligated, morally, on the merits, to offer alternatives to calm society's shattered nerves.

But so long as it is prudent, I am not sure his catalogue is terribly persuasive. The four he propounds—victim services, demystifying violence, sentencing advocacy, and new kinds of penalties (largely non-incarcerative, I suppose)—

all have merits quite unrelated to the retention *vel non* of the death penalty and they seem to me utterly unlikely to appease the public's desire for tough retributiveness (to say nothing of the courts'). They not only do not address the problem, they dis-address it, if I may say so, by more "liberal" social service techniques whose failure (or at least perceived failures) are precisely what has turned the society so anti-liberal. No one trusts you to cure child abuse before they get stabbed waiting for the evening bus; that's what it amounts to. Indeed, if you got those four programs actively implemented, they could serenely co-exist with capital punishment (and probably would).

I abhor life-without-parole notions as does Mr. Immarigeon. I understand the Governor's felt political need for that push in New York, but I will not be heard to endorse it. Leon Sheff (in his *Ultimate Penalties*) quite unnecessarily reproaches the American abolition movement for surreptitiously supporting

LWOP to slake the public's thirst for beastliness.

Henry Schwarzschild, Director
ACLU Capital Punishment Project,
New York

To the Editor:

I really appreciated David Fathi's article on U.S. political dissent in your Fall 1990 issue,² but he made a small but significant historical error when he states that Congress in 1940 enacted the Smith Act to "criminalize membership in the Communist Party." Actually the Communist Party favored the passage of the Smith Act because it supported World War II and the Act originally targeted anti-war Trotskyists. It is both one of the great ironies of the left and one of the best historical arguments for civil liberties for all regardless of political belief that the CP originally endorsed an act that after the war would have such a devastating impact on it.

Bill Douglas, Director
Criminal Justice Ministries, Des Moines

Fathi replies: While I wholeheartedly agree with Bill Douglas on the importance of resisting repressive legislation, whoever the ostensible target, he is incorrect when he states that the Communist Party originally supported the Smith Act. The origin of this persistent misconception is unknown, although it has been attributed to Socialist Party leader Norman Thomas. In fact, the CP vigorously fought the Smith Act from its inception, and several party leaders, notably Elizabeth Gurley Flynn, actively opposed the Smith Act prosecution of Trotskyists. An account of these events may be found in Herbert Aptheker, *Can We Be Free? An Analysis of the Smith/McCarran Acts*, published at the height of the Smith Act trials.

¹ "Instead of Death: Alternatives to the Death Penalty," *NPP JOURNAL*, Vol.5, No.3.

² "U.S. Punishes Political Dissidents," *NPP JOURNAL*, Vol.5, No.4.

AIDS Project Presses for Programs Behind Walls

BY ALEXA P. FREEMAN AND JUDY GREENSPAN

Since the beginning of the AIDS epidemic, there have been 5,411 cases of full-blown AIDS in jails and prisons. This figure represents a conservative estimate because many AIDS cases are still misdiagnosed or unreported.

Statistics compiled for 1989 show, for the first time, that the percentage increase of AIDS cases in prisons and jails exceeded the increase in the outside general population; prison and jail AIDS cases in the United States increased by 72%, while cases on the outside only increased by 50%. To some extent, the higher percentage in prison AIDS cases reflects better reporting measures, more accurate testing and better record keeping than the previous year. However, it also highlights the changing nature of the HIV epidemic in this country. The spread of HIV disease in the United States has shifted from the white gay male popula-

tion to poor communities heavily affected by IV drug use and addiction. In particular, Black and Latino populations are increasingly at risk. Because Blacks and Latinos are disproportionately represented in our nation's jails and prisons, the number of prisoners with HIV disease has grown. Notably, however,

the growth in the number of HIV-infected in jails and prisons is not due to transmission within the institutions. Instead, people are coming into prisons from the street already infected.

Today's profile of a prisoner with HIV disease is a Black or Latino male with a

history of IV drug use. While the percentage of women with AIDS in prison has been increasing rapidly, women still comprise less than 10% of that population. Most correctional AIDS cases are still found in the Mid-Atlantic states of New York and New Jersey (over 60%).

The Spanish language pamphlet remains one of the few resources available and relevant to Latino prisoners.

These data present both a challenge and an opportunity for public health officials and prisoner advocates. Traditionally, IV drug users have been a very difficult population to educate about the AIDS epidemic, but imprisonment offers a prime opportunity to reach them. At the same time, public health and prisoner advocates have encountered formidable obstacles in putting together AIDS programs.

This past year the AIDS Project of the National Prison Project has encouraged the development of effective AIDS education programs targeted to the special needs and concerns of prisoners. Much of our work reflects an effort to encourage corrections administrators, medical service directors, AIDS service organizations, state legislatures, and AIDS activists to provide quality, comprehensive AIDS education to prisoners and staff. Also, we have stepped up our support for peer education and counseling efforts in the jails and prisons because health educators on the outside have emphasized the importance of organizing community-run AIDS education programs.

Last December, for example, Judy Greenspan, AIDS information coordinator for the Project, attended AIDS education seminars at Rikers Island, which is part of the New York City jail system. While there, she interviewed staff at the Center for Community Action

to Prevent AIDS at Hunter College. The Center has been in the forefront of developing peer education and counseling projects in poor communities in New York City. The Center recently initiated an "empowerment" AIDS education project for women prisoners at Rikers Island. Greenspan interviewed Dr. Nicholas Freudenberg, the director of the Hunter College Center for Community Action and author of the book *Preventing AIDS, A Guide to Effective Education for the Prevention of HIV Infection*.

In March 1990 the American Foundation for AIDS Research (AmFAR) invited NPP staff to serve on their Expert Review Panel in the AIDS Education Material Review Project, and to review a large assortment of AIDS education materials. In July, Ms. Greenspan attended a four-day Reviewer's Conference co-sponsored by the National AIDS Information Clearinghouse (NAIC) of the U.S. Department of Health and Human Services Centers for Disease Control. We reviewed over 1,600 brochures, videos, posters and other AIDS information materials from the NAIC database. We were able to meet with a diverse group of AIDS and health educators from around the country, many of whom are beginning to do AIDS education in local prisons.

The AIDS Project has lent assistance over the past year to prisoner groups who are developing peer education programs at the Attica, Clinton, Eastern, Fishkill, Great Meadow, and Bedford Hills Correctional Facilities in New York State. We have provided educational materials and technical assistance to these pioneer efforts. The Project also produces an informal newsletter to prisoner AIDS educators and counselors now being circulated in several prisons in New York State. Unfortunately, most New York State prison administrators have not responded favorably to prisoner-developed education programs.

Peer education efforts have met with greater success in Massachusetts. An ongoing, sanctioned AIDS education and counseling program at MCI Norfolk has received a great deal of support and assistance from the AIDS Project.

One barrier that prisoner AIDS educators constantly face is the lack of support by outside AIDS service organizations for their efforts inside. The AIDS Project has helped to form the Ad-Hoc Prison Health Network—a broad group of prisoner advocates, health educators, people with AIDS and AIDS service organizations, including the National Lawyers' Guild AIDS Network,

ActionAIDS of Philadelphia, the now-defunct National AIDS Network, and the NPP. The first project of the Prison Health Network was an all-day institute held in Washington D.C. on July 18, 1990. Over 100 health educators, attorneys and others attended the day-long session entitled "HIV/AIDS Education and Health Concerns for Incarcerated Populations." Workshops were held on medical and psychosocial issues, AIDS education for prisoners and staff, and advocacy and support for prisoners with HIV disease.

Of course, the most valuable educational tool of the AIDS Project is the brochure, *AIDS & Prisons: The Facts for Inmates and Officers*. This year, we updated this educational tool to 27 pages, with expanded sections on medical care and legal rights for prisoners with AIDS. We also added a new section on women and AIDS. To date, we have distributed 135,000 copies in the prisons, jails, and detention centers of this country. The Spanish language pamphlet remains one of the few resources available and relevant to Latino prisoners.

In addition to education, another major and continuing concern of the AIDS Project has been to ensure that HIV-infected prisoners receive adequate medical care and are treated fairly. Over the past year, certain medical breakthroughs have led doctors to change their views of this disease. AIDS, while incurable, can be managed for an increasing number of years as a chronic condition rather than the "killer virus" it was once considered. With proper medical attention, frequent T4 cell monitoring, and access to early treatment regimens of such drugs as AZT and aerosolized pentamidine, the life span of people with HIV disease has increased dramatically. The challenge for corrections, health educators and prisoner advocates is to ensure that prison medical care is upgraded to reflect changes in treatment methods.

Despite the recent breakthroughs in the treatment of HIV disease, most HIV-positive prisoners do not have access to early or continuous medical care, even though FDA-approved. Daily advocacy on behalf of prisoners with HIV disease has become one of the most important tasks of the AIDS Project in the following ways:

- We respond to prisoners' requests by mail and by phone;
- inform prison officials and prison medical staff of the prisoners' complaints;
- provide medical information to

prisoners so they are better able to monitor their own care;

- work with prison officials and medical staff to improve their HIV protocols; and
- obtain attorneys to represent the prisoners if necessary.

Besides often being denied FDA-approved treatments, prisoners are denied access to experimental HIV drug trials. Last October, the AIDS Project began collaborating with the AIDS Action Foundation to plan a roundtable conference on prisoner access to experimental HIV drug trials. Access to experimental drugs has been a life and death issue for HIV-positive people in the general population and a focus of AIDS activists around the country. Prisoner access to these drug trials is a much more complicated and sensitive issue than is access by people outside prison. After two months of planning, this unique roundtable conference, "Prisoner Access to Experimental HIV Drug Trials," was held in January 1990, in Washington, D.C. An impressive grouping of medical experts, ethicists, attorneys, people with AIDS and health educators attended. Since this roundtable meeting, prisoner access to drug trials has been discussed widely in both public policy and corrections forums.

In addition to medical advocacy, the AIDS Project is constantly called upon to look at a range of problems stemming from the isolation of HIV-positive prisoners; the involuntary antibody testing of prisoners; the lack of voluntary testing for prisoners; the lack of confidentiality regarding medical records and the identities of infected prisoners; and the refusal of public officials to develop early release policies for prisoners dying of AIDS.

One of the most difficult aspects of this work is finding lawyers who are willing to represent HIV-infected prisoners. NPP staff work hard to encourage prisoner legal advocates across the country to take on cases by contacting them and offering support. We offer to assist attorneys by tracking AIDS and prison cases throughout the country. We help them identify the issues and provide referrals to experts in the field. Often consultations continue throughout the duration of a case.

Alexa Freeman, the AIDS Project director, is writing the chapters on AIDS and prison issues for the updated Yale University Press book on *AIDS and the Law* and the National Lawyers' Guild's *AIDS Litigation Manual*. The chapter in

the *Litigation Manual* is directed to lawyers and should be helpful for those considering taking these cases.

Most lawyers find the Project's updated AIDS and Prison Bibliography very useful. It remains in great demand with over several hundred copies distributed this past year. The 1990 *Bibliography* contains one of the most comprehensive legal case listings of AIDS and prison issues. We have added an expanded resource section listing educational materials and organizations servicing a variety of communities affected by the AIDS epidemic.

Finally, Project advocacy on behalf of HIV-infected prisoners has emphasized public education. In the past year, staff have provided background information to news media and have been interviewed for stories on AIDS in prison. We are frequently invited to speak at conferences around the country. In the past year these have included, among others, the National Commission on Correctional Health Care Conference, the American Public Health Association Conference, the Lavender Law Conference, a program on AIDS and the Bill of Rights at Northern Virginia Community College, the National Conference of Black Lawyers Conference, and the ACLU Executive Directors' and Lawyers' Conference. Judy Greenspan continues to write her *AIDS Update* column which now appears regularly in the National Prison Project *JOURNAL*.

Perhaps the most important public education took place under the auspices of the National Commission on AIDS (formerly the Presidential Commission on AIDS). The Commission held its first hearing on AIDS and prison on August 17, 1990 in New York City. The AIDS Project played a major role in the conceptualization of this hearing and helped develop the speakers' list. We presented testimony on *Harris v. Thigpen*, 727 F.Supp. 1564 (M.D.Ala. 1990), a case brought by the National Prison Project, the Southern Prisoners' Defense Committee, and local lawyers challenging the mandatory HIV testing and segregation of Alabama state prisoners, and the inadequate medical and mental health care provided them. We also collected and presented testimony from many prisoner peer educators and prisoners with HIV disease to the Commission. The Project is now advising the Commission on the preparation of its final report and recommendations to President Bush.

The AIDS Project has embarked on

many exciting projects over the past year. It is a unique national resource on AIDS and prison issues and has played an important role in encouraging local legal advocates and AIDS service organizations to tackle the complex problems faced by prisoners with HIV disease and AIDS. Project staff has its work cut out for it over the next year: to continue to advocate for comprehensive and meaningful AIDS education programs for incarcerated populations. Through the Prison Health Network and our work with local advocacy groups, the AIDS Project will continue to seek to secure sorely needed medical, psycho-social

support and legal services for prisoners with HIV disease. At the same time, we will continue to work with a growing coalition of organizations, governmental bodies like the National Commission on AIDS, and individual corrections administrators, medical directors, health educators, prisoners and AIDS activists to develop model policies on the care and management of HIV disease in the nation's prisons and jails. ■

Alexa P. Freeman, a staff attorney at the NPP, is AIDS project director. Judy Greenspan is the AIDS information coordinator.

FOR THE RECORD

■ The Summer 1990 issue of Jail Suicide Update includes Part One of a four-part series on Model Jail Suicide Prevention Programs. The Update describes a model program in the Oneida, New York Correctional Facility which relies on thorough Suicide Prevention Screening Guidelines, three levels of inmate supervision, and inter-agency cooperation involving local mental health agencies. Jail Suicide Update is a quarterly newsletter published by the National Center on Institutions and Alternatives; the Summer 1990 issue is available free to readers of the *NPP JOURNAL*. Contact the National Center on Institutions and Alternatives, 40 Lantern Lane, Mansfield, MA 02048, 508/337-8806. Jails which would like their model suicide prevention program considered for a future Jail Suicide Update should also contact NCIA.

■ The Prison Fellowship has announced it will officially launch America's first national in-prison newspaper, the *Inside Journal*, at the District Correctional Complex at Lorton, Virginia.

Written for prisoners by current and former inmates, the premier issue of the quarterly publication is being distributed to prisons in Alabama, California, Colorado, Connecticut, Indiana, Pennsylvania and Washington, D.C. Future issues will be distributed to state and federal prisons nationwide.

"Our primary goal is to provide inmates with resources for life in prison so that, once released, they will never set foot in prison again," says Charles W.

Colson, Prison Fellowship chairman.

"With prisons packed to capacity and national recidivism studies showing that two out of three current inmates will return to prison, that's a tall order for a newspaper, but we believe *Inside Journal* is a step in the right direction," Colson adds.

Former inmate and senior editor of *Inside Journal*, Craig Pruitt, adds that "we want to introduce inmates to a new way of life, and at the same time, work with prison officials and the public in gaining a deeper understanding of the justice system from the prisoner's point of view. We are delighted with the cooperation we've received from correctional officials who've agreed to assist us in distributing the newspaper in federal and state prisons."

The newspaper will publish success stories of current and former inmates and encourage them to contribute to its many columns, including "From Behind the Walls" (news clips on prison life); "Bar None" (inmate Q&A); "Staying Together," (advice and job tips to inmates who will soon be released).

The *Inside Journal* also will feature professional sports schedules, articles on health issues that affect inmates, entertainment, medical breakthroughs, politics, and news from other prison institutions nationwide. Pruitt believes the newspaper will provide immediate access to national statistics and developing trends in prisons, thereby resulting in more timely responses and solutions to prison problems.

For information, contact Prison Fellowship, P.O. Box 17500, Washington, D.C. 20041-0500, (703) 834-3663.

BY JOHN BOSTON

Highlights of Most Important Cases

Modification of Judgments/Judicial Disengagement

How long does a court injunction last? What does it take for prison officials to get out from under judicial supervision?

The Supreme Court's recent decision in *Board of Education of Oklahoma City Public Schools v. Dowell*, No. 89-1080 (U.S., January 15, 1991), a 30-year-old school desegregation case, may make it easier for school officials to escape the obligations of injunctive orders. But *Dowell's* relevance to other civil rights litigation, especially prison cases, is far from clear, and in practice the decision may make post-judgment monitoring in prison cases more intrusive.

Traditionally, a defendant can escape the obligations of an injunction only on a showing of "grievous wrong evoked by new and unforeseen conditions." *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).¹ *Dowell* holds that this is the wrong standard to apply to the dissolution of school desegregation decrees. In *Swift*, an antitrust case, the decree "was by its terms effective in perpetuity." By contrast, "[f]rom the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination." Therefore, the court held that a finding that the schools were "being operated in compliance with the commands of the Equal Protection Clause, and that it was unlikely that the school board would return to its former ways," would suffice to justify dissolving the decree.

The *Dowell* opinion, like most school desegregation cases, is framed almost entirely in terms of desegregation law, without reference to any general jurisprudence of civil rights remedies. Its relevance to public institutions other than schools is therefore debatable, and there is good reason to believe it will have little application to prison litigation.

Dowell dealt with classic *de jure* segregation, rooted in the state constitution and statutes and buttressed by state-enforced restrictive covenants and intentionally discriminatory acts by the school board. Racism is alive and well in America, but not this kind of overt official discrimination. Jim Crow has gone, and its days were obviously numbered thirty years ago. It was entirely reasonable to expect that school desegregation decrees would be a "temporary measure to remedy past desegregation," as even Justice Marshall agreed in his dissenting opinion.

By contrast, the prison conditions that have led to large-scale, protracted federal court intervention are rarely archaic remnants of a bygone social order. Rather, they arise from lack of resources and administrative neglect or incompetence, which in turn lead to deteriorated physical facilities, correctional and professional staffs that are inadequate both in numbers and in qualifications, administrative procedures that fail to deliver essential services and to control hazards to life and health, and the failure of lower-level staff to carry out those policies and procedures that are nominally in place.

These problems are as modern as the explosion in the prison population, competing governmental priorities, and economic crises in states and localities—none of which show any sign of fading away within our lifetimes. One need look no further than the case of *Tillery v. Owens*, 719 F.Supp. 1256 (W.D. Pa. 1989), *aff'd*, 907 F.2d 418 (3d Cir. 1990), to find recent conditions comparable to those described in the early large-scale prison conditions cases in states like Alabama, Mississippi, and Arkansas.

For these reasons, prisoners' advocates will argue that prison conditions decrees are not intended as temporary measures, but bear the same expectations of permanency as any other injunction. Constitutional compliance, they will argue, is not evidence that the decree should be vacated, but evidence that it is safeguarding constitutional rights against the ever-present dangers of overcrowding, inadequate funding, and administrative neglect. While enforcement mechanisms like reporting requirements or the appointment of a monitor may be limited in time, substantive

injunctive terms are presumptively permanent. See *Battle v. Anderson*, 788 F.2d 1421, 1428 (10th Cir. 1986) (case dismissed but prior orders and injunctions remained in force upon a finding of no current constitutional violation).

In many cases, these arguments will be supported by the structure or language of the decree itself. For example, if a decree contains some provisions with explicit time limitations and other provisions without them, plaintiffs will plausibly argue that the latter provisions were intended to operate indefinitely. This argument should be particularly effective in the case of negotiated judgments. See *Halderman v. Pennhurst State School and Hospital*, 901 F.2d 311, 317-21 (3d Cir. 1990), *cert. denied*, 111 S.Ct. 140 (1990).

If *Dowell* does have some application to prison cases—or as long as the question remains open—post-judgment proceedings may become more intrusive and formal, and good will may be a casualty. The prudent plaintiffs' lawyer will anticipate a motion to vacate based on *Dowell* and will therefore closely scrutinize defendants' performance for non-compliance and attempt to document in court every manifestation of noncompliance, in place of the present widespread practice of resorting first to informal means of resolution. Under *Dowell*, therefore, post-judgment practice may by necessity become more formal and adversarial, and direct court involvement may become more frequent.

Punitive Segregation

Once more, a federal court has found that conditions in a punitive segregation unit violated minimum standards of decency and therefore constituted cruel and unusual punishment. In *LeMaire v. Maass*, 745 F.Supp. 623 (D.Or. 1990), the district judge condemned the excessive use of physical restraints, the punitive use of "controlled feeding status" and "strip status," the denial of recreation to many prisoners, and other aspects of confinement in the Oregon State Penitentiary's Disciplinary Segregation Unit (DSU).

The *LeMaire* opinion is striking for its acknowledgment that the level of hostility between staff and inmates in many segregation units is so great that staff misconduct, as

well as inmate misconduct, is not only possible but is likely. The court observed:

Working under the constant threat of unpredictable assaults and bombardment with feces, urine, spit, food, and any available movable object, as DSU staff does, is a nightmare. It is understandable that in such a hostile, violent, and confrontational environment, inmates who are locked down and isolated for almost 24 hours a day, sometimes for years on end, in tiny, damp, smelly cells, with absolutely nothing to do, will strike out any way they can. It is understandable that guards will retaliate.

745 F.Supp. at 623.

This approach contrasts sharply with many other prison conditions decisions, including several by the Supreme Court, that have emphasized the risk of dangerous misconduct by prisoners but have ignored the equally real risk of abuse of power by prison staff. *See, e.g., Hudson v. Palmer*, 468 U.S. 517 (1984) (holding that prisoners have no Fourth Amendment protection against abusive cell searches).

Restraints. Oregon regulations permit the use of mechanical restraints in order to control certain behavior, but require that the restraints be removed "as soon as it is reasonable to believe that the behavior leading to the use of restraints will not immediately resume." *Id.* at 632 (quoting regulations). The court found that in practice prisoners were left in full mechanical restraints for days at a time after acts of misconduct, without any continuing emergency and without medical justification. It observed: "Guards exposed to constant abuse by inmates cannot be expected always to make reasonable, controlled judgments about the appropriate response to inmate misbehavior." *Id.*

Food. Oregon regulations also permit serving inmates meals of "Nutraloaf," which consists of leftover foods ground up and baked into bricks, when they throw or misuse food, human waste, or utensils. A state court had previously upheld those regulations as facially valid, and the federal court agreed that they are a "valid, temporary safety measure when [Nutraloaf's] use is directly connected to the misconduct it is intended to curb." *Id.* at 633. But it found that the use of Nutraloaf was far more extensive; the record showed that inmates were routinely kept on Nutraloaf feeding for seven days regardless of whether their disruptive behavior continued or stopped, and some inmates were subjected to Nutraloaf for misconduct that had little or nothing to do with the misuse of food or utensils. The court concluded that Nutraloaf was being used as punishment, and that such use violated the Eighth Amendment. The court also concluded that by limiting the use of Nutraloaf to particular purposes, and by forbidding its use as punishment, state

regulations created a liberty interest. The use of Nutraloaf as punishment therefore denied due process. In reaching that conclusion, the court observed once more that "in a hostile, explosive environment, there is a high likelihood of an erroneous deprivation." *Id.* at 636.

Clothing, Furnishings, Property. The court concluded that defendants' use of "strip status" was unconstitutional, for the same reasons it cited in connection with Nutraloaf and mechanical restraints. Strip status consists of the removal of all clothing, bedding, and other property including toilet paper and writing materials until such time as the guards decide in their discretion that the prisoner has "earned it back." *Id.* at 639.

Communication of Medical Needs. The use of "quiet cells" with double steel doors was found unconstitutional. The court agreed that it is legitimate to separate "noisy, disruptive inmates" from the rest of the unit population, but not to isolate them so completely from staff that they cannot call for assistance in the event of medical problems.

Exercise and Recreation. The imposition of long periods of "loss of exercise privileges," resulting in segregation inmates being out of their cells three times a week for showers only, deprived the plaintiff of "outdoor exposure and exercise opportunities adequate to prevent physical and mental deterioration." *Id.* at 643. The plaintiff had accumulated almost four years of this punishment.

An injunctive judgement was entered in January 1991, and prison officials have filed a notice of appeal.

Environment—Hazardous Substances and Conditions

Several federal courts have addressed the constitutionality of subjecting prisoners to "second-hand" cigarette smoke. Most recently, a three-judge panel of the federal court of appeals for the Tenth Circuit has held that a policy of "permitting the indefinite double-celling of smokers with nonsmokers against their expressed will can amount to deliberate indifference to the health of nonsmoking inmates...." *Clemmons v. Bohannon*, 918 F.2d 858 (10th Cir. 1990). By contrast, other federal courts have held that subjection to second-hand smoke does not violate "evolving standards of decency" at the present time, though it may in the future. *Wilson v. Lynaugh*, 878 F.2d 846, 851-52 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 417 (1990); *Caldwell v. Quinlan*, 729 F.Supp. 4 (D.D.C. 1990); *Gorman v. Moody*, 710 F.Supp. 1256, 1259-64 (N.D.Ind. 1989).

The Tenth Circuit did not merely disagree with the outcomes of the other cited cases. It accused them of asking the wrong question in their Eighth Amendment analysis:

The dispute among these courts has centered

on the necessary extent of public recognition that long term exposure to ETS [environmental tobacco smoke] in close quarters is potentially damaging to one's health, and how much this recognition must percolate throughout our social institutions and become manifest in legislative enactments before a court may invoke the "evolving standards of decency that mark the progress of a maturing society." We believe this type of inquiry is unnecessary. The extensive line of cases recognizing a prisoner's constitutional right to a "healthy habitative environment"... reflects a longstanding judicial recognition that exposing a prisoner to an unreasonable risk of a debilitating or terminal disease does indeed offend these "evolving standards of decency." [Citations omitted.]

Thus, the question for the court is whether *in fact* a challenged practice "poses an unreasonable risk of harm to an inmate's health," regardless of social attitudes and legislative responses to that practice. The court suggested an appropriate basis for comparison: "whether the type of exposure potentially faced by a nonsmoking prisoner double-celled with a smoker constitutes a health hazard at least as significant as denial of exercise," which has been found to violate the Eighth Amendment in numerous decisions (including *LeMaire*, discussed above).

The *Clemmons* case has been accepted for rehearing *en banc* by the full ten-judge appellate court.

Crowding/Remedies/Pre-trial Detainees

A recent decision from the Supreme Judicial Court of Massachusetts in a jail crowding case demonstrates that court's willingness to apply federal constitutional guarantees in a manner similar to the federal courts.

In *Richardson v. Sheriff of Middlesex County*, 407 Mass. 455, 553 N.E.2d 1286 (Mass. 1990), the court upheld the trial court's conclusion that crowding in the Middlesex County jail constituted unlawful punishment of pre-trial detainees. In a familiar scenario, the jail—a modern structure constructed with a capacity of 161—had at times held as many as 303 inmates, and the overflow was housed in visiting rooms, common areas, dayrooms, and other makeshift housing areas.

The appeals court agreed that it is unconstitutional to require inmates to sleep on the floor, with or without mattresses, or to hold them in makeshift dormitories without access to toilets and showers or with inadequate toilet and shower facilities. (The trial judge had cited some areas with only two toilets and one shower for sixty prisoners.) The court also agreed that crowding inmates into common areas—particularly those designed as open or recreational space for inmates—was unconsti-

tutional, as was double bunking in holding cells that were not only small but contained benches that further reduced the floor area. Although the trial court had relied in large part on state regulations, the appeals court preferred to focus on the inmates' constitutional claims, relying almost entirely on precedent from the federal courts. But it concluded that the state regulations were entitled to "some weight" in assessing the standards of decency against which constitutional claims are measured.

The court rejected the sheriff's argument that the jail's crowded conditions were justified by a legitimate governmental purpose, "to keep the facility operating so as to detain unbailworthy defendants awaiting trial." 553 N.E.2d at 1293. It echoed the sentiment of a federal court that

[t]he only conceivable purpose over-crowding...serves is to further the state's interest in housing more prisoners without creating more prison space. This basically economic motive cannot lawfully excuse the imposition on the presumptively innocent [pretrial detainees] of genuine privations and hardship over any substantial period of time...

553 N.E.2d at 1293, quoting *LaReau v. Manson*, 651 F.2d 96, 104 (2nd Cir. 1981).

For these reasons the court affirmed the trial judge's imposition of a population cap, as well as his orders to comply with state regulations with regard to bathroom facilities. But it displayed the same reluctance as have federal courts to intervene directly and forcefully in criminal court practices and the same concern for protocol if such intervention becomes necessary. Thus, it rejected the plaintiffs' request to direct special court sessions for purposes of bail review, without excluding the possibility that such an order might ultimately be appropriate—but only after the trial judge "request[ed]" the relevant administrative justice to institute special sessions and if necessary "sought" the assistance of the Chief Administrative Justice of the Trial Court.

Other Cases Worth Noting

U.S. SUPREME COURT

Contempt

Spallone v. United States, 493 U.S. ___, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990). It was an abuse of discretion to impose contempt sanctions directly on Yonkers City Council members for failing to vote for desegregation relief when there was a reasonable probability that sanctions against the city itself would

achieve the desired result. Only if such sanctions failed to work should contempt sanctions against local legislators have been considered. The court relies on the same considerations that underlie legislative immunity in reaching this conclusion.

Religion

Employment Division v. Smith, 494 U.S. ___, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). At 886: "...[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." (Citations omitted.)

One court has already suggested that this non-prison decision has "cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences: the doctrine on which all the prison religion cases are founded." *Hunafa v. Murphy*, 907 F.2d 46, 48 (7th Cir. 1990).

Remedies/State-Federal Comity

Missouri v. Jenkins, 495 U.S. ___, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990). The imposition of a tax increase by the district court to fund a desegregation remedy was an abuse of discretion. It should have ordered the school district to levy the tax and enjoined the operation of contrary state laws. At 54: "The difference between the two approaches is far more than a matter of form. Authorizing and directing local government institutions to devise and implement remedies not only protects the function of the institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems."

The requirements of a tax increase in the aid of ending constitutional violations did not exceed the court's equitable powers or Article III jurisdiction and did not violate the Eleventh Amendment. At 58: "Even though a particular remedy may not be required in every case to vindicate constitutional guarantees, where (as here) it has been found that a particular remedy is required, the State cannot hinder the process by preventing a local government from implementing that remedy." The opposite result would be contrary to the Supremacy Clause.

Medical Care/Theories—Due Process

Cruzan v. Director, Missouri Dept. of Health, 497 U.S. ___, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990). At 111 L.Ed.2d 236:

"This [common law] notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment... The

informed consent doctrine has become firmly entrenched in American tort law...

The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment."

At 241: "The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." At n.7: The right is better analyzed as a Fourteenth Amendment liberty interest than as part of a "generalized constitutional right of privacy." The Court assumes that the Constitution would grant a competent person "a constitutionally protected right to refuse life-saving hydration and nutrition" (242), but holds that states may require proof by clear and convincing evidence that the incompetent person would have wished to exercise that right.

U.S. COURT OF APPEALS

Mental Health Care

Thomas S. by Brooks v. Flaherty, 902 F.2d 250 (4th Cir. 1990). In a class action dealing with the mentally retarded in psychiatric hospitals, the district court properly applied the *Youngberg v. Romeo* standard by declining to weigh the decisions of treating professionals against the testimony of plaintiffs' experts to decide which of several acceptable standards to apply. Rather, it found that many of the treating professionals' decisions had not been implemented. It also found that many of their decisions departed from accepted standards of treatment, based on the Secretary's written standards and the plaintiffs' and defendants' expert testimony concerning drug use, restraint, and habilitation.

At 253: "Relevant accreditation is *prima facie* evidence of constitutionally adequate conditions." However, evidence of deficiencies found by the Joint Commission on Accreditation of Hospitals and by a federal agency rebutted this presumption even though JCAH had accredited the institution.

Attorneys' Fees and Costs

Plyler v. Evatt, 902 F.2d 273 (4th Cir. 1990). The court upholds fee awards at South Carolina rates for attorneys from the National Prison Project. Where plaintiffs prevailed in the underlying litigation but lost a motion to modify and permit double-celling, they were entitled to fees for defending the modification motion, since it was "intertwined with the original claims" and counsel were under "clear obligation to make the defensive effort." (281)

Procedural Due Process

Meador v. Cabinet for Human Resources, 902 F.2d 474 (6th Cir. 1990). A state statute pro-

viding that "[t]he cabinet shall arrange for a program of care, treatment and rehabilitation of the children committed to it," and that "the cabinet shall be responsible for the operation, management and development of the existing state facilities for the custodial care and rehabilitation of children," created an "entitlement to protective services" protected by due process. The plaintiffs' allegation was that they had been sexually abused in a foster home (apparently an institution).

Procedural Due Process— Disciplinary Proceedings/Discovery

Wagner v. Henman, 902 F.2d 578 (7th Cir. 1990). The plaintiff was convicted of murder in a prison disciplinary proceeding. The district court erred in requiring total disclosure of an FBI report to plaintiff's counsel without considering the risk of inadvertent disclosure of information that might identify confidential informants and without looking for ways in which such risk could be avoided, such as redacting the documents.

Publications/Qualified Immunity

Allen v. Higgins, 902 F.2d 682 (8th Cir. 1990). The plaintiff was denied the right to receive a government surplus catalog and a jury awarded him \$1.00. The responsible prison official made this decision without examining the catalog, which was shown at trial not to pose a security threat. He was not entitled to qualified immunity since, without examining the catalog, he could not have reasonably assessed whether his conduct violated clearly established law, and its exclusion did not serve legitimate penological interests.

False Imprisonment

Lee v. Dugger, 902 F.2d 822 (11th Cir. 1990). The plaintiff was held for an extra year because prison officials refused to give him the benefit of an intermediate state appellate court decision regarding the proper calculation of "gain time." Instead, they argued in his state habeas proceeding in the same court that the earlier decision was wrong. One judge held that defendants were entitled to qualified immunity because one case, decided by an intermediate appellate court, "falls short of the clarity of the law required to defeat a defense of qualified immunity," and defendants were "entitled to attempt to persuade the same court that its prior decision was in error."

A second judge, concurring specially, argued that the plaintiff's rights were not violated because he received the process due through his state court habeas petition. Judge Johnson, dissenting, argues that the statutes created a liberty interest, the first court decision clearly established the law, and pre-deprivation process was required.

Mental Health Care

Society for Good Will to Retarded Children v. Cuomo, 902 F.2d 1085 (2d Cir. 1990). Judge Weinstein's latest findings of unconstitutionality in this case do not meet Rule 52's requirement that facts be found "specially." Findings of unconstitutionality from proceedings made seven years earlier cannot be relied on to support the present findings because the district court acknowledged that there had been "enormous improvements." A "sweeping grant of relief" could not be justified absent any specific findings that patients had regressed as a result of present conditions.

The district court also departed from the *Youngberg v. Romeo* standard by failing to determine whether treatment and conditions actually departed from accepted professional judgment. "The court instead misused expert testimony by treating it as evidence of alternative choices against which the institution's treatment should be compared." (1089) Experts are to be used only to help the court determine what the minimum professional standard is.

Relief requiring population reduction and community placement was not narrowly tailored. The court should not have granted injunctive relief "without first identifying the specific constitutional violations that each part of the ordered remedy would cure." (1090) The conclusory statement that "administrative limitations" made it impossible to remedy the violations without reducing population was insufficient; defendants should have a chance to cure the "administrative limitations." Court-ordered community placement is a remedy of last resort.

Use of Force/Medical Care— Standards of Liability

Simpson v. Hines, 903 F.2d 400 (5th Cir. 1990). The decedent was arrested and put in a cell. He brandished marijuana, and refused to give it or his other property up. Ten officers came into the cell. Simpson wound up handcuffed and dead from asphyxia caused by neck trauma.

The court treats this as a case arising "before or during arrest" and therefore governed by the Fourth Amendment, without any discussion of where arrest ends and detention begins.

A factual issue precluding summary judgment was created by the presence of ten officers, the use of a neckhold, an officer's sitting "astraddle" the plaintiff (i.e., on his chest), the nature of the injury, and a tape recording of the decedent's screams and cries for mercy along with "statements from which the trier-of-fact might infer malice."

Evidence that the decedent was uncon-

scious when the officers left the cell and that they knew he had heavily exerted himself during the struggle and was under the influence of drugs, combined with the officers' callous statements on the tape, supported an inference of deliberate indifference, as did the failure of another officer, who later observed that the decedent was not moving, to summon medical help.

Pre-trial detainees are owed a duty of "reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective." (404) The court does not explain how this standard differs from the deliberate indifference standard.

Pre-Trial Detainees/Suicide Prevention/Municipalities/Training

Burns v. City of Galveston, Texas, 905 F.2d 100 (5th Cir. 1990). Here is yet another case of a drunken arrestee who behaved bizarrely and then killed himself. There was evidence that he had threatened to kill himself if he didn't get a cigarette, but the officers testified that because of other noise in the jail they didn't understand what he was yelling. Another prisoner called out to the officers when he saw the decedent hanging, and they told him to be quiet.

An alleged failure to make hourly cell checks required by city policy could not establish municipal liability because the decedent killed himself less than an hour after admission.

The failure fully to implement psychological screening procedures contained in a municipal manual did not support municipal liability because there is no "absolute right to psychological screening." (104) Officers need not be trained to screen for suicidal tendencies; this "requires the skills of an experienced medical professional with psychiatric training."

Religion—Practices— Beards, Hair, Dress

Benjamin v. Coughlin, 905 F.2d 571 (2d Cir. 1990). Equal protection claims based on disparate treatment of religious groups are evaluated by a reasonableness standard similar to the *Turner/Shabazz* standard.

Defendants in this class action were precluded from contesting the unconstitutionality of requiring intake haircuts for Rastafarian inmates by decisions of the state court of appeals even though they were rendered in individual actions, since there was a "substantial overlap" of evidence and argument and defendants had both incentive and opportunity to contest the issue. The haircut requirement was unconstitutional because there was a nearly costless alternative, tying the hair in pony tails for an intake photograph.

Protection from Harm

Fruit v. Norris, 905 F.2d 1147 (8th Cir. 1990). The plaintiffs were disciplined for refusing to

clean out a raw sewage facility without the protective clothing and equipment called for by the operations manual. The temperature was 125 degrees. The district court dismissed because there was no evidence that the defendants had actual or constructive knowledge of serious dangers.

Intentionally placing inmates in dangerous surroundings violates the Eighth Amendment. The plaintiffs made out a prima facie case because common sense suggests that defendants should have known the dangers of heatstroke and of disease spread through contact with human waste.

Women/Good Time/Equal Protection

Jackson v. Thornburgh, 907 F.2d 194 (D.C. Cir. 1990). A statute that grants early release to prisoners in District of Columbia prisons does not deny equal protection to D.C. women offenders who are housed in federal prisons and do not receive the statute's benefits. Heightened scrutiny is not applicable because the distinction is not based on gender but on place of incarceration, "although its interaction with the District's gender-specific prisoner-assignment rules clearly make it disadvantageous to be female." The disadvantaged class does include males, and some women (those with short sentences) do benefit from the statute. There is a rational basis for the distinction in the fact that the District of Columbia is under a constitutional obligation to reduce crowding in its prisons.

Protection from Inmate Assault

Wright v. Jones, 907 F.2d 848 (8th Cir. 1990). The plaintiff was assaulted by other inmates and beaten for five minutes before guards intervened. This assault followed a period in which large numbers of inmates had congregated in the housing unit and there were numerous fights. Evidence that the guards had knowledge of the prior assaults, had a duty to supervise the housing area, and had a clear view of the area created a jury issue under the reckless disregard standard.

The *Whitley* standard of "malicious and sadistic" behavior does not apply "because the guards have not identified a competing obligation which inhibited their efforts to protect inmates." (851) The phrase "highly foreseeable" found in the instructions to the jury does not impose a standard of mere or gross negligence; viewed in context, it required that defendants have had notice of the danger. "Under our precedents, liability can be imposed if guards disregard a known risk to the safety of inmates." (851)

Modification of Judgments/Administrative Segregation—Death Row

McDonald v. Armontrout, 908 F.2d 388 (8th Cir. 1990). A class action challenging death

row conditions was resolved by a consent decree. Two years later, defendants sought to move the unit to a newly built prison and asked for other modifications consistent with their implementation plan. Plaintiffs objected to the reduction of outdoor exercise time from 16 hours to four hours a week; a smaller and less well equipped yard; greater restrictions on religious services; and limited non-legal telephone access (one hour a week). These restrictions were imposed on the higher-security death row prisoners; those in less restrictive classifications received more recreation time and other benefits.

The modifications were properly approved. The move to a new prison was explicitly contemplated in the original judgment and the court would have had power to approve it in any case.

Handicapped/Jury Instructions/State, Local and Professional Standards

Evans v. Dugger, 908 F.2d 801 (11th Cir. 1990). The partly paraplegic plaintiff was denied appropriately designed toilet and shower areas and adequate access to toilet and shower, and denied adequate exercise and physical therapy.

Denial of adequate care to a disabled prisoner is to be judged under the *Estelle* deliberate indifference standard and not the *Whitley* standard, since there was no clash between treating him and meeting other legitimate needs.

The district court properly instructed the jury that compliance with "generally accepted standards requiring handicapped accessibility" is not legally required in prison housing, but such standards may be considered insofar as they are relevant. The plaintiff had requested an instruction that noncompliance with the state statute was evidence of deliberate indifference and a basis for holding particular noncomplying officials liable.

Suicide Prevention/Municipalities/State, Local and Professional Standards

Popham v. City of Talladega, 908 F.2d 1561 (11th Cir. 1990), *aff'g* 742 F.Supp. 1504 (N.D. Ala. 1989). The plaintiff was arrested for public intoxication. He was emotional, depressed, and angry. His belt and shoes were taken and his cell was ordered monitored by TV. After 11:00 p.m., there was no physical monitoring because there were no guards on duty. The plaintiff hanged himself with his blue jeans in a space in the cell out of view of the camera.

Jail suicide cases are governed by a deliberate indifference standard and the determination turns on "the level of knowledge possessed by the officials involved, or that which should have been known as to an inmate's suicidal tendencies." (1564) "Absent knowledge of a detainee's suicidal tendencies,

the cases have consistently held that failure to prevent suicide has never been held to constitute deliberate indifference." (1564) The decedent had been jailed before and had not threatened suicide. The defendants didn't know that he had tried to commit suicide two days previously. They didn't know that he was threatening suicide from his jail cell. The removal of shoelaces, belts, etc., and the presence of closed circuit cell monitoring show the absence of deliberate indifference.

Protection from Inmate Assault/Statutes of Limitations/Qualified Immunity

Ayala Serrano v. Lebron Gonzales, 909 F.2d 8 (1st Cir. 1990). The plaintiff was assaulted by other inmates and stabbed repeatedly in view of the defendant officer, who did nothing. A court awarded him \$20,000.

The plaintiff's amended complaint, filed by counsel, related back for limitations purposes to the time of filing of the *pro se* complaint, which named the defendant's supervisors.

The defendant was not entitled to qualified immunity where he neither intervened in the assault nor summoned others to help.

Pre-Trial Detainees/Use of Force/Medical Care—Denial of Ordered Care

Martin v. Board of County Commissioners of Pueblo County, 909 F.2d 402 (10th Cir. 1990). The plaintiff was arrested while in the hospital recovering from a neck fracture and was moved against doctor's orders.

Pre-trial detainees are entitled to the benefit of the same deliberate indifference standard applied to convicts' medical care. The reasonableness of an arrest involving movement of an injured person is governed by the same standard. Physical contact is not necessary to a Fourth Amendment use of force claim; the threat of physical coercion may be sufficient.

Defendants were not entitled to qualified immunity. At 407: "The absence of authority on all fours with the unusual facts of this case should not be considered fatal to plaintiff's claim, in light of the patently insubstantial character of the distinction upon which defendants' qualified immunity argument rests."

Access to Courts—Punishment and Retaliation/Work Assignments

Madewell v. Roberts, 909 F.2d 1203 (8th Cir. 1990). Medically disabled inmates were assigned to "inside utility" work (vegetable processing) and made to work at night sitting directly on a concrete floor. They were excluded from "Class I" status, a classification which permitted inmates to earn more good time.

Allegations that prison officials retaliated for plaintiffs' lawsuit by blocking reclassification opportunities and worsening their living and working conditions raised a factual issue

that should not have been decided against plaintiffs on summary judgment. The manifestations of retaliation need not themselves amount to constitutional violations. "The violation lies in the *intent* to impede access to the courts." (1207)

The plaintiff's allegation that his serious arthritis was painfully aggravated by sitting on cold concrete for hours in an unheated space could support the conclusion that his work assignment was dangerous to health or unduly painful.

Psychotropic Medication/ Qualified Immunity

Bee v. Greaves, 910 F.2d 686 (10th Cir. 1990). The plaintiff received a jury verdict of \$100 actual and \$300 punitive damages for the forcible administration of thiorazine. The doctor was not entitled to qualified immunity. The Supreme Court in *Washington v. Harper* said it had "no doubt" that the plaintiff had a liberty interest in avoiding unwanted medication, citing *Vitek* and *Parham v. J.R.*, which pre-dated the plaintiff's involuntary medication.

Administrative Segregation— High Security/Cruel and Unusual Punishment

McCord v. Maggio, 910 F.2d 1248 (5th Cir. 1990). The plaintiff alleged that he was confined for 23 hours a day in "Closed-Cell Restriction" in "an unlighted, windowless cell with only a hole cut in the steel door for outside access, while water and human waste sometimes up to ankle high seeped into the cell from frequently broken fixtures and pipes," and of being required to sleep on a mattress on the floor under these conditions. The magistrate should have made findings of fact as to the plaintiff's living conditions and assessed the totality of conditions, despite the defendants' argument that the facilities "were old and worn down, but prison officials did the best that they could given the conditions." (1250) The State Health and Safety Code is a "valuable index" of contemporary levels of decency but is not the only standard by which they are judged. "Conditions not condemned as unfit for human habitation in the prison setting have been held to still amount to a violation of a prisoner's Eighth Amendment rights." (1250)

Religion—Practices—Names

Ali v. Dixon, 912 F.2d 86 (4th Cir. 1990). Prison officials' refusal to add the newly converted plaintiff's Muslim name to some of his prison records, requiring him to use his old name when drawing money from his account, would violate his First Amendment rights in the absence of any penological justification for the refusal. The prison's refusal to add the new name to official correspondence with the plaintiff would also violate his rights unless

prison officials showed that there was a risk of misfiling. Defendants' arguments were addressed to substituting the new name in their records (which they are not required to do) rather than adding it.

The continued use of his old name by prison staff in addressing him did not violate his rights because of the importance of having staff know prisoners by name and the interference of name changes with that familiarity.

Service of Process

Puett v. Blandford, 912 F.2d 270 (9th Cir. 1990). At 275:

...[W]e hold that an incarcerated pro se plaintiff proceeding in forma pauperis is entitled to rely on the U.S. Marshal for service of the summons and complaint, and, having provided the necessary information to help effectuate service, plaintiff should not be penalized by having his or her action dismissed for failure to effect service where the U.S. Marshal or the court clerk has failed to perform the duties required of them....

If mail service proves unsuccessful, the Marshals should be directed to serve the complaint personally.

Suicide

Buffington v. Baltimore County, Md., 913 F.2d 113 (4th Cir. 1990). The court rejects defendants' argument that under *DeShaney*, jail officials are not required to take steps to prevent the suicide of people who have been civilly committed so they won't hurt themselves. If the state has taken custody of someone, its obligations do not depend on the reason for the custody. The duty of care owed is the same as that owed to detainees, i.e., the deliberate indifference standard, which does not require screening for suicidal tendencies or other preventive measures unless the defendants know of the individual's suicidal tendencies. Here, deliberate indifference was established by the flouting of the jail's suicide policy despite the knowledge that the plaintiff was a suicide risk.

Protection from Harm/Environment—Hazardous Conditions and Substances

Powell v. Lennon, 914 F.2d 1459 (11th Cir. 1990). A federal prisoner who alleged that he was housed in an area with an asbestos hazard and that prison officials refused to transfer him to an asbestos-free dormitory stated an Eighth Amendment claim of deliberate indifference to serious medical needs. Defendants were not entitled to qualified immunity; the unlawfulness of their actions "should have been apparent...in light of *Estelle*." (1464)

Equal Protection/Good Time

Pryor v. Brennan, 914 F.2d 921 (7th Cir.

1990). The District of Columbia Good Time Act, which limits eligibility for certain good time credits to those convicted of D.C. criminal offenses and incarcerated in D.C. prisons, did not deny equal protection to D.C. offenders housed in federal prisons because it was rationally related both to the goal of relieving crowding in D.C. and the goal of letting the prison system with actual custody apply its good time system.

Habeas Corpus/Access to Courts— Punishment and Retaliation

Clark v. State of Georgia Pardons and Paroles Board, 915 F.2d 636 (11th Cir. 1990). A § 1983 claim that the parole board denied parole to the plaintiff because he had pursued litigation against prison personnel is not barred by the *Preiser* exhaustion rule as long as it seeks only damages and a declaratory or injunctive relief and not release, since it would not "undermine his conviction."

Administrative Segregation—Death Row/Modification of Judgments/ Monitoring and Reporting

Thompson v. Enomoto, 915 F.2d 1383 (9th Cir. 1990). Death row inmates at San Quentin obtained a consent judgment governing conditions; after various enforcement motions a monitor was appointed, with powers including broad access to the premises, documents, meetings and personnel, the ability to retain experts or specialists, etc. The appeals court then held that appointment of a monitor was not appealable on an interlocutory basis. In subsequent proceedings, the parties agreed to give prison officials more latitude to use handcuffs in return for providing free weights in the yard, and to permit inmates the use of 4K memory typewriters in return for their dismissing a state court lawsuit. The present appeal stems from the district court's adoption of several modifications proposed by the monitor, some favorable to each side, and its rejection of their request to vacate the order because their actions were constitutional.

At 1388: "Consent decrees have the attributes of both contracts and judicial acts.... A district court has the power to modify a consent decree if experience with the administration of the decree shows the need for modification in order to accomplish the primary goals of the decree."

An order provided that "jurisdiction" would continue for six months, and "[i]f it appears at or before the expiration of said six months that there has been substantial compliance" with the decree, jurisdiction would not be extended. During the six months, there was further noncompliance and an order continuing the matter for purposes of negotiating modifications. "Implicit in this

order was the ruling that there had not been substantial compliance, that the jurisdiction to assure compliance was extended, and that the decree would be modified." (1389) Besides, after eight subsequent years of litigation it is too late for the defendants to complain about it. No distinction is made in this discussion between "jurisdiction" and "active supervision."

It is also eight years too late for defendants to dispute that the consent decree applied not only to inmates in the original death row but to inmates in the new housing space to which death row was extended, since they had had at least one clear opportunity to appeal. The court's interpretation of the order is law of the case.

The court refused to interpret *Firefighters v. Stotts* as barring the modification, since this modification did not conflict with any statutory or constitutional requirement.

The court summarily rejected defendants' argument that the decree violated the Eleventh Amendment because it no longer vindicated substantive federal rights.

DISTRICT COURTS

Medical Care/Handicapped/ Injunctive Relief—Preliminary

Yarbaugh v. Roach, 736 F.Supp. 318 (D.D.C. 1990). The plaintiff has multiple sclerosis. As of the hearing, about 20 months after the case was filed, the defendants had not examined him to establish an appropriate plan for medical services for him; he had not received physical therapy regularly; he had not had a bath or shower for six months despite his requests; he routinely received no assistance in changing position in bed or moving between bed and wheelchair; his manual bed did not raise or lower; the call button in his room did not work.

In the midst of setting out the deliberate indifference standard, the court observed, "In the District of Columbia, physicians owe the same standard of care to prisoners as physicians owe to private patients generally." (319) The court granted plaintiff a preliminary injunction, stating that "it is clear to the Court that plaintiff is not receiving adequate medical services." (320)

AIDS

Deutsch v. Federal Bureau of Prisons, 737 F.Supp. 261 (S.D.N.Y. 1990) (Ward, J.). The plaintiff complained of being assigned to a prison cell with an HIV-positive inmate and not being warned of his condition. Absent evidence that defendants had knowledge that the cellmate might do something to expose the plaintiff to a risk of infection, they were entitled to summary judgment on his Eighth Amendment claim.

Crowding

Tyler v. United States, 737 F.Supp. 531 (E.D.Mo. 1980). The court increased the population cap on a local jail from 450 inmates to 481 inmates, subject to the following requirements:

Staff must be increased by 10%. There must be no deterioration in food services, clothing allowances, or availability of medical and dental treatment. The defendants must submit a plan for house arrest of detainees, including "electronic shackling," within 30 days, and for transferring women inmates elsewhere. All sentenced inmates must be transferred to state prison within 10 days after the imposition of sentence, and military prisoners, persons awaiting extradition, and persons charged with parole and probation violation must be moved out within 10 days of incarceration. Defendants must expand their educational programs. Defendants must submit a plan for establishment of a drug treatment center in the jail for detainees.

The court noted the futility of increasing jail populations and of preventive detention. It concluded by reminding the defendants that its orders must be complied with. "Otherwise, the jails must be closed."

Medical Care—Standards of Liability/ Personal Involvement and Supervisory Liability

Kaminsky v. Rosenblum, 737 F.Supp. 1309 (S.D.N.Y. 1990). A prisoner died after 16 months of allegedly inadequate medical care. He had multiple illnesses, including AIDS and PCP, which were diagnosed at autopsy.

The court notes the Second Circuit's reluctance to uphold summary judgment in such cases and states that it "has provided instruction to the district courts that determining the difference between malpractice and deliberate indifference is a factual issue which cannot properly be decided at the summary judgment stage." Contested issues of fact in this case include whether defendants failed to act on an outside doctor's recommendation of immediate hospitalization, the reasons for an "unexplained gap" in medical care during a two-month period when he was seriously deteriorating, and whether the defendant doctor's statements and letters "indicate a tendency toward deliberate indifference." (1317)

Evidence that the Superintendent and Medical Director "were made aware of Kaminsky's condition and his unhappiness with the care he was receiving at Green Haven" raised a factual issue barring summary judgment as to their personal involvement.

Contempt/Crowding/Modification of Judgments/Pre-Trial Detainees

Palmigiano v. DiPrete, 737 F.Supp. 1257 (D.R.I. 1990). Continued crowding resulting in

the loss of most program space, serious violence, deficiencies in food services, maintenance, fire safety, and medical services constitutes "an emergency situation screaming for instant action."

The defendants have already been found in contempt. Now they are found in "continuing contempt." They are ordered to:

(a) *Bail Projects*: maintain a bail fund of \$200,000 to bail out all indigent detainees with bail of \$10,000 or less. The court notes that numerous prisoners had been bailed out with the last batch of contempt fines. (1266)

(b) *Good Time, Release of Prisoners* give all sentenced prisoners 90 days of expedited good time off their maximum expiration dates, and, contrary to state law, off their parole eligibility dates;

(c) *Good Time, Release of Prisoners* give additional 90-day good time awards every 30 days until all sentenced prisoners are out of the prisons in question;

(d) *Crowding* limit the populations of the prisons to specified numbers;

(e) *Monitoring and Reporting, Contempt* supply monthly reports on their daily population, which may subject them to further orders fining them \$50 a day per excess prisoner;

(f) *Medical Care—Examinations*: perform intake medical screening within seven days of incarceration, and read TB tests between 48 and 72 hours after their administration;

(g) *Fire Safety* assign staff to fire safety duties, properly maintain all fire detection and suppression equipment, and have them inspected both by institutional staff and State Fire Marshal personnel;

(h) *Crowding* separate beds in dayrooms and dormitories by unobstructed 36-inch corridors;

(i) *Ventilation*: balance and repair the ventilation system.

Contempt/Crowding

Tasker v. Moore, 738 F.Supp. 1005 (S.D.W.Va. 1990). The Warden and Commissioner did not comply with a state court order to release the plaintiffs and others to relieve overcrowding. The Governor then ordered them not to appear at a contempt hearing scheduled by the state judge. Several months later the plaintiffs were released. The federal court directed a verdict for plaintiffs on liability and the jury awarded them \$19,000 and \$13,500 in compensatory damages, respectively, and \$100,000 each in punitive damages against the Governor.

At 1010: "It is beyond peradventure that officials who willfully, intentionally or recklessly keep an inmate in prison past the date he was ordered released are liable under section 1983 for infringing upon the inmate's personal liberty protected by the substantive

due process clause of the Fourteenth Amendment." The defendants' conduct therefore violated clearly established rights and they were not entitled to qualified immunity.

Pre-Trial Detainees/Class Actions—Certification of Classes

McKenzie v. Crotty, 738 F.Supp. 1287 (D.S.D. 1990). An inmate released from the jail can adequately represent a class of jail inmates seeking injunctive relief. Since the plaintiff was released the day after the complaint was filed, the court could not have ruled on the certification issue before his release, and under *Gerstein* the certification relates back to the filing of the complaint even though no certification motion was made immediately. The fact that plaintiff sued for his own compensatory damages gave him sufficient personal stake in proving the conditions to permit him adequately to represent a class.

Use of Force/Training

McKenzie v. City of Milpitas, 738 F.Supp. 1293 (N.D.Calif. 1990). A jury question was presented on plaintiffs' failure to train claim concerning police use of tasers where the policy included: "supplying tasers to officers with limited experience; allowing officers to carry tasers when making investigatory stops; not requiring officers to holster their tasers; allowing officers to resort to the use of tasers immediately after verbal warnings; and, inadequately training officers in the constitutional ramifications and health hazards of using tasers." (1301) Plaintiffs must prove a causal connection between the failure to have more or different training and the constitutional violation.

Food/Medical Care—Standards of Liability

Hodge v. Ruperto, 739 F.Supp. 873 (S.D.N.Y. 1990). Allegations that the plaintiff was deprived of food and water for two-and-a-half days, that he had to sleep on a steel frame without a mattress, that the "sanitation facilities" were so filthy he could not use them, and that he was denied medical care stated constitutional claims.

The arresting officers could be held liable for removing the plaintiff from a hospital before his x-rays could be examined and his injuries treated. A detainee's medical care rights are "at least as great" as those afforded a convicted prisoner.

Protective Custody

Madden v. Kemna, 739 F.Supp. 1358 (W.D.Mo. 1990). The plaintiffs were transferred from Colorado to Missouri pursuant to contract and put in protective custody as they requested, but were not granted the "substantial equality" of privileges relative to general population

inmates that Missouri regulations required for protective custody inmates. (They were put in a disciplinary segregation unit and treated more or less accordingly.) "Neither a security problem nor shortage of resources (except as self-inflicted)" was cited in justification.

The regulation requiring "substantial equality" of privileges is "sufficiently mandatory and sufficiently definite" to create a liberty interest, and the plaintiffs were denied it without due process. They are entitled to a preliminary injunction.

Medical Care—Standards of Liability

Lavoie v. Town of Hudson, 740 F.Supp. 88 (D.N.H. 1990). Whether police officers violated the rights of the decedent, whom they had shot, to obtain medical care depends on whether they "used reasonable professional judgment" when they called an ambulance and dealt with medical personnel. ("Cf. *Youngberg v. Romeo*") An allegation that an officer was told not to describe the decedent's injury in calling the ambulance, that only certain paramedics were allowed to attend the injured man, and that his wife was not permitted to accompany him or told where he was being taken, stated a deliberate indifference claim.

Attorneys' Fees and Costs/Monitoring and Reporting

Hadix v. Johnson, 740 F.Supp. 433 (E.D.Mich. 1990). Plaintiffs' counsel in a prison case are entitled to fees for monitoring activities based on having prevailed in the underlying litigation. The fact that some of their work was done in a related case to which some issues had been transferred did not mean fees could not be recovered in this litigation.

Communication with Media/Federal Officials and Prisons

Martin v. Rison, 741 F.Supp. 1406 (N.D.Calif. 1990). The plaintiff wrote articles about prison life for the San Francisco *Chronicle* for two years and got paid for them. They were run under his by-line. This violated Federal Bureau of Prisons regulations, but no one did anything until he wrote an article called "The Gulag Mentality." He was then put in administrative segregation and transferred. He continued to write and be published under a preliminary injunction.

The court upholds Bureau of Prisons regulations providing that an inmate may not "direct a business" and may not "receive compensation or anything of value for correspondence with the news media. The inmate may not act as a reporter or publish under a byline."

The *Turner/Abbott* standard, rather than the *Procunier* standard, is applicable even though the case is about material sent out of the prison, because it comes back into the

prison in the form of newspaper articles. The alternative of censoring incoming publications is not required because prison officials would have to read the publications, and it would "create an even greater danger to society—the censorship of the content of daily newspapers." (1417)

Privacy

Best v. District of Columbia, 743 F.Supp. 44 (D.D.C. 1990). The plaintiffs were rousted out of bed in Lorton, placed in handcuffs, leg irons and belly chains, and flown to Spokane. On the way they were periodically videotaped by an officer.

Prisoners retain a right to privacy; "they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters..." (48, quoting *Houchins v. KQED*). Some institutional justification must be asserted to overcome the right. The absence of public disclosure did not defeat the claim where the tape had been shown to prison personnel and there was a possibility of future disclosure.

Protective Custody

Griffin v. Coughlin, 743 F.Supp. 1006 (N.D.N.Y. 1990). The conditions of protective custody confinement at Clinton, more restrictive than at other New York State prisons, did not deny equal protection because the plaintiffs did not show the irrationality of the restrictions. Defendants justified restrictions on recreation, programming, access to inmate law clerks, etc., by citing reasons of cost, staffing problems, and security threats.

Defendants' legal access scheme, a two-book-a-day cell delivery system supplemented by written communication with law clerks, was inadequate because of the lack of face-to-face communication with law clerks, the fact that two-thirds of the clerks were not trained, and the relative unavailability of the supervising officer. The cell delivery system was not adequate because inmates did not have access to a "basic library," and in addition there were delays in delivery of books, sometimes the wrong books were delivered, they couldn't get Shepard's, and the clerks didn't always do their Shepardizing correctly.

The denial of confidential discussion, in a room apart from their cells, with priests, chaplains, or other religious advisers, violated the Free Exercise Clause. Defendants put forth no justification for the denial and there was a room available for such meetings.

Food/Length of Stay

Adams v. Kincheloe, 743 F.Supp. 1385 (E.D. Wash. 1990). The five-day disciplinary restriction to a nutritionally adequate but unappetizing "nutra-loaf" for throwing something at another inmate did not violate the Eighth

Amendment. The court stressed the short time period and the fact that the plaintiff had no demonstrable adverse physical reaction.

FEDERAL RULES

Protective Custody/ Class Actions/Damages

Williams v. Lane, 129 F.R.D. 636 (N.D.Ill. 1990). The court determined after trial that the plaintiff class of protective custody inmates had established the predicate for compensatory and punitive damages in an amount to be determined later.

Class certification under Rule 23(b)(2) can support an award of damages as long as injunctive relief was also appropriate. Class

members were entitled to recover damages through the post-judgment date on which the Special Master found that defendants had substantially complied with the remedial order. Class members may recover damages incurred after the court's decision if the constitutional violations continued. Damages may extend backward five years beyond the filing of the complaint where the statute of limitations was five years.

Monitoring and Reporting/Discovery

Handschu v. Special Services Division, 131 F.R.D. 50 (S.D.N.Y. 1990). At 52: "[C]onsent orders do not deprive litigants of their right to claim disobedience with [sic] their terms, or in appropriate circumstances to obtain discovery into

compliance." The court distinguishes its previous denial of discovery on the ground that this request addresses a "more narrow, discrete incident, involving an acknowledged violation." ■

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"Some courts have held that modifications may be obtained in institutional litigation under a more flexible standard as long as they are not "in derogation of the primary objective of the decree." *New York State Assn. for Retarded Children v. Carey*, 706 F.2d 956, 969 (2d Cir.), cert. denied, 464 U.S. 915 (1983). That rule obviously has no application when the defendants are trying to get the decree vacated altogether.

Judge Orders Changes at Virginia Penitentiary

Cites Fire, Environmental Hazards Weeks Before Prison Closes

BY JAN ELVIN

Concerned about fire safety and environmental health at the Virginia State Penitentiary, United States District Judge Robert R. Merhige Jr. recently ordered major changes at the 190-year-old prison, just weeks before it officially closed.

While the judge declined to order that the institution close immediately, he did order prison officials to repair exposed electrical wiring, to properly maintain fire exits, and to station officers in housing areas and the infirmary on a round-the-clock fire watch. An October tour by a fire safety inspector uncovered numerous hazards which posed serious risk of injury or death to prisoners and staff.

While saying that he was pleased with some of the changes the state had made, the judge put state officials on notice that he and/or the ACLU could inspect the prison on 12 hours' notice to ensure compliance.

The court order resulted from a lawsuit filed in September of 1990, *Congdon v. Murray*, by attorneys from the National Prison Project of the American Civil Liberties Union and the Virginia ACLU on behalf of all prisoners confined at the Penitentiary. "Health, safety, and lives are in imminent danger," alleged the lawsuit, and prison officials' "failure to provide basic fire safety and environmental health and safety

measures subjects prisoners to life-threatening conditions resulting in cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments" to the U.S. Constitution.

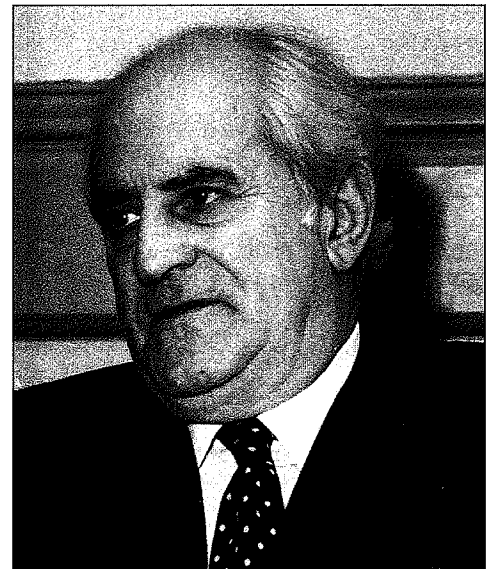
While attorneys for the Commonwealth told Judge Merhige they would not represent to him that the Penitentiary was a model institution, they denied that it was unconstitutional.

In the November 21, 1990 ruling, the state was also ordered to:

- clean showers and cells daily;
- have a certified pest control technician regularly set and maintain rodent traps in the rear of the food service area;
- repair or cover broken and missing windows;
- not permit any prisoner to stay more than four hours in a cell with a broken toilet or sink.

The penitentiary officially closed on December 14. Most prisoners at the Richmond institution, the oldest penitentiary in the country, had been on lockdown status since August 1988. They were confined to their cells 22-1/2 hours a day, six days a week, and locked in a full 24 hours a day on the seventh day. They had been double-bunked since March of that year in cells so small that the man in the top bunk was unable to sit up.

Each cell had to be unlocked individually, dangerously slowing evacuation in case of fire. Also, the building offered only one means of egress.



Richmond Newspapers, Inc.

In *Congdon v. Murray*, U.S. Judge Robert R. Merhige Jr. ordered a 24-hour fire watch at the Virginia Penitentiary as part of a series of fire safety measures.

Original Petition Written By Prisoners

In May of 1990 Cornelius James, a prisoner at the Penitentiary, sent the National Prison Project a copy of a petition he had drawn up, signed by 104 inmates, asking Commonwealth officials to "cease unconstitutional prison practices in B-Building." He asked the Prison Project to intervene on their behalf. After receipt of James' petition, NPP staff visited the facility in July of 1990. They found conditions to be intolerable. Shortly thereafter, Alvin J. Bronstein, executive director of the Prison Project, wrote Department of Corrections director Edward Murray, calling the Penitentiary "the most shameful prison in America," and likening it to a 19th century dungeon.



Richmond Newspapers, Inc.

Were it not for a recent lawsuit challenging squalid and unsafe conditions, the 190-year old Virginia Penitentiary might still be in use today. Instead, the facility closed in December 1990.

Neither Mr. Murray nor anyone else in the Department responded to the letter. Bronstein called on prison officials to end the two-year lockdown and improve environmental and sanitary conditions, or close the prison down.

The lawsuit was the latest in a long series of attempts by private citizens and concerned organizations to bring pressure to bear on the Department of Corrections to close the Penitentiary or, at the very least, to improve conditions. An active forum of local religious leaders toured the antiquated prison in 1989, characterizing living conditions there as "inhumane and immoral." In a letter to the official state Commission on Jail and Prison Overcrowding, the religious group stated its fear for the "immediate health and safety of the inmates, prison guards, and administrators at the Virginia State Penitentiary. We are even more concerned for the future health and safety of the Commonwealth; such inhumane conditions hardly prepare offenders to become productive members of society when they are released."

Attempts by Prison Project lawyers to reach out-of-court agreement over the

summer of 1990 with the Attorney General's office were unsuccessful, and on September 21, the Prison Project, along with the Virginia affiliate of the ACLU, filed suit in federal court on behalf of all prisoners at the Penitentiary, listing as representatives of that class of prisoners Alfred Congdon, Kareem Olajuwon, and Lloyd Wasloski. Mr. James, author of the original petition, had since been transferred to Powhatan Correctional Center and therefore could not be listed as a named plaintiff.

Shortly after filing the lawsuit, Prison Project attorneys filed a motion for a temporary restraining order, asking Judge Merhige to enjoin defendants from continuing to confine prisoners at the Penitentiary "unless certain basic environmental health and fire safety measures [were] immediately taken."

The judge ordered an immediate hearing. On October 12, 1990, NPP attorney David Fathi told the court that the Penitentiary was "a fire tragedy waiting to happen." In the event of a fire, he warned, "people are going to die." He again noted the problem with the individual locking system.

Penitentiary is Finally Closed in Mid-December

The site has been purchased for \$5 million by the Ethyl Corporation, which has announced no plans for the land, although it has said that it will raze the prison.

"The state has been promising for years now that the Penitentiary is 'just about to close,'" said Fathi. "It is almost certain that, without the pressure of the lawsuit, the Penitentiary would still be open today, housing prisoners in dangerous and squalid conditions."

All of the former inhabitants of the prison have been moved either to other existing prisons or to the newly built Greenville Correctional Center, 55 miles south of Richmond, which will ultimately provide cells for 1,700 men. Two hundred of those will be isolation cells. Double-celling is planned for 35% of the remaining cells, which could bring the capacity to 2,225. The other new prison awaiting occupancy is the Keen Mountain Correctional Center in Buchanan County. ■

Jan Elvin is editor of the NPP JOURNAL.

Third Party Supervision Bolsters Probation Programs

BY MICHAEL COURLANDER AND DAVID E. TRACEY

Ever since John Augustus¹ stepped forth as a probation volunteer over 100 years ago, volunteers have offered their guidance and supervision to offenders on probation. The degree of involvement that volunteers have been permitted has changed over the years, but the kinds of tasks that the volunteers can perform have remained fairly constant. The roles of volunteers (or third party supervisors) can be divided into three categories: compliance monitor, advocate, and mediator.²

Compliance Monitor. This role most closely resembles that of a probation officer. As a compliance monitor, the third party supervisor performs many of the tasks that a probation officer ideally would, if he or she had a reasonable caseload. In this role, the third party supervisor monitors the offender to ensure compliance with any alternative sentencing plan requirements that have been established as conditions of probation. Depending on the requirements of the specific case, the supervisor may track the offender's attendance and level of performance at the workplace or at a program (e.g., substance abuse testing, counseling, community service). He or she may also report on the probationer's progress (for example, the number of hours of community service completed to date) to either the probation officer or to the sentencing judge. The supervisor may, in addition, periodically visit a program to observe the offender's participation first-hand. The compliance monitor is usually committed to report any infraction of the alternative sentencing plan to the judge or probation officer.

Advocate. As an advocate, the third party supervisor has the opportunity to counteract some of the messages of disapproval and rejection that often accompany an encounter with the criminal justice system. The supervisor can provide support and encouragement (in the spirit of John Augustus) for the probationer's efforts toward self-improvement, and may help with day-to-day matters and with logistical situations that arise out of the probationary plan. The offender may need assistance with transportation, scheduling, selecting

proper attire, and developing interview skills, and it may be that the third party supervisor is the only person able to help. The supervisor, in this role, is also available to assist in times of crisis; if he or she has been attentive and available to the probationer, the supervisor could be the person the probationer turns to in a crisis.

In the role of advocate, the supervisor is overtly looking out for the best interests of the offender.³

Mediator. The third party supervisor may also negotiate for or speak on behalf of the offender in case of difficulties with the probation department, a community service organization, or a social service agency, or, in cases involving financial restitution, a victim. A third party supervisor may be able to clarify and rectify problems that involve another party.

How Should a Third Party Supervisor Be Chosen?

There are four major sources for third party supervisors: 1) responsible citizens in the community who know the offender or the offender's family; 2) responsible citizens who are not acquainted with the offender or the family; 3) correctional service agencies that provide probationary supervision free of charge; and 4) agencies that provide the service for a fee.

The advantage in selecting someone known to the defendant or the family is that this person already has an established bond to the defendant and is likely to be committed to the defendant's success. This type of supervisor usually performs well in the advocate and mediator roles, but may find it difficult to report a violation when acting as the compliance monitor. In selecting a third party supervisor from the defendant's sphere of acquaintances, an attorney or sentencing professional should attempt to gauge the potential supervisor's overall sense of responsibility and commitment to the offender. It is practical and strategically wise to select a third party supervisor who is a respected member of the community. Law enforcement officers, clergymen, PTA presidents, teachers, coaches, judges,

and civic leaders are usually good candidates. The position titles of these community members project images of respectability because in most cases these positions are filled by individuals who possess strong personal attributes. Of course, not every defendant will have friends or acquaintances that fall into these stereotyped categories. Nevertheless, most individuals know someone of upright character who can be presented as such. Of course, co-defendants or convicted felons should not be considered as third party supervisor candidates.

In selecting a third party supervisor from the realm of the defendant's acquaintances, attorneys should also consider: 1) the candidate's familiarity with the criminal justice system; 2) the candidate's common sense and knowledge of psychology, counseling, or criminology; 3) how well the potential supervisor and defendant match up in terms of personality and background; and 4) the time the potential supervisor has to devote to the supervisory task.

Qualities that make up a good "acquaintance supervisor" are the same ones to look for in a supervisor who does not know the defendant. A supervisor of this type is likely to experience less discomfort in the compliance monitor role than would the acquaintance supervisor. However, this same individual, as a stranger to the offender, may be less effective in the advocate and mediator roles. Should the supervisor and offender fail to get along, it is likely that the only role the supervisor can effectively take on will be that of compliance monitor. The major drawback to this type of supervisor, however, is that there are rarely organized ways of locating such persons willing to perform this kind of service. Churches and organizations such as the Salvation Army sometimes yield candidates, but the attorney or sentencing professional should realize that the search for this supervisor type will require some time and effort.

Some community agencies provide third party supervision free of charge. A potential benefit of this option is that a judge may feel that strangers can be more objective than friends. A possible disadvantage to going this route is that it may produce a supervisor who will favor the "monitoring" role, relegating the advocate and mediator roles to the background.

Finally, in some jurisdictions there are for-profit agencies that provide third party supervisors. These programs, too, project an aura of objectivity that may

appeal to the court. However, because this agency is usually paid by the defendant, the agency may fear losing a client if it reports a violation. A supervisor from this type of agency may have a financial stake in retaining the client and thus be less likely to rigorously perform the compliance monitor role. In addition, this option is probably least likely to produce a supervisor who is committed to the defendant and who will actively participate in the mediator and advocate roles. Some courts, however, may prefer it to the acquaintance supervisor. This option also becomes more appealing if viable candidates in the community cannot be found and if a "no-fee" supervisory program is not available.⁴

Donald's case

Examining the fictional case of Donald (a defendant denied probation because the judge feared there would be inadequate supervision of the probation plan) presented in David Tracey's sidebar piece, we can speculate that the inclusion of a

third party supervisor along with the alternative sentencing plan may have provided the judge with the confidence to grant Donald probation. Donald would be spared the lasting, negative impact of incarceration and would be provided a plan with rehabilitative, compensatory, and punitive components. Once on probation, Donald would have to perform community service, participate in family counseling, work a full-time job, and attend Alcoholics Anonymous meetings.

The third party supervisor would then be in a position to monitor his participation in the plan, provide him with emotional and logistical support, and serve as a mediator if needed. As an advocate, the third party supervisor would work with Donald to secure employment—probably the first order of business. The supervisor would also be available to mediate difficult situations for Donald, should they arise. With a third party supervisor as a part of the probationary plan, considerable burden is lifted from the probation officer, Donald's

likelihood at succeeding on probation is increased, and his chances for rehabilitation are substantially improved.

Use of third party supervisors is not without pitfalls, but if both the individual selecting the supervisor and the supervisor are aware of potential problems, they can deal more effectively with them if they appear, and the advantages of the third party supervisor are more likely to be realized.

The benefits, however, that come from using a third party supervisor greatly outweigh the potential difficulties. ■

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The authors would like to thank Jerry Miller and Herb Hoelter of The National Center on Institutions and Alternatives for their tutelage in alternative sentencing.

¹Probation's acknowledged founder, John Augustus was a Boston cobbler who, beginning in 1841, assisted over 2,000 offenders in an intensive supervisory capacity.

²A third party supervisor is defined here as an individual outside of the probation department who provides additional guidance and supervision to a probationer.

³Miller characterizes advocacy as "one-sided, driven with a point of view, aimed toward action and, if successful, wide ranging in outcome." See Miller, J., (undated) "Advocacy for Youth in Trouble," National Center on Institutions and Alternatives, p. 1.

⁴Volunteers in general, and specifically volunteers who have worked with probation departments, have historically come under fire, often unjustly, for their casual commitment to the tasks at hand and for a lack of professionalism. The third party supervisor drawn from the field of acquaintances or from an agency is not likely to suffer from the tandem of these two criticisms. The acquaintance supervisor will have a vested interest in the probationer, and thus will be highly committed. The supervisor from an agency will be subject to organizational control and supervision. The supervisor who is not acquainted with the offender and who is not associated with an organization, however, is potentially vulnerable to both criticisms.

Donald's Story

In a heated encounter, an inebriated Donald (a fictitious character) slugged a patron in a local tavern, and found himself charged with assault and battery. Only a month earlier, Donald had been charged with committing domestic violence in an incident involving his oldest son. A check of prior convictions revealed that he had also been convicted of two charges of Driving While Under the Influence in the preceding three years. After conducting a thorough background investigation, Donald's attorney realized that Donald was an alcohol abuser who drank heavily as a reaction to stress. Donald had been laid off from his job recently; his resulting depression and periodic outbursts of anger severely strained his home life. All Donald's difficulties with the law had been precipitated by alcohol abuse. At the sentencing hearing, Donald's attorney detailed his client's problems and presented a comprehensive alternative sentencing plan composed of four elements: community service, family therapy, employment, and participation in Alcoholics Anonymous. The judge, however, was acutely aware of the limitations of the probation department: could it implement and effectively monitor this individualized program? Despite the plan's practicality, its apparent suitability for the offender and Donald's voiced commitment to comply, it carried inherent risk—risk that the system was not capable of monitoring and securing Donald's success in this community correctional plan. Without this vital link—an

accountable monitor—the judge would not order probation. He reluctantly sentenced Donald to 60 days in the local jail.

This troubling profile is an increasingly familiar one for judges, probation officers, treatment professionals and offenders themselves. In this particular case, the judge's dilemma resulted from the probation department's limited resources. The changing nature and expansion of probation officers' responsibilities and the prevailing political climate in criminal justice further complicate the decisions today's judges must make. In Donald's case, the plan lacked an individual or agency to shepherd him through the proposed alternative sentencing plan. The judge sensed the risk that an offender who is not closely supervised in an individualized probation plan often fails. Too often, however, this abandoning of a sound punitive alternative only guarantees a greater failure for that offender and an additional financial burden to the public.

The criminal justice system needs to develop and use creative options that address public safety, punishment, restitution, deterrence, and rehabilitation. For probation departments, in particular, the task is even greater. Saddled with staggering caseloads and excessive bureaucratic demands, the role of probation has become so stretched that its original purpose is often forgotten.

—David E. Tracey

BY JUDY GREENSPAN

Criminalization of An Epidemic

Outraged cries of "Shame, Shame," and "You've just given this man a death sentence," echoed throughout the crowded Camden County, New Jersey courtroom after Superior Court Judge John B. Mariano sentenced Gregory Smith to 25 years in prison for allegedly biting a prison guard. Mr. Smith, a young, Black, gay prisoner with the Human Immunodeficiency Virus (HIV) had recently been convicted by a jury for attempted murder despite the court's acknowledgment that HIV is not transmitted through biting or the exchange of saliva. Judge Mariano stated in court that he wanted to send the message that "criminal conduct of this nature will be met with swift and severe punishment."

Criminal cases involving the Acquired Immune Deficiency Syndrome (AIDS) have indeed been sending a message to the public for several years—the wrong one. Criminal charges of attempted murder or assault with a deadly and dangerous weapon for alleged acts of spitting, biting or spilling blood directly contradict the medical facts of HIV transmission. The effect of these charges has been to cause unfounded and widespread fear in the general population and to fan the flames of discrimination and abuse against people with AIDS and HIV.

Fear of AIDS and the stigma of HIV infection has led to a dangerous "criminalization" of the disease. The disease has been treated in the courts as a criminal matter, rather than as a serious medical crisis. A rash of criminal transmission cases brought against people with HIV and AIDS has sprung up around the country. While many felony charges have arisen out of alleged attempts at sexual transmission, this article will only focus on biting and spitting incidents.

Over the past three years, approximately 10 cases have been brought to court in which people with AIDS have been indicted for attempted murder or assault with attempt to commit murder

for biting and spitting on police or corrections officers. In almost every case, the defendant with HIV has been convicted and sentenced to a long prison term.

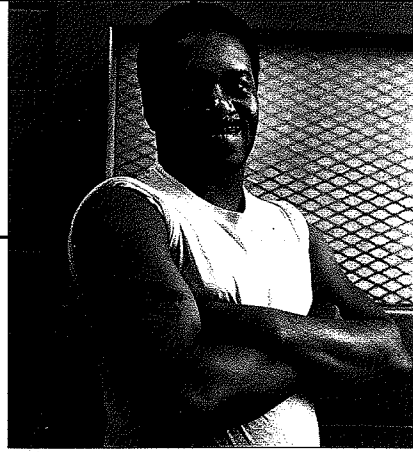
Curtis Weeks, a Texas prisoner serving a two-year term, was sentenced to life in prison for allegedly spitting on a prison guard. While Mr. Weeks' case is being appealed, there are two other prisoners who have been charged with "attempted capital murder" for similar incidents.

Gregory Scroggins, a Georgia resident with HIV, was convicted of aggravated assault with intent to commit murder for allegedly biting a policeman during an arrest after police had been called to his residence to break up a domestic dispute. The jury deliberated for three hours; Mr. Scroggins was sentenced to 10 years in prison.

Donald Haines, despondent over his illness, was in the midst of a suicide attempt when police and paramedics burst into his home. A struggle ensued between the distraught Mr. Haines, who was bleeding, and the emergency personnel. Mr. Haines, accused of "intentionally" spraying the paramedics with his blood and biting a policeman, was convicted of attempted murder. Mr. Haines was sentenced to 30 years in an Indiana prison.

These cases stand in contradiction to the latest scientific studies and transmission information issued by the federal Centers for Disease Control. In February 1990, CDC delivered the results of the largest study to date concerning the possibility of "casual transmission" through biting and the exchange of saliva. CDC researchers tested 89 household members living with 25 children with HIV. Although many of the children with HIV had bitten non-infected siblings and other members of the households, there was no transmission of the virus. The CDC has removed saliva from its list of body fluids that requires the use of universal precautions, i.e., the wearing of surgical gloves and masks.

According to the 1989 study of the National Institute of Justice on AIDS and correctional facilities, no police or correctional officers have contracted HIV infection through on-the-job exposure. The NIJ report concluded that due to increased AIDS education and recent



Ellen B. Neipris

Gregory Smith, an HIV-infected prisoner, was sentenced to 25 years in prison for allegedly biting a guard; yet, scientific studies indicate that AIDS and HIV are not transmitted through biting and saliva exchange.

reports from the CDC, fears of contracting HIV or AIDS by correctional personnel have actually abated.

Nonetheless, people with HIV and AIDS continue to face serious charges of attempted murder or assault with a deadly and dangerous weapon for acts that would commonly be treated as routine misdemeanors or disciplinary infractions were AIDS not a factor. The seriousness of these charges is compounded by the inadequate legal representation afforded some HIV-positive defendants, many of whom have been represented by attorneys who suffer from their own variety of fear of AIDS and who lack critical knowledge about HIV transmission and the disease itself. Cases have been reported in which court-appointed lawyers and public defenders have refused to represent HIV-positive defendants. Some HIV-positive defendants do not have the financial resources to hire medical experts who could refute inaccurate testimony about HIV transmission.

In New Jersey, Mr. Smith maintains his innocence. He says that not only did he not bite the correctional officer but he was severely beaten and brutalized by the officer.

In his statement to the court Smith said, "This is a matter of civil rights. It's not about criminal conduct." The growing coalition of AIDS activists, lawyers, health educators and community leaders that have rallied to his case concur and have begun to focus needed national attention on the discriminatory treatment faced by defendants with HIV and AIDS. It is this combination of legal advocacy and political activism that is needed to make a difference in all of these cases. ■

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

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, AIDS, family support, and ex-offender aid. 9th Edition, published September 1990. Paperback, \$30 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, \$3 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. (Note: This is not a "jailhouse lawyers" manual.) \$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.

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

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

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Fill out and send with check payable to:

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

Name _____

Address _____

City, State, Zip _____

The following are major developments in the Prison Project's litigation program since October 15, 1990. Further details of any of the listed cases may be obtained by writing the Project.

Austin v. Lehman—On November 27 the Prison Project, along with the ACLU of Pennsylvania, the Pennsylvania Institutional Law Project and the Philadelphia law firm of Kairys & Rudovsky, filed this case which challenges overcrowding and conditions in 13 Pennsylvania prisons. The case was filed following investigations into the October 1989 Camp Hill prison riots and a series of other disturbances in the state prison system.

Bates v. Lynn—This case seeks to ensure adequate legal access for death row prisoners in Louisiana. Parties have reached a partial settlement which provides death row prisoners with contact legal visits and increased indigent mail privileges.

Brown v. McKernan—On November 30 we reached a partial settlement in this new case, filed in October, challenging overcrowding and conditions for protective custody and administrative segregation prisoners at the Maine State Prison.

Congdon v. Murray—In this case challenging conditions at the 190-year-old Virginia Penitentiary (but really designed to close it), the court on November 21 ordered an around-the-clock fire safety watch, regular cleaning and pest control, and repairs. State officials, who had promised to close the Penitentiary for years, finally did so in mid-December.

Hamilton v. Morial—This case challenges conditions at the Orleans Parish Prison, the municipal jail for the city of New Orleans. Shortly after the start of a November trial on medical care issues, parties opened settlement talks. On November 30 they reached a settlement providing for an organized system of medical care delivery and covering all components relating to that system.

Palmigiano v. DiPrete—This case challenges conditions in the Rhode Island prison system. A hearing was held on January 11, 1991 requiring defendants to show cause why they should not be held in contempt for failing to open two new facilities on November 15 as they had promised the court. The new medium facility has been only partially operable since opening November 20 and the opening of the new Intake Service Center addition was pushed back to late January.

Thomas v. Kidd—This case challenges conditions and overcrowding in the

Mecklenburg County Jail (N.C.). A settlement was reached in November which includes a substantial reduction in the population, a population cap, a doubling of staffing and recreation space, and improvements in medical care, fire safety and environmental conditions.

U.S. v. Michigan/Knop v. Johnson—This is a statewide Michigan prison conditions case. Following an October compliance hearing, the court ordered improvements in the evaluation and treatment of mentally ill prisoners and ordered state officials to grant prisoners' attorneys access to prisoners, their records and reports. The court also ruled that in the future, state corrections officials would be held responsible for noncompliance, regardless of advice given them by state attorneys. (There is a history here of lawyer misbehavior.)

Wilson v. Seiter—We argued this case before the Supreme Court on January 7 maintaining that the Sixth Circuit had applied a standard in conflict with human decency, and with the standard applied by other circuits for Eighth Amendment violations. Also, for the first time in 20 years, the U.S. Solicitor General's office took a pro-prisoners' rights stance, filing an *amicus* brief and arguing in support of our position.

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