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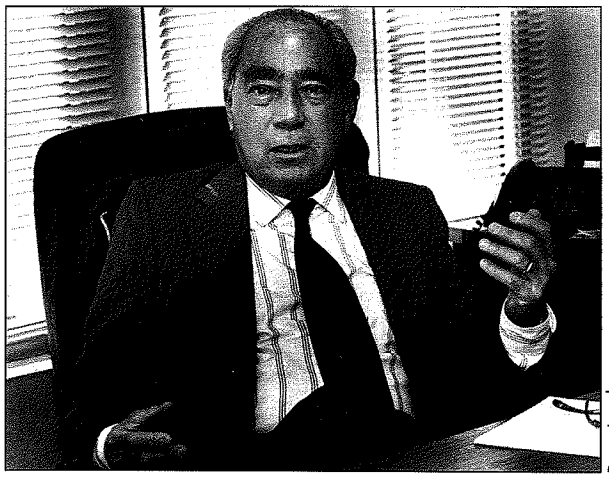
"The thing that drives me—you always have to be on the watch for excessive state power."

—Alvin J. Bronstein

BY DAVID C. FATHI

Alvin J. Bronstein's contribution to prisoners' rights is profound and unparalleled. Under his energetic leadership, the National Prison Project has forced changes in the way the nation's prisons operate and the conditions under which prisoners live. Over the course of the last 19 years, the Prison Project has garnered the respect of most who work in the criminal justice field, including many who find themselves on the opposite side of the philosophical fence.



Patsy Lynch

In 1989, Bronstein was awarded a MacArthur Fellowship in recognition of his work, and in 1991, for the third time in a row, the National Law Journal *named him one of the country's 100 most influential lawyers.*

A native of Brooklyn, New York, Bronstein first became interested in prisons in the 1960s while working as a civil rights lawyer in the South. He was shocked when he visited prisoners in jails and saw the conditions in which they were housed.

Interviewed here by David Fathi, NPP's newest staff lawyer, Bronstein looks back on his experiences as a vigorous defender of civil rights in the South and shares his insights on the current state of America's prisons.

Fathi: How did you become a lawyer?

Bronstein: It was part serendipity, part interest from a very early age. For my eighth birthday I was given a child's anthology of biographies of a hundred different people. One of them was Clarence Darrow. I remember being fascinated by him and then getting other Darrow books out of the library. By the time I was 13, I'd read almost everything he had written—collections of his speeches, his closing arguments. He became one of my heroes. My other hero was Lincoln Steffens, the muckraker journalist.

Circumstances did not move me toward the law initially. By the time I was 10 years old, my family's finances had taken a drastic turn for the worse. I was only able to go to one of the free colleges in New York.

My mother decided the only profession I could get into would be accounting—I couldn't be a doctor or a lawyer because they couldn't afford to send me to school. So I went to the City College of New York, the School of Business Administration, to become a CPA. I hated it, and I flunked out of college in my senior year.

After that I went to work. A year later my Uncle Jay, who was a lawyer and who I'd always been fairly close to, offered me an errand/clerk job in his office to see if later I might be interested in going to law school. I worked there for a year, saved some money, and was able to get into law school. New York Law School had reopened shortly after World War II and they were looking for students. As I recall, the tuition was $600 for either a year or semester, plus books.

Fathi: Did you then go to work with your uncle?

Bronstein: Yes, and after I was admitted to the bar, he raised my salary from $20 to $40 a week. Within a year, he made me a partner in the firm, and I stayed there for 12 years. He had one associate and one clerk; they did no trial work. The firm specialized in commercial and personal injury practice and farmed the trial work out to others. I was interested in trial work and pressed him to let me do it—that became the part of the practice I most enjoyed.

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Patsy Lynch

"I began to see prisoners' rights as a natural outgrowth of civil rights work."

Fathi: How did you begin to get involved in civil rights cases?

Bronstein: Well, again, part coincidence, part interest. In the late 1950s and early '60s my ex-wife and I—with three small kids—became involved in a progressive educational movement, the Summerhill Society. The Summerhill Society had a little office in New York, in *the* public interest building at the time, and shared a suite of offices with A.J. Muste of the War Resisters' League, Ella Baker of CORE (Congress of Racial Equality), and SNCC (Student Nonviolent Coordinating Committee). Through that connection, I began to get into some First Amendment and conscientious objector cases. I represented the War Resisters' League in one case where a high school teacher refused to have his class participate in air raid drills because he thought they were harmful to the children. I was introduced to the people in Brooklyn CORE, the most militant of the CORE chapters. They conducted the first sit-in in a bank, protesting the lending policies as racially discriminatory. They were a provocative, nonviolent but direct action group—a pretty active client. I began putting more and more time into the kind of work I enjoyed and felt was important, and spending less and less time on fee-producing work. Our partnership ended in 1963 and I left Brooklyn; by then we had decided to start our own alternative school. We sold our house in New York City and moved upstate, where we bought some property and started the first Summerhill School in this country.

Fathi: Tell me about that.

Bronstein: We were concerned about the overemphasis in New York Public schools on control—sounds like prison!—and the stifling of kids' imaginations. Having read about and discussed the Summerhill philosophy with many educators, we felt that a school modeled on those principles was what we wanted for our kids...to be able to offer that to others. The school grew and lasted for about 13 or 14 years. But my marriage broke up shortly after we moved there, so I left the school and began practicing law in Elizabethtown, the home town of two great federal judges, Learned and Augustus Hand. I became the unofficial public defender in the county, travelling the circuit handling criminal cases and trial work for other lawyers. It was very interesting, very different from big-city practice. You had personal injury cases where you had to learn how you connected the horse part to the tractor part...not the kind of thing you ran into in New York City.

Fathi: How did you happen to go South to do civil rights work?

Bronstein: In the spring of 1964 I heard about the formation of the Lawyers Constitutional Defense Committee (LCDC) by the ACLU and other rights groups to provide volunteer lawyers for Freedom Summer in Mississippi, and for the civil rights movement in general. I spoke by phone to Henry Schwarzschild, the executive secretary of LCDC, and I volunteered to go to Mississippi.

He called me back a couple of days later and said, okay, you're going to St. Augustine, Florida—we need someone there with trial experience. So off I went and stayed for almost six weeks. It was really remarkable—a life-changing experience. I knew after that I could not go back to doing traditional legal work.

Fathi: Why did you get so involved in it?

Bronstein: Two things: first, the local people who were so courageous. The local black people just opened up their homes to us. Sometimes they would drive along behind us to protect us from the Klan. I stayed in the home of an elderly woman who lived alone. The way she was exposing herself by putting us up, in the face of all kinds of economic and physical abuse—it was just amazing. She did it calmly and quietly, thanking me all the while for being there. There was a little old cafe across the street from the office—the only place we could eat in town, since this was pre-Public Accommodations Act—owned by a gruff old black ex-sailor who went out of his way to feed and take care of us. The courage of the local people was very moving.

The second thing was, what a marvelous opportunity to be at the frontiers of the law! I was involved in the first omnibus case under Title II of the 1964 Civil Rights Act: a case against 24 motels and restaurants in St. Augustine. After we obtained an injunction requiring them to serve blacks, we handled the first contempt case under the Act. Local police officials were found in contempt for interfering with the injunction; that decision was upheld on appeal. We handled mass arrests, mandatory injunctions enjoining the state police to provide protection and a variety of other important cases. It was very exciting—we were in court every day. I felt that I was in on the beginning of a new era of important litigation.

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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.
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Fathi: But didn't you end up spending much longer than six weeks in the South?

Bronstein: It turned out that I spent almost five years there. On my way home from St. Augustine I stopped in New York City and talked to Henry [Schwarzschild], briefed him on what happened and told him I was really interested in going back to the South. No one had thought much about what would happen after the summer when all the volunteers went home.

We had raised expectations, filed affirmative lawsuits, removed thousands of criminal prosecutions from state to federal court, and I felt strongly that we could not just walk away. I came back to New York that fall after the summer program was over, and had several meetings with Schwarzschild, Mel Wulf (legal director of the ACLU), Jack Pemberton (ACLU executive director), and Jack Pratt (general counsel of the National Council of Churches), trying to get money to continue.

Then I got a call from Henry asking if, in the meantime, I would be willing to go to Mississippi for the NAACP Legal Defense Fund. During the summer of 1964 they had filed a big police brutality case against the city, state and county police in the area around McComb, Mississippi. The case was coming up for trial and they didn't have an experienced trial lawyer in the Mississippi office. I agreed to go and lived there for about five weeks, living in the Freedom House. I became even more inspired now by a whole different set of people in the South. These were the bravest and most beautiful people I had ever met.

We opened the first permanent LCDC office in Jackson, Mississippi and thereafter offices in New Orleans and Selma, Alabama. I moved to Jackson, eventually supervising 10 fulltime lawyers and hundreds of volunteers in the three states of the Deep South. It is almost impossible to describe the magnificence of that experience.

Fathi: What interested you in prisons as a civil rights issue?

Bronstein: In civil rights work you got to see a lot of prisons, and a lot of bad ones in the South—county jails and state facilities like Angola in Louisiana and Parchman in Mississippi. I began to see prisoners' rights as a natural outgrowth of civil rights work. This was in the early stages in the development of prisoners' rights law and once again, I saw this as a new frontier for legal work. The litigation tactics and litigation strategies of the civil rights movement could be applied to prisoners' rights work.

Fathi: What's wrong with American prisons today?

Bronstein: There are too many of them. And, for the most part, they are too institutional in nature—calculated to make people worse. They send a message that we have given up on you people as human beings, and we don't really care if you make it back in society. In fact, we don't think you will, so why should we do anything to help you?

Fathi: As you know, the United States is now number one in the world in its rate of incarceration. I'm sure you would agree it is among the worst in the developed world in prison conditions. Why is that?

Bronstein: To be fair, I wouldn't say it's among the worst in the developed world. There are developed countries like the United Kingdom, France, Italy, Spain, and Turkey, where prison conditions are worse, generally, than in this country. During the past 20 years in the U.S., we have gone from 19th century dungeons to 20th century prisons with bad conditions. Today a lot of the awful conditions are the result of overcrowding. I think there are enough fairly decent administrators out there who, if they were not under such enormous population pressures, would run much, much more decent prisons than we have. Today, the numbers drive just about everything, seriously affecting basic health, safety and services.

Going back to what's wrong with our prisons, we also tend to overemphasize security. The American belief is that to run a secure prison you have to exercise more and more control over prisoners' movement. I think that's wrong, in fact, I think the opposite is true. With a few individual exceptions, the way to control security, in my opinion, is to allow maximum movement within the prison. We overemphasize security, we are threatened by the pressure of population. All of this comes at a time of increasingly scarce resources throughout the country at the state and federal levels, and particularly the county levels. Those jurisdictions are hurting for money; prisons are competing with schools, highways, libraries, and police and fire protection. Prisoners don't vote, they're not a popular constituency. Unless legislators are forced to do otherwise by court orders, they will cut—or not provide—funding for prison programs and services. The correctional administrator is given fewer and fewer resources to deal with a growing population and that naturally results in bad conditions.

Fathi: Why is the population increasing as much as it is?

Bronstein: We have dramatically changed our sentencing practices in this country in the last 15 or so years. We moved to mandatory and determinate sentences, increasing lengths of sentences to the extreme. Of course we also have a serious crime problem in this country. Politicians have been conducting their war on crime with all the wrong ammunition, if you will. We are the only developed country that I know of, with the possible exception of the U.K., that still uses incarceration as a crime control mechanism. Politicians tell the public, "We're going to solve your crime problems by locking up more people." It is not possible to imprison enough people to affect crime rates. We need longterm programs to address root causes of crime, not short term, political responses that get people elected. Any time we have a Willie Horton episode that gets politicians elected, it sends more and more people into prison for longer. The third big thing is the offspring of the second, and that is the "war on drugs." We're locking up huge numbers of minor drug offenders, minor drug abusers who

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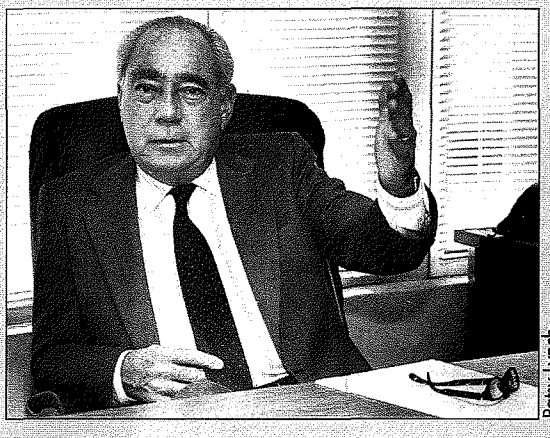


Patsy Lynch

commit small crimes to pay for their habit. We are not, as the Bush administration claims, getting the bad guys off the street. All of that reflects the fact that we are a society that is vengeance-driven. What we're interested in now is vengeance and punishment, not justice and equity.

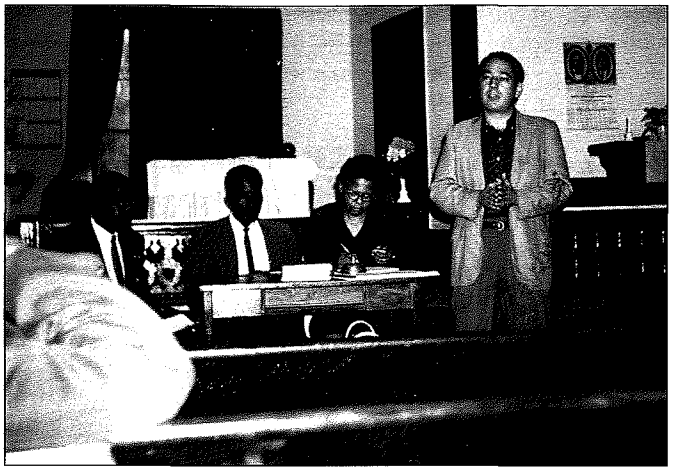
Fathi: All the evidence indicates that the work you do is not very popular. Many people would prefer that prison conditions be awful and horrible.

Bronstein: Yes, that's generally true. It's the message they get from the political leadership. Lock people up and throw away the key. Also, these are troubled times. People are troubled economically, they're worried about how to pay for medical care, for education for their kids. Whenever things get tough, people get more conservative. When people are hurting, they want a scapegoat. You get the "we-they" syndrome. "Part of the reason why I'm in such bad shape," they say, "is because you have Them Out There stealing and robbing and doing dope." That's part of it.

On the other hand, I have found that if you can sit down with people, have an hour or two to talk to them, to talk about how most of these people are going to come out, which they don't think about, that a brutal prison experience can make a person more threatening, more dangerous when they come out. These people are human beings, and not everyone in prison is a rapist and a murderer and a sex offender. If you can just get people to think about it....

Fathi: What do you consider the Prison Project's greatest successes?

Bronstein: Certainly the Alabama case (*Pugh v. Locke*), which alleviated conditions immediately and substantially for many people, and the state was ordered to release people. The case was even more important because of the impact it had nationally—more outside of Alabama than in the state itself. The court had set out very specific standards that it labelled "minimum constitutional standards." It may have been a poor choice of words, but it was taken seriously. The Alabama case was really the impetus for the development of professional standards of the American Bar Association, the American Correctional Association, and the American Public Health Association.



Members of the Mississippi Freedom Democratic Party meet in a church in Holmes County, Mississippi in the spring of 1966. Here Bronstein is delivering a report on legal activities.

The Rhode Island case (*Palmigiano v. Garrahy)* was important. It's a small system, but over the years the case has resulted in a lot of good law with reported decisions on almost every possible aspect of prison litigation—contempt, varieties of contempt and the powers of the federal district judge, the initial opinion itself, and modification.

New Mexico (*Duran v. King*) was significant, partly because the case in the early stages was so overwhelmed by events—the February 1980 riot that cost so many lives. The case resulted in a consent decree that has been looked at by many, many states. It has made some interesting law, too, on decree modification and attorneys' fees, and it's still a symbol of what you can do with a consent decree. Today, many of the State's prisons are in compliance with the Constitution and the consent decree.

Baraldini v. Quinlan was important, as was the case involving the 1950s Puerto Rican nationalists (*Cordero v. Levi*). In both cases we claimed certain prisoners were being treated differently and more harshly because of their political views. We believed that the government was attempting to discourage certain political beliefs by making an example of these two groups of prisoners. We believed that the government was acting illegally and we were successful in obtaining relief in both cases. They were important symbolically.

Fathi: You've been trying to reform prisons for almost 20 years now. Do you think it's possible to do that without reforming the rest of society? Aren't you always going to have terrible prison conditions as long as you have terrible racism and gross maldistribution of wealth in this society?

Bronstein: You're always going to have terrible prisons because prisons in and of themselves are terrible. And as long as we have the social, political and economic conditions that you mention, we're going to have a lot of prisons and most of them are going to be dreadful. On the other hand, things today do not generally approach the depths of degradation and inhumanity of as recently as 15 years ago, or even five years ago in some of the states that we've worked in. As an example, the infamous "doghouse" in Alabama: it was a windowless building, where six or seven men were jammed into a 32 square foot cell so that no more than three could lie down at a time and four had to stand. No toilet in the cell. No light. That will not happen again in America. Five years ago in Hawaii, in the men's prison you had dormitories that were hard to believe. You walked in, it was like going into a cattle pen. Filth and stench and crowding. You had a women's unit that had windowless cells so small they could not accommodate a cot. Just horrendous kinds of conditions. People were dying throughout the country's prisons for lack of medical care. Now, that still happens, but not in the wholesale kind of way that it did then in so many places. I think we've helped bring prisons into the 20th century in the last 15 years, and that was worth doing. This does not mean that we have nice prisons. But that's as much as you can achieve with the law as an instrument of social change. The rest will require political and policy changes.

Fathi: Is there any hope for that in the foreseeable future?

Bronstein: (Laughing) If I didn't think there was any hope, I wouldn't still be doing this. Our one great hope is what is happening in the world: a growing awareness of human rights even in places such as South Africa. In Czechoslovakia, Poland, some of the other Eastern Bloc countries, there are real human rights movements. As the European Community develops, it is going to be making stronger commitments to human rights. Turkey is going to have to change its prisons because otherwise it will be pressured in the Council of Europe. The U.K. is going to have to change its practices, certainly in Northern Ireland,

if they want to stay a partner in the European Community. It will take time, but there are written, enforceable standards and policies in the European Community. All of that is developing at a time when, in this country, we're becoming more repressive. Look at what's happening in the arts, the First Amendment area, privacy invasions, in our prisons and criminal justice system—we're going the other way, really, from much of the rest of the world. I visualize a day, in the not-too-distant future, when international pressure will be meaningful. Right now, we ignore it. We ignore the World Court. We ignore it whenever anyone criticizes us. We use those instruments only to our advantage.

Fathi: No one could do the kind of work you've done for as long as you've done it without some sort of driving internal force—an ideology, a philosophy. What makes you do what you do?

Bronstein: At home I heard a lot about oppression and injustice—my father emigrated from Russia when he was only 17. I heard that those injustices were to be expected because the Jews were powerless and weak in Russia and in Poland. I learned it was important to be concerned about people who were disadvantaged and less powerful.

It was *the state* oppressing my family, the government, the czar, the Cossacks, the troops. Throughout our history, with a few exceptions when organized religion got into the act, most oppression has been done in the name of The State. This is what is so hard for people to understand, people I talk to who fuss, why aren't you concerned about victims and victims' rights? I am, but there's a big difference between me mugging you or beating you up on the street, and two police officers doing it. I don't represent the state and they do. That's the thing that drives me—you have to always be on the watch for excessive state power. The people who are most often going to have that power imposed on them improperly are the weak, minorities, people of different backgrounds, different colors, different languages, the poor.

Fathi: You often speak to law students. What do you tell students coming up through law school some 40 years after you did?

Bronstein: I try to tell them two things: I hear young lawyers say—"Oh, it's too late, the frontiers are all gone. It's not like in the Sixties." I don't think that's true. There are exciting new frontiers that I mentioned earlier, such as the application of international human rights standards and human rights law to the problems of this country. Second, a lawyer can make a difference in the lives of people. And that's worth doing. ■

David C. Fathi is a staff attorney with the National Prison Project.

Rhode Island Judge Reflects on *Palmigiano*

BY THE HONORABLE RAYMOND J. PETTINE

In 1976, National Prison Project lawyers became lead counsel in Palmigiano v. Garrahy, *a case challenging conditions and overcrowding in Rhode Island's state prisons. Until early this year, the Honorable Raymond J. Pettine presided over the case in the United States District Court in Rhode Island. Throughout his involvement, Pettine sought to enforce the population limits and reforms of a 1977 judgment and subsequent consent decrees despite unprecedented overcrowding and the seeming inability of defendants to institute population controls.*

The state recently opened two new prisons, and the population is now in compliance with court-ordered limits. With overcrowding eased, Judge Pettine recused himself from the case in January 1991. He shared the following insights in this statement issued at that time.

At this milestone in the history of the Court's involvement in litigation to correct unconstitutional living conditions, which existed for years in the Adult Correctional Institutions, I feel constrained to issue this rather brief comment.

On August 10, 1977, when I published the first opinion mandating major reforms, the absolute nadir of prison life may not have been reached in Rhode Island, but neither was it missed by much. One highly respected and widely traveled national authority on corrections cited conditions in our prison as the worst he had ever seen in his long and varied career, observing that Rhode Island institutions embraced "all the egregious deficiencies that could possible exist." In the opinion, I held that the Maximum Security Institution was "unfit for human habitation according to any criteria used by public health officers or correctional personnel." Since then a long and difficult road has been traveled—a road strewn with obstacles. The Court encountered legislative and public pressure, the inherent resistance of an entrenched bureaucracy to change and an old-line cadre of guards with inflexible and unyielding intolerance of incarcerated criminals. Fortunately, over the years, attitudes changed.

A book could be written of all that has transpired for the past 17 years; every aspect of prison life has been adjudicated, as a result, the old Maximum Security section was renovated so as to meet constitutional standards, new Medium Security, Intake Service Center, and Super Maximum Security buildings were constructed. In addition, other structures have been renovated and modified to house prisoners. The gargantuan effort exerted, though turtle-like in its movement, has finally come to fruition.

Since this is a cursory statement and not an analytical, historical narration nor a saga of this Court's and the State's adventure in the area of prison reform, I do not hesitate to jump to the most recent chapter in the adventure—the completion of the new Intake Service Center. The overcrowding problem has been solved with the expenditure of millions of dollars; sailing appears relatively smooth and calm waters prevail. According to figures provided by state officials as of December 1988, "since the arrival of John Moran as Director of Corrections in 1978 the Department...committed some $84 million dollars in new construction and renovations... In addition, since 1980, the ACI budget has grown from 16.5 million to 42.2 million dollars a year." Since these figures were given to me as of December 1988, the present sums must surely exceed 84 million dollars. The impact on the State's economy is manifest—indeed, startling in the wake of the economic stress we are now experiencing.

This brings me to the very purpose of this statement—that is, to urge the authorities to realize that the operation of a prison within the State is *not* a matter of secondary importance amidst the array of complicated public issues that the

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THE NATIONAL PRISON PROJECT JOURNAL

Case Law Report

BY JOHN BOSTON

Highlights of Most Important Cases

Crowding/Damages/Contempt/ Pre-trial Detainees

The wages of overcrowding may be payable to inmates in cash, according to two recent decisions.

In *Benjamin v. Sielaff*, 752 F.Supp. 140 (S.D.N.Y. 1990), the latest chapter in the long-running New York City jail litigation, federal District Judge Morris E. Lasker found prison officials in contempt of a 10-year-old order that barred housing inmates in dayrooms, receiving rooms, gymnasiums and program space. The defendants did not dispute that during the preceding six months, "hundreds of inmates [had] been sleeping on the floors of receiving rooms and on cots in gymnasiums." Nor did they dispute the prisoners' attorneys' reports of the resulting "nightmarish" conditions:

Detainees have been forced to sleep on crowded, filthy floors in close proximity to seriously ill people, many of whom have not been medically screened; they must rely on inadequate numbers of grossly unsanitary toilets and sinks; access to telephones is de minimis *or nonexistent, with the result that many inmates have been lost to their families and attorneys; access to showers is rare or nonexistent; access to medical care and critical medication is sporadic at best.*

As is common in such disputes, prison officials claimed that they were unable to comply because of "events beyond their ability to predict or control," including population increases and delay in opening new facilities. But Judge Lasker made it clear that after ten years it was too late for such arguments to be taken seriously.

Judge Lasker rejected the plaintiffs' proposals for coercive fines and appointment of a special master, but adopted their proposal for compensatory damages. In the future, any prisoner held longer than 24 hours in a receiving room or other non-housing area will be entitled to damages of $150, plus $100 more for each additional 12-hour period or portion thereof. The court cited the approach of other federal courts in fixing *per diem* damage awards for wrongful placement in segregated confinement. Judge Lasker added a warning of the possible consequences of further noncompliance: "[I]f the sanctions ordered prove ineffective, serious consideration would have to be given to limiting the number of inmates who can be admitted to the respective institutions." 752 F.Supp. at 149.

When this decision was issued on November 30, 1990, the immediate result was a torrent of outrage in the local media, with many commentators comparing receiving room conditions favorably (and very inaccurately) to the living conditions of American soldiers stationed in Saudi Arabia. This hostile publicity has served in practice to focus the Department of Correction's attention on complying with its obligations under long-standing court orders and the Constitution. Recently the Department itself has publicly announced its discovery of instances of noncompliance, blaming lower-level employees and proposing to discipline them by fining them the amount of the damages paid to inmates. Whether the blame is appropriately placed is the subject of considerable debate.

Another federal court was unimpressed with "too little, too late" in *Moore v. Morgan*, 922 F.2d 1553 (11th Cir. 1991). Mr. Moore sued for damages based on his stay in the Chambers County, Alabama jail in 1985-86. After a trial the magistrate found that he had been subjected to unconstitutional overcrowding, with inmates routinely sleeping on the floor in crowded cells and in bullpens with less than 15 square feet of floor space per inmate, excluding the size of the bunks. The space provided inmates "does not come close to any known standard," and the overcrowding was "cruelly exacerbated" by the lack of any out-of-cell time whatsoever. 922 F.2d at 1555. But the magistrate ruled that the defendants were entitled to qualified immunity and therefore declined to award damages.

On appeal the court held that damages must be awarded. The plaintiff's official capacity claims against the county commissioners were equivalent to a suit against the municipal government, and qualified immunity is not available to municipalities under any circumstances.

The court went on to hold that the undisputed facts showed that the unlawful overcrowding resulted from a municipal policy. The crowding problem had been a topic of discussion in the county government for several years, but the commissioners did nothing but authorize a study. After the plaintiff filed his suit, however, they bought a facility for 25 inmates, and by cutting funds for other governmental activities provided funds to build a new jail for up to 200 inmates. The court concluded, "The ways in which the commissioners actually obtained the money to finance the necessary jail improvements, when put under the threat of litigation, provides compelling evidence of the fact that the commissioners could have taken steps to improve the jail at a much earlier date." Their "policy of delayed action" established their liability for the resulting unconstitutional conditions. 922 F.2d at 1557. The court added the oft-repeated observation that "lack of funds for facilities does not justify the maintenance of unconstitutional jail conditions." *Id.*, n. 4.

The court held that the sheriff and the commissioners were also subject to liability in their personal capacities because the defense of qualified immunity was waived by their failure to plead it.

Transfers/Disciplinary Proceedings

In *Stewart v. McManus*, 924 F.2d 138 (8th Cir. 1991), a federal appeals court has held that the Interstate Corrections Compact does not require officials in the state that receives a prisoner to conduct disciplinary hearings pursuant to the rules and regulations of the sending state. The decision is one of the first significant judicial constructions of the statute, and behind its thicket of technical reasoning lurk practical issues of great concern to correctional administrators.

The Interstate Corrections Compact is a uniform statute that participating states adopt legislatively and then implement through contracts. About two-thirds of the states belong to the Interstate Corrections

Compact, the Western Interstate Corrections Compact, or the New England Interstate Corrections Compact. Lilly and Wright, Interstate Inmate Transfer after *Olim v. Wakinekona*, 12 *New England Journal of Criminal and Civil Confinement* 71, 75 (1986).

The plaintiff in *Stewart* was a Kansas prisoner who in 1983 had been transferred to Iowa, where he accumulated a serious disciplinary record. He argued that Iowa was obligated to apply Kansas disciplinary rules in any proceedings it brought against him.

In rejecting his argument, the appeals court had to pick and choose from the language of the statute. It was unimpressed by language stating, "The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state." Nor was it convinced by a provision that hearings to which the inmate is entitled under the sending state's law may be conducted in the receiving state by that state's officials, but "the governing law shall be that of the sending state." Iowa Code 247.2. Rather, the court preferred to apply a provision that transferred inmates "shall be treated equally with such similar inmates of the receiving state as may be confined in the same institution," along with language from the implementing contract providing that the receiving state shall "maintain proper discipline and control" over transferred inmates, "make certain that they receive no special privileges," and "exercise disciplinary authority over them," and that these inmates "shall be subject to all provisions of law and regulations" applicable to the receiving state's prisoners that are "not inconsistent with the sentence imposed." Based on these provisions, the court held that no liberty interest protected by due process was created by the Compact, overruling the contrary decision in *Cameron v. Mills*, 645 F.Supp. 1119, 1124-26 (S.D.Iowa 1986).

In addition to its due process ruling, the appellate court held that the terms of the Compact are not federal law and are therefore not enforceable under 42 U.S.C. 1983. In doing so, it again rejected the reasoning of *Cameron v. Mills* and denied the relevance of a 1981 Supreme Court decision.

The Compact Clause of the Constitution provides, "No state shall, without the consent of Congress,...enter into any Agreement or Compact with another State." U.S.Const., Art. I, § 10, Cl. 3. Not every interstate agreement requires Congressional consent; if the agreement does not increase the states' power, potentially encroaching on that of the federal government, it need not be authorized by Congress. "But where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). This principle extends even to compacts for which congressional approval is not mandatory. *Washington Metropolitan Area Transit Authority*, 706 F.2d 1312, 1317 n. 9 (4th Cir. 1983).

The *Cuyler* case involved the Interstate Agreement on Detainers, and the Supreme Court concluded that Congress had consented to it in advance in the Crime Control Consent Act of 1934, 4 U.S.C. 112. Consequently, the Detainer Agreement became part of federal law, enforceable under 42 U.S.C. 1983, the civil rights statute most frequently used in prisoner suits.

The district court in *Cameron v. Mills* had concluded that the Interstate Corrections Compact, like the Interstate Agreement on Detainers, was also authorized by the Crime Control Consent Act. It cited the Act's legislative history, which stated an intent to foster "cooperative effort and mutual assistance in the prevention and *punishment* of crime," and the fact that the Interstate Corrections Compacts were specifically acknowledged as within the Act's scope when it was amended in 1961 to include Guam. (In fact, one purpose of that amendment was to permit Guam to join the Western Interstate Corrections Compact.) *Cameron*, 645 F.Supp. at 1127 (emphasis supplied, citations omitted).

The appeals court in *Stewart* rejected this reasoning, stating that "no evidence exists that Congress has approved the Interstate Corrections Compact." It failed to discuss or acknowledge the evidence cited in *Cameron*. Nor did it precisely answer the question posed by *Cuyler v. Adams*: whether the subject matter of the Compact is "an appropriate subject for congressional legislation." The Supreme Court in *Cuyler* held that Congress's power to legislate in the area was derived from both the Commerce Clause and the Extradition Clause of the Constitution. While the Extradition Clause is not relevant to the Corrections Compact, the Commerce Clause appears no less relevant to the Corrections Compact than to the Detainer Agreement. However, the *Stewart* court failed to address the Commerce Clause question at all.

Although the *Stewart* decision disposed of the case before the court, it did little to clarify the application of the Interstate Corrections Compact in general. The Compact's provision that confinement in a receiving state "shall not deprive" inmates of rights they would enjoy in the sending state must mean something, even if it doesn't apply to disciplinary rules. The same court that decided *Stewart* acknowledged as much in an earlier case holding that an Arkansas inmate transferred to Florida was entitled to good time and other unspecified benefits that he would have had in an Arkansas prison. *Hayes v. Lockhart*, 754 F.2d 281, 283 (8th Cir. 1985). *Stewart* contains no guidance as to how a court is to determine which rights travel with the inmate and which do not.

Of course, the federal courts will not have to worry about these questions if they agree with *Stewart's* holding that the Interstate Corrections Compact is not federal law enforceable under § 1983. But that simply means that the problem will be dumped in the laps of state courts, which plainly have jurisdiction to enforce the Compact. *See, e.g., Application of Chapa*, 115 Idaho 439, 767 P.2d 282 (App. 1989) (bench warrant could be issued pursuant to court's general power to enforce the Compact); *Gibson v. Morris*, 646 P. 2d 733 (Utah 1982) (sending state could not extradite to a third state without the receiving state's authorization). So far, most Compact litigation in state courts has focused on issues of sentence computation, parole, and other matters unrelated to conditions of confinement. But a broader range of prisoner litigation based on the Compact is certain to develop, especially if federal courts continue to narrow their interpretations of prisoners' constitutional rights.

It is easy to be critical of the *Stewart* decision; there is definitely more than one side to each of the questions that it decided adversely to the prisoner. But the problem, ultimately, is in the statute itself, which was drafted at a time when prisoners had very few rights—statutory, constitutional, or otherwise—and when "civil death" provisions barred many of them from enforcing the minimal rights they did possess. Ambiguities that no one noticed thirty years ago are the stuff of lawsuits now, and will continue to be until the Interstate Corrections Compact receives a thorough legislative overhaul.

Other Cases Worth Noting

U.S. COURT OF APPEALS

Use of Force

Miller v. Leathers, 913 F.2d 1085 (4th Cir. 1990) (*en banc*). After a verbal dispute, the defendant officer took the plaintiff out of his cell in handcuffs; after further verbal disputes, including insults to the officer's mother, the officer struck the plaintiff several times with a baton and broke his arm. The fact that the plaintiff had filed a grievance against the officer and that the officer removed him from his cell without summoning a supervisor, vio-

lating a prison regulation, support an inference that the officer intended to retaliate against him by provoking an incident.

The court holds the prison use of force claims are governed by the standard of *Whitley v. Albers*, but it reverses the panel opinion granting summary judgment to the officer. The dissenting judges accuse the majority of "professing" to apply *Whitley* while actually limiting its applicability to full-scale riots.

Use of Force/Restraints

Stenzel v. Ellis, 916 F.2d 423 (8th Cir. 1990). The plaintiff insisted on sleeping completely covered by a blanket contrary to jail rules. Officers came into his cell, forcibly removed him from his bunk, pulled him by his hair, and shoved him to the floor. One officer pulled back his finger and another had his knee in the small of the plaintiff's back. He was smashed into the bars on the way out and choked to the point he could not speak on the way to isolation. In isolation, he put toilet tissue over the surveillance camera and refused to remove it; he was then handcuffed and chained to his bed for the rest of the night and urinated in his pants as a result.

The use of force and restraint claims are governed by *Whitley*, 106 S.Ct. 1292 (1986). Summary judgment is granted to the officers, since the plaintiff's injuries (bruises and abrasions) were minor, the plaintiff was a big man and passively resisted being moved, he was not handcuffed, and he had previously fled to avoid prosecution.

Restraining the plaintiff in his bunk was justified by his disobedience to a valid jail rule. It was therefore his own fault that he was "humiliated" by urinating on himself.

False Imprisonment

Alexander v. Perrill, 916 F.2d 1392 (9th Cir. 1990). The plaintiff was kept past the expiration of his sentence because of a failure to credit him with foreign jail time. Prison officials had a clearly established obligation to investigate prisoners' claims that they were being incarcerated after the expiration of their sentences. Even in the absence of case law on point, defendants' "duties are clearly established by virtue of the Bureau of Prisons regulations and policies which they were legally obligated to perform." (1398)

AIDS/Searches—Person

Walker v. Sumner, 917 F.2d 382 (9th Cir. 1990). The plaintiff alleged that he was forced to submit to a blood test for AIDS under threat of being shot with a taser gun. It was undisputed that all inmates were tested for AIDS on entry to the prison system and that no Nevada prisoner had AIDS at the time. The plaintiff claimed that the purpose of the blood sampling program was to train medical personnel in conducting the tests.

Prison officials were not entitled to summary judgment under *Turner v. Safley*, 107 S.Ct. 2254 (1987), where they identified no legitimate penological objective and demonstrated no relationship between their actions and the blood-testing policy. At 387: "Without a further explanation, general protestations of concern for the welfare of the citizens of Nevada and the prison community are simply insufficient to render the involuntary seizure of blood specimens, even from prison inmates, constitutionally reasonable." Training of state health care workers is a "highly dubious" purpose, and plaintiff "may well be correct" that this is not a legitimate penological objective.

Staffing—Sex/Privacy

Timm v. Gunter, 917 F.2d 1093 (8th Cir. 1990). Prisoners' privacy claims concerning the assignment of female officers to supervise male inmates are governed by the *Turner v. Safley*, 107 S.Ct. 2254 (1987), standard. Their rights must be balanced against the equal employment rights of staff members and the internal security needs of the prison.

Female guards' pat frisking of male inmates was not unconstitutional where the searches were brief and of "minimal obtrusiveness" and requiring same-sex guards to perform searches would create significant problems for the defendants. The sex-neutral assignment of guards to all posts except the maximum security unit was not unconstitutional since the surveillance (even of bathrooms) did not involve "constant, intrusive observation." (1101)

Protection from Inmate Assault/ Evidentiary Questions/Theories—Due Process

Walker v. Norris, 917 F.2d 1449 (6th Cir. 1990). The decedent was killed by another inmate with a knife while several officers looked on despite several opportunities to intervene and prevent his death.

Photographs of the decedent's body were properly admitted as evidence of conscious pain and suffering.

The court approves the following jury instruction (at 1454):

A defendant acts with deliberate indifference if he causes unnecessary and wanton infliction of pain on the decedent by deliberately disregarding a serious threat to the decedent's safety after actually becoming aware of that threat. A mere inadvertent or negligent failure to adequately protect the decedent does not constitute deliberate indifference.

The trial court appropriately refused to equate reckless disregard with deliberate indifference because in its substantive due process charge it used the terms "reckless disregard" and "gross negligence" interchangeably and the jury might have been improperly led to believe that "gross negligence" could support a deliberate indifference claim.

The district court's instruction that liability could be found on a substantive due process theory based on "reckless disregard or gross negligence" was erroneous. "Such disparity between the substantive due process and eighth amendment standards seems plainly incompatible with the Supreme Court's decision in *[Whitley v.] Albers*." [106 S.Ct. 1292 (1986)] (1454) Besides, since the Eighth Amendment provides an "explicit textual source of constitutional protection against this sort of" conduct (*quoting Graham v. Connor*), inmate assault cases must be adjudicated under the Eighth Amendment and not the due process clause.

Telephones/Attorney Consultation

United States v. Noriega, 917 F.2d 1543 (11th Cir. 1990). At n. 10: "It is not unusual or unreasonable to condition the use of telephones by penal inmates on monitoring of the telephone calls by the authorities charged with the responsibility of maintaining the security of the penal facility." The district court should determine whether General Noriega had a reasonable expectation of privacy in his telephone conversations with his defense attorneys after signing a release acknowledging that all his telephone calls would be recorded.

Procedural Due Process—Disciplinary Proceedings/Personal Property

Gaston v. Taylor, 918 F.2d 25 (4th Cir. 1990). The plaintiff was issued an altered pair of jeans from the prison laundry; he was later charged with possessing contraband, defined as "anything not specifically approved for the specific inmate who has possession of the item."

Prisoners are entitled to prior notice of prohibited conduct before severe sanctions are imposed. A 15-day suspended sentence might not be "severe" in itself, but its potential effect on the plaintiff's parole opportunities "entitle[d] him to at least minimal notice that his conduct was prohibited." (28)

Because prison officials need to control inmate possessions and can't list every prohibited item, they may "switch the burden" and direct inmates to possess only approved items, as long as there is a clear definition of what items are approved. The plaintiff's allegations that he was issued the pants in the prison laundry room, that other inmates wore similarly altered clothing without reprimand, and he had never seen a rule or regulation imposing a duty to turn in altered clothes from the prison laundry, created a genuine issue of fact as to the adequacy of notice.

Protection from Inmate Assault/ In Forma Pauperis

Street v. Fair, 918 F.2d 269 (1st Cir. 1990). The plaintiff alleged "a campaign of violent intimidation conducted by certain inmates against other inmates in connection with seating in the prison dining hall," in which inmates were threatened with assault if they persisted in sitting in the wrong place. He alleged that "many inmates" had been "seriously injured" and identified one who had been stabbed. He himself had been told many times that he could not sit at a particular table and had once been threatened with physical injury.

These allegations did not make out a constitutional claim. Although a prisoner subject to "constant threats" may obtain relief without waiting to be assaulted, this plaintiff was neither physically attacked nor subjected to "constant threats" of violence.

The district court should not have dismissed the plaintiff's complaint *sua sponte*, with prejudice; it was not frivolous, and dismissal for failure to state a claim is restricted under *Neitzke v. Williams*, 109 S.Ct. 1827 (1989) to complaints containing "inarguable" legal conclusions or "fanciful" factual allegations. This complaint's deficiencies could conceivably be cured by amendment and the plaintiff should have had the opportunity to try.

Contempt/Discovery

Lamar Financial Corp. v. Adams, 918 F.2d 564 (5th Cir. 1990). A contempt fine of $500 a day for each day of noncompliance with a document production order was within the district court's discretion.

Religion—Practices—Names/Personal Involvement and Supervisory Liability

Bilal v. Davis, 918 F.2d 723 (8th Cir. 1990). The plaintiff claimed that he was expelled from a disciplinary proceeding for refusing to respond to his committed name. His First Amendment claim that he had a right to be addressed by his Muslim name, dismissed by the district court, should be reconsidered in light of *Salaam v. Norris*, 905 F.2d 1168 (8th Cir. 1990).

Correspondence—Legal and Official/ Injunctive Relief—Preliminary

Diamontiney v. Borg, 918 F.2d 793 (9th Cir. 1990). Defendants refused to deliver the plaintiff's mail, including his legal mail, because it did not bear his name of commitment (Dreamer) rather than his current, preferred name (Diamontiney). The district court properly granted a preliminary injunction requiring prison officials to add (not substitute) the preferred name in their computer program or otherwise ensure that the plaintiff got his mail. The plaintiff was not required to show "actual injury or prejudice to potential or pending litigation"; the purpose of injunctive relief is to prevent injury. The court's inability to communicate with the plaintiff constituted irreparable harm.

Mental Health Care/Medical Care—Standards of Liability—Deliberate Indifference/Medical Care—Staffing—Qualifications/Summary Judgment/ Evidentiary Questions

Smith v. Jenkins, 919 F.2d 90 (8th Cir. 1990). The plaintiff was prescribed Sinequan and Prolixin before his incarceration; a prison doctor terminated his medication, claiming he did so based on his clinical judgment.

The deliberate indifference standard can be met by showing "[g]rossly incompetent or inadequate care," "a doctor's decision to take an easier and less efficacious course of treatment," or "[m]edical care so inappropriate as to evidence intentional maltreatment or a refusal to provide essential care." (93, citations omitted)

Thus, the district court erred as a matter of law in ruling that mere proof of medical care consisting of diagnosis only sufficed to disprove deliberate indifference. Smith is entitled to prove his case by establishing that Dr. Oglesby's course of treatment, or lack thereof, so deviated from professional standards that it amounted to deliberate indifference....

Id.

The court is "particularly troubled" by the absence of the plaintiff's medical records from the court record; they must be reviewed before the claim is dismissed.

At n. 4: The court is also troubled by absence of evidence of the appropriate standard of care. The plaintiff had moved for the appointment of an independent psychiatrist pursuant to Rule 706, F.R.Ev., and the court holds "it would be incongruous to deny the nonmoving party the ability to present the necessary proof to withstand a motion for summary judgment—as the district court did here by denying the Rule 706 motion—and then grant summary judgment against the nonmoving party simply because the nonmoving party has failed to come forward with such proof."

The district court is instructed to review the plaintiff's medical records; it "may" appoint an independent psychiatrist to review them and provide an opinion as to the proper diagnosis and the appropriate standard of care, or the court "may deem it advisable" to obtain an opinion from the plaintiff's previous physician concerning the nature of his prior treatment and the necessity of continuing his medication.

Drug Dependency Treatment

Pedraza v. Meyer, 919 F.2d 317 (5th Cir. 1990). An allegation that the plaintiff received no medical attention for drug withdrawal symptoms for four days, accompanied by callous remarks from the prison nurse, was not frivolous under the deliberate indifference standard. The district court conducted a *Spears* hearing and decided the plaintiff was not credible; the court of appeals disapproves this conclusion, noting that his allegation "is, at least, not contradicted" by the medical records in evidence.

Attorneys' Fees and Costs

Associated Builders & Contractors v. Orleans Parish School Board, 919 F.2d 374 (5th Cir. 1990). Where a civil rights suit is resolved without a judgment, a party has prevailed for fees purposes if it shows "(1) that the goal of the law suit was achieved, and (2) that the suit itself caused the defendant to remedy the discrimination." The defendant can refute such a showing "only by showing that its conduct was a 'wholly gratuitous response to a lawsuit that lacked colorable merit.'" (378, citations omitted) In this analysis, "the chronology of events is an important consideration" because defendants rarely confess that they were influenced by litigation.

The importance of this case is that it acknowledges the language in *Texas State Teachers Assn. v. Garland Independent School District*, 109 S.Ct. 1486 (1989) concerning the necessity of a "change in the legal relationship between the parties" without concluding that it changes the established "catalyst" analysis.

Injunctive Relief—Changed Circumstances

Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990). At 546: "Permanent injunctive relief is warranted where, as here, defendant's past and present misconduct indicates a strong likelihood of future violations."

Protection from Inmate Assault/ In Forma Pauperis

Hernandez v. Denton, 919 F.2d 573 (9th Cir. 1990). On remand from the Supreme Court for reconsideration under *Neitzke v. Williams*, 109 S.Ct. 1827 (1989), the court remands the plaintiff's claim that he was drugged and raped over 28 times by inmates and officers to permit the plaintiff to file an amended complaint providing more factual information. The court cannot conclude that all 28 rapes are "fantastic or delusional" without making the kind of credibility judgment forbidden by *Neitzke*. The court takes "guidance" from the evidentiary rule concerning judicial notice and concludes the plaintiff's claims are not contrary to facts that are "generally known" and their truth cannot be verified from any "readily available, accurate source."

Procedural Due Process—Disciplinary Proceedings/Habeas Corpus

Blair-Bey v. Nix, 919 F.2d 1338 (8th Cir. 1990). The plaintiff lost a year's good time in a disciplinary proceeding. He could not challenge the disposition under § 1983 without exhausting state remedies even though he was serving a life sentence and the loss of good time would have no effect unless his sentence was commuted to a term of years. The district court properly stayed his § 1983 suit.

Protective Custody

C.H. v. Sullivan, 920 F.2d 483 (8th Cir. 1990). Prisoners in the federal government's witness protection program complained that double celling them breached their security because their cellmates had access to their personal effects and might learn their identities.

At 485: "Double celling is not unconstitutional for a general prison population absent deprivation of food, medical care, sanitation, increased violence, or other conditions intolerable for incarceration." Whether a protective custody inmate needs protection from his cellmate is better left to prison officials. The district court's finding of no constitutional violation is affirmed.

Medical Care—Standards of Liability—Deliberate Indifference/Attorneys' Fees and Costs/Class Actions—Effect of Judgments and Pending Litigation/Procedural Due Process

DeGidio v. Pung, 920 F.2d 525 (8th Cir. 1990). The plaintiffs alleged that prison officials' response to a tuberculosis epidemic constituted deliberate indifference. The district court found that their conduct, "taken as a whole" (531), constituted deliberate indifference, but found that they had cleaned up their act by the time of trial. It therefore granted no relief, but awarded attorneys' fees on a "catalyst" theory.

A finding of deliberate indifference does not require a showing of intent; it is sufficient to show that defendants have "disregard[ed] a known or obvious risk that is very likely to result in the violation of a prisoner's constitutional rights." (532, quoting *Canton*). At 533: "...[A] consistent pattern of reckless or negligent conduct is sufficient to establish deliberate indifference to serious medical needs."

The district court's finding of deliberate indifference was supported by evidence that the prison "lacked adequate organization and control in the administration of health services" in that "no one was responsible for the overall supervision and control of health services" until the hiring of a medical director with public health training in 1986. There was no written protocol concerning TB testing and control; little information on TB was available at the prison; not all inmates were tested for TB on intake and two-step testing (follow-up eight to ten weeks later) was not done. The administration of tuberculosis medication was deficient. Defendants' ignorance and lack of administrative guidance "caused delayed diagnoses of active cases and inadequate responses when active cases were discovered." Neglect in the treatment of several individual cases is described, along with inadequate methods of investigating the contacts of identified TB cases.

Good Time/Ex Post Facto Laws

Story v. Collins, 920 F.2d 1247 (5th Cir. 1991). Retroactive application of a good time statute that is less favorable to the prisoner than the statute effective at the time of the offense would violate the Ex Post Facto Clause.

Procedural Due Process—Disciplinary Proceedings/Qualified Immunity

Engel v. Wendl, 921 F.2d 148 (8th Cir. 1990). After *Superintendent v. Hill*, 105 S.Ct. 2768 (1985), reasonable prison officials would have known that disciplining someone in the absence of any evidence supporting the charge denied due process.

The plaintiff wrote prison officials a note stating that two other inmates were in danger. Plaintiff was convicted of threats or intimidation, obstructive or disruptive conduct, and misuse of communications, and a state court reversed the conviction finding a lack of evidence. Defendants did not contest plaintiff's claim that this judgment was preclusive on the merits.

Protective Custody/Equal Protection/Religion—Services Within Institution/Excersise and Recreation/Attorney Consultation

Divers v. Department of Corrections, 921 F.2d 191 (8th Cir. 1990). The allegation that "lock-down protective custody" inmates receive worse treatment than "general population protective custody" and are thereby denied equal protection is not frivolous. More specifically, the court ruled that denial of all religious services to these inmates stated a non-frivolous Eighth Amendment claim; a claim that exercise time is limited to 45 minutes a week states a non-frivolous Eighth Amendment claim; a claim that the plaintiff's class of inmates were permitted to phone an attorney only if they could prove they had a court appearance within 30 days was not frivolous.

Discovery

Fitzgerald v. Patrick, 921 F.2d 758 (8th Cir. 1990). In a police shooting case, the defendants are entitled to qualified immunity, but the State is assessed costs, including the plaintiff's deposition costs, because the State waited ten months after the filing of an amended complaint to file its motion.

Social and Political Expression/Transfers

Frazier v. DuBois, 922 F.2d 560 (10th Cir. 1990). An allegation that the plaintiff was transferred in retaliation for his activities as chairman of the "Afrikan Cultural Society" was not frivolous. "Most circuits...have held that *Meachum* did not confer on prison officials unbridled discretion to transfer inmates in retaliation for exercising their constitutional rights." (561)

Medical Care—Denial of Ordered Care

Howell v. Evans, 922 F.2d 712 (11th Cir. 1991). The decedent died of an asthma attack. A physician, who knew the plaintiff was in serious condition, ordered appropriate treatment over the telephone, but did not order more treatment as his condition grew worse and did not come to the prison, was not deliberately indifferent, though he may have committed malpractice.

A superintendent who had been told by the medical staff that the prison could not provide adequate treatment to the decedent and who did nothing to get him transferred or to improve the prison facilities could be found deliberately indifferent even if the medical staff did not specifically request a transfer or other action.

DISTRICT COURTS

Hazardous Condition and Sustances/Protection from Harm

West v. Wright, 747 F.Supp. 329 (E.D.Va. 1990). At 332: "[W]here plaintiff does not suffer from any preexisting medical condition that is aggravated by environmental tobacco smoke, and where defendants have implemented significant safeguards to protect nonsmokers from environmental tobacco smoke, the factual circumstances do not support a claim of cruel and unusual punishment." The "safeguards" included providing windows, letting inmates obtain personal fans, and providing the "opportunity to request" double celling with another nonsmoker for honor housing inmates.

Searches—Person—Convicts/Verbal Abuse

Merritt-Bey v. Salts, 747 F.Supp. 536 (E.D.Mo. 1990). The plaintiff complained about a strip search on entry to segregation in which one of the officers remarked, "So, it's not true what they say about all blacks anyway."

The strip search was justified because the plaintiff had been charged with two

disciplinary violations in the preceding 15 minutes, one of them involving contraband. The presence of a female guard did not violate the plaintiff's rights because she did not conduct the search and practices involving "occasional viewing" of nude male inmates are not unconstitutional. The quoted remark, which the court states "on its face is not harassing," was not unconstitutional. "A single, isolated remark does not comprise a constitutional violation." (539)

Use of Force

Wright v. Whiddon, 747 F.Supp. 694 (M.D.Ga. 1990). A detainee was shot dead when he tried to escape during a court appearance. His use of force claim is adjudicated under the Fourth Amendment rather than the Eighth because a detainee "has the status of a presumptively innocent individual... and is therefore more akin to a suspect than a convicted prisoner." (699)

There was a jury question as to the reasonableness of shooting the decedent; despite his criminal record, he had been repeatedly apprehended by the same defendant without the use of any force at all even though he was armed on each occasion, and defendants had used minimal security precautions in connection with the court appearance. The defendants were not entitled to summary judgment as to qualified immunity, since immunity would turn on resolution of the factual dispute.

Contempt

NOW v. Operation Rescue, 747 F.Supp. 772 (D.D.C. 1990). Compensatory damages and coercive fines are assessed for contempt of an order forbidding obstruction of the activities of abortion clinics. At 777: "Moreover, as additional deterrence, and because plaintiffs have demonstrated that defendants' activities cause damage to the blockaded clinics, any future fines will be payable to the clinic that was the subject of the illegal blockade." The fines must be tailored to the defendants' ability to pay. Operation Rescue will be fined $50,000 for any future blockade and individual defendants will be fined $5000 each for violating the injunction, to be doubled for each succeeding violation.

Medical Care

Williams v. United States, 747 F.Supp. 967 (S.D.N.Y. 1990). The plaintiff, a diabetic federal prisoner held at Otisville, developed an infection in his foot which developed into gangrene, ultimately requiring the amputation of his leg below the knee. Applying the "general standard of care for physicians in New York" (1006), the court finds that the gangrene and the necessity for amputation proximately resulted from the negligence of prison medical staff, based on a long and complex trial record. Although the Otisville doctor never held himself out as having expertise in the treatment of diabetics, the fact that Otisville treated these patients in-house subjected its staff to the "special standards of care applicable to the treatment of the diabetic infected foot." (1009) The finding of malpractice is reached despite the fact that the plaintiff received abundant and competent medical attention on other occasions at Otisville. The plaintiff is awarded damages of $500,000.

Exhaustion of Remedies/Law Libraries and Law Books

Housley v. Killinger, 747 F.Supp. 1405 (D.Or. 1990). Federal prisoners bringing *Bivens* actions for damages must exhaust the prison's grievance procedures, even though those procedures are incapable of providing damages.

A warden who followed Bureau of Prisons law library regulations that had never been found inadequate under statute or constitution was entitled to qualified immunity. The law library was open about six hours a day during the week and for seven and a half on weekend days. At 1408: "This level of accessibility does not fall below the standard set forth in *Bounds* [97 S.Ct. 1491 (1977)] or any relevant constitutional provision."

Juveniles

Grenier v. Kennebec County, Me., 748 F.Supp. 908 (D.Me. 1990). The 15-year-old plaintiff was confined for four days in an adult jail.

There was no private cause of action under the Maine Constitution for actions taken before the effective date of the Maine Civil Rights Act (a statute similar in effect to 1983). There was no private right of action for violations of the Maine Juvenile Code under the strict test applied under Maine law.

The Federal Juvenile Justice Act was violated when the defendants placed the plaintiff in a secure facility that was not the least restrictive alternative, was not in "reasonable proximity" to his family and home community, and did not provide services enumerated in the statute.

At 916: "The question is not, therefore, whether Congress implied a private right of action in the Juvenile Justice Act. The proper question is whether the Juvenile Justice Act creates federally protected rights which may be enforced through private actions under section 1983." The answer is "yes" unless the statute relied on does not create enforceable rights or Congress has specifically foreclosed a remedy under § 1983. The court concludes that the Juvenile Justice Act may be enforced under § 1983.

Modification of Judgments

United States v. County of Nassau, 749 F.Supp. 463 (E.D.N.Y. 1990). The county was not entitled to modification of a consent decree concerning waste management where the alternatives it proposed were available at the time the decree was signed and there were no new or unforeseen conditions and no showing that the modification advanced or was essential to the purpose of the decree.

Suicide Prevention/Qualified Immunity

Zwalesky v. Manistee County, 749 F.Supp. 815 (W.D.Mich. 1990). The decedent was arrested, drunk, and threatened to kill his relatives, his wife, and himself on the way to jail, in addition to banging his head on the protective screen in the police car. The jail supervisor therefore put him in a detoxification cell where he was found dead 90 minutes later, having hanged himself with his shirt.

All the individual defendants are entitled to qualified immunity from the *Estelle* deliberate indifference claim. At 819: "The 'right' that is truly at issue in the present case is the right of a detainee to be screened for suicidal tendencies and to have steps taken that would prevent him from taking his own life." This right is not clearly established.

Procedural Due Process—Work Assignments

Glidden v. Atkinson, 750 F.Supp. 25 (D.Me. 1990). Prisoners do not have a property interest in obtaining or keeping prison jobs unless such an interest is created by state laws or regulations. The plaintiff's failure to cite such a state law basis for his claim requires dismissal of his complaint. At n. 2: The alleged promise of a prison official that the plaintiff would keep his job did not have the effect of law or regulations.

Juveniles/Access to Courts

Shookoff v. Adams, 750 F.Supp. 288 (M.D.Tenn. 1990). The previously certified plaintiff class consisted of all present or future inmates of three "juvenile" correctional facilities, who were persons 12 to 20 years old who had been found guilty of committing delinquent acts.

At 291:

The same concern for the seriousness of juvenile detention which requires the recognition that juveniles have constitutional rights to procedural protections at juvenile commitment hearings motivates this Court to recognize that incarcerated juveniles have a right of access to the courts comparable to incarcerated adults.

At 292:

A juvenile's need for access to the courts may even be greater than an adult's in that access to the courts assists the rehabilitative process.... Whereas adult inmates do not have a constitutional right to rehabilitation, this

is arguably not the case for juveniles. [Footnotes omitted]

The scope of states' affirmative obligations to provide court access is succinctly reviewed (291-92).

The right of court access was denied where the juvenile prisons did not have law libraries and provided no assistance from legally trained persons. Their court access program was limited to telling inmates how to contact local legal aid or legal services agencies, which in most cases were unable to or did not assist them. The effect of a new Public Defender Act on this population was "largely wishful thinking" because of the offices' inadequate staffing and funding and the lack of authorization for assistance in civil rights lawsuits or at the pre-pleading stage.

Pro Se Litigation/Service of Process

D'Amario v. Russo, 750 F.Supp. 560 (D.R.I. 1990). A *pro se* plaintiff who has diligently tried to serve the defendants may be granted some leniency in enforcing the technical requirements of timely service.

Medical Care/Municipalities/ Medication

Lowe v. Board of Commissioners, County of Dauphin, 750 F.Supp. 697 (M.D.Pa. 1990). The plaintiff's gout medication was confiscated on his admission to prison; despite his repeated complaints to every nurse on duty, he did not get the medication for two days, allegedly because they could not contact his doctor.

At 700: "[W]e cannot say at this stage of the litigation that an alleged policy of indiscriminately removing any kind of medication from all entering inmates may not lead to an Eighth Amendment claim." The allegations do not state a claim against the municipality because they do not spell out how the policy was established. Allegations that every medical staff member the plaintiff spoke to described the policy as "policy" and that it was enforced uniformly by prison staff do not suffice.

Cruel and Unusual Punishment/ Financial Resources

Kitt v. Ferguson, 750 F.Supp. 1014 (D.Neb. 1990). At 1019: "...[A] superintendent or warden, with policy-making authority, can be held liable for operating a prison with unsanitary and inhumane conditions."

Conditions at the Medium Security Unit of the Nebraska State Penitentiary do not violate the Eighth Amendment but "are potentially close to creating intolerable conditions for prison confinement unless remedial measures are implemented." (1019) At 1022:

As the standards of decency which mark the progress of society evolves [sic], the State of Nebraska may someday find the condition at MSU violative of the prisoners' rights unless steps are taken now, and in the future, to correct some of the most glaring problems in the physical plant. Continued blindness to such things as leaking waste water pipes, pervasive body waste odors, etc., under the guise of budgetary constraints can potentially amount to obduracy and wantonness for the interest and safety of inmates.

Discovery/Municipalities

Everitt v. Brezzel, 750 F.Supp. 1063 (D.Colo. 1990). Discovery of police files is governed by federal law and not state law privileges and *in camera* inspection procedure. *In camera* inspection is not required in every case and is problematical because courts are not in as good a position as plaintiff's counsel to evaluate the importance of the information to the plaintiff's case and because *in camera* procedure deprives the court of the benefit of argument.

The preferable procedure is "*in camera* inspection" by plaintiff's counsel under an order of confidentiality, similar to the practice in cases involving trade secrets. Also, in their initial response under such an order, defendants may redact material they regard as "so sensitive or confidential that it should be shown to nobody." Counsel can then confer about the redactions.

The court cites *Monell* as supporting an additional discovery ruling. At 1069: "[A] plaintiff asserting municipal liability under *Monell* is entitled not only to factual information concerning an officer's alleged past violations, but also to information concerning his superiors' knowledge of those violations and what, if anything, they did about them." Thus, "evaluative summaries," protected under some pre-*Monell* case law, "may be highly probative in a case concerning municipal liability."

Class Actions—Conduct of Litigation/ Damages—Assault and Injury

Cimino v. Raymark Industries, Inc., 751 F.Supp. 649 (E.D.Tex. 1990). In a mass tort class action, the court decides damages will be awarded to class members based on the actual damages awarded by juries in a sample of 160 cases randomly selected and tried from a universe of 2,298. "Whether it is by the mechanism of the Court's plan or by some other procedure approved or suggested by the Court of Appeals, without the ability to determine damages in the aggregate, the Court cannot try these cases." (667)

Access to Courts—Law Libraries and Law Books

Messere v. Fair, 752 F.Supp. 48 (D.Mass. 1990). The plaintiff was transferred under the Interstate Corrections Compact from Massachusetts to a Connecticut prison that lacked Massachusetts legal materials. He was unable to obtain attorney assistance for his Massachusetts post-conviction and civil rights proceedings. Connecticut prison officials refused either to provide Massachusetts materials or send him back to Massachusetts.

The plaintiff was denied access to courts. The availability of photocopies from the Connecticut state library did not provide adequate access "[b]ecause specific citations are required to access materials from the state library... It is doubtful that many lawyers and judges could do minimally adequate research if they were required to request materials by mail via specific citations." (50) The court distinguishes a prior First Circuit case in which a prisoner failed effectively to pursue avenues of legal assistance; this plaintiff "actively sought legal assistance, but fell through the cracks in the system through no fault of his own." (50)

The court rejects the argument that prejudice must be shown to establish a denial of court access, since the right is "an aspect of due process" and due process claims (or other fundamental right claims) do not require proof of injury.

Correspondence—Legal and Official/ Federal Officials and Prisons/ Qualified Immunity/Mootness/ Injunctive Relief

Burt v. Carlson, 752 F.Supp. 346 (C.D.Calif. 1990). At 348: "Since *Wolff*, federal courts have held that properly identified mail addressed to an inmate from his attorney, the courts, or from various government agencies, may not be opened outside the presence of the inmate and, if opened, may be inspected only for contraband, and not read or copied." Requirements of identification of legal mail are evaluated under the *Procunier* narrow tailoring requirement. The Federal Bureau of Prisons' requirement that legal mail be marked "Special Mail—Open Only in the Presence of Inmate," to the exclusion of any other language, is unconstitutional as applied to markings that are "patently sufficient to notify the prison officials that the mail is claimed to be legal." (349)

FEDERAL RULES

Discovery

Klein v. King, 132 F.R.D. 525 (N.D.Cal. 1990). This includes a magistrate's protective order and discovery planning order in a commercial case that is worth looking at as a model of early judicial intervention and control over discovery in a complex case. ■

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(con't from page 5)
State must grapple with. An *ad hoc* approach when a prison crisis surfaces is not the answer. After some 14 years of involvement in the ACI litigation, I concluded it was time for someone who might have a new perspective to take over and resolve any future litigation. I asked Chief Judge Francis J. Boyle to reassign the case of *Palmigiano* versus "various Governors, *et al.*" to another judge. This request has been granted. In divorcing myself from future prison conditions suits, I leave with certain suggestions born of experience and trial by ordeal.

Now is the time to institute safeguards that will forestall and hopefully prevent a recurrence of the past frustrating, costly and devastating ills. If a program is not vigilantly and aggressively pursued, it will only be a very short time before overcrowding will again reach crisis proportions. It seems to me the legislators must seriously consider, study and enact legislation to accomplish proposals that have been presented to this Court in the various conferences and hearings we have held. I set forth these proposals as submitted:

OPTIONS FOR SENTENCED POPULATION

1. Emergency Overcrowding Release Act. More than 13 states have enacted legislation that requires the Director of Corrections and the Governor to declare a state of prison overcrowding emergency when the population exceeds design capacity, thereby expediting by 90 or 180 days parole consideration for those offenders who are approaching their parole eligibility dates. Rhode Island does not have any such legislation. I am advised that a proposed draft for such a law was submitted to the Executive Branch for review during the 1989-90 session and is still pending.

2. Intensive Supervision in Probation. A number of states have created low-caseload, high-supervision programs for sentenced offenders who are usually also required to pay victim restitution, perform community service, hold a job, submit to random urine and alcohol testing, etc. The State of Georgia has the best-known program, adopted in 1982 to alleviate prison overcrowding and rising prison costs. As of January 1, 1987, Georgia reports that more than 4,000 offenders participated in the program with an 80-90% success rate (more than double the success rate of persons serving regular prison sentences) at savings of at least $7,000 for each offender diverted from prison to the program.

This proposal should markedly differ from routine supervision.

3. House Arrest, With and Without Electronic Monitoring. Numerous jurisdictions have developed house arrest programs for [the] sentenced population (both at the front end as an initial sentence and at the back end as an early release program) and pretrial detainees. Sometimes utilized with an electronic monitoring or surveillance system (wrist or ankle bracelet, electronically connected to a phone), this option is also often combined with victim restitution, community service and probation supervision. The Florida program, which has had 20,000 participants in the first four years, has a very high success rate and [the program] costs $3.69 a day to supervise each offender as compared to $32.20 per day to keep an offender in prison. And this does not take into account the $30 to $35 million construction costs to build a 600-person prototype correctional institution.

The Florida program cost $3.69 a day to supervise each offender as compared to $32.20 per day to keep an offender in prison.

Rhode Island has enacted such a law, R.I.G.L. 42-56-20.2. I urge its expansion and full utilization.

4. Restitution, Community Service Order, Intermittent Confinement, Day Fines (sliding scale based upon offense and ability to pay). Many jurisdictions are relieving overcrowding by utilizing one or more of these sanctions, often in conjunction with probation or house arrest. To insure uniformity and provide guidance for the state judiciary, clear-cut legislation should be proposed and enacted.

5. Halfway Houses and Other Community Placement. Numerous jurisdictions have utilized a variety of community-based programs, some operated by state and local government agencies and some run by private agencies and church groups. These are often combined with probation and drug or alcohol treatment programs and are far more successful than in-prison treatment programs.

I understand that Rhode Island has entered into a contract with Massachusetts Half Way Houses, Incorporated to locate and place up to 30 inmates in a halfway house. This should be expanded and pressed to completion with legislation enacted to permit the Department of Corrections to place inmates in such facilities.

6. Sentencing. A number of states have, in addition to the options set forth above, reduced certain sentence lengths, expanded or revised good time credit policies, adopted community corrections laws and enacted first-time eligibility presumptive parole laws, all designed to alleviate overcrowding.

OPTIONS FOR DETAINEE POPULATION

1. Pre-Trial Release Services. Throughout the country, state-run and privately run agencies have developed a coordinated set of mechanisms to reduce pre-trial populations which include Release on Recognizance Units, Conditional Release Programs, and Third Party Custody Programs, all of which may be combined with supervision, counseling, urinalysis, etc.

2. Bail Programs. Every jurisdiction has a variety of bail options available. The key element is a bail agency, public or private, that screens every detainee immediately after arrest and then makes recommendations to the court. The options include deposit bail (usually 10% of the total), surety bail or property bond and, in many jurisdictions, the bail agency has funds available to insure that indigent or poor detainees do not sit in jail for months because of their inability to provide a relatively small amount of bail. Programs like this have had dramatic impact on the pre-trial population in New York, Philadelphia, Mobile and other jurisdictions.

The Emergency Overcrowding Relief Fund is presently satisfying this need. I cannot overemphasize the importance of its continuation. Some authorities predict that without it, the new facilities will be overcrowded within six months. The present private bail fund, R.I.G.L. 12-16-25, is inadequate—it cannot and has not functioned to date.

3. Prosecutorial Options. In many jurisdictions, the prosecuting agency, together with the courts, has developed a series of programs to expedite the criminal process thereby resulting in fewer detainees and detainees being held for shorter periods of time. These include early screening of cases, warrant screening, bail and release recommendations, diversion of cases from the criminal justice system, assigning cases to special units, charge consolidation, calendar control and the use of accelerated calendars.

The State advises me it has several variations of some of these proposals un-

der study and consideration. That is commendable. I would only suggest some responsibility be assigned to assure the ideas are enacted. To accomplish the foregoing, tough political decisions will have to be made. If they are not made, the State faces a future of costly and divisive confrontations about the overcrowding dilemma.

I leave intact my last order. It is now for Judge Lagueux, to whom the case has been assigned, to determine whether it should stand, be modified, or be rescinded.

Some while ago, I wrote a paper which I never published in deference to all that had been written by learned scholars on the subject. However, for what it is worth, I offer an excerpt from it now as a conclusion to this chapter of my judicial life; a chapter which has been both a rewarding and an exciting experience. Before doing so, however, I must say that credit is due to the *Providence Journal-Bulletin* for its unstinting editorial support of the Court's position. The *Journal*'s reasoned, articulate endorsement did much to deflate the not-infrequently irresponsible posturing of local officials. Without this support, I do not doubt that the prestige of the Court in this state would have been seriously damaged. Had that happened, I am sure the judicial task would have been infinitely more difficult. The editorial page of the *Journal* may not always be directly aligned in support of some of the present approaches, but that is understandable—like all problems, there is no simple answer. I, personally, see no other acceptable alternative to what has been judicially ordered. And this, in and of itself, may be good reason for another jurist's thinking. With that said, I quote from my hitherto unpublished paper.

"The need for change in the Rhode Island prison system, however politically unpopular, was hardly ever denied; it simply remained dormant as an issue of public debate until the court intervened and opened a Pandora's box that bared the evils and miseries of our institutions, anachronistically existing in what we like to believe is an enlightened democracy.

"In Rhode Island and elsewhere, the coercive nature of judicial intervention has stimulated endless debate over prison issues from a variety of perspectives. There are those who insist that the control of prisons with all its economic burdens is exclusively the province of lawmakers who alone should decide the priorities of social reform. The people, appalled at the rising crime rate and shocked by daily stories of violent crime, have little compassion for convicted murderers, rapists, burglars and arsonists. As a consequence, they see little sense in substantial expenditures for prison reform at the expense of the needs of the poor, the handicapped and the aged. Correctional officers, who must deal with incorrigibles at the risk of their own lives every day, resent the intrusion on their authority; an authority they feel is necessary to control a prison population. The courts, I believe, see principally the Constitution, with its mandate to strike down any law or practice which offends a fundamental constitutional guarantee, and thus, act without concern for the attitudes of the legislative and executive branches of the government. Prisoners, filled with fear and distrust, see only public apathy and the toleration of inhumane, indecent, and brutalizing conditions.

"There is little I can add to the perceptive studies and research reports on prison reform which have been written by learned administrators and academicians. However, I feel it is worth saying that prison class action suits are an important—and frequently the only—means for alleviating unconscionable prison conditions. The coercive nonpolitical force of the court is often essential for the realization of drastic changes. This is not to say that the political body is deaf and blind to inhumane conditions. The contrary has been proven in Rhode Island where the Governor and the legislators played an important role in reforms. It must, however, be realized that politicians inevitably walk a tightrope; a strong political base is neither fostered nor nurtured by attention to prison reform at a time when the needs of the poor and unfortunate members of our society are so compelling. A court, on the other hand, may accept political condemnation, admitting from its safe judicial bastion that there is no great credit in expostulating unpopular constitutional rights. That is the role of the judge, and, when he is immunized with life tenure, it is not a difficult one. The desire for popularity and plaudits is inimical to the role a court must play, and a sacrilegious stigma on the character of the judge who caters to such human foibles.

"True, the court's authority has limitations, but its infinite ability to rub the raw nerves of a society, calloused to a constitutional violation, highlights the social ill that cannot thereafter be ignored; it fashions orders that arguably belong to other branches of government, and it may have problems implementing them because of economic resources beyond its control. I believe, however, the record shows that the courts have, over time, experienced marked success in the execution of the remedies they have fashioned as well as the eventual acceptance of their orders by the public at large.

"I do not subscribe to the theory that courts have assumed unwarranted power in fashioning orders as in the *Palmigiano v. DiPrete* case. The court was created to share equal responsibility with the executive and legislative arms. Our founders deliberately gave the courts equal standing in deciding the cases *thrust* upon them. Properly, the decisional process necessarily involves a limited political role; it must be this way, for the only alternative is to grant omnipotence to the legislative process, regardless of how arbitrary or unconstitutional its actions may be."

It is my hope the Court's future role in this case will be minimized. It, of course, can be if the executive and legislative branches transcend purely political considerations. In the balancing of needs, those of the correctional facilities must be considered fairly and knowledgeably. Our authorities must understand the factual and constitutional concepts involved. To accomplish this, I suggest that the *modus operandi* adopted by the Court be considered. Just as I needed a master to be the "eyes and ears" of the Court, so do the Governor and legislators need a person, a sort of ombudsman, to make suggestions and keep them alerted to the conditions in our correctional institutions. Such a person as my master, J. Michael Keating Jr., who is an expert and who, divorced from politics, would present the case to them and the people of this state in a reasoned and impartial manner. We cannot afford to slide back into the quagmire from which we have just extricated ourselves. I do not intend, by this suggestion, to set forth the details of such an appointment but rather an idea; an idea which, if developed, could be priceless in both its economic contribution and its contribution to humanity and decency in the treatment of this state's prisoners.

With the foregoing statement, I hereby recuse myself from all future suits involving the Adult Correctional Institution....So Ordered.

January 10, 1991. ■

The Honorable Raymond J. Pettine is a Senior U.S. District Judge, U.S. District Court of Rhode Island.

Louisiana Death Row Gains Greater Legal Access

BY STUART ADAMS

The main road to the Louisiana State Prison in Angola, Louisiana, unlit for 20 miles, twists and turns towards the entrance to one of the largest prisons in the United States. Death row is located near the main gate on what one prisoner described as a "prison plantation...naturally fortified in the middle of the most rugged and desolate regions of the state.."[1] The difficulties of navigating the access road to the prison pale in comparison to the difficulty death row prisoners have had in attempting to exercise their most fundamental of all constitutional rights, the right of access to the courts.

When the National Prison Project responded to pleas for legal assistance from Louisiana death row *pro se* litigants, we found approximately 40 condemned men existing under unreasonable restrictions on their ability to communicate with an attorney, virtually blocking them from preparing meaningful petitions for post-conviction relief or complaints to challenge the conditions of their confinement.

When this case was filed in January 1989, the following conditions and their effects prevailed: Condemned men (Louisiana has no women on death row), all either disproportionally poor, illiterate, or black were routinely and arbitrarily denied any face-to-face visit with their attorneys. The attorney, having prearranged the visit, often waited in a locked and unventilated room. Behind a wall and a dense mesh wire screen was another unventilated and claustrophobic room. The guard would corral the prisoner, always in leg irons and handcuffs locked to a waist chain, into this second room. Sometimes a "black box" was attached to the handcuffs to further restrict movement of the prisoner's wrists. Only one legal visit could occur at a time, creating more delay.

Dense mesh screen prevented either party from seeing the face of the other. To communicate with someone of olive or dark complexion was like communicating with a shadow. Attorneys, in a vain attempt to see, would hold hands to forehead as light shields while peering through the wire screen. Of course the prisoner's handcuffs prevented him from doing this. Only with enormous difficulty could the prisoner and attorney read documents through the screen and they could never simultaneously review them. The prisoner could not comfortably turn the pages of his legal materials. Prisoners stood up to reduce pressure on their hands and frequently complained of welts caused by the scraping of handcuffs on their skin as they attempted to turn pages. To exchange confidential legal documents, a prison guard would have to be summoned to carry documents between a prisoner and an attorney. The procedure required that the guard remain out of sight long enough to read the prisoner's confidential legal documents.

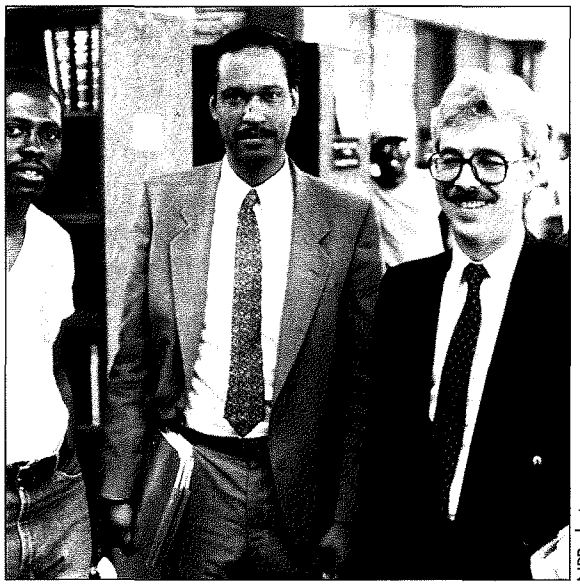
No context exists in which a person's right to a contact visit with an attorney is more critical than when this person is scheduled to be killed by the State. Richard H. Burr, director of the Capital Punishment Project of the NAACP Legal Defense and Educational Fund, argues that noncontact visiting arrangements substantially interfere with aspects of the attorney-client relationship which are unique to the representation of condemned prisoners. He outlines why this

Photo courtesy of The Angolite.

Some of the more than 30 death row plaintiffs in *Bates v. Lynn* are among the group pictured above at a religious seminar. Named plaintiff Abdullah Hakim El-Mumit is seated third from left, front row. Former named plaintiff Dalton Prejean, far right, second row, was executed in 1990.

attorney-client relationship requires a qualitatively different degree of trust and openness than that in non-capital cases: (1) the life history of the prisoner is the richest source of mitigating factors. The prisoner must fully participate in the discussion. Therefore, a trusting relationship must be developed wherein the prisoner is able to reveal experiences and memories which may prove to be embarrassing, humiliating and extremely painful. (2) More and more, a capital post-conviction petitioner must demonstrate a colorable showing of innocence in order to receive merits review of constitutional claims which were not properly raised at trial or on appeal. Thus, a prisoner must trust the attorney enough to tell the complete, absolute, and unadulterated truth about the events of the crime and his role in it. (3) The assertion of all available constitutional claims is crucial in capital cases. The attorney must help the person overcome the fear that the pursuit of constitutional claims pertaining to sentencing only is not done at the expense of the pursuit of conviction-related claims. This fear can only be overcome through a relationship of profound trust between the attorney and prisoner. Prisoners on death row are more prone to depression, withdrawal, loss of faith in authority figures, loss of hope, and an emotional incapacity to mount a defense. Most of the people presently sentenced to death have serious mental, emotional, and/or intellectual disabilities—bipolar mood disorders, paranoid schizophrenia, schizo-affective disorder, atypical psychoses, organic brain syndrome, fetal alcohol syndrome or fetal alcohol effects, mental retardation or a combination of the above. These conditions demand that the attorney-client relationship be allowed to develop without interference from the State. A noncontact visit, by its nature, impedes the development of intimacy and trust between the attorney and client and the ability of the attorney to evaluate the client's probable performance on the stand. Inevitably the attorney in some cases will be unable to pursue claims or a trial strategy that would otherwise inure to the client's benefit.[2]

Death-sentenced prisoners who had noncontact attorney visits were the relatively lucky ones—some LSP death row prisoners had no legal visits at all. The State of Louisiana did not provide death row prisoners access to attorney assistance for post-conviction relief. The Louisiana Bar Association would help locate attorneys to volunteer for appointment to death penalty cases. Once an attorney was identified, the Louisiana Supreme Court, without statutory authority to do so, would appoint the lawyer to the post-conviction matter. Due to the voluntariness of this system, the appointment of an attorney was not guaranteed. Thus, death-sentenced prisoners remained at risk of going without legal advice on their post-conviction matter for years. Nick Trenticosta, director of the Louisiana Death Penalty Resource Center,[3] explains that it is not uncommon that once one of these appointments is made, Trenticosta must attempt to do damage control on the work of the well-intentioned but inexperienced attorney.



NPP photo

NPP attorney Stuart Adams (center) represents the death row clients in *Bates v. Lynn*, a legal access case. He is pictured here with Norris Henderson (l.), a law clerk at the Louisiana State Prison's main law library, and James Wilber (r.), an expert on legal access.

In the spring of 1989, the Louisiana Department of Corrections (LDOC) placed additional restrictions on a death-sentenced person's ability to contact an attorney. LDOC refused to allow indigent prisoners to mail letters to out-of-state attorneys unless the attorney had written the prisoner first and had indicated that he represented him—an obvious Catch-22. This policy foreclosed or severely frustrated any attempt by the prisoner to solicit assistance from death penalty or prisoner rights experts from around the country. Further, the State of Louisiana did not provide death-sentenced prisoners access to attorney assistance on challenges to their conditions of confinement.

Louisiana death row was on extended 23-hour lockdown with no direct access to a law library. In order to obtain legal assistance, these prisoners had to rely on two "inmate counsel substitutes." These two "substitutes" had received little training from LDOC and even this had been discontinued for two years prior to the filing of the lawsuit. Legal assistance existed in name only.

The inmate counsel substitutes were essentially book fetchers. Upon the prisoner's request, substitutes would deliver a maximum of three law books per request for the prisoner's use for three days. The prisoner had to know the exact citation of the book, otherwise he would not receive it; nor were photocopies of any materials to keep provided. Further, the prisoner was not provided an inventory of the mini-law library or main law library's substandard law book collection. Lastly, many of these men, due to intellectual and/or educational deficiencies, were unable to use the legal materials once provided.

The substitutes were overworked. They provided the same "service" to approximately 51 non-death-sentenced prisoners who were also on 23-hour extended lock-down. In addition, they were responsible for representing these prisoners in disciplinary court. Communication between the substitutes and prisoners was brief—on the tier, through the cell bars, and within earshot of staff and other prisoners. The condemned men had no tables or desks on which to write, no chairs on which to sit, and no control over the light in the cell.

When viewed as a whole, these conditions placed Louisiana far behind the starting block of other jurisdictions which were attempting to meet their affirmative obligation of providing meaningful access to the courts as first enunciated in the landmark Supreme Court case, *Bounds v. Smith*, 430 U.S. 817, 824, (1977). Of the 37 states which condemn prisoners to death, 11 have policies which deny death row prisoners contact visits with their attorneys: Arkansas, Idaho, Mississippi, Montana, North Carolina, Oregon, Pennsylvania, Texas, Washington, and Arizona. However, of those, Washington and North Carolina routinely grant contact legal visits when requested by the attorney of record. In addition, Arizona, Idaho, Oregon, Pennsylvania and Wash-

ington automatically provide counsel for indigent death row prisoners to help them initiate state collateral proceedings; and Arkansas and Montana provide death-sentenced prisoners attorney-supervised assistance through prisoner paralegals or law students. Louisiana plaintiffs and their attorneys were not only confronting bad conditions, they were also confronting a bad attitude.

The extreme hostility towards a prisoner's right to challenge the legality of his or her incarceration or the conditions under which he is held as expressed through the Louisiana "legal access plan" had been carefully nurtured by the institution of slavery, slavery's impact on the law, and the peculiar legacy of the Louisiana prison system. As late as 1968, "the terms 'convict,' 'slave,' 'negro,' and farm worker have remained interchangeable in the mind of institutional Louisiana."[4]

Today Angola is run for profit as a penal farm, the offspring of the convict-lease system, where 80% of the general prison population and 40% of death row is black. However, blacks comprise only 30% of the state population. It is against this historical backdrop that the original named plaintiffs sought to bring some humanity to Louisiana. The original plaintiffs, M. Wayne Bates (life sentenced-1991); John Sullivan; Dalton Prejean (executed-1990); Jimmy Glass (executed-1988), and Ernest Busby (life sentenced-1990) filed a lengthy *pro se* complaint embracing every death row condition including the kitchen sink. NPP legal staff and local ACLU attorney William P. Quigley convinced them that access to courts and the right to counsel claims were the strongest and the ones which would most likely prevail. While confident of winning some relief in the Fifth Circuit Court of Appeals in spite of the conservative trend in the federal judiciary, we knew that that could take years resulting in more avoidable suffering and deaths.

In order to settle this case, we had to convince the defendants that plaintiffs had a very good chance of prevailing on the merits and that the state could accommodate the plaintiffs at minor expense, with no disruptions in the management of death row. At the outset this task proved nearly impossible.

During a pre-settlement status conference, the defendants were inflexible. We responded by submitting a comprehensive unrequested memorandum on the law of legal access. Settlement discussions began, then quickly collapsed. Surprisingly, in the interim, the LDOC, assisted by the Baton Rouge Bar Association, conducted two very well-publicized but inadequate "training sessions" for inmate counsel. The handwriting was on the wall. The defendants' strategy was to moot the action or to frustrate us into dropping this suit. However, plaintiffs kept the pressure on.

After nearly an eight-month delay, plaintiffs prevailed on the court to put this case on track towards trial. Only a few days before we were scheduled to depose defendants' experts, defendants indicated they were prepared to resume settlement negotiations. They demonstrated good faith by granting plaintiffs contact legal visits during the discussion phase. Plaintiffs successfully negotiated a very comprehensive settlement agreement. The highlights include contact legal visits; private contact visits between prisoners and prisoner legal assistants; a constitutionally sufficient law library inventory; a comprehensive legal training program with attorney instructors for prisoner legal assistants; supervision of prisoner legal assistants by the Loyola Law School Clinical Program; two additional prisoner assistants for death row; and the removal of restrictions on a prisoner's ability to contact an out-of-state attorney.

If the court adopts the agreement, life will no longer be the same on LSP's death row. Let's just hope and pray that life on death row prevails. ■

Stuart Adams is a staff attorney with the National Prison Project.

[1] *Angola: Legacy of Louisiana Slavery.* Unpublished essay, written by Kwablah Mthawabu, a prisoner serving a life sentence at Louisiana State Prison, Angola.

[2] *Non-Contact Legal Visits on Death Row in Louisiana: Efforts on the Representation of Death Sentenced Prisoners,* a preliminary report by Richard H. Burr, 1990.

[3] The Louisiana Death Penalty Resource Center is a federally-funded program providing technical assistance to attorneys who represent death-sentenced prisoners on post-conviction matters.

[4] *Politics and Punishment: The History of the Louisiana State Penal System,* by Mark T. Carlton, p.7.

FOR THE RECORD

■ *Women at the Wall,* by Laura T. Fishman, is the first ethnographic study of how the arrest, trial, imprisonment and release of male criminals affects their families, particularly their wives. Relying on first-person accounts, the book explores the effects of enforced spousal separation and the control husbands maintain even during incarceration, and shows how women attempt to establish stable, conventional lives for themselves while supporting their husbands through various stages of the criminal justice system. A volume in the State University of New York series, *Critical Issues in Criminal Justice,* the book costs $17.95 paperback/$54.50 hardcover (New York residents add 7% sales tax) plus $2.00 postage/handling. Contact SUNY Press, c/o CUP Services, P.O. Box 6525, Ithaca, NY 14851, (800) 666-2211.

■ CURE, the national prisoner advocacy organization, has formed a National Issues Chapter, CURE for Veterans, to address issues of concern to incarcerated veterans. The chapter will promote participation of outside veterans groups in matters concerning incarcerated veterans; work to restore V.A. benefits lost due to incarceration; and develop and advocate legislation on behalf of incarcerated and ex-offender veterans. Membership rates are $2/prisoners, $10/basic, $20/family, $50/sustaining, and $100/life. Contact CURE for Veterans, P.O. Box 86, Boston, MA 02122.

■ The Victim Offender Reconciliation Program (VORP) of the Mennonite Central Committee has released the following materials: *VORP Volunteer Handbook* (new edition), which is also available on computer diskette, $1.50; *Mediating the Victim/Offender Conflict,* updated, .40; and three videos which originally appeared as slide sets, *Crime: The Broken Community; Crime: Mediating the Conflict,* and *The Forgotten Neighbor,* loans free, $15 to purchase. In addition, VORP has released a new 28-minute training video, *VORP Mediation: A Peacemaking Model,* which explains the preparation and commitments necessary for mediation and examines three key components in successful mediation. To order, contact MCC Information Services, 21 South 12th St., Box M, Akron, PA 17501, (717) 859-1151.

THE NATIONAL PRISON PROJECT

AIDS Update

BY JUDY GREENSPAN

States Move to Mainstream HIV-Positive Prisoners

In the early days of the epidemic, prisoners who were believed to be carriers of the "AIDS" virus were treated like lepers—locked-up, abused, shunned and feared. Today, while many states have mainstreamed or re-integrated HIV-positive prisoners into general population, a few such as Alabama, California, and Mississippi cling to antiquated segregation policies.

For example, in 1985, the first prisoner who tested positive in Alabama was placed in isolation, told he had AIDS and that he was going to die. Once, upon being moved to another institution, he was forced to wear a full body suit, mask and gloves. Prisoners who were suspected of prior high-risk activity such as "homosexual" sex and intravenous drug use fell victim to mandatory testing policies. Those who tested positive for HIV (erroneously called AIDS) were isolated from the general population, locked down 23 hours a day, denied access to recreation, the law library, religious services, parole, furloughs, employment and vocational school. That's how misunderstood the HIV virus was in the years 1984-1987.

AIDS Spread in Prison Lower Than Expected

State corrections officials have since conducted random serological testing of their populations, and have found the numbers of HIV-positive prisoners to be much lower than expected. Yearly studies by the National Institute of Justice show that the spread of AIDS in prison runs parallel to the outside community. The cost of segregating a very small population has proved prohibitive for most state systems. Up-to-date information from the Centers for Disease Control and the U.S. Public Health Service points out that HIV is not casually transmitted. Protests by prisoners and prisoner advocates against inhumane and intolerable prison conditions for those with HIV have helped focus attention on this problem. As added impetus, many states have chosen to end the segregation of HIV-positive prisoners rather than face costly class action lawsuits.

The National Commission on Correctional Health Care, the American Correctional Association and the American Bar Association oppose the segregation of HIV-positive prisoners, now recognized as leading to stigmatization and discrimination. To the HIV-positive prisoner, it sends a message of gloom and doom. For the prisoner in general population, a policy of segregation sends the false message that he or she is "safe" and doesn't have to worry about AIDS.

Changes in State and Federal Care of HIV-Positive Prisoners

In 1987-88 the National Prison Project studied the care and management of prisoners with HIV and AIDS within state and federal systems. The study reported almost half of the states segregated prisoners with full-blown AIDS and approximately 10 states still segregated all prisoners with HIV infection. Since that time, most states have moved progressively toward mainstreaming prisoners with HIV into the general population.

The most dramatic change in the care and treatment of HIV-positive prisoners came about in Connecticut, largely as a result of two class action lawsuits. This year's settlement in *Doe v. Meacham* and last year's agreement in *Smith v. Meacham* have placed Connecticut in the forefront of medical care and treatment of HIV disease. *Smith* provides for strict confidentiality in medical care; medical staff must promptly and privately inform HIV-positive prisoners of the results of medical tests. Most importantly, it provides for a board of outside prisoner advocates to monitor Connecticut's compliance with the settlement. Last year, a settlement was reached which dismantled that state's segregation of prisoners with AIDS and created critical care units for prisoners with HIV disease. Connecticut is well on its way to becoming a model for other states in the care and treatment of prisoners with HIV.

Recently, Massachusetts and Maryland have discontinued their policies of isolating prisoners with AIDS. An attempt by New York State authorities (who supposedly desegregated the New York State prison system in 1987) to establish an AIDS unit for New York State prisoners was roundly defeated in the courts last year. South Dakota and Arizona also dropped segregation policies in 1989.

The small handful of states which segregated prisoners testing HIV-positive have begun to dismantle those policies. Over the past two years, Tennessee, Wyoming and Georgia have returned HIV-positive prisoners to general population.

As a result of a recent lawsuit, the California Department of Corrections is piloting a program to integrate HIV-positive prisoners into general programming at four prisons. The men and women involved in this pilot program represent only a small percentage of the HIV-positive population and are still housed separately. The lawsuit did succeed in upgrading the standard of medical care at the Vacaville medical unit for all prisoners there.

Most Colorado state prisoners with HIV disease have been integrated into general prison programs although they are still separately housed.

The future holds great promise for the management and care of prisoners with HIV and AIDS. New medical developments and the discovery of new treatment drugs have revealed HIV to be a chronic but manageable disease. The challenge for corrections will be to upgrade medical services to adequately care for HIV-positive prisoners.

We hope that this next year will see the end of punitive measures against prisoners with HIV and AIDS and provision of the life-giving medical care and treatment that all prisoners need. ■

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

THE NATIONAL PRISON PROJECT

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

___ **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.

(order from ACLU)

ACLU Handbook, The Rights of Prisoners. Guide to the legal rights of prisoners, parolees, pre-trial detainees, etc., in question-and-answer form. Contains citations. $7.95 (free to prisoners) from ACLU, 132 West 43rd St., New York, NY 10036.

QTY. COST

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 NATIONAL PRISON PROJECT

Highlights

The following are major developments in the Prison Project's litigation program since January 15, 1991. Further details of any of the listed cases may be obtained by writing the Project.

Austin v. Lehman—The district court granted plaintiffs *in forma pauperis* status in this case which challenges overcrowding and conditions in 12 Pennsylvania prisons. We have filed initial discovery requests and interrogatories.

Bates v. Lynn—This case seeks to ensure adequate legal access for death row prisoners in Louisiana. The parties negotiated a settlement which provides death row prisoners with contact legal visits, regular legal training, attorney supervision for law library legal assistants, and increased indigent mail privileges.

Dickerson v. Castle—This case challenges conditions and overcrowding in Delaware's adult facilities. In December, defendants submitted a population reduction plan. We objected to the plan because it was overly vague and lacked an automatic population reduction mechanism should defendants fail to reduce the population by their July 1991 deadline. We filed a proposed order requiring such a mechanism; however, the judge postponed a decision until defendants could complete a population projection report. Parties will then meet for a status conference.

Hamilton v. Morial—This case challenges conditions at the Orleans Parish Prison, the municipal jail for the City of New Orleans. Trial on the psychiatric care issues has been scheduled for the week of May 1, 1991. Discovery is underway.

Harris v. Thigpen—This case challenges the AIDS testing and segregation policies of the Alabama Department of Corrections. Oral argument before the Eleventh Circuit was held April 9, 1991. We argued our appeal of the district court decision denying relief to plaintiffs on all claims, including medical and mental health care claims, and the court's dismissal of the case.

Palmigiano v. DiPrete—This case challenges conditions in the Rhode Island prison system. The department recently opened two new facilities which have eased overcrowding, and, for now, the State is in compliance with the court-ordered population caps.

On January 10, parties and the judge met with newly-elected Governor Bruce Sundlun to discuss the case. Also, in January Judge Raymond J. Pettine recused himself from the case (see article by Judge Pettine on p.5 in this issue).

Spear v. Waihee—This case challenges conditions in Hawaii's state prison. On a January tour, we found the women's facility to be grossly out of compliance with the 1985 consent decree. Defendants' plans to build a new facility had stalled due to a controversy concerning the site. Defendants have since developed a plan to renovate the juvenile facility for the women inmates, and we have decided against filing for contempt in the immediate future.

U.S. v. Michigan/Knop v. Johnson—This is a statewide Michigan prison conditions case. In February, *Knop* plaintiffs requested emergency relief from the court to prevent massive prison staff lay-offs which would violate the consent decree. Following negotiations, the court permanently enjoined the lay-offs. On March 13, the court upheld a mental health contempt order imposing $10,000/day fines on defendants for March 15-29; however, $5,000/day of that amount will not be collected until late May.

Witke v. Vernon—This case challenges conditions and inequitable programming in the Idaho women's prison. During settlement discussions, defendants refused to agree to provide due process rights for assignment to restrictive housing and agree to requirements regarding life safety repairs. Trial on these issues has been scheduled for October 1991. Also, the State has decided to locate the new women's prison in Pocatello despite our efforts to persuade them to select Boise as the site.

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