

TB Comes Back, Poses Special Threat to Jails, Prisons

BY JAN ELVIN

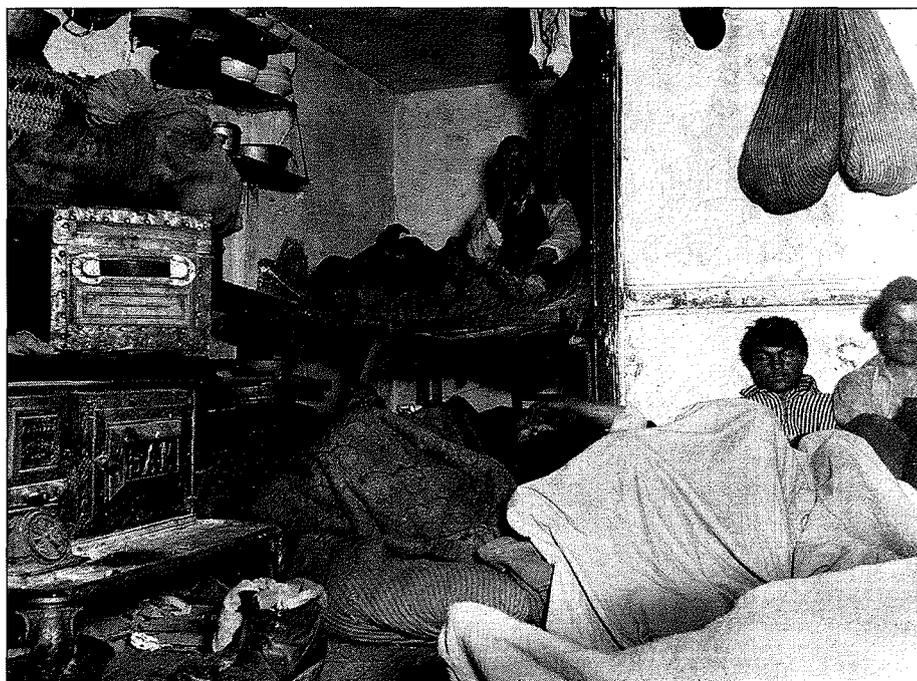
Only three years ago Dr. Louis Sullivan, the Secretary of Health and Human Services, was optimistic enough to set 2010 as the target date for total elimination of

official in New York City characterized the disease there as "out of control."¹

Thought to have been nearly eliminated, TB now has medical professionals confounded and anxious, if not panicked. This generation of health professionals has had little experience with treating the known forms of the

setting, such as a slum, homeless shelter, nursing home, or prison; the outbreak and spread of the disease poses a hazard. Dr. Steven Safyer, director of Montefiore Medical Center at Rikers Island in New York City,² refers to jails and prisons as "the tenements of today," where ideal conditions for the spread of the disease meet head-on with the population most vulnerable to it. Tenement life in the earlier part of the century, where tuberculosis was rampant, held many things in common with life in prison today: overcrowding, poor ventilation, inhabitation by an at-risk and unhealthy population, and inferior health care.

During the 1940s and '50s the number of cases dropped off dramatically due to improvements in housing and sanitation, and the introduction of anti-tuberculosis drugs. Ample government funds had also been provided to combat the disease. The tuberculosis epidemic of the early 1900s touched mostly poor white immigrants who were crowded into urban neighborhoods. The tuberculosis of this decade thrives under the same kinds of conditions, but its casualty has a different face. That face is most likely that of a Black or Latino living on the street, in prison or a shelter, likely to be HIV-infected, out of money, with a history of drug abuse and no access to



Jacob Riis/Culver Pictures Inc.

In the early part of the century, crowded "five cents a spot" Lower East Side (NYC) lodgings were breeding grounds for tuberculosis. Today's prisons and jails—like the tenements—are packed with people, many of whom are in poor health.

tuberculosis in the United States. But during the course of those three years, health officials have come to realize that their goal is unreachable. While medical experts say they believe the disease will eventually be brought under control, tuberculosis has now re-emerged as a major public health menace.

New cases are being reported at a breakneck pace, and one public health

disease, and few have the expertise to deal with the new drug-resistant strains which have emerged.

Prisons take place of tenements as ideal environments for TB

At the turn of the century tuberculosis accounted for 25% of the nation's fatalities. It has historically struck hardest at poor people who live in substandard housing. In any crowded

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proper health care. This same population, of course, is overrepresented in prisons and jails, and moves in and out of them frequently. The high mobility adds to the number of people with potential exposure to the disease.

The decline of TB control programs

HIV infection is most often cited in the media as the cause for the recent re-emergence of the disease, and while this is true in large part, meaningful social, economic and historical factors contributed to the increasing rate several years before the full force of HIV infection was felt.

A major study by Brudney and Dobkin documenting the rise of tuberculosis in New York City and, by analogy, other urban areas, presents the "stark reality" that the increase is due largely to the total failure of the public health system and the federal government to continue funding TB control programs. The study summarizes the historical events leading to the decline of these programs.³

In the face of years of warnings, predictions, and urgent recommendations—all unheeded—about the renewed threat of the disease, TB prevention and treatment programs were systematically cut. These government cuts, say the authors, have led directly to the resurgence of the disease.

The editors of the review which published the Brudney-Dobkin findings refer to a common occurrence in public health practice which they describe as the "U-shaped curve of concern." First, evaluations of a public health program show improvement, which then leads to diminishment of need. Subsequently, resources to run programs dry up. And finally, the incidence of the "controlled" disease begins to rise in proportion to diminished resources. One can picture the letter "U," the editors suggest, and then compare it with graphs of actual TB case rate data. The graph also outlines a "U" shape.

The combination of the decline in government-funded TB prevention programs during the Reagan years, the spread of HIV infection, the increase in homelessness, and a rise in drug abuse has added up to disaster.

Dr. Safyer says that his experience with the more than 500 patients he discharges each year on active TB treatment—more now with drug resistant TB—is that they go on to what Dobkin and Brudney found in Harlem Hospital: a 90% loss to followup and continuity of care. "It is no wonder," he says, "that we

are experiencing a rapid rise in drug resistance—the public health infrastructure is not present in New York City."

Control programs are important because, while the technology for diagnosis, treatment, care and control of tuberculosis is available, it requires

Tuberculosis will touch communities into which prisoners are released.

support from public health programs that goes beyond drugs in the form of supervised therapy; careful contact followup; use of community health workers for surveillance and treatment; hospitalization when necessary; medications provided without cost to the patient; compliance enhancements and enablers to assure drug taking and followup. When such support is removed, case rates rise and the disease spreads.

Multiple-drug resistance in tuberculosis (MDR-TB)

Coinciding with the tuberculosis epidemic in New York City and other urban areas are reports of an increase in the number of patients infected with drug-resistant strains of the disease.

There are two ways to contract MDR-TB: an individual can either be infected with MDR-TB to begin with, or a person infected with "regular" TB may fail to complete a course of treatment with antituberculin such as isoniazid (INH) or rifampin. The stopping and starting of medication gives rise to the opportunity for infection. Then, the drugs kill only the most vulnerable of the bacteria, leaving the remaining, stronger germs to be passed on.

Successful treatment requires a patient to follow a demanding course of therapy, perhaps taking as many as four different drugs, several pills per dose, every day for two months and then several times a week for six more months. Such a complicated course can be difficult to follow for those whose low immunity makes them most vulnerable to the disease. Many are trying to survive on the streets and figure out where the next meal is coming from; adhering to such a strict regimen often proves too burdensome.

If "first-line" drugs prove ineffective, the patient must go to "second-line" drugs

to attempt to cure the disease. If a person proves to be infected with MDR-TB, the course of treatment is much longer, more costly, and more complicated. MDR-TB is difficult to manage; consultation with experts in treating microbacterial diseases is warranted.

After studying sputum samples from all tuberculosis cases diagnosed during the first quarter of 1990 and the first quarter of 1991, the Centers for Disease Control reported a rise in drug-resistant tuberculosis nationwide. The number of patients whose TB was resistant to INH increased by 50% and the number resistant to rifampin increased 73%. The numbers of cases resistant to two drugs or more increased by 77%.⁴

"If you are a healthy, immunocompetent person who contracts MDR-TB, you have a 50% chance of dying from it," says Dr. Alan Bloch, medical epidemiologist for the Division of Tuberculosis Elimination of the Centers for Disease Control. "You have a 25% chance that your body's immune system will bring it into remission, and you have a 25% chance of becoming a chronic excreter requiring lifetime isolation and quaran-

THE NATIONAL PRISON PROJECT

JOURNAL

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

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

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Drug-Resistant Tuberculosis

Provisional figures for the first three months of 1991; confirmed cases of tuberculosis were tested for resistance to two major TB drugs, isoniazid and rifampin.

	NEW CASES			RECURRENT CASES			TOTAL RESISTANT CASES
	Tested	Resistant	(percent)	Tested	Resistant	(percent)	
TOTAL	2,337	71	(3.0)	173	12	(6.9)	90*
N.Y.C.	98	45	(45.9)	9	6	(66.7)	51
N.J.	142	9	(6.3)	3	0		9
Ala.	88	3	(3.4)	3	0		3
Tex.	268	5	(1.9)	9	0		5
Ill.	102	3	(2.9)	7	0		3
Calif.	551	2	(0.4)	49	4	(8.2)	6
Ariz., Ga., Pa., Va.	282	4	(1.4)	23	0		4
Other	806	0		70	2	(2.9)	2

* Seven resistant cases were also reported in Florida, Illinois, Michigan, and Washington and Hawaii.

of view on isolation. If a prisoner is in a very active stage of the disease, spitting up sputum, and so on, it would be irresponsible to put him or her in general population. What worries me is that corrections administrators will use surrogate markers, such as HIV infection, TB, or AIDS to isolate people. Isolation is fine if narrowly targeted."

Crowding in prison

When planners and architects design correctional facilities, they construct systems to meet what is called the "design capacity," or the number of people intended to inhabit the building. When that capacity is exceeded, as is often the case today (see NPP Status Report, p. 13) a ventilation system which was not medically designed may be unable to filter the air to prevent the accumulation of microorganisms and other contaminants.

Ventilation in institutions is generally designed to remove odors and provide heating and cooling, not to prevent infection.

The physical conditions that give rise to the spread of TB are part and parcel of most court pens, correctional facilities, and police holding areas: overcrowding, poor ventilation, and constant movement. Studies have even shown that spending time in prison or jail can be an independent risk factor in itself for the contraction of tuberculosis.⁵

Unlike the HIV virus, which cannot be spread through casual contact, the TB bacteria is airborne and can be transmitted by coughing, sneezing, or talking. When people talk, cough, or sneeze, large numbers of droplets are ejected, many of which contain infected organisms. The droplets can remain suspended in a room or cell for many hours after an infected individual has departed.

Some health experts say that crowding by itself, if accompanied in all cases by adequate ventilation, may not contribute to spread of the disease. But according to one environmental expert, "Crowding... favors the spread of such infections because it increases the likelihood of the organisms finding a new host and reduces the distances they must travel between hosts."⁶

Epidemiological studies of TB in the Cook County, Illinois, Jail demonstrated that crowded contact among large numbers of men caused a rapid spread of disease throughout the institution.⁷

"The mass incarceration of populations at risk," says Safyer, "has contributed to this epidemic. Putting more than one

tine. In all three scenarios you will need to be isolated from society."

If the MDR-TB occurs in a patient with HIV infection it usually proves deadly; indeed, being infected with HIV can narrow the progression from disease to death to as little as 30 days.

Most tuberculosis, health officials emphasize, is still "garden-variety," however, and responds to drugs. Individuals who become infected may never develop a clinical illness because the immune system brings the infection under control. The infection could persist for years while the individual remains at risk of developing the disease at any time, especially if the immune system becomes impaired.

New York: a microcosm?

Last November, a strain of drug-resistant tuberculosis killed 13 prisoners and a correctional officer in New York.

All 14 fatalities in New York had one thing in common: a weakened immune system. The prisoners were immunosuppressed because they were HIV-infected; the correctional officer's immune system had been weakened because he was receiving chemotherapy treatments for cancer.

After the 14 deaths became known, Thomas A. Coughlin 3d, commissioner of correctional services in New York, announced that "the rate of TB among inmates has increased dramatically, rising

almost 900%, from 15 per 100,000 in 1976-78 to greater than 130 per 100,000 in 1988-91." Coughlin stressed that "their [the prisoners'] health problems reflect those faced by the community at large."

In the wake of the fatalities, New York corrections officials in the state have begun testing all staff and inmates to provide a baseline of data.

All inmates and staff with positive reactions to skin tests should be considered for preventive doses of drugs, according to health experts. HIV-negative individuals who test positive on a tuberculosis skin test should undergo six to 12 months of INH therapy, while HIV-positive people should undergo a full 12 months' worth.

The New York City experience is similar to the state's. Dr. Safyer reports that in 1985 Rikers Island had two deaths from tuberculosis and in 1990 there were 12 (four of which were MDR-TB).

Isolation needs and civil liberties concerns

Usually a seven-to-14-day isolation period is sufficient for a person with a healthy immune system to become non-infectious, once treatment therapy has begun. Since people with HIV infection do not respond as quickly to drugs, they will require a longer course of therapy.

Larry Gostin, executive director of the American Society of Law and Medicine, says, "I would take a public health point

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million Americans behind bars—mainly minorities—must be evaluated from a public health as well as a social perspective.”

Who is at risk for contracting tuberculosis?

“HIV,” said CDC’s Bloch in a speech to correctional health care workers, “is now the strongest risk factor yet identified for developing tuberculosis.

“HIV has changed tuberculosis from a chronic disease to an acute disease as well as one with an extremely short incubation period.”

Another New York City study showed that individuals who are HIV-infected are at very high risk of developing active TB, apparently because the suppressed immune system allows the reactivation of latent infection.⁸ Thus, while HIV infection does not actually increase the chance of getting infected with TB, it increases the chance of its development into active disease. The estimated risk of developing tuberculosis in the HIV-positive patient groups is 8% *per year* versus a *lifetime* risk among the immunocompetent of 10%.⁹

The incidence of HIV infection in state and federal prison systems is now rated at 180 per 100,000, compared to 17 per 100,000 in the outside world. In other words, a person in prison is about 10 times more likely to have AIDS. In terms of TB, the result is that “corrections facilities are sitting on a powder keg,” says Bloch. A recent study showed one in 20 people in a correctional facility is HIV-positive, while the range of prevalence in some institutions is as high as one in nine, some one in seven for HIV infection.

“If TB gets in those systems, you have the potential for a very large number of cases to develop in a very short period of time. If it is MDR-TB it is extremely explosive,” says Dr. Bloch.

Spread beyond the walls

Tuberculosis will also touch communities into which prisoners are released. More than nine and a half million people are discharged annually from local jails, and more than 400,000 from state and federal prisons—all potentially infectious with TB. Because the median age upon release is 28 years, the lifetime risk of TB in a person infected during imprisonment may be considerable.¹⁰

Pretrial detainees stay in jail a relatively short time. Within seven days of arraignment in New York City, for example, 47% of detainees have been

released back into their communities. Many return to homes with children who may then become exposed.

Dr. Safyer also points out that Montefiore Rikers Island staff have a higher positive skin test rate than the inmate/patients. “Many of our staff

“HIV is the strongest risk factor yet identified for developing tuberculosis.”

have been working here for many years and some of that rate is from job exposure.”

Outbreaks of HIV/MDR-TB

“This is the TB of the future and it is happening right now,” says Dr. Bloch. “We have never seen...hospital-based...tuberculosis outbreaks like this before and we have never seen drug-resistant TB outbreaks like this before.” He stressed that both hospitals and corrections facilities have many HIV-and TB-infected patients.

“We are close to losing all of our first-line drugs for treating tuberculosis in this country,” he continued. “HIV is the driving force behind these multiple-drug resistant tuberculosis outbreaks. Also, there is an extremely high mortality in patients with end-stage HIV disease in a very short period of time.”

The actual number of deaths from MDR-TB is impossible to ascertain since doctors and laboratories do not routinely test for the susceptibility of the bacteria to drugs.

Why standard tests fail in HIV/TB cases

Tuberculosis is also more difficult to detect in an individual co-infected with the HIV virus. When a person is infected with TB, he or she becomes extremely anergic (without immune energy). The immune system is then incapable of mobilizing a response to make a skin test for TB turn positive. Thus, yet another difficulty is presented: the disease can escape detection among HIV-positive people, the group in which most of the new cases have occurred.

Montefiore Rikers Island has found that 25% of active IV drug users are anergic upon entry.

What does the future hold?

Dr. Bloch presented a grim scenario for

the year 2000: “I would like to be proven wrong, but my personal opinion is that this is what is going to happen: we will see the widespread occurrence of multiple-drug resistant and pan-resistant tuberculosis...It will be extremely lethal to HIV-infected persons.

“Right now multiple drug resistance appears confined to a few states. But,” says Dr. Bloch, “so was AIDS, initially, and so was a certain strain of gonorrhoea, but both entities were eventually disseminated throughout the United States. The similar initial distribution is an ominous sign that this is going to spread...”

“We have reports of patients who are resistant to seven drugs and reports of patients resistant to all five first-line drugs. All this,” he reported, “within a few months after the initial outbreaks were investigated.

“One of the tragedies of this pan-resistant TB is when it infects an HIV-infected person it will wipe out the benefits of AZT or whatever new anti-viral drugs we have.”

CDC recommendations

Dr. Bloch recommended the following procedures be followed:

- 1) Place TB patients on directly observed therapy to make sure they get medication;
- 2) Increase the number of drugs in regimens; at least two drugs to which organisms are susceptible. Some hospitals are now starting people on five drugs;
- 3) Use negative pressure isolation rooms;
- 4) Strictly enforce infection control;
- 5) Establish special TB hospitals and sanatoria. “Nobody is talking about that now,” he says, “but it will be the subject of debate in the future”;
- 6) Rapidly test for drug-susceptibility;
- 7) Rapidly report results;
- 8) Be alert to drug resistance in hospitals and prisons;
- 9) Report HIV in TB patients. “It would be helpful,” said Bloch, “if HIV reporting occurred for TB patients, but that will require state laws being changed”;
- 10) X-ray everyone who tests positive for HIV, whether or not they have a positive skin test for TB and have no symptoms.

Stop the buck

Bloch further suggests that a staff member in the correctional facility be assigned to each TB case.

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NPP Denounces ACA's Failure to Back Use of Force Standards

BY BETSY BERNAT

In October 1983, Keith Hudson, an inmate at the Louisiana State Penitentiary, was being transported to a disciplinary cell within the prison by two correctional officers. An earlier argument had ensued between Hudson and the officers. After moving him out of sight of other prisoners, the officers began to beat Hudson while he was in handcuffs and shackles. One officer held him while the other punched him in the mouth, eyes, chest and stomach. A lieutenant standing nearby did nothing more than caution the officers "not to have too much fun." The beating cracked Hudson's dental plate, loosened his teeth and split his upper lip.

The correctional officers' actions were in complete violation of the use of force standards established by the American Correctional Association (ACA). Yet, when Mr. Hudson's case reached the Supreme Court of the United States in 1991, the ACA declined two invitations to file an *amicus* brief on his behalf. Their decision drew sharp criticism from Alvin J. Bronstein, the executive director of the National Prison Project.

Bronstein was appointed counsel in *Hudson v. McMillian*¹ in April of 1991 after the Supreme Court granted Hudson's *pro se* petition for *certiorari*. Under challenge was the Fifth Circuit's decision that because Hudson had not suffered a "significant injury," he had no viable claim under the Eighth Amendment ban on cruel and unusual punishment.

Bronstein argued Hudson's case in the Supreme Court on November 13, maintaining that "significant injury" should not be a requirement of an Eighth Amendment claim. His argument was supported by an impressive group of *amici* (friends of the court). The office of the U.S. Solicitor General not only filed an *amicus* brief but also argued a portion of the case. Americans for Effective Law Enforcement (AELE), Human Rights Watch, and two prisoners' rights groups also filed as *amici*. The ACA, whose mission is to develop professionalism in corrections, would have been an influential ally.

Their standard regarding use of force by guards on inmates reads: "Written policy, procedure, and practice restrict the use of physical force to instances of justifiable self-defense, protection of others, protection of property, and prevention of escapes, and then only as a last resort and in accordance with appropriate statutory authority. In no event is physical force justifiable as punishment."²

Bronstein first contacted the ACA regarding Hudson in April. In a letter to then-director Anthony Trivisono, he urged the group to file an *amicus* brief "to help prevent the Supreme Court from creating an environment in which what happened to Hudson and what happened more recently with the L.A.P.D. [Los Angeles Police Department] can become everyday occurrences.

"I believe it would be disastrous for professional law enforcement and corrections personnel if the Supreme Court were to ratify the Fifth Circuit decision, he wrote. "[C]orrectional officers could hang a prisoner by his thumbs for two weeks. Every hour, an officer could smash the prisoner in the kidneys. However, because the prisoner suffered no 'significant injury,' no claim could be made that the officers' conduct violated the Constitution."

AELE also contacted the ACA, inviting them to sign on to their *amicus* brief. Director Wayne Schmidt wrote to Trivisono, "In more than 120 cases, our brief has been on the same side as the law enforcement agency.... This would be our third case" in which they filed "on the other side."

At their May meeting, the ACA Executive Committee rejected both invitations to join as *amicus*. President Helen Corrothers wrote to Bronstein, noting the

"abhorrence each member felt concerning the use of unnecessary force." She said that the Committee felt it was not "in the best interest of the ACA" to sign onto AELE's brief.

"The role of the Association is to foster good correctional practice through the development, promulgation and implementation of policies, standards and methods for measuring compliance or accreditation," Corrothers wrote. "The Association has strongly advocated through training and technical assistance compliance with correctional policies and standards concerning the appropriate and humane care of offenders."

She concluded by saying, "This request to file a brief in the United States Supreme Court against a member agency is not covered by previously established policy and procedure."

Bronstein replied: "First, your protestations about training, standards and good correctional practice become meaningless when you refuse to defend your own standards. Second, you were not asked 'to file a brief against a member agency'.... You were asked to appear as an expert friend of the court, to explain and to defend your own professional standards, in a case against three correctional officers who clearly violated those standards. No agency is involved in the case. And what difference should agency involvement make? Suppose the Louisiana Department of Corrections decided to murder every other incoming prisoner to alleviate overcrowding. Under your rationale, the ACA would fill the air with silence."

Bronstein then wrote to all members of the ACA Standards Committee. "I thought I should share with you the fact that, once again, the ACA leadership has demonstrated that ACA standards are not professional corrections standards. Rather, they are a collection of words and phrases relied on selectively by various ACA officials when it serves their interest (e.g., as a defense to a conditions lawsuit; as a means of getting funds from the legislature).

"The ACA Executive Committee action--non-action may be a better description--makes a sham of the whole standards and accreditation process." ■

ACA Committee Relaxes Double-Celling Standard

The Summer NPP JOURNAL discussed a proposal to the ACA Standards Committee to allow double-celling and multiple-occupancy housing for medium security inmates.¹ The NPP, the ABA and many corrections practitioners strongly opposed the revision. In August, the Standards Committee voted 12-7 to adopt the new standards, but imposed constraints involving classification, amount of unencumbered space, direct supervision and the definition of a medium security inmate.

¹ "ASCA Proposes Watering Down of Single-Celling Standards," NPP JOURNAL, Vol. 6, No. 3, Summer 1991.

Betsy Bernat is the editorial assistant of the NPP JOURNAL.

²No. 90-6531, cert. granted April 15, 1991.

³American Correctional Association, Standard 3-4198 (Ref 2-4206), *Standards for Adult Correctional Institutions*, 3d ed., (January 1990).

BY JOHN BOSTON

Highlights of Most Important Cases

State Officials and Agencies

It isn't a prison case, but the Supreme Court's decision in *Hafer v. Melo*, 60 U.S. Law Week 4001 (November 5, 1991), will make a big difference in prisoner damage litigation. In *Hafer*, the Court clarified some of its recent jurisprudence of "capacity" and of the Eleventh Amendment. In doing so, the Court preserved the ability of prisoners to recover damages for constitutional violations committed pursuant to official policy.

The Legacy of *Will*

The Court's task in *Hafer* was to clean up the mess left by some of its own loose talk in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). *Will* held that 42 U.S.C. §1983, the Reconstruction Era civil rights statute under which most prisoner actions are brought, does not permit suits against states, even in state courts, because they are not "persons" within the statute's meaning. And it extended that holding to state officials "acting in their official capacities," reasoning that an official capacity suit is not a suit against the official but rather is a suit against the official's office. 491 U.S. at 70-71 (emphasis supplied).

The use of the word "acting" yielded a bumper crop of mischief. Formerly, the word "capacity" had been interpreted to refer only to the plaintiff's intent to seek relief against government officials as individuals or against the governmental entities they serve. Damage claims under §1983 against state officials were by necessity pled as individual or personal capacity claims. See *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). *Will*, however, suggested that capacity is not determined by how the plaintiff pleads, but rather by the nature of the conduct the defendant is alleged to have committed, and how that conduct is related to the official's authority and to the policies of the government entity that employs the official.

That, in any case, was how several lower courts saw the matter. The Sixth Circuit declared that under *Will*, "[t]he capacity in which the individual defendants were acting is what matters, not the capacity in which they were sued...." *Rice v. Ohio Dept. of Transportation*, 887 F.2d 716, 719 (6th Cir. 1989) (emphasis supplied).

The effect of *Will* went beyond the definition of "person." It also vastly expanded the scope of Eleventh Amendment immunity. The Eleventh Amendment actually says only that suits against states by citizens of other states or countries cannot be heard in the federal courts. However, it has long been construed to bar official capacity damage suits against state officials, and courts that believed *Will* broadened the definition of "official capacity" gave the Eleventh Amendment a correspondingly broad sweep. *Cowan v. University of Louisville School of Medicine*, 900 F.2d 936, 942-43 (6th Cir. 1990).

The result in prison cases was to place alleged constitutional violations by staff outside the reach of §1983 unless they were unauthorized by or contrary to prison policy. See, e.g., *Eckford-El v. Toombs*, 760 F.Supp. 1267, 1269-70 (W.D.Mich. 1991) (damage claim for unjustified seizure of correspondence dismissed because the defendants were "working as employees of" the prison); *Gallipeau v. Berard*, 734 F.Supp. 48, 51 (D.R.I. 1990) (officers' acts would not be actionable if they were done pursuant to a prison regulation); *Portee v. Tollison*, 753 F.Supp. 184 n.4 (D.S.C. 1990) ("prison policy...rather than any maverick actions" of prison personnel could not be the basis of a §1983 suit).

The Decision in *Hafer*

In *Hafer*, the newly elected Auditor General of Pennsylvania fired several subordinates who, she claimed, had obtained their jobs through improper means. Some of the employees sued under §1983, alleging that the real reason for their discharge was their Democratic political affiliation and their support for *Hafer's* opponent.

Relying on *Will v. Michigan Dept. of State Police*, *Hafer* argued that she had fired the employees in her official capacity and was therefore not amenable to suit under §1983.

She also argued that she was immune from suit under the Eleventh Amendment. The Third Circuit rejected her arguments, creating a square conflict between circuits concerning the interpretation of *Will*. See *Melo v. Hafer*, 912 F.2d 628, 634-37 (3rd Cir. 1990).

The Supreme Court resolved this conflict by unanimously rejecting both of *Hafer's* arguments, offering a crucial clarification of *Will*: "the phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury. To the extent that *Will* allows the construction *Hafer* suggests, we now eliminate that ambiguity." 60 U.S. Law Week at 4003.

The Court went on to point out that any other view would contradict the intent of §1983, since the statute was intended to provide redress for officials' abuse of their authority. "We cannot accept the novel proposition that this same official authority insulates *Hafer* from suit." *Id.* Nor was the Court willing to distinguish between actions within and without the scope of the official's authority, or between those allegedly essential to the performance of governmental functions and those that were not so essential. It cited its prior holding that §1983 was intended to provide liability against officials "whether they act in accordance with their authority or misuse it." *Id.* at 4003, citing *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974) (internal quote marks omitted). It also observed that *Hafer's* position "cannot be reconciled" with the large body of existing law concerning official immunity in civil rights cases.

Determining that the claims against *Hafer* were personal capacity claims removed the chief basis for her Eleventh Amendment defense. The Court gave short shrift to what was left of her argument, observing only that it was long established that personal capacity damage claims were not barred by the Amendment. 60 U.S. Law Week at 4004.

History and the Other Shoe

The Eleventh Amendment and related capacity issues have been a persistent source of controversy and conceptual difficulty.

Even the courts admit that Eleventh Amendment jurisprudence makes little sense. See, e.g., *Eng v. Coughlin*, 858 F.2d 889, 897 (2d Cir. 1988) ("not...a model of logical symmetry, but marked rather by a baffling complexity"); *Spicer v. Hilton*, 618 F.2d 232, 235 (3rd Cir. 1980) ("Any step through the looking glass of the Eleventh Amendment leads to a wonderland of judicially created and perpetuated fiction and paradox.")

This should not be surprising, since last century's leading Eleventh Amendment case declares that the meaning of the Amendment is not limited by its narrow language. By its terms, the Amendment forbids the federal courts to entertain suits against states by citizens of other states or foreign countries. However, in *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court held that the Amendment somehow embodies traditional doctrines of sovereign immunity and thereby forbids suits against states by their own citizens.

Later, the Court realized that *Hans* effectively nullified the Reconstruction civil rights statutes and made unenforceable the Fourteenth Amendment, which by that time chiefly benefited businesses in their attempt to avoid state regulation. In *Ex parte Young*, 209 U.S. 123, 159-60 (1908), therefore, the Court held that a state official who violates the Constitution is "stripped of his official or representative character and is subject in his person to the consequences of his individual conduct," even if the official is enforcing a state statute. This holding, which is the basis of all modern §1983 jurisprudence, is commonly known as the "*Ex parte Young* fiction."

The next major controversy in this area is likely to involve injunctive actions against state officials. Again, it will arise from the intersection of Eleventh Amendment doctrine and the definition of capacity.

The above-quoted language from *Ex parte Young*, which was an injunctive case, indicates that injunctive claims should be brought against officials in their individual or personal capacities. Such was the practice for many years. See, e.g., *ACLU of Mississippi v. Finch*, 638 F.2d 1336, 1340-42 (5th Cir. 1981) (holding that claims were in personal capacity for Eleventh Amendment purposes but in official capacity for purposes of substitution of parties). This practice was unsettled by more loose talk from the Supreme Court. In *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985), in the course of adjudicating an attorneys' fees controversy arising from a damage case, the Court observed in passing that "official-capacity actions for prospective relief are not treated as actions against the State" (emphasis supplied), citing but not seriously discussing

Ex parte Young, and ignoring the practice and interpretation of cases like *ACLU v. Finch*. This passing reference was reiterated with equal superficiality in *Will*, 491 U.S. at 71 n. 10. Since *Graham*, the lower courts have generally referred to injunctive claims as official capacity claims. See, e.g., *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1327 (9th Cir. 1991).

Meanwhile, in another part of the forest, the Supreme Court had stated that official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n.55 (1978). It said so in the course of holding in the context of local government liability that such suits can be brought only where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers." *Id.* at 690; see also *Canton v. Harris*, 489 U.S. 378 (1989) (summarizing development of "official policy" requirement).

Taken together, these cases can be read to support the following syllogism:

1. Injunctive claims are necessarily official capacity claims.
2. Official capacity claims require proof that the challenged conduct results from official policy.
3. Therefore, without such proof of official policy, no injunction can be granted.

That is exactly the conclusion of *Griffin v. Fairman*, 770 F.Supp. 1271 (N.D.Ill. 1991), in which a prisoner sought the return of good time and classification grade that he lost in an allegedly unconstitutional disciplinary proceeding. Since there was no evidence of an official policy of denying prisoners their due process rights, the court held that the plaintiff could not maintain an injunctive claim. *Accord*, *Nix v. Norman*, 879 F.2d 429, 432-33 (8th Cir. 1989) (assuming that an allegation of "state policy" is essential to an official capacity injunctive claim against state officials); *Parsons v. Bourff*, 739 F.Supp. 1266, 1267 (S.D.Ind. 1989).

This view poses serious problems for prison and other civil rights jurisprudence, since official agencies rarely promulgate official policies to violate the Constitution. To take a single example, it would undermine the decision in *Inmates of Attica v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971), directing injunctive relief after the rebellion and retaking at Attica in order to protect prisoners against gauntlet beatings and other retaliatory abuse that clearly was contrary to official policy. As long as these acts were officially discouraged, however ineffectually, judicial relief

might be unavailable.

Common sense and some authority support the view that the "official policy" requirement has no application to injunctive cases and that an injunction can be granted against any person who violates the Constitution under color of state or federal law. *Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1986); *Nobby Lobby, Inc. v. City of Dallas*, 767 F.Supp. 801 (N.D.Tex. 1991); *Schwarz v. Ohio State University Board of Trustees*, 31 Ohio St. 3d 267, 510 N.E.2d 808, 812-13 (Ohio 1987) (state court §1983 action applying federal law). But the Supreme Court's piecemeal approach to issues of capacity by no means forecloses the question. We can probably expect more holdings like that of *Griffin v. Fairman*, and ultimately the necessity of clarification by the Supreme Court.

REMEDIES/FINANCIAL RESOURCES

Problems of long-standing or recurrent noncompliance with injunctive orders are endemic in prison and jail litigation. Courts have engaged in many stratagems to obtain compliance in seemingly intractable situations, including further injunctions, appointment of monitors and masters, contempt findings, and monetary penalties. In *Shaw v. Allen*, 771 F.Supp. 760 (S.D.W.Va. 1990), the court has gone one step further and appointed a receiver, entirely supplanting the authority of local officials.

Shaw involves the county jail in McDowell County, West Virginia. In 1983, the court entered an injunctive order to ensure constitutional conditions of confinement. In the face of persistent noncompliance, the plaintiffs moved for contempt in 1985, 1987, and 1988. The court in response ordered inspection of the jail and recommendations by outside experts; a contempt finding and a temporary population cap; and appointment of a monitor. Nothing worked, and the monitor reported in 1989, "I hold no hope that voluntary efforts at compliance will effect compliance with the 1983 court order."

The plaintiffs moved again for contempt in 1990, and the court had had enough. It appointed as receiver W. Joseph McCoy, a professor at Marshall University and a former state Commissioner of Corrections, under a broad grant of authority:

...[T]he powers of the receiver to implement this Order shall be that authority, which in usual circumstances is vested by law in the County Commission and the Sheriff of McDowell County as such related to the operation of the McDowell County Jail and its environs.

The appointment was made for a period of one year, renewable upon a showing of continued or prospective noncompliance.

Shaw is not the first instance of federal

court receivership in a jail or prison case. The entire Alabama prison system was placed in receivership at one point by a federal court. *Newman v. State of Alabama*, 466 F.Supp. 628, 635 (M.D.Ala. 1979). But in *Newman*, the state governor was appointed as receiver. *Shaw* appears to be the first reported case in which local authority over jail or prison operations has been so completely bypassed. There was apparently a prior receivership [involving the same receiver] in an unreported case arising from Cabell County, West Virginia in 1981. *Shaw*, 771 F.Supp. at 764, citing *Brown v. Bailey*, Civil Action No. 78-3046-H (S.D.W.Va., June 5, 1981). Other receiverships have been created by federal courts in school desegregation and in environmental cases, and by state courts. *Shaw* at 762 (citing cases).

Other Cases Worth Noting

U.S. COURT OF APPEALS

Work Assignments/Classification—Race

La Bounty v. Adler, 933 F.2d 121 (2nd Cir. 1991). A black inmate's allegation of racially disparate treatment in program assignments and of a history of racially disparate treatment stated an equal protection claim.

Pre-Trial Detainees/Procedural Due Process—Transfers

Covino v. Vermont Dept. of Corrections, 933 F.2d 128 (2nd Cir. 1991). A pre-trial detainee complained that he was transferred to administrative segregation. The district court should have analyzed Vermont statutes and regulations to determine whether a state-created liberty interest existed. Regardless of the propriety of the initial transfer, the plaintiff's nine-month confinement "smacks of punishment," and the district court should analyze it under *Bell v. Wolfish*.

Class Actions—Effect of Judgments and Pending Litigation/Judicial Disengagement

Picon v. Morris, 933 F.2d 960 (8th Cir. 1991). A class action consent decree provided that certain "emergency segregation cells" would be used only in limited circumstances for short periods of time. After three years of compliance reports, the defendants claimed that the cells were no longer used, and the court held it was "no longer required to retain jurisdiction" and dismissed "the above cause" with prejudice.

The plaintiff was held in one of the cells in violation of the consent decree. He amended his complaint to allege violation of the decree

only after the decree had been dismissed. The plaintiff then filed a Rule 60 motion to vacate the dismissal of the decree, fearing that *res judicata* would preclude his §1983 action and the dismissal of the decree would bar his contempt claim.

Assuming that the district court's dismissal vacated the consent decree, the district court abused its discretion in denying the motion to vacate the dismissal so the plaintiff could proceed with a contempt action.

Women/Monitoring and Reporting/Contempt/Financial Resources/Attorneys' Fees and Costs

Glover v. Johnson, 934 F.2d 703 (6th Cir. 1991). The district court long ago found that program opportunities for women were so inadequate as to deny equal protection. The district court later appointed a "special administrator" after finding that prison officials had not complied with prior orders.

The defendants were properly held in contempt under the clear and convincing evidence standard. Although they did not obtain all the cooperation that they wished from outside colleges and educators, they failed to explore or attempt alternative solutions and failed to take all actions that were under their control.

The court rejects the argument that enforcement requires the participation of other state agencies and the legislature and should therefore be abandoned. The court orders are directed at prison officials and require parity of programming.

Requiring the defendants to appoint an administrator to develop a remedial plan was not an abuse of discretion. The court had determined that expert advice was required, and the record "shows a consistent and persistent pattern of obfuscation, hyper-technical objections, delay, and litigation by exhaustion...to avoid compliance with the letter and spirit of the district court's orders."

Res Judicata and Collateral Estoppel/Prisoners as Staff

McDuffie v. Estelle, 935 F.2d 682 (5th Cir. 1991). The *Ruiz v. Estelle* decision collaterally estopped Texas prison officials with respect to the constitutionality of the building tender system, but not with respect to disciplinary practices, in a subsequent damage action. At 685-86: "[T]hose officials not named as defendants in *Ruiz* were nevertheless bound by the injunction as agents and employees of TDC and Estelle."

Qualified Immunity/Searches—Person—Visitors and Staff

Daugherty v. Campbell, 935 F.2d 780 (6th Cir. 1991). A visual body cavity search of a

prison visitor without "at least reasonable suspicion" violated clearly established law. The court relies on dicta from a previous Sixth Circuit case and on the consensus of the three other circuits that had ruled on the issue before the incident in question.

Punitive Segregation/Summary Judgment

Williams v. Adams, 935 F.2d 960 (8th Cir. 1991). Allegations that the plaintiff was placed in "the hole" for 13 days in a cell with a broken toilet that leaked filthy waste onto the floor stated a constitutional claim.

Federal Prisons and Officials/Exhaustion of Remedies

Trell v. Brewer, 935 F.2d 1015 (9th Cir. 1991). A federal prisoner seeking both damages and injunctive relief cannot bring a *Bivens* action without first exhausting any available administrative remedies. The proper disposition where remedies have not been exhausted is dismissal without prejudice.

Attorneys' Fees and Costs

Cabrales v. County of Los Angeles, 935 F.2d 1050 (9th Cir. 1991). The plaintiff won a verdict of \$150,000 in a jail suicide case and prevailed on appeal; the Supreme Court granted *certiorari* and vacated and remanded; the appellate court reinstated its affirmance and the Supreme Court denied *certiorari*. The plaintiff prevailed as to her unsuccessful opposition to the first *certiorari* petition. "If a plaintiff ultimately wins on a particular claim, she is entitled to all attorneys' fees reasonably expended in pursuing that claim—even though she may have suffered some adverse rulings." (1053) "[L]osing is part of winning." (1053)

Pro Se Litigation/Summary Judgment

Hall v. Bellmon, 935 F.2d 1106 (10th Cir. 1991). At 1109:

When the pro se plaintiff is a prisoner, a court-authorized investigation and report by prison officials (referred to as a Martinez report) is not only proper, but may be necessary to develop a record sufficient to ascertain whether there are any factual or legal bases for the prisoner's claims.... Telephone evidentiary hearings before a judge or magistrate may serve the same purpose as a Martinez report.... Although a court may consider the Martinez report in dismissing a claim pursuant to §1915(d)...it cannot resolve material disputed factual issues by accepting the report's factual findings when they are in conflict with pleadings or affidavits.... A bona fide factual dispute exists even when the plaintiff's factual allegations that are in conflict with the

Martinez report are less specific or well-documented than those contained in the report. Because pro se litigants may be unfamiliar with the requirements to sustain a cause of action, they should be provided an opportunity to controvert the facts set out in the Martinez report.

At 1110:

A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. We believe that this rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.

Pre-Trial Detainees/Medical Care—Standards of Liability—Serious Medical Needs

Davis v. Jones, 936 F.2d 971 (7th Cir. 1991). At 972:

Police must respond to conditions they can observe. Just as the Constitution does not demand that police obtain medical care for prisoners whose injuries appear to be slight but turn out to be serious, so the officers must obtain medical care when the wound reasonably appears to be serious even if the risk turns out to be small. Police can act only on appearances; anything else is gambling with another person's life, a wager the Constitution does not permit arresting officers to undertake. Whether the injury is actually serious is a question best left to a physician.

Procedural Due Process—Disciplinary Proceedings

Ramer v. Kerby, 936 F.2d 1102 (10th Cir. 1991). A policy barring prisoners from calling staff members as witnesses denied due process, which requires an individualized determination of the importance of each witness's testimony and the interests of the institution. An assertion that testimony is "merely cumulative" generally does not justify denying a witness request "when that inmate faces a credibility problem trying to disprove the charges of a prison guard."

The plaintiff was not denied due process when his witness request was denied based on his refusal to submit written questions, a procedure which is essential for the disciplinary committee in determining whether to call the witness.

Food/Religion—Practices—Diet

LaFevers v. Saffle, 936 F.2d 1117 (10th Cir.

1991). The Seventh Day Adventist plaintiff's religious belief in vegetarianism was entitled to constitutional protection if sincerely held, even though the religion does not require a vegetarian diet. The plaintiff's First Amendment claim should not have been dismissed, nor should his equal protection claim based on the provision of pork-free meals to Muslims.

Defendants justified their refusal to provide a vegetarian diet on medical grounds and on the alleged risk of liability. The plaintiff submitted a position paper from the American Dietetic Association and a letter from a university professor stating that vegetarian diets can be nutritionally adequate. The district court should not have dismissed the complaint as frivolous under the *Turner* standard.

Use of Force/Qualified Immunity

Davis v. Locke, 936 F.2d 1208 (11th Cir. 1991). The plaintiff escaped, was recaptured, and alleged that officers dragged him by his feet out of a "dog cage" on the back of a pickup truck while his hands were shackled, causing him to land on his head. He presented expert psychiatric evidence of severe psychological injury and no evidence of physical injury. The jury awarded no compensatory damages and \$1,750 in punitive damages from each officer.

The record supports a finding that the officers violated the Fourteenth Amendment, if not the Eighth. (This holding is contrary to the Supreme Court's statement in *Whitley v. Albers* that the Due Process Clause confers on convicts no greater protection against use of force than does the Eighth Amendment.) Since the plaintiff had been recaptured, caged and shackled, he posed no ongoing threats to the officers. This evidence, combined with the defendants' threats and racial epithets, supported a finding of punishment through excessive force.

The officers were not entitled to qualified immunity because the law in 1984 prohibited "the unjustified use of excessive force by a prison guard against an inmate."

Procedural Due Process—Disciplinary Proceedings, Classification, Transfers, Administrative Segregation

Smith v. Massachusetts Dept. of Correction, 936 F.2d 1390 (1st Cir. 1991). Procedural regulations governing reclassification and transfer to higher custody did not create a liberty interest because they did not contain substantive predicates limiting officials' discretion. A classification contract phrased in discretionary terms without limits on the statutory discretion to transfer also failed to create a liberty interest. In any case, the plaintiff's disciplinary record breached the

contract and extinguished any liberty interest he might have had.

Placement in "awaiting action" status based on a disciplinary report for rape did not deny due process because the plaintiff received the process due under *Hewitt* and the rape charge met the substantive predicate of posing a threat to institutional safety.

Prison officials were not entitled to summary judgment as to their refusal to call the alleged rape victim to testify where the reason for their refusal was not in the record.

Prison officials were not entitled to summary judgment as to their unexplained refusal to produce a prison log that would allegedly have shown that the alleged rape victim was inaccessible to the plaintiff on the day of the rape.

Procedural Due Process—Disciplinary Proceedings/Searches—Urinalysis

Kingsley v. Bureau of Prisons, 937 F.2d 26 (2d Cir. 1991). The petitioner was ordered to provide a urine sample for drug testing but was unable to do so within three hours despite various extreme measures such as applying ice to his testicles. He was disciplined for refusing to provide the sample.

The petitioner asked that other inmates subjected to the test be called as witnesses. Although the prison had a list of them, and the petitioner did not know any of their names because he had just arrived, the hearing officer found that the petitioner had waived their presence by failing to identify them by name. This constituted an arbitrary application of the relevant federal regulation, which tracks the constitutional rules for witnesses. The witnesses' testimony would have been probative of the petitioner's willingness to supply the sample. The conviction should be expunged and the loss of 15 days' good time restored unless the petitioner is given a new and proper hearing.

Attorneys' Fees and Costs/Municipalities

Dotson v. Chester, 937 F.2d 920 (4th Cir. 1991). The plaintiffs settled a jail conditions case and fees were allocated between the county commissioners and the sheriff. The sheriff didn't pay. Since under state law the sheriff possessed final policymaking authority for the county, and not the state, the county could be held liable for the remaining fees. The plaintiffs were also entitled to attorneys' fees for time spent in collecting their fees.

Suicide Prevention

Bell v. Stigers, 937 F.2d 1340 (8th Cir. 1991). Here is yet another case of a young drunk driving arrestee who had never been in jail before and who hanged himself by his belt after saying, "Well I think I'll shoot myself."

The jailer who heard this remark and who violated jail rules by not removing the arrestee's belt was not deliberately indifferent because he was not aware of a "strong likelihood" that the decedent would attempt suicide. At 1344: "A single off-hand comment about shooting oneself when no gun is available cannot reasonably constitute a serious suicide threat." Jail officials are not liable for knowledge of a prisoner "suicide profile." The defendant's conduct was negligent at worst.

Religion—Practices—Beards, Hair, Dress

Mosier v. Maynard, 937 F.2d 1521 (10th Cir. 1991). The Native American plaintiff was denied a religious exemption from a haircut rule under a policy requiring "external evidence" of his adherence to a "recognized" religion. He had been granted an exemption at another prison before his transfer.

The fact that the plaintiff was not a member of the Cherokee nation or the Native American worship group at the prison did not make his belief insincere. Practice or nonpractice of a particular religious tenet may be relevant to sincerity but is not conclusive. "Intrafaith differences are common and cannot be resolved by secular courts." (1523) At 1526: in general, "courts carefully avoid inquiring into the merits of particular religious beliefs in an effort to gauge sincerity."

This case is distinguished from previous cases upholding hair length limits because the prison is not a temporary detention facility and because the issue is not the grooming code but the prison-created exemption policy and its application. The defendants are not entitled to summary judgment.

Class Actions—Effect of Judgments and Pending Litigation/Searches/Access to Courts/Contempt

Welch v. Spangler, 939 F.2d 570 (8th Cir. 1991). A consent decree provides that legal papers will not be searched outside the inmate's presence without consent. The district court's finding that the decree was violated is upheld. Regardless of whether a consent decree may be enforced under §1983, the plaintiff could pursue a contempt claim. At 572: "If the court lacked the power to hold parties in contempt, consent decrees would be robbed of much of their legal significance, and the purpose for which the decree was entered would be undermined."

The court properly imposed a \$500 fine. The court properly imposed \$10 in "nominal" damages. No injury need be proven to support nominal damages. The award "personalizes the remedy" and helps ensure future compliance.

Use of Force/Qualified Immunity

Felix v. McCarthy, 939 F.2d 699 (9th Cir. 1991). Correctional officers were not entitled to qualified immunity in a use of force case in which it was alleged that one officer "used his position of authority intentionally and gratuitously to degrade [the plaintiff's] dignity" and "threw him across a hallway and against a wall, causing bruising, soreness, and emotional damage," and two officers then "pushed him yet another time" (701), all without provocation. It was clearly established by 1985 that use of this sort of force without justification was unconstitutional. Cases excusing the infliction of such "minor" injuries involved real or perceived security threats. At 702: "[I]t is not the degree of injury which makes out a violation of the eighth amendment. Rather, it is the use of official force or authority that is 'intentional, unjustified, brutal and offensive to human dignity.'"

Unsentenced Prisoners and Convicts Held in Jails/Crowding

Williams v. McKeithen, 939 F.2d 1100 (5th Cir. 1991). In 1977, a population limit was imposed on the state prison at Angola. Subsequently, all pending and future actions involving crowding in any state prison or parish jail were ordered consolidated. Population caps were entered in 1982 governing all parish jails in the state.

The district court ordered that all prisoners held in any jail by agreement with the District of Columbia be removed and no additional prisoners from the Immigration and Naturalization Service be admitted without court approval. This was done *sua sponte* in response to news about one sheriff's contract with the District of Columbia, with no notice to any other sheriff or to the District; most of the sheriffs filed motions to vacate, which were denied, and the injunction was reissued with the District added as a party and with fines of \$10,000 a day per unauthorized prisoner imposed.

The district court's actions were improper under the All Writs Act, since they required "substantial, uncompensated change in appellants' existing operations" and did not have a close nexus to an underlying order. There was no evidence that any state prisoner had been denied admission to a jail or that any consent decree had been violated. There was no actual case or controversy before the court. Even if the injunction was otherwise proper, the notice requirements of the Federal Rules were violated.

DISTRICT COURTS

Correspondence—Legal and Official/Access to Courts

Chinchello v. Fenton, 763 F.Supp. 793

(M.D.Pa. 1991). An allegation that the defendant intercepted and read a prisoner's letter to an attorney stated a First Amendment claim, even though the letter was ultimately delivered. It also stated a violation of the right to court access, but only the prisoner, and not the attorney or his employer, the Lewisburg Prison Project, had standing to assert this right. The failure to provide minimum procedural safeguards stated a claim for denial of due process.

At 795: "[A] private individual who acts in concert with federal officials may be held liable for violating a party's constitutional rights." The defendant was a former warden of Lewisburg; he used the letter in a meeting with a private organization to dissuade them from funding the Lewisburg Prison Project.

Procedural Due Process—Disciplinary Proceedings/Summary Judgment/Qualified Immunity

Richardson v. Coughlin, 763 F.Supp. 1228 (S.D.N.Y. 1991). Officers seized a petition and other written materials from the plaintiff's cell and charged him with violating rules against "sit-ins, lock-ins or other actions which may be detrimental to the order of the facility" and against "conduct which disturbs the order of the facility." The hearing officer found him guilty, writing that "the acquisition of signatures without the expressed authorization of departmental officials is prohibited." There was in fact no rule requiring prior approval before collecting signatures on a petition.

The plaintiff is granted summary judgment on the ground that punishment for violating a nonexistent rule denies due process. The hearing officer was not entitled to qualified immunity as to the lack of notice claim, but was entitled to qualified immunity to the extent that his action was based on the language of the petition.

The defendants were entitled to qualified immunity on the plaintiff's First Amendment claim because the plaintiff cited no case that as of 1987 barred prison officials from regulating the circulation of a petition with language like this one.

Defendants were not entitled to summary judgment on plaintiff's damage claim for a transfer that arguably resulted from the unconstitutional disciplinary hearing.

Protection from Inmate Assault/Qualified Immunity

McNeal v. Macht, 763 F.Supp. 1458 (E.D. Wis. 1991). Two officers who were present when the plaintiff was assaulted and allegedly failed to intervene could be found deliberately indifferent. They were not entitled to qualified immunity because the right to be free of deliberate indifference by staff when

attacked by another inmate has been established for some time.

Modification of Judgments

National Law Center on Homelessness and Poverty v. United States Veterans Administration, 765 F.Supp. 1 (D.D.C. 1991). At 6:

A court has the authority to issue further orders to enforce its prior injunction....In making such a decision, a court may take into account the compliance with the court's previous orders and the need for a further order to prevent "inadequate compliance" in the future....As with the initial injunction, however, an order granting further injunctive relief must also be "narrowly tailored to remedy the specific harm shown..."

Rehabilitation

Mace v. Amestoy, 765 F.Supp. 847 (D.Vt. 1991). The plaintiff was convicted of lewd and lascivious conduct with his stepdaughter, not including sexual intercourse. He was granted probation on condition that he complete a treatment program requiring that he take responsibility for all his sexual conduct. The program personnel then demanded that he admit sexual intercourse with the stepdaughter, and his probation was revoked after he refused to do so.

At 850: "Even where a person is imprisoned or on probation, if the state compels him to make incriminating statements that could be used in a prosecution against him for a crime other than for which he has been convicted, his Fifth Amendment rights have been violated." This is the case even when prosecution is "unlikely." The state has the burden of eliminating the threat of incrimination.

Use of Force

Thomas v. Frederick, 766 F.Supp. 540 (W.D.La. 1991). The sheriff is found liable in a use of force case based on the absence of "even the most rudimentary procedure for investigating or documenting incidents of police brutality" and his "turn[ing] a blind eye" to such allegations. (551) The sheriff's liability is premised in part on his "duty under state law to supervise his deputies in all aspects of their performance, including the manner in which they observed, or failed to observe, constitutional standards in carrying out their duties." (555) The sheriff is found liable in both official and individual capacities.

Standing/Racial Discrimination/Transfers/Personal Involvement and Supervisory Liability

Martin v. Lane, 766 F.Supp. 641 (N.D.Ill. 1991). The prisoner plaintiff lacked

standing to complain of alleged racial discrimination in the hiring and promotion of blacks in the Department of Corrections and in the failure to deposit funds, including inmate funds, in minority-owned banks.

A claim that the plaintiff was transferred in retaliation for his lawsuit, supported by a disputed chronology from which retaliation could be inferred, raised a genuine issue of material fact.

An allegation that the warden ordered the lockdown and the departmental director approved it sufficiently alleged their personal involvement in the resulting deprivations.

Financial Resources

Kroll v. St. Charles County, Mo., 766 F.Supp. 744 (E.D.Mo. 1991). A consent decree resolved claims of discrimination against the handicapped in public buildings. A bond issue to pay for renovations was voted down. The court "orders and adjudges" that it will "consider" imposing a property tax increase if the county fails to come up with the funding, and that a statutory rollback of local taxes "may" be enjoined.

Pre-Trial Detainees/Use of Force

Frohman v. Wayne, 766 F.Supp. 909 (D.Colo. 1991). Force used during the jail booking process is governed by a substantive due process standard, here presented as a modified version of the *Johnson v. Glick* standard. The district court grants summary judgment to the defendant despite the plaintiff's allegations that he was "hit," "kicked," "beaten" and "tortured all night long," on the ground that these are "conclusory."

Crowding/Modification of Judgments

Arney v. Finney, 766 F.Supp. 934 (D.Kan. 1991). *Res judicata* does not prevent the modification of an injunction. The court analogizes prison cases to school desegregation cases, citing *Dowell*. The court cites the need for flexibility even though the parties incorporated the "grievous wrong" standard in the consent judgment.

The court denies without a hearing the request to double cell in certain units based on construction delays. Even though the defendants worked in good faith to comply, "such good faith cannot excuse noncompliance with a long-established requirement which the court believes is at the heart of this litigation." (938) The need for the space is not clear and population control measures, also required by the order, are designed to deal with a possible population increase. Also, the system has medium security beds occupied by minimum security inmates who could be transferred. Even if some inmates had to be released temporarily, "we have no

evidence that a substantial danger to society would be created by such a release." (938)

The court offers the defendants a hearing on their request to modify the prohibition on housing inmates in certain units. If conditions are now "clearly within constitutional norms," there is no reason to keep them closed, and short-term housing in them may not undermine the purposes of the order.

The court grants an increase in operating capacity at a prison that was not the focus of the litigation and where the court has no reason to fear that unconstitutional conditions will result.

Searches—Person—Prisoners/Use of Force/Qualified Immunity/Cruel and Unusual Punishment/Privacy

Valdez v. Farmon, 766 F.Supp. 1529 (E.D.Cal. 1991). The pregnant plaintiff refused a strip search incident to a transfer; eventually, an officer shot her in the abdomen with a taser gun. She lost the child and was thought to have suffered an "incomplete abortion." The plaintiff alleged that she had been ordered to strip with males present.

Defendants are entitled to summary judgment on the Fourth Amendment claim. Under *Graham v. Connor*, the Fourth Amendment does not protect convicted prisoners, and in this case there was no actual search, but force used in connection with the threat of a search. At 1534: "All of plaintiff's allegations...are directed at the means by which the search was undertaken, not the propriety of the search itself." The court also thinks that presenting the claim to the jury under the *Graham* "objective reasonableness" test and the *Whitley* "obdurate or wanton" standard would not make sense. However, the plaintiff may present evidence that her refusal to submit to the search was a "justifiable assertion of her Fourth Amendment rights." At 1535:

Force used to compel prisoners to comply with orders violative of those rights may well be found excessive. In other words, a prisoner can invoke a clearly existing constitutional right, and say "no" to prison officials who are unjustifiably about to infringe on that right, without fear that force can be used with impunity in any event to compel her to give up that clearly established right.

It was clearly established in 1988 that routine unclothed searches by members of the opposite sex...or unnecessary viewing of a prisoner's unclothed body by correctional officers of the opposite sex, violated a prisoner's right to privacy or right to be free from unreasonable search and seizures....However, casual observances of

unclothed prisoners by correctional officers of the opposite sex, or body cavity searches in emergency conditions, do not necessarily violate a prisoner's constitutional rights.

Procedural Due Process—Disciplinary Proceedings

Howard v. Wilkerson, 768 F.Supp. 1002 (S.D.N.Y. 1991). At 1008: "No disciplinary hearing officer could have reasonably believed that merely accepting the written report of an officer not present at an alleged attack met the requirements of due process. Indeed if this were enough there would be no purpose in holding a hearing at all." The case turned on whether the plaintiff was properly identified as the assailant; the victim had identified him from a photograph. The court analogizes the victim's allegation to an accusation by a confidential informant and holds that it is clearly established that "a hearing officer's failure to assess the credibility of hearsay information relating to inmate misbehavior constituted a violation of due process." (1008) The court notes that the accuser in this case had a long psychiatric

history and had made inconsistent statements about identifying his attackers. It concludes that under these circumstances there is not "some evidence" to support the conviction. Summary judgment is granted to the plaintiff.

The hearing officer in a prison disciplinary proceeding claimed that he had more evidence than the written material before him, i.e., oral reports, but *Wolff* requires a written statement of evidence relied on. Summary judgment is granted to the plaintiff on the inadequacy of the written record.

Modification of Judgments/Financial Resources

Lorain NAACP v. Lorain Board of Education, 768 F.Supp. 1224 (N.D. Ohio 1991). The "less stringent" standard of consent decree modification is applied in plaintiffs' favor, since "a better appreciation of the facts in light of experience" indicates that the proposed desegregation plan was much more expensive than contemplated. The state is therefore ordered to pay more.

Access to Courts—Punishment and Retaliation

Pratt v. Rowland, 769 F.Supp. 1128 (N.D. Cal. 1991). The plaintiff complained of disciplinary actions and other forms of harassment allegedly in retaliation for his former affiliation with the Black Panther Party and his attempts to expose his conviction as a frame-up.

The plaintiff is permitted to file a supplemental complaint adding new parties and recounting further incidents of retaliatory action after the date of the initial complaint.

Allegations of verbal abuse, false charges, placement in segregation, etc., may not be actionable in themselves, but are so when done in retaliation for the exercise of protected rights. At 1135: "...[I]f the Court were to find that plaintiff had been improperly classified and incarcerated in a maximum security facility out of retaliation for his exercise of his First Amendment rights, it would be within the Court's equitable powers to correct this situation." ■

John Boston is the director of the Prisoners' Rights Project, Legal Aid Society of New York. He regularly contributes this column to the NPP JOURNAL.

Readers' survey

Your comments and responses to our readers' questionnaire were overwhelmingly favorable, and should prove to be very useful to us. Despite the wide variety in *JOURNAL* readership, which includes lawyers, corrections professionals, prisoners, prisoner rights advocates, among others, there was great similarity in what you like about what we're doing and what you would like to see more of. In fact, most of the "criticism" came in the form of—"I would like the *JOURNAL* to carry more pages and come out more frequently."

All categories of readers said the *JOURNAL* is the most interesting and useful publication that they read in the criminal justice field. (Some also mentioned that it was the *only* publication they had ever read in the field.)

Case Law Report is very popular. Most readers would like to see it expanded, although a few wanted to see a "less legalistic focus" and more general discussion of what court decisions actually mean to them.

Heading the list of what you would like to see more of were articles about alternatives to incarceration (including boot camps and electronic monitoring), advice on litigation, followed by articles on long-termers, mandatory sentences, death penalty, and lastly, AIDS and womens' issues. Many prisoners wanted articles about their particular state.

Prisoner subscribers often complained that they do not receive all the issues. Please let us know when

this happens, and remember to send changes in address if you are transferred.

Many of you, from academics to attorneys, described the *JOURNAL* as a publication you "can count on." You called the *JOURNAL* "informative, analytical, and to the point."

Other comments: "It gives prison law information from the point of view of the innovative and humane professional."

One attorney—unburdened by the need to present a case—said the *JOURNAL* was the "most interesting" of the publications read, and, to explain why, said, "It just is."

Several corrections staff members wanted to see more on AIDS and jail issues.

One reader thought some of the articles were biased, while others thought the publication was objective.

It was resoundingly clear that the *JOURNAL* fills a real need.

"I may not be well-educated, but I've learned a great deal from the *NPP JOURNAL*," said one prisoner. A warden said the *JOURNAL* "deals with issues authentically." One judge likes Case Law Report but would like to see even more in-depth discussion of new cases.

Many of you—jailhouse lawyers, attorneys, and prisoner advocates—requested more "how-to" articles.

According to the survey, the *JOURNAL* is read by many more people than our subscription list indicates. Many of you say your issue is read by five to ten others.

Don't feel you have to wait for a questionnaire to offer suggestions or feedback. This is *your* publication. We hope that in the near future you see more of what you need in the *JOURNAL*. ■

Status Report: State Prisons and the Courts—January 1, 1992

COMPILED BY EDWARD I. KOREN

Forty states plus the District of Columbia, Puerto Rico and the Virgin Islands are under court order or consent decree to limit population and/or improve conditions in either the entire state system or its major facilities. Thirty-two jurisdictions are under court order for overcrowding or conditions in at least one of their major prison facilities, while 11 jurisdictions are under court order covering their entire system. Only five states have never been involved in major litigation challenging overcrowding or conditions in their prisons. The following list gives the current status of each state. (*Asterisks indicate states/jurisdictions where the ACLU has been involved in the litigation.)

1. **Alabama:*** The entire state prison system was under court order dealing with total conditions and overcrowding. *Pugh v. Locke*, 406 F.Supp. 318 (M.D. Ala. 1976), *aff'd in substance sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied, sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978). A receiver was appointed. 466 F.Supp. 628 (M.D. Ala. 1979). On January 13, 1983, the district court entered an order establishing a four-person committee to monitor compliance with previous orders. In December 1984, the district court relinquished active supervision after the parties agreed that substantial compliance had been achieved. The court dismissed the case in December 1988.

2. **Alaska:*** The entire state prison system is under a consent decree and a court order entered in 1990 dealing with overcrowding and total conditions of confinement. *Cleary v. Smith*, No. 3AN-81-5274 (Superior Court for the State of Alaska, 3rd Jud. Dist.; complaint filed March 3, 1986). The parties agreed to population caps at each facility and a mechanism to reduce the population when a cap is exceeded. This mechanism will remain in effect until the state legislature approves an emergency overcrowding reduction statute.

3. **Arizona:*** The state penitentiary is operating under a series of court orders

and consent decrees dealing with overcrowding, classification, and other conditions. Orders, August 1977-1979; *Harris v. Cardwell*, C.A. No. 75-185 PHXCAM (D. Ariz.).

A special administrative segregation unit at the Arizona State Prison in Florence was operating under a December 12, 1985 consent decree. A monitor was appointed. *Black v. Ricketts*, C.A. No. 84-111 PHXCAM. The unit was later found to be in full compliance with the consent decree and *Black* was dismissed in February 1988.

A state-wide class action, filed on behalf of Arizona state prisoners on January 12, 1990, challenges legal access, health care, and discrimination against handicapped prisoners. *Casey v. Lewis*, CIV-90-0054 PHXCAM. Partial summary judgment for plaintiffs was entered in August 1991 enjoining discrimination against HIV-positive prisoners in job assignments. Trial began on November 20, 1991 on all other issues.

4. **Arkansas:*** The entire state prison system was under court order dealing with total conditions. *Finney v. Arkansas Board of Corrections*, 505 F.2d 194 (8th Cir. 1974). A special master was appointed. *Finney v. Mabry*, 458 F.Supp. 720 (E.D. Ark. 1978). Compliance was assessed in 1982. 534 F.Supp. 1026 (E.D. Ark. 1982); 546 F.Supp. 626 (E.D. Ark. 1982). After a finding of full compliance, the federal court relinquished jurisdiction in August 1982. 546 F.Supp. 628 (E.D. Ark. 1982).

5. **California:*** The administrative segregation units at San Quentin, Folsom, Soledad and Deuel are under court order because of overcrowding and conditions. A preliminary injunction was entered. *Toussaint v. Rushen*, 553 F.Supp. 1365 (N.D. Cal. 1983), *aff'd in part sub nom. Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984). The district court thereafter entered a permanent order enjoining double-celling and other conditions at the San Quentin and Folsom units. *Toussaint v. McCarthy*, 597 F.Supp. 1388 (N.D. Cal. 1984). A later opinion reversed on the issue of placement and retention in

administrative segregation. 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987). A monitor is overseeing compliance. *Toussaint v. Rowland*, 711 F.Supp. 536 (N.D. Cal. 1989).

The California Men's Colony at San Luis Obispo is under a court order establishing population limits. *Dohner v. McCarthy*, 635 F.Supp. 408 (C.D. Cal. 1985). However, compliance monitoring has ceased.

The California Institution for Men at Chino is operating under a settlement agreement providing for improved sanitation, classification, legal access and other conditions. Compliance is being monitored. *Boyden v. Rowland*, CV-86-1989-HLH.

The California Medical Facility at Vacaville is under a 1990 consent decree concerning the delivery of health care services. Compliance is being monitored. *Gates v. Deukmejian*, *S-87-1636-LKK-JFM.

Two lawsuits are pending concerning the delivery of medical and mental health service to prisoners at the California Women's Institution at Frontera. *Doe v. Rowland*, A Civ. 89-598-GLT (C.D. Cal.), and *Whisman v. McCarthy*, *OCV-33860 (Sup. Ct., San Bernardino Co.).

6. **Colorado:*** The state maximum security penitentiary at Canon City is under court order on total conditions and overcrowding. *Ramos v. Lamm*, 485 F.Supp. 122 (D. Colo. 1979), *aff'd in part and remanded*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), *on remand*, 520 F.Supp. 1059 (D. Colo. 1981). During the compliance stage, the parties reached a series of agreements later approved by the court concerning general conditions as well as specific areas such as legal access and double-bunking.

A lawsuit filed on February 27, 1990 challenges conditions and delivery of health care services at three other major state facilities (Buena Vista, Fremont and the women's prison). *Nolasco v. Romer*, 90-C-340 (D. Colo.). During 1991, the parties discussed settlement in both *Ramos* and *Nolasco*.

7. **Connecticut:*** The Hartford Correctional Center is under court order dealing with overcrowding and some conditions. *Lareau v. Manson*, 507 F.Supp. 1177 (D. Conn. 1980), *aff'd*, 651 F.2d 96 (2nd Cir. 1981).

Other facilities under consent decree are: Bridgeport Correctional Center, *Mawhinney v. Manson*, *B78-251 (D. Conn. 1982); New Haven Correctional

Center, *Andrews v. Manson*, #N81-20 (D. Conn. 1982); the Morgan Street Correctional Center, and the Union Avenue Correctional Center.

Litigation challenging overcrowding is pending at the state prison at Somers, *Bartkus v. Manson*, Civ. No. H-80-506, and at the Montville Correctional Center, *Foss v. Lopes*. Niantic Women's Prison is under a court order on a full range of women's prison issues. *West v. Manson*, #H-83-366 (D. Conn., entered October 3, 1984). Compliance is being monitored in these cases.

8. **Delaware:*** All major Delaware prisons are under a consent decree filed in state court on issues of overcrowding, physical plant, medical care, and access to the courts. *Dickerson v. Castle*, C.A. No. 10256 (Del. Ct. Chan., entered November 22, 1988). Compliance is being monitored.

9. **Florida:** The entire state prison system is under court order dealing with overcrowding. *Costello v. Wainwright*, 397 F.Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir. 1977) and 553 F.2d 506 (5th Cir. 1977). In 1980, the court entered a consent decree providing measures for population control. 489 F.Supp. 1100 (M.D. Fla. 1980). A special master was appointed. Additional consent decrees were entered covering environmental health and safety. Also, a consent decree was entered on December 17, 1987 concerning health care services to be delivered by a private provider. The special master is also monitoring this order. During 1991, the parties negotiated to end court supervision of the health care order by turning over monitoring and enforcement to the Correctional Medical Authority, a newly established independent state agency.

10. **Georgia:** The state penitentiary at Reidsville is under court order on total conditions and overcrowding. A special master was appointed in 1979, and dismissed in 1983. *Guthrie v. Evans*, C.A. No. 3068 (S.D. Ga.). The case was closed in 1983, but the injunction remains in effect. The order requires single-celling, improvements in the medical and mental health care delivery system, and improvements in environmental health, among other things. A number of other state facilities have come under challenge.

11. **Hawaii:*** The men's prison (O.C.C.C.) in Honolulu and the women's prison on Oahu are under court order as a result of a 1985 consent decree

entered in a totality of conditions suit. *Spear v. Ariyoshi*, Civ. No. 84-1104 (D. Hawaii). Monitors were appointed and continue to assess compliance with the court decree. The parties have been engaged in further negotiations with a view toward modifying the decree to more accurately reflect current conditions.

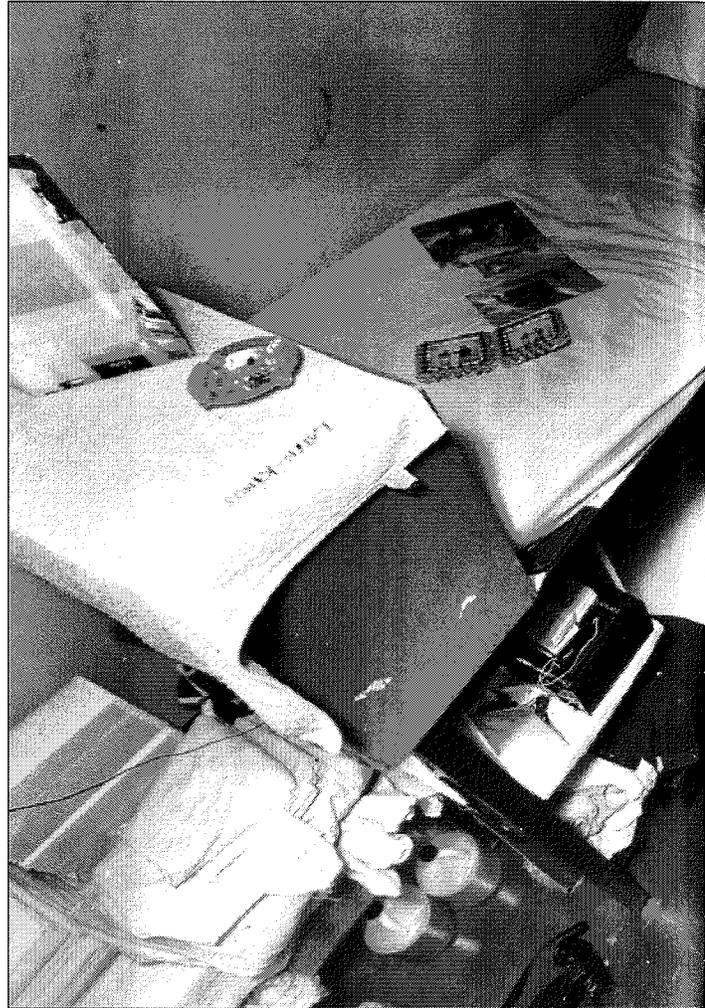
12. **Idaho:*** The men's Idaho Correctional State Institution is under a court order concerning conditions. *Balla v. Idaho State Bd. of Correction*, 595 F.Supp. 1558 (D. Idaho 1984). In 1987, incident to *Balla*, the district court held that the prison was unconstitutionally overcrowded and ordered population reductions. 656 F.Supp. 1108 (D. Idaho 1987). The court of appeals upheld the district court decision rejecting defendants' attempt to obtain more time to reduce the population, among other things. 869 F.2d 461 (9th Cir. 1989).

The women's prison is operating under an interim agreement signed in July 1991 concerning conditions, including overcrowding and medical care, which will remain in effect until the DOC opens a new facility in the summer of 1992. *Witke v. Crowl*, Civ. No. 82-3078 (D. Idaho). Once this new facility is operational, the previous agreements reached in this case in 1991 concerning programming, delivery of medical care, and legal access will become operative.

13. **Illinois:*** The state penitentiary at Menard is under court order on total conditions and overcrowding. A special master, appointed in 1980, was discharged after four years. There has been substantial compliance with the decree; however, the injunction remains in force. *Lightfoot v. Walker*, 486 F.Supp. 504 (S.D. Ill. 1980).

Dwight Correctional Center is under a May 1990 consent decree which requires programs for women prisoners and the construction of a 200-bed minimum security facility for women. *Moorhead v. Lane*, #86-C-2020 (C.D. Ill.).

The Stateville facility is under a December 1990 consent decree, entered by the district court, which provides for improved protection from assault. *Calvin R. v. Peters*, #82C1955 (N.D. Ill.). The district court ordered that protective custody prisoners at the Stateville facility be provided with improved



As a result of crowding pressures, more prisons are double-celling prisoners. However, in some institutions, courts have prohibited this practice as part of a court order or consent decree.

programming, conditions and legal assistance. *Williams v. Lane*, 646 F.Supp. 1379 (N.D. Ill. 1986). The court of appeals affirmed this decision. 851 F.2d 867 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 879 (1989).

14. **Indiana:*** The state prison at Pendleton was found unconstitutional on total conditions and overcrowding. *French v. Owens*, 538 F.Supp. 910 (S.D. Ind. 1982), *aff'd in pertinent part*, 777 F.2d 1250 (7th Cir. 1985), *cert. denied*, 479 U.S. 817 (1986).

The state penitentiary at Michigan City is under a court order on over-

crowding and other conditions. *Hendrix v. Faulkner*, 525 F.Supp. 435 (W.D. Ind. 1981), *aff'd sub nom. Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984).

The state prison at Westville is under a consent decree on overcrowding,

of conditions; however, this decree is not being actively monitored for compliance. *Watson v. Ray*, C.A. No. 78-106-01, 90 F.R.D. 143 (S.D. Iowa 1981).

Fort Madison is also under a series of consent decrees involving the delivery of medical care services, *McBride v. Ray*, #73-242-2 (S.D. Iowa) and segregation and protective custody practices, *Gavin v. Ray*, #78-62-2 (S.D. Iowa) and *Parrott v. Ray*, and these cases are being actively monitored.

16. **Kansas:** A consent decree on total conditions was entered in 1980 at the state penitentiary at Lansing. *Arney v. Bennett*, No. 77-3132 (D. Kan.). The case was reopened and expanded in 1988, and a more comprehensive order was entered in April 1989. That order requires the state's oldest facilities to meet and maintain standards of the American Correctional Association (ACA) and the National Commission on Correctional Health Care (NCCHC); the capacities of all other existing or new facilities must meet ACA standards. A panel of experts is monitoring mental health treatment. In 1991 the defendants moved for modification of the consent decree to permit double-celling and to increase operating capacity because of construction delays. The court denied modification in two

prisons which were the focus of this case and granted it in other institutions, but only where ACA standards and other limitations are met. *Arney v. Finney*, 766 F.Supp. 934 (D. Kan. 1991).

17. **Kentucky:** The Kentucky State Penitentiary at Eddyville is under court order by virtue of a consent decree on overcrowding and some conditions, including guard brutality. *Kendrick v. Bland*, 541 F.Supp. 21 (W.D. Ky. 1981). The court of appeals later vacated some requirements of the order related to the brutality issue. 740 F.2d 432 (6th Cir. 1984). The district court found KSP in substantial compliance with the consent decree, with the exception of the new construction requirements. As a result, the case was placed on the

inactive docket of the court, a decision affirmed by the court of appeals. 931 F.2d 421 (6th Cir. 1991). However, the court held that the district court could reinstate the case if plaintiffs could prove "a major violation" of the decree.

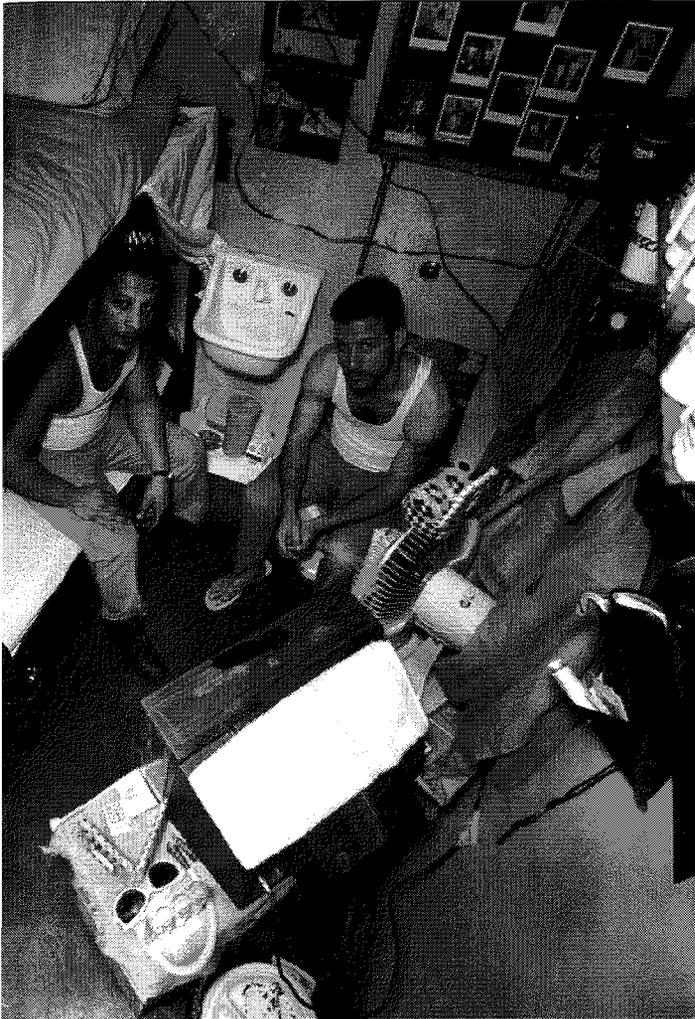
The women's prison, KCIW at Pee Wee Valley, is under court order on a variety of conditions, including crowding, physical plant, sanitation, access to the courts, programming, classification and work. *Canterino v. Wilson*, 546 F.Supp. 174 (W.D. Ky. 1982), and 564 F.Supp. 711 (W.D. Ky. 1983). The district court's order concerning work and study release was vacated by the court of appeals. 869 F.2d 1948 (6th Cir. 1989).

18. **Louisiana:** The Louisiana State Prison (Angola) is under court order dealing with overcrowding and a variety of conditions. *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977). In 1981, the court of appeals consolidated all prison and jail overcrowding cases in Louisiana before one district court judge. This decision included *Williams. Hamilton v. Morial*, 644 F.2d 351 (5th Cir. 1981). On December 7, 1983, the district judge who was appointed under *Hamilton* approved a consent decree dealing with crowding and population problems at Angola. In 1989, the judge declared a state of emergency, appointed a court expert and requested that the U.S. Department of Justice investigate. The Justice Department is conducting an investigation.

19. **Maine:** The State Prison at Thomaston was challenged on overcrowding and a variety of conditions in 1978. The trial court granted relief on the issue of restraint cells and otherwise dismissed the complaint. *Lovell v. Brennan*, 566 F.Supp. 672 (D. Me. 1983), *aff'd*, 728 F.2d 560 (1st Cir. 1984).

In October 1990, a lawsuit was filed against the state prison at Thomaston concerning conditions, treatment and placement in the protective custody and administrative segregation units. *Brown v. McKernan*, #90-246-P. In March 1991, the parties reached an agreement to end double-celling in those units and to enhance programming opportunities.

20. **Maryland:** The Maryland House of Corrections at Jessup and the Baltimore Penitentiary were declared unconstitutionally overcrowded in, respectively, *Johnson v. Levine*, 450 F.Supp. 648 (D. Md. 1978), and *Nelson v.*



Albert Dickson/The Hartford Courant

conditions and delivery of mental health services. *Anderson v. Orr*, C.A. No. S83-0481 (N.D. Ind., case filed in 1983). A comprehensive settlement was reached March 31, 1989. Compliance is being monitored.

In June 1990, a case was filed challenging conditions and delivery of health care services to prisoners confined at Indiana's reception and classification facility. *Lecclier v. Bayh*, IP90-1460-C (S.D. Ind.). After conducting discovery, the parties reached a comprehensive settlement. A consent order was entered on July 5, 1991. Compliance is being monitored.

15. **Iowa:** The Iowa State Penitentiary at Fort Madison is under court order on overcrowding and a variety

Collins, 455 F.Supp. 727 (D. Md. 1978), *aff'd sub nom. Johnson v. Levine*, 588 F.2d 1378 (4th Cir. 1978), *on remand*, Nos. H-77-113 and B-77-116, (D. Md. January 5, 1981), *rev. and remanded sub nom. Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981) (*en banc*). A settlement agreement and consent decree were subsequently entered in both cases.

In a case against the Maryland Correctional Institution at Hagerstown, the district court approved a settlement agreement in 1979 which required that double-celling be eliminated and certain conditions improved. *Washington v. Keller*, 479 F.Supp. 569 (D. Md. 1979). Later the *Washington* and *Johnson* cases were consolidated and further agreements were entered in October 1987 and February 1988. Compliance is being monitored. Contempt motions filed in these cases have been resolved by negotiation.

21. **Massachusetts:** The maximum security unit at the state prison in Walpole was challenged on total conditions. *Blake v. Hall*, C.A. 78-3051-T (D. Mass.). The district court decided in prison officials' favor. On appeal, this decision was affirmed in part and reversed in part and remanded, 668 F.2d 52 (1st Cir. 1981).

A case filed in state court challenged unlawful conditions, use of force and classification practices in DOC segregation units statewide. After months of trial before one justice, the state Supreme Court ruled in the prisoners' favor; compliance is being monitored. *Hoffer v. Fair*, #85-71 (Sup. Jud. Ct. for Suffolk Co.). A case filed against MCI at Concord successfully challenged numerous unlawful conditions, including the use of dayrooms for housing prisoners. The practices have ceased and the state has settled for money damages. *Jacobs v. Fair*, #86-81758 (Superior Ct., Suffolk Co.).

22. **Michigan:** The women's prison is under a court order concerning the total conditions of confinement including programming. *Glover v. Johnson*, 478 F.Supp. 1075 (E.D. Mich. 1979); further orders entered, 510 F.Supp. 1019 (E.D. Mich. 1981). Later, the Department of Corrections was found in contempt, 659 F.Supp. 621 (E.D. Mich. 1987), *vac. and remanded*, 855 F.2d 277 (6th Cir. 1988). On remand, the state was required to appoint a special administrator to design and implement a remedy for violations of the order. 721 F.Supp. 808 (E.D. Mich. 1989), *aff'd*, 934 F.2d 703 (6th Cir. 1991). Subse-

quently, a special administrator was appointed, and a compliance plan was ordered to be submitted on November 22, 1991.

Four men's prisons (Marquette, Michigan Reformatory, Riverside and a portion of Jackson) are under consent decree on overcrowding and other conditions. *U.S. v. Michigan*, 680 F.Supp. 928 (W.D. Mich. 1987). Court orders in another case, *Knop v. Johnson*, cover issues not included in the consent decree in *U.S. v. Michigan. Knop v. Johnson*, 685 F.Supp. 636 (W.D. Mich. 1988). *Knop* is currently on appeal.

The Central Complex and most of the North Complex at the Jackson state prison are operating under a consent decree. *Hadix v. Milliken*, #80-73581 (E.D. Mich.; order entered May 13, 1981). Among other issues, the decree requires improved health care delivery, sanitation, out-of-cell activity and staff supervision. Another order in *Hadix* requires defendants to subdivide the enormous Jackson Prison into more workable units. Compliance is being monitored. Finally, a court order which requires improved legal assistance is pending on appeal. *Hadix v. Johnson*, 694 F.Supp. 259 (E.D. Mich. 1988).

23. **Minnesota:** The state has kept overcrowding in abeyance through use of sentencing guidelines which take the number of available prison beds into account. Also, individual facilities and the Department of Corrections have been responsive to complaints raised by advocates for prisoners.

24. **Mississippi:** The entire state prison system is under court order dealing with overcrowding and total conditions. *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974). Compliance is not being monitored.

25. **Missouri:** The State Penitentiary at Jefferson City is under court order on overcrowding, medical care and other conditions. *Burks v. Walsh*, 461 F.Supp. 454 (W.D. Mo. 1978), *aff'd sub nom. Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979). On remand, the state was held liable for failing to provide adequate medical care. *Burks v. Teasdale*, 492 F.Supp. 650 (W.D. Mo. 1980). In 1982, a separate order was entered on the medical care issues.

26. **Montana:** No conditions lawsuits have been filed. Montana's prison population has been small. However, the prison population has been increasing and problems have been occurring in the system. A major riot occurred at the Deer Lodge prison in

September 1991. The women's prison in Warm Springs has severe problems with respect to environmental health and sanitation, the delivery of health care and a dearth of programming. The state plans to build a new facility.

27. **Nebraska:** No cases have been filed dealing with overcrowding; however, there is an equal protection and conditions case involving the Nebraska Center for Women at York. *Klinger v. Nebraska Dept. of Correctional Services*, C.V. 88-L-399 (D. Neb.). In a case challenging conditions at the Medium Security Unit of the Nebraska State Penitentiary, the court held that there was no violation of the Eighth Amendment. However, the court did note that those conditions "are potentially close to creating intolerable conditions...unless remedial measures are implemented." *Kitt v. Ferguson*, 750 F.Supp. 1014, 1019 (D. Neb. 1990).

28. **Nevada:** The Nevada State Prison at Carson City has been under a comprehensive court order since 1980 concerning population, conditions, and delivery of health care services. A new consent decree consolidating the previous orders was entered by the district court on May 19, 1988. *Phillips v. Bryan*, CVR-77-221-ECR (later changed to *England v. Miller* with the same docket number). Two monitors appointed under the terms of the agreement have been reporting on compliance. In 1991, the state made a motion to dismiss the case; that motion is pending. In the meantime, the parties are negotiating on the mental health issues.

29. **New Hampshire:** The state penitentiary is under court order dealing with total conditions and overcrowding. *Laaman v. Helgemoe*, 437 F.Supp. 269 (D.N.H. 1977). The parties negotiated a consent decree in May 1990 that resolved a pending motion for contempt. Compliance is being monitored.

30. **New Jersey:** For years the state has been able to stave off overcrowding in the prisons by mandating that county jails take the overflow from the state system. However, most of the state's 21 county jails are under court order. State prisoners continue to back up into municipal lock-ups.

31. **New Mexico:** The entire system is under court order on overcrowding and total conditions. *Duran v. Apodaca*, C.A. No. 77-721-C (D.N.M.) (consent decree entered August 1, 1980). A special master was appointed

in June 1983. Defendants moved to vacate the consent decree, but the district court denied the motion. *Duran v. Carruthers*, 678 F.Supp. 839 (D.N.M. 1988). The court of appeals affirmed the decision. 885 F.2d 1485 (10th Cir. 1989), *cert. denied*, 110 S.Ct. 865 (1990). Because the state is in substantial compliance with the decree, in August 1991 the parties agreed to an eventual vacating of the decree. In exchange, the state agreed to a permanent, non-modifiable set of population controls including a prohibition against double-celling. The district court approved this settlement in an order entered September 20, 1991.

32. **New York:** While no state-wide comprehensive lawsuits have been brought, numerous prison facilities are under court order, and injunctive relief has been obtained in the following cases:

In 1979, a case was filed challenging the delivery of medical care at the Green Haven Correctional Facility. *Milburn v. Coughlin*, 79 Civ. 5077 (S.D.N.Y.). In 1982, the parties entered into a comprehensive settlement. Later, in order to settle a contempt motion, the parties negotiated a modified agreement. Compliance is being monitored.

A case was filed challenging delivery of medical care at the Bedford Hills women's prison. The court of appeals upheld a favorable opinion and order. *Todaro v. Ward*, 565 F.2d 48 (2nd Cir. 1977). In 1988, a renegotiated consent decree was entered which included improvements in the delivery of health care in general and the enforcement of services to HIV-positive prisoners.

A state-wide class action suit was filed in 1990 challenging the inadequate treatment of HIV-positive prisoners and deficiencies in the HIV education program. *Inmates with AIDS v. Cuomo*, #90CV252 (N.D.N.Y.). This action was certified as a class action and discovery is proceeding, subject to elaborate safeguards to protect confidentiality.

A state-wide class action suit was filed in 1980 on behalf of prisoners confined to segregation units. *Anderson v. Coughlin*, 80 Civ. 3037 (S.D.N.Y.). A consent decree was entered in 1984 on the medical and legal access issues. In 1985, the court of appeals upheld an unfavorable decision on the exercise and recreation issues. *Anderson v. Coughlin*, 757 F.2d 33 (2d Cir. 1985).

The protective custody unit at Green Haven Correctional Facility is operating under a 1983 consent judgment concerning conditions and practices. *Honeycutt v. Coughlin*, 80 Civ. 2530 (S.D.N.Y.). Compliance is being monitored.

A district court judge recently held defendants liable for racial segregation in housing and job assignments at Elmira Correctional Facility. *Santiago v. Miles*, #86-694L (W.D.N.Y.) (decision and order entered October 1, 1991).

Prisoners at Clinton Correctional Facility brought a class action suit in 1983 concerning the delivery of mental health services. *Tomasulo v. LeFevre*, 84 CV 1035 (N.D.N.Y.).

The Attica Special Housing Unit is under challenge on conditions of confinement. In 1990, the court granted a preliminary injunction providing substantial relief on the delivery of medical care services. *Eng v. Coughlin*, CV-80-3859 (W.D.N.Y.). See also, 865 F.2d 521 (2nd Cir. 1989).

The Bedford Hills Correctional Facility is under challenge concerning the delivery of mental health services for women confined in segregation facilities. Defendants' motion for summary judgment or qualified immunity was denied. *Langley v. Coughlin*, 709 F.Supp. 482 (S.D.N.Y. 1989), *appeal dismissed*, 888 F.2d 252 (2nd Cir. 1989). In a later opinion, the court accepted the recommendations of the magistrate to deny defendants' further motion for summary judgment and for class certification. 715 F.Supp. 522 (S.D.N.Y. 1989).

33. **North Carolina:*** In September 1985, a consent judgment was entered covering overcrowding, staffing, programming, and medical services in thirteen units of the state's road and farm camp system in the South Piedmont area. *Hubert v. Ward*, C-C-80-414-M (W.D.N.C.). Compliance was achieved, and the case was placed on the court's inactive docket.

The Craggy Unit outside of Asheville was under an August 1987 consent decree covering conditions and overcrowding. *Epps v. Martin*, A-C-86-162 (W.D.N.C.). A new prison was completed and Craggy was closed.

The Caledonia Farm facility is operating under a 1988 consent decree concerning overcrowding and general conditions. The consent decree imposed a population cap and emphasized protection from assault and reducing violence. *Stacker v. Stephenson*.

There are also pending cases on overcrowding and conditions at Odom Farm, *Barnet v. Allsbrook*, #89-705 CRT BO (E.D.N.C.), and Harnett Correctional Center, *Bass v. Stephenson*, #87-499-CRT BO (E.D.N.C.). These cases, filed in 1989, are still in the discovery phase.

The remaining 49 units of the state system are operating under a December 1988 settlement covering overcrowding and conditions. *Small v. Martin*, 85-987-CRT BR (E.D.N.C.). Compliance is being monitored.

A case challenging the adequacy of mental health care at the state's women's prison was settled out of court. *Mutz v. Johnson*.

34. **North Dakota:** No cases have been filed dealing with overcrowding or conditions.

35. **Ohio:*** In a case involving the Southern Ohio Correctional Facility, the district court banned double-celling. The Supreme Court later reversed this decision. *Chapman v. Rhodes*, 434 F.Supp. 1007 (S.D. Ohio 1977), *aff'd*, 624 F.2d 1099 (6th Cir. 1980), *rev'd*, *Rhodes v. Chapman*, 452 U.S. 337 (1981).

A preliminary injunction was entered at the Columbus State Prison on the housing of prisoners by race and on the use of certain physical restraints. *Stewart v. Rhodes*, 473 F.Supp. 1185 (S.D. Ohio 1979). A consent decree was later entered in 1979 which incorporated the provisions of the preliminary injunction. See 656 F.2d 1216 (6th Cir. 1981). The state prison was closed in 1985.

The State Reformatory at Mansfield was operating under a consent decree on various conditions. *Boyd v. Denton*, C.A. 78-1054A (N.D. Ohio, order entered June 1983). The prison was closed at the end of 1990. A case was filed in 1978 concerning the delivery of medical care to all Ohio prisoners. *Register v. Denton*, C-78-1680 (N.D. Ohio). Medical care at Mansfield operated under a 1981 consent decree until a new medical facility was constructed in the late 1980s. The plaintiffs are currently conducting discovery and attempting to apply the terms of the consent decree to the newly built unit.

There is continuing litigation with respect to conditions and population at the Marion Correctional Facility at Marion, Ohio. *Taylor v. Perini*, #C69-275 (N.D. Ohio). Also see published orders and reports of the special master in this case at 413 F.Supp. 189 (N.D. Ohio

1976); 421 F.Supp. 740 (N.D. Ohio 1976); 431 F.Supp. 566 (N.D. Ohio 1977); 446 F.Supp. 1184 (N.D. Ohio 1977); 455 F.Supp. 1241 (N.D. Ohio 1978) and 477 F.Supp. 1289 (N.D. Ohio 1980).

A case filed by an individual prisoner challenging conditions and crowding at the Hocking Correctional Facility was dismissed by the district court. On appeal, this decision was affirmed.

Wilson v. Seiter, 893 F.2d 861 (6th Cir. 1990). In June 1991, the Supreme Court reversed and remanded. 111 S.Ct. 2321 (1991). The case is now in the district court on the state's motion for summary judgment.

36. Oklahoma: The state penitentiary at McAlester is under court order on total conditions, and the entire state prison system is under court order on overcrowding. *Battle v. Anderson*, 564 F.2d 388 (10th Cir. 1979). The district court's decision in 1982 to retain jurisdiction to assure continued compliance was upheld. 708 F.2d 1523 (10th Cir. 1983). Later, in 1984, the district court relinquished jurisdiction; that decision was affirmed. 788 F.2d 1429 (10th Cir. 1986). Although the court has ended active supervision, all compliance orders are still in effect, and the penitentiary remains under permanent injunction. In fact, the state recently asked the court to vacate or amend the original order to allow the state to renovate closed housing because of overcrowding. The court determined that the order is still in effect, and refused to amend the order because circumstances have not changed.

37. Oregon: The state penitentiary was under a court order on overcrowding. *Capps v. Atiyeh*, 495 F.Supp. 802 (D. Or. 1980), *stayed*, 449 U.S. 1312 (1981) (Rehnquist, J.), *vacated and remanded*, 652 F.2d 823 (9th Cir. 1981). On remand, the district court determined that only medical care and fire safety violated the Eighth Amendment. 559 F.Supp. 894 (D. Or. 1982).

38. Pennsylvania: A case was filed at the women's state prison at Muncy challenging equal protection violations and hazardous physical conditions (including fire safety violations). *Beehler v. Jeffes*, 664 F.Supp. 931 (M.D. Pa. 1986). Most of the claims have been settled or voluntarily dismissed; an asbestos claim is pending and plaintiffs are monitoring the removal schedule.

The State Correctional Institution at Pittsburgh (SCIP) is under court order to reduce double-celling in the old 19th

century cellblocks and to improve staffing and the delivery of medical and mental health services. *Tillery v. Owens*, 719 F.Supp. 1256 (W.D. Pa. 1989), *aff'd*, 907 F.2d 418 (3rd Cir. 1990). The parties negotiated a remedial agreement in 1990 which the court then entered as an order. In early 1991, the district court entered further orders on legal access and staff supervision.

On November 20, 1990, a case was filed challenging conditions and overcrowding at 13 state facilities, excluding those already under court order. *Austin v. Lehman*, C.A.#90-7497 (E.D. Pa.). A motion to dismiss was denied, and discovery is now under way.

39. Rhode Island: The entire state system is under court order on overcrowding and total conditions. *Palmigiano v. Garrahy*, 443 F.Supp. 956 (D.R.I. 1977). A special master was appointed in September 1977. New population caps were imposed by court order in June 1986. Various contempt orders have been entered. *See, e.g.*, 700 F.Supp. 1180 (D.R.I. 1988). On August 21, 1989, the First Circuit affirmed in all respects the trial court's opinions and contempt orders of October 21, 1988 and April 6, 1989, imposing sanctions. The trial court ordered that the fines be utilized to establish a bail fund to release low-bail detainees. 710 F.Supp. 875 (D.R.I. 1989), *aff'd*, 887 F.2d 258 (1st Cir. 1989). In May 1990 the court made an additional finding of noncompliance with population cap orders and required the release of certain prisoners. 737 F.Supp. 1257 (D.R.I. 1990).

40. South Carolina: The entire prison system is under a consent decree on overcrowding and conditions. *Plyler v. Evatt*, C.A. No. 82-876-O (D.S.C.) (January 8, 1985). A release order entered by the district court in the summer of 1986 was held moot by the court of appeals. 804 F.2d 1251 (4th Cir. 1986). In 1988 the district court denied the state's motion to modify the consent decree and ordered the state to reduce the prison population in conformance with the decree. This order was vacated and remanded by the court of appeals. 846 F.2d 208 (4th Cir. 1988). In 1990 the district court again denied the state's motion to modify the decree and again the court of appeals vacated and remanded the case. 924 F.2d 1321 (4th Cir. 1991). There have been extensive subsequent negotiations in this case. In 1990, the parties agreed to permit an increase in

population, but the state made important concessions in programming and future construction.

41. South Dakota: The state penitentiary at Sioux Falls is under court order on a variety of conditions. *Cody v. Hillard*, 599 F.Supp. 1025 (D.S.D. 1984). The appeals court reversed an overcrowding order, finding that double-celling was not unconstitutional. 830 F.2d 912 (8th Cir. 1987) (en banc), *cert. denied*, 485 U.S. 906 (1988).

42. Tennessee: The entire system is under court order for overcrowding and conditions. *Grubbs v. Bradley*, 552 F.Supp. 1052 (M.D. Tenn. 1982). The court ordered a reduction in population, and appointed a special master in December 1982. In an October 25, 1985 order, the court enjoined the intake of new prisoners because the state had failed to comply with the population reduction terms of prior orders.

On August 16, 1990, the court ordered that the Tennessee State Prison in Nashville be closed by March 30, 1992. In the interim, the population will be reduced. On February 15, 1991, the special master recommended to the court that double-celling be permitted at the Turney Center. He also recommended population caps at four new state regional facilities. However, his report required that there be no decrease in staffing levels. These recommendations are currently pending before the judge.

On October 4, 1989 the Sixth Circuit consolidated *Grubbs* with numerous local jail overcrowding cases in which state prisoners were backed up in the jails. *Carver v. Knox Co. Sheriff*, 887 F.2d 1287 (6th Cir. 1989). A master was appointed to monitor the jails and work with the *Grubbs* master. Population caps have been recommended and approved by the court.

43. Texas: In 1980, the entire state prison system was declared unconstitutional on overcrowding and conditions. A special master was appointed. *Ruiz v. Estelle*, 503 F.Supp. 1265 (S.D. Tex. 1980), *aff'd in part, vacated in part*, 679 F.2d 1115 (5th Cir. 1982). The parties negotiated an agreement and, in 1985, a consent decree was entered on the issue of overcrowding. On December 3, 1986, the district court held state officials in contempt. *Ruiz v. McCotter*, 661 F.Supp. 112 (S.D. Tex. 1986). The contempt order was vacated on April 27, 1987; no fines were imposed. The state sought to modify the terms of the consent decree concerning crowding;

this motion was denied and the denial affirmed on appeal. *Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987). During the summer of 1989, private corporations operating state prisons on a contract basis were added as party defendants. Because the backlog of state prisoners confined in county facilities affects the *Ruiz* consent order, the Fifth Circuit has ordered the *Ruiz* court and the district court having jurisdiction over the jail cases to jointly hear any requests for relief requiring the transfer of county prisoners into state custody. *In Re Clements*, 881 F.2d 145 (5th Cir. 1989), and *Alberti v. Sheriff of Harris County, Texas*, 937 F.2d 984 (5th Cir. 1991). The special master's office closed in 1990.

44. Utah: The state penitentiary is operating under a consent decree on overcrowding and some conditions. *Balderas v. Matheson* (formerly *Nielson v. Matheson*), C-76-253 (D. Utah). The 1979 consent decree was ignored because it lacked an effective mechanism for enforcement. A lawsuit challenging double-celling at the penitentiary was filed in 1986. *Baker v. DeLand*, #C86-0361G. In June 1989, the court entered a temporary restraining order regarding double-celling. In November 1991, the magistrate judge filed a report with the court recommending that double-celling be barred in some units while permitting it in others after remodeling.

In December 1989, a further complaint was filed challenging the delivery of medical and mental health services at the state penitentiary. *Henry v. DeLand*, C.A. 89-C-1124 (D. Utah). Settlement discussions on some issues are underway.

Finally, a complaint was filed in 1989 on violence at the prison perpetrated by both staff and prisoners. This case is in discovery. *Harding v. DeLand*, #890-905342CV.

45. Vermont: The state prison was closed in the late 1970s. Maximum security prisoners are sent to other states. The state operates two in-state "central" facilities for close and medium custody prisoners.

46. Virginia: The state prison at Powhatan is under a consent decree dealing with overcrowding and conditions. *Cagle v. Hutto*, 79-0515-R (E.D. Va.).

The maximum security prison at Mecklenburg is under court order dealing with various practices and conditions. *Brown v. Hutto*, 81-0853-R

(E.D. Va.) (April 1985).

The state penitentiary at Richmond was challenged in 1982 on the totality of conditions. *Shrader v. White*, C.A. No. 82-0247-R (E.D. Va.). The trial court dismissed the complaint in June 1983. The court of appeals affirmed in part and remanded in part. 761 F.2d 975 (4th Cir. 1985). The remand was settled in 1987, covering certain prisoner safety issues.

Finally, on September 21, 1990, a lawsuit was filed challenging deteriorating conditions at the 190-year-old state penitentiary at Richmond, which

(Circuit Court, Marshall County)(memorandum and order of June 21, 1983). Plaintiffs challenged as insufficient a remedial plan prepared by defendants. The state Supreme Court agreed with plaintiffs and ordered the defendants to develop a new plan. 342 S.E.2d 422 (W.Va. S.Ct. 1986). Since that 1986 decision, the state Supreme Court has maintained jurisdiction over this case. In 1988, the court ordered the defendants' improved plan to be implemented, and further ordered the state to close the prison. 376 S.E.2d 140 (1988). Thereaf-



Los Angeles Times

Court orders have been entered in 40 states, the District of Columbia, Puerto Rico and the Virgin Islands in an effort to eliminate overcrowded conditions in prisons.

the state had announced on three occasions would be closed. *Congdon v. Murray*, 3:90-CV-00536 (E.D. Va.). On November 21, 1990, the district court ordered basic fire safety and sanitation measures. The state permanently closed the prison on December 14, 1990.

47. Washington: The state penitentiary at Walla Walla was declared unconstitutional on overcrowding and conditions, and a special master was appointed. *Hoptowit v. Ray*, C-79-359 (E.D. Wash.) (June 23, 1980), *aff'd in part, rev'd in part, vacated in part and remanded*, 682 F.2d 1237 (9th Cir. 1982). The court of appeals affirmed the subsequent decision of the trial court and remanded the case again for entry of an order. *Hoptowit v. Spellman*, 753 F.2d 779 (9th Cir. 1985). An order was filed on April 10, 1986. Defendants' motion to dissolve the injunction was denied on May 22, 1987. There is no compliance monitoring.

48. West Virginia: The state penitentiary at Moundsville is under court order on overcrowding and conditions. *Crain v. Bordenkircher*, #81-C-320R

ter, opinions on the status of implementation have been filed on an annual basis. See 382 S.E.2d 68 (1989); 392 S.E.2d 227 (1990); and 408 S.E.2d 355 (1991).

The Huttonsville Correction Center is also under court order with respect to crowding and conditions. The detailed order required population reduction and the building of a vocational training center. *Nobles v. Gregory*, #83-C-244 (Circuit Court, Randolph Co.)(memorandum and order dated February 22, 1985). Enforcement proceedings are ongoing.

In 1981, the state Supreme Court held that women prisoners had a state statutory and constitutional right to rehabilitation and education. *Cooper v. Gwinn*, 292 S.E.2d 781 (W.Va. S.Ct. 1981). Detailed orders were entered thereafter. The women were transferred in 1990 to a facility located in Grafton, West Virginia. Compliance is being monitored.

49. Wisconsin: The state prison at Waupun is under a court order on overcrowding. *Delgado v. Cady*, 576

F.Supp. 1446 (E.D. Wis. 1983).

The women's prison at Taycheedah is operating under a 1988 consent decree which imposes a population cap and deals with programming, delivery of medical services and environmental health issues. *Bembenek v. Bablitch*, #86-C-262 (E.D. Wis.). Compliance is being monitored.

50. **Wyoming:** The old state penitentiary was being operated under the terms of a stipulation and consent decree. *Bustos v. Herschler*, C.A. No. C76-143-B (D. Wyo.). The federal court relinquished jurisdiction in early 1983 and that prison is now closed. A new prison was opened thereafter which, in 1991, was operating above capacity.

51. **District of Columbia:** The District jails are under court order on overcrowding and conditions. *Inmates of D.C. Jail v. Jackson*, 416 F.Supp. 119 (D.D.C. 1976); *Campbell v. McGruder*, 416 F.Supp. 100 (D.D.C. 1976), *aff'd and remanded sub nom. Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978) (concerning the old D.C. Jail). On remand, the court ordered a time limit on double-celling and an increase in staff at the new D.C. Jail (CDF). 554 F.Supp. 562 (D.D.C. 1982). In 1985, after trial, the district court ordered that intake be enjoined. *Inmates of D.C. Jail v. Jackson*, #75-1668 (D.D.C.) (entered July 15, 1985). A consent decree, which supplanted the initial order and required a reduction in population, was entered August 22, 1985.

Several facilities at the Lorton Complex, the District's facility for sentenced prisoners, are under court order for overcrowding, conditions, and the delivery of health services. Population caps are in place at both the Central Facility and the Maximum Security Facility. *Twelve John Does v. District of Columbia*, #80-2136 (D.D.C.) (Central); *John Doe v. District of Columbia*, #79-1726 (D.D.C.) (Maximum). The District has been held in contempt for violations of the cap at Central. *Twelve John Does v. District of Columbia*, 855 F.2d 874 (D.C. Cir. 1988).

On December 22, 1986, Lorton's medium security Occoquan facilities came under court order and a population cap was imposed. *Inmates of Occoquan v. Barry*, 650 F.Supp. 619 (D.D.C. 1986), *vacated and remanded*, 844 F.2d 828 (D.C. Cir. 1988), *motion for rehearing en banc denied*, 850 F.2d 796 (D.C. Cir. 1988) (dissenting opinions and separate statements). A second trial on remand was held in January

1989. The facility was held unconstitutional, and the defendants were ordered to devise a plan to alleviate constitutional violations. 717 F.Supp. 854 (D.D.C. 1989). Plans have been approved by the court and compliance is being monitored.

In March 1990, a lawsuit was filed challenging crowding and conditions at Lorton's Modular Facility, a new prison that was designed as the District's reception and classification facility. *Inmates of Modular Facility v. District of Columbia*, #90-0727 (D.D.C.). In the middle of trial, a settlement was reached and a consent decree entered which includes a population cap and requires improvements in medical care. (Order of December 14, 1990.)

52. **Puerto Rico:** The entire Commonwealth prison system is under a 1979 court order dealing with overcrowding and conditions. *Morales Feliciano v. Romero Barcelo*, 497 F.Supp. 14 (D.P.R. 1979). In 1986, the Commonwealth was again found liable on crowding, conditions and delivery of health care services in its entire prison and jail system. Two court monitors were appointed. 672 F.Supp. 591 (D.P.R. 1986). In 1987, the Commonwealth was held in contempt for violation of the population limits set out in a 1986 stipulation. *Morales Feliciano v. Hernandez Colon*, 697 F.Supp. 26 (D.P.R. 1987).

A population cap was established at Ponce District Jail where sentenced felons are housed. 697 F.Supp. 37 (D.P.R. 1988). The district court ordered contempt fines for violations of the cap; the fines were upheld on appeal. *Morales Feliciano v. Parole Board*, 887 F.2d 1 (1st Cir. 1989).

53. **Virgin Islands:** The territorial prison is under court order dealing with conditions and overcrowding. *Barnes v. Gov't. of the Virgin Islands*, 415 F.Supp. 1218 (D.V.I. 1976).

Summary

Entire Prison System Under Court Order or Consent Decree:

11 jurisdictions: *Alaska, *Delaware, Florida, Mississippi, *New Mexico, *Rhode Island, *South Carolina, *Tennessee, Texas, Puerto Rico, Virgin Islands

Major Institution(s) in the State/ Jurisdiction Currently Under Court Order or Consent Decree:

32 jurisdictions: *Arizona, *California, *Colorado, *Connecticut, *Hawaii, *Idaho, *Illinois, *Indiana, Iowa, Kansas, *Kentucky, Louisiana, *Maine, *Maryland, Massachusetts, *Michigan, *Missouri, *Nevada, *New Hampshire, New York, *North Carolina, *Ohio, *Oklahoma, Oregon, *Pennsylvania, *South Dakota, Utah, *Virginia, *Washington, West Virginia, *Wisconsin, *District of Columbia

Formerly Under Court Order or Consent Decree or Currently Released from Active Supervision of the Court:

6 jurisdictions: *Alabama, *Arkansas, Georgia, *Oklahoma, Oregon, *Wyoming

Pending Litigation:

11 jurisdictions: *Arizona, *California, *Colorado, *Connecticut, Georgia, Nebraska, New York, *North Carolina, *Ohio, *Pennsylvania, *Utah

Special Masters/Monitors/Mediators Appointed (present and past):

25 jurisdictions: *Alabama, *Alaska, *Arizona, *Arkansas, *California, *District of Columbia, Florida, Georgia, *Hawaii, *Idaho, *Illinois, Kansas, Louisiana, *Michigan, *Nevada, *New Mexico, New York, *Ohio, *Pennsylvania, *Rhode Island, *Tennessee, Texas, Washington, District of Columbia, Puerto Rico

Prison Systems or Major Facilities Under Court Order and Cited for Contempt (present and past):

8 jurisdictions: *Alabama, *Michigan, Mississippi, *Rhode Island, Texas, Virginia, *District of Columbia, Puerto Rico

Not Involved (to date) in Overcrowding or Conditions Litigation:

5 jurisdictions: Minnesota, Montana, New Jersey, North Dakota, Vermont

Note: There is some overlap between the second and fourth categories because, in some states, one or more facilities are under court order while other facilities in that state are presently being challenged (e.g., Illinois). Also, Oklahoma is listed in both the second and third categories because the McAlester facility is still under the court order entered in *Battle v. Anderson* but is no longer under active court supervision. ■

Edward I. Koren is a senior staff attorney with the NPP.

BY JUDY GREENSPAN

AIDS Coordinator Looks Back on Four Years' Work

When I first joined the National Prison Project as the AIDS information coordinator in 1988, I met with one of the foremost advocates of prisoners with HIV/AIDS in this country—Mike Riegle* of *Gay Community News*. While sitting out in Dupont Circle, Mike told me that he could count the number of advocates for prisoners with AIDS on one hand. I realized that the most important contribution that I could make would be to strengthen the small but growing network of support for prisoners who were HIV-positive or who were trying to understand and fight the AIDS epidemic behind the walls.

Nearly four years later, as I leave the National Prison Project to move to California, I think that the combined efforts of people around the country have affected the lives of prisoners with HIV and AIDS. While this

coalition has included a variety of people—AIDS educators and activists, lawyers, prisoner advocates, health care workers, some concerned prison staff—it has been the tireless intervention of prisoners themselves that has made the most difference.

It's not that the quality of life for prisoners with HIV or AIDS has changed. I doubt whether conditions have improved in four years. It is true that almost all of the state prison systems and the Federal Bureau of Prisons are dispensing AZT and other drugs necessary to treat and manage the AIDS virus. Fewer state systems than ever are segregating HIV-positive prisoners or those with full-blown AIDS. HIV-positive prisoners have been effectively mainstreamed into the general prison population. Only a few stubborn states like Alabama, Mississippi, Missouri and California maintain the unnecessary segregation policies.

However, despite more seemingly enlightened prison policies, prisoners with HIV/AIDS are still treated differently. They are often rated more harshly for disciplinary infractions and held longer in administrative segregation. Many states still do not allow HIV-infected prisoners

access to the same jobs and vocational training as other prisoners. While some early parole/medical release programs have been put into place for prisoners with terminal illnesses, most state legislatures and prison administrations have not discovered the humanity of allowing prisoners with AIDS to live the last months of their lives with their family and friends.

Corrections administrators have yet to ensure an HIV-positive prisoner's right to privacy. Staff have much to learn about how HIV/AIDS is transmitted and why they should use universal precautions when dealing with all prisoners, not only the few known to be HIV-positive.

The most important change over the past four years has been advocacy on behalf of prisoners with HIV and AIDS on both sides of the walls.

AIDS service organizations and health educators all over the country have set up programs inside jails and prisons. Of course, there has been some resistance on the part of prison administrators to "outsiders," but many projects have overcome even that obstacle. These organizations have provided badly needed educational brochures, videos, and classes for prisoner peer educators.

(cont'd from page 4)

"The buck must stop with one particular person...a person with a name and a face must be responsible for each tuberculosis patient."

The CDC also stresses that the burden of proving that intramural transmission of TB is *not* occurring rests on the correctional institution. Until improvements in this area are made, a jail or prison sentence may include not only loss of freedom but also an increased risk of tuberculosis.

Judge Morris Lasker has ordered New York City to open a 140-bed isolation unit on Rikers Island. The first 42 beds will be operational by May 1st. Dr. Safyer is delighted about the unit, which he calls "state-of-the-art...far exceeding anything I have seen in the New York hospital system."

The New York City correctional system (which already diagnoses and treats over

100 patients on any given day) will provide chest x-rays for all 150,000 admissions along with the tuberculosis skin test.

"By doing this," says Safyer, "we will diagnose many more patients, place them in safe environments and follow them under supervised care. This is the only proper response for New York City and, I suspect, for many other corrections systems." ■

Jan Elvin is editor of the NPP JOURNAL.

¹ Quoting Dr. George di Fernando Jr., director of New York State Health Dept. TB Control Program, "New York Moving to Limit TB Spread," *New York Times*, p.42, (December 8, 1991).

² Montefiore provides medical care for the approximately 20,000 inmates in the New York City jails.

³ Karen Brudney and Jay Dobkin, "Resurgent

Tuberculosis in New York City: Human Immunodeficiency Virus, Homelessness, and the Decline of Tuberculosis Control Programs," *American Review of Respiratory Disease*, 144:741-743 (1991).

⁴ Alan Bloch, M.D., in a speech entitled, "Preventing TB Outbreaks in Your Correctional Facility," given at the 1991 National Conference on Correctional Health Care.

⁵ William W. Stead, M.D., "Undetected Tuberculosis in Prison: Source of Infection for Community at Large," *JAMA*, Vol.240, No.23, (Dec. 1, 1978).

⁶ Bailus Walker Jr., Ph.D., MPH, "Prison Population Pressures: The Epidemiological Basis for Present Density Standards," *Journal of Environmental Health*, Vol. 54, No.2, pp.18-21, (Sept./Oct. 1991).

⁷ L.N. King and G. Geis, "Tuberculosis Transmission in a Large Urban Jail," *JAMA*, 261:393-397, (1977).

⁸ Peter A. Selwyn, et al., "A Prospective Study of the Risk of Tuberculosis Among Intravenous Drug Users with Human Immunodeficiency Virus Infection," *The New England Journal of Medicine*, Vol.320, No.9, pp. 545-550, (March 2, 1989).

⁹ Barnes, et al., *The New England Journal of Medicine*, Vol.324, No.23, (June 1991).

¹⁰ Bureau of Justice Statistics.

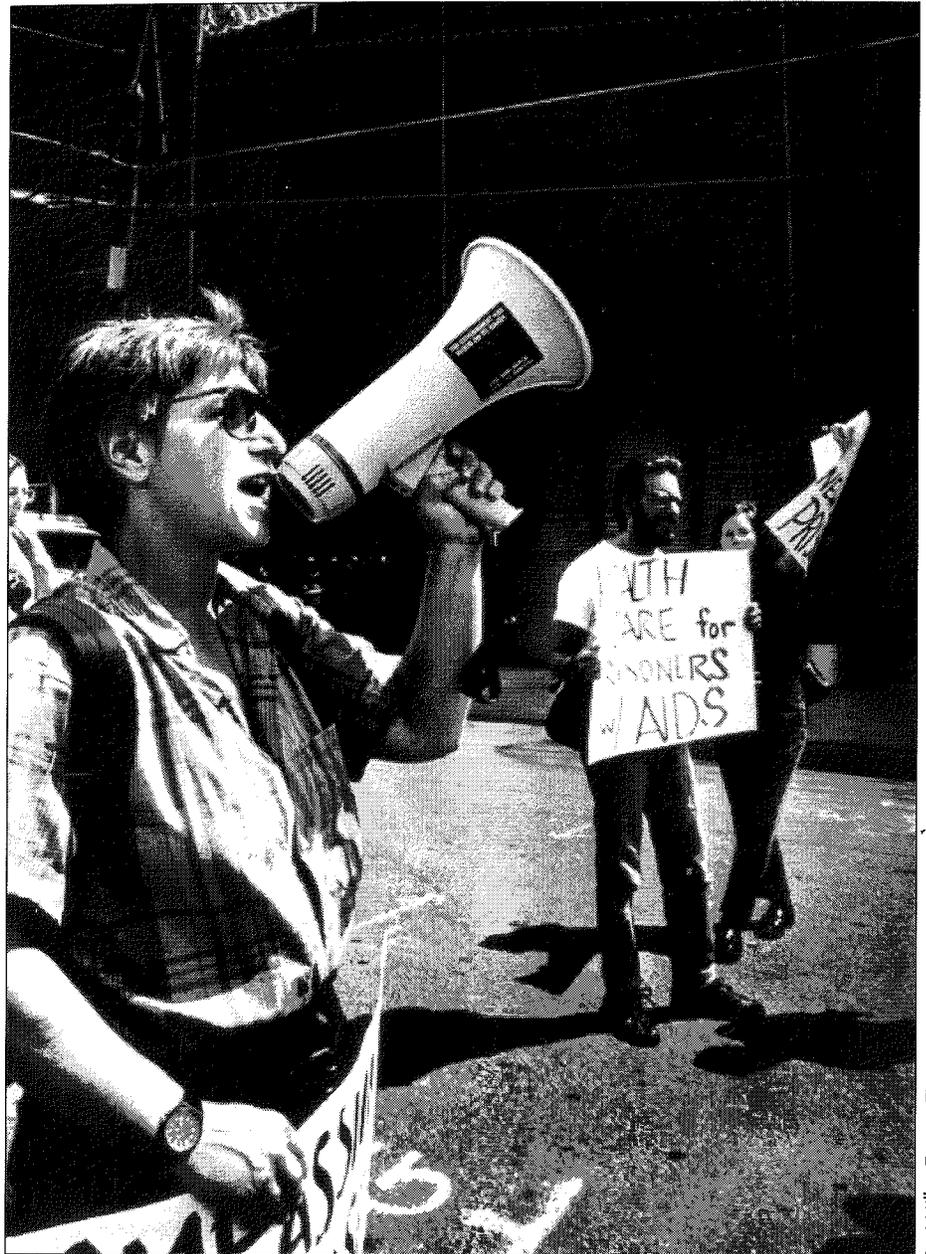
AIDS activist organizations, like ACT UP, have responded creatively to critical problems and abuse faced by prisoners with HIV and AIDS. From the Justice for Gregory Smith campaign (an HIV prisoner, Smith was convicted of attempted murder and sentenced to 25 years in prison for biting a prison guard) to the first national demonstration in Madison, Wisconsin, on the anniversary of the suspected murder of Donald Woods, a prisoner with AIDS, activists have strongly advocated on behalf of prisoners with HIV/AIDS.

The National Commission on AIDS report on "HIV Disease in Correctional Facilities" was a major contribution to our efforts to place AIDS and prison issues on the national agenda. This document, based on prison site visits and testimony by prisoners, lawyers, corrections officials, health educators and practitioners, contains a set of model recommendations which, if followed, would radically transform the care and treatment of people with HIV/AIDS behind the walls.

Not surprisingly, prisoners themselves are the most active members of this coalition. I consistently drew my greatest inspiration from the prisoners who attempted to stem the epidemic behind the walls. Joining with them were prisoners who were not HIV positive but felt the urgency of responding positively to the epidemic.

These prisoners are truly on the front lines fighting not only the epidemic but the fear of AIDS. These peer educators have faced punitive transfers, harassment, shakedowns, and disciplinary segregation for their efforts to set up education programs. From the ACE (AIDS Counseling and Education) program in New York (which I was never able to visit because of the defensiveness of the Department of Correctional Services) to less recognized but equally dedicated groups of men and women prisoners around the country, I salute your efforts to provide peer counseling and education.

Four years later—the problems are still as overwhelming as they were then. My greatest concern is complacency among correction officials. True, the numbers of HIV-positive prisoners in some areas of the country have not proven to be as high as originally anticipated. The epidemic has not spread as quickly as predicted. However, two recent news items will



Patti Miller, Trenton Times

Judy Greenspan, NPP AIDS information coordinator for the past four years, demonstrates here on behalf of Gregory Smith, an HIV inmate convicted of attempted murder for biting a prison guard.

have a dramatic impact on the situation of AIDS and prison not only in New York but around the country. First is the discovery of a drug-resistant strain of tuberculosis which has caused several deaths in a New York state prison. The second item is the recent announcement by the World Health Organization that AIDS cases worldwide will rise tenfold by the year 2000. Since the rate of HIV infection in prisons and jails is much higher than that of the general population, we will witness an increase in the number of prisoners with HIV and AIDS.

I am much more optimistic than I

was four years ago about advocacy and education efforts on behalf of prisoners with HIV/AIDS. But we will have our work cut out for us as we move into the second decade of the AIDS epidemic. I intend to continue my involvement from my new home on the West Coast. ■

"We learned before going to press that Mike Riegle has died. We mourn the loss of a friend and a valuable advocate for prisoners with HIV/AIDS.

Judy Greenspan recently resigned from her position as AIDS information coordinator for the NPP.



The National Prison Project JOURNAL, \$30/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 cases which deal with overcrowding and/or the total conditions of confinement. (No jails except District of Columbia.) Updated January 1992. \$5 prepaid from NPP.

Bibliography of Material on Women in Prison lists information on this subject available from the National Prison Project and other sources concerning health care, drug treatment, incarcerated mothers, juveniles, legislation, parole, the death penalty, sex discrimination, race and more. 35 pages. \$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.) \$20 prepaid from NPP.

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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; \$5 for prisoners. ACLU Dept. L, P.O. Box 794, Medford, NY

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

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Address _____

City, State, Zip _____

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

Casey v. Lewis, filed on behalf of all Arizona state prisoners, challenges legal access, health care, and practices relating to assignment to segregation. Defendants sought a stay from the Ninth Circuit on a district court decision that enjoined them from prohibiting contact visits between prisoners and their attorneys, and from denying food service jobs to qualified HIV-infected prisoners. The Ninth Circuit denied the stay. Trial began on November 20 on medical care, access to courts, confidential information and handicap access, and continued through January 1992.

Dickerson v. Castle challenges conditions and overcrowding in Delaware's adult prisons. In November, the Court of Chancery held that defendants had substantially cured their noncompliance with the consent decree and accordingly denied plaintiffs' motion for contempt. However, the court ruled that plaintiffs were entitled to attorneys'

fees and invited them to file a renewed motion for contempt in the event defendants fail to maintain compliance.

Hamilton v. Morial challenges conditions at the Orleans Parish Prison, the municipal jail for the City of New Orleans. In September 1991, the court entered an order requiring the defendants to conform to the mental health standards adopted by the National Commission on Correctional Health Care (NCCCHC). The defendants were also ordered to remove all state hospital patients from the jail within 90 days.

Hudson v. McMillian—On November 13, 1991, the Supreme Court of the United States heard argument in this Louisiana case involving prisoner Keith Hudson who was beaten by guards while in shackles. The National Prison Project argued that the Fifth Circuit was wrong to require a showing of significant injury in order to prove an Eighth Amendment violation. The U.S. Solicitor General, joining as *amicus* on behalf of Hudson, also argued a portion of the case.

Inman v. Board of Supervisors for Northampton Co., Virginia—On October 11, 1991, the Prison Project and the ACLU of Virginia filed this case against the Northampton, Virginia County Jail, challenging overcrowding, poor plumbing and sanitation, insect and rodent

infestation, fire safety violations and inadequate medical care. The court heard argument on the motion for a temporary restraining order on October 28. On November 15, the court issued an order suspending the case for 60 days to allow the State Board of Corrections to resolve the problems. Plaintiffs filed a motion for reconsideration, asking the judge to lift the stay.

Rufo v. Inmates of Suffolk Co. Jail—The Supreme Court heard oral argument in this case on October 9, 1991. Officials of the Suffolk County Jail in Massachusetts sought to modify a 1979 consent decree which prohibits double-celling. Officials argued that modification was necessitated by unanticipated population increases and that the modification would not result in unconstitutional conditions. The NPP participated as *amicus curiae* on behalf of the inmates. On January 15, 1992, the Court sent the case back to the district court, ruling that courts are to apply a "flexible" standard in determining whether to modify consent decrees. The Court also held that the fact that a consent decree may go beyond the requirements of the Constitution would not, by itself, justify modification.

National Prison Project

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