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Odyssey: A Prison Magazine's Difficult Journey

BY LUKE JANUSZ

America has a long tradition of prison journalism. For more than a century, prisoners have established journals to communicate their interests within the prisons and to carry their voices into the community. Despite the hundreds of jour-

shape their content by viewing everything in the context of security. In short, they exercise censorship.

To make matters worse, the Supreme Court and the lower federal courts have consistently weakened prisoners' First Amendment rights during the past 10 years. In *Turner v. Safley*¹ for example, the Court established that "...censored

material must bear a reasonable relationship to security." Although the court did affirm that prisoners have First Amendment rights, the practical effect of the ruling was to grant correctional officials broad latitude to censor or ban reading material or writings by prisoners based on prison officials' definition of security. Free speech would be subject only to passive review by the courts.

In *Thornburgh v. Abbott*,² the "reasonable relationship" standard was reaffirmed for censorship of publications sent to prisoners. The Court ruled that a regulation prohibiting publications that are "...determined [to be] detrimental to the security, good order, or discipline of the institution or...might facilitate criminal activity" is not unconstitutional. The obvious and troubling question raised by this ruling is—who will determine what is detrimental?

The lawsuit that has generated the greatest interest and perhaps will have the most

lasting impact on the interpretation of prisoners' First Amendment rights was brought in July of 1988 by Dannie Martin and the *San Francisco Chronicle*. Martin, a prisoner at the U.S. penitentiary in Lompoc, California at the time, had written more than 40 articles under his byline during a two-year period for the *San Francisco Chronicle*, openly and without objection by Federal Bureau of Prisons officials. When he wrote an article describing rising tensions in Lompoc and criticizing the policies of the new warden, he was placed in solitary confinement and hastily transferred to a federal prison in Phoenix. Martin was charged with violating prison regulations because he had "acted as a reporter and published under a byline" and because he had "conducted a business."

In an opinion delivered by federal district court judge Charles A. Legge in June 1990, Martin's writings were praised for their "educational and entertaining" qualities. Legge went on to note that prisoner writing is a "healthy use of time,...appears to be worthwhile for educational reasons, [and]...could provide a good role model for other prisoners."

**1992
STATUS
REPORT**

See Page 3



Jack Ildon/The Standard Times

Luke Janusz, editor and publisher of Odyssey.

nals that have been created, these goals have often been frustrated because the real concerns prisoners wish to communicate are all too often censored by prison administrations. It would be more accurate, therefore, to speak of prison journalism as an unfulfilled aspiration.

Prison journalists confront formidable obstacles in their work. Ownership is the fundamental area of contention. Prisoners naturally view their creative expressions as belonging to them; conversely, prison administrators view the journals as belonging to the prison, and attempt to

INSIDE...

Case Law Report	12
Public Defender in D.C. helps prisoners	19
Highlights of recent NPP cases	24

The judge then reasoned that "...as long as prison security is a valid interest, the order of priority of the penological interests is for the Bureau of Prisons and not for this court to decide."

Referring to the critical issue of balancing the public's right to know with prison security, Legge said, "These are questions which are not within the power of this court to decide. They are for the Bureau of Prisons to decide."

In effect, the judge forfeited the authority and power of the judiciary to interpret and enforce the First Amendment rights of prisoners and granted it to prison officials. The decision is under appeal to the Ninth Circuit Court of Appeals.

Legge's strained and contradictory legal "reasoning" is symptomatic of the attitude of a federal judiciary that is consistently reactionary with respect to prisoners' rights. Seventy percent of all federal judges currently sitting were appointed either by Reagan or Bush, and many of them were distinguished by their sterling record of contempt for prisoners' rights.

State prison officials, however, are also subject to the jurisdiction of the state courts and must contend with judges who may have a greater respect and appreciation for prisoners' First Amendment rights. In addition, state judges are in a position to apply their state constitutions and are not completely bound by the *Turner* standard. Prison administrators at the state level, therefore, are reluctant to justify their actions in court because much of what they wish to censor has less to do with security than ideology.

Prison administrators invariably assert their "right" to control the financial management of the journal. Under the pretext of fiscal management, they ultimately determine everything from the size of the publication to the production schedule.

Without financial autonomy, prison publications must rely on the institution's production facilities, and access to the production facilities is regulated according to the dictates of "security." As a result, most prison journals become either extensions of the warden's public relations department or token efforts without funding or support. They may feature articles about sports, entertainment, social events, and perhaps some innocuous political commentary for appearance's sake. Continued favor with the prison administration is purchased by producing a journal that retreats from the real concerns and problems facing prisoners.

This was the condition of *The Question Mark* journal at Norfolk State Prison [in Massachusetts] when I became editor in 1989. The prison population, through its

representative body, had elected me to create a meaningful voice for prisoners. The prison authorities, however, were content with the prevailing pretense. My nomination as editor was rejected by prison offi-

"...who will determine what is detrimental?"

cial because in their estimation, I lacked a "significant amount of responsibility," an administrative phrase that meant that I was not a cooperative inmate. After a protracted battle that included legal action, the superintendent intervened and approved me for the position.

The newspaper staff convened a closed door meeting. *The Question Mark* did not survive that meeting. Our task was to transform a 12-page collection of random notes into a 120-page quarterly magazine. Our goal was to reclaim the press from the prison administration; any association with the former journal, either in name or in substance, would compromise our efforts and undermine our credibility as journalists.

The identity of the magazine took shape during the next few weeks. We chose the name *Odyssey* for the magazine because it reflected the essence of the prison experience—the journey home.

Defining goals and developing a strategy for *Odyssey* was more of a process of evolution than a predetermined plan. We began with a few fundamental ideas and strong convictions based on many years of incarceration. We wanted *Odyssey* to establish a forum where prisoners could express their views about criminal justice issues in open exchange with members of the broader community. By publishing innovative research and creative articles by prisoners, correctional officials, legislators, victims of crime, and others who may influence criminal justice policy, we believed that *Odyssey* would promote a dialogue that would lead to greater understanding about the problems of crime and punishment in our society.

Becoming a meeting place for ideas and debate seemed to be an obvious starting point. We soon discovered that it was anything but obvious. Searching in vain for a magazine that could serve as a model, we learned instead that virtually all criminal justice publications are characterized by exclusion and special interest agendas. Competing ideologies have replaced a healthy debating of ideas.

We were offering to build a forum to encourage diverse opinions and to challenge established ideologies. From this

basic premise the magazine began to take on a will and purpose of its own. We strove for solutions that would benefit victims of crime, taxpayers, prisoners, and correctional officials simultaneously. We perceived that *Odyssey's* significance transcended prison or criminal justice issues in that we were attempting to develop a model for collective problem-solving that would apply to all social problems.

Prison security forces moved swiftly in response to our plans. Within three months of my appointment as editor, I was placed in "the hole" (solitary confinement) for allegedly organizing a hunger strike. The disciplinary report referred to me as a "silent leader." During my ten weeks in isolation, the organizational plan for *Odyssey's* future was conceived. The intervention of the security forces confirmed that the only way a prison magazine can survive is for prisoners to establish an independent financial and production base outside prison walls. I drafted a proposal that incorporated these ideas and mailed it to a group of journalists, educators, and prisoners' rights activists.

After a core group was formed, we filed

(cont'd on page 21)

THE NATIONAL PRISON PROJECT

JOURNAL

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

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

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

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

Status Report: State Prisons and the Courts – January 1, 1993

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 four 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 in which 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), *rev'd in part and remanded sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978). A receiver was appointed. 466 F.Supp. 628 (M.D. Ala. 1979). In January 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, 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. The parties contemplated that the mechanism would remain in effect until the state legislature approved an emergency-overcrowding reduction statute. By October 1992, the legislature failed to pass such legislation, the DOC failed to reduce the population at the six largest prisons, and the State filed for relief from the order.

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*, CIV-

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 statewide class action, filed on behalf of Arizona prisoners on January 12, 1990, challenges legal access, health care, and discrimination against handicapped prisoners. *Casey v. Lewis*, CIV-90-0054 PHXCAM (D. Ariz.). Partial summary judgment for plaintiffs was entered in August 1991 enjoining discrimination against HIV-positive prisoners in job assignments. The State has appealed. Trial on the remaining issues occurred in 1991-1992; plaintiffs are awaiting a decision on the health-care and handicapped-access issues. On November 13, 1992, the district court entered a decision favorable to prisoners on the legal-access issues.

4. **Arkansas:*** The entire state prison system was under court order dealing with total conditions. *Finney v. Arkansas Board of Correction*, 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 (DVI) are under court order due to overcrowding and conditions. A preliminary injunction was entered. *Toussaint v. Rusben*, 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). The court of appeals reversed on the issues of placement and retention in administrative segregation. 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987). A monitor was appointed to oversee compliance. *Toussaint v. Rowland*, 711 F.Supp. 536 (N.D. Cal. 1989).

The monitorship was dissolved in 1991, but the plaintiffs continue to evaluate compliance. On June 29, 1992, acting on the defendants' motion under Fed.R.Civ.P. 68, the district court entered an order on conditions and double-celling with respect to Soledad and DVI.

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

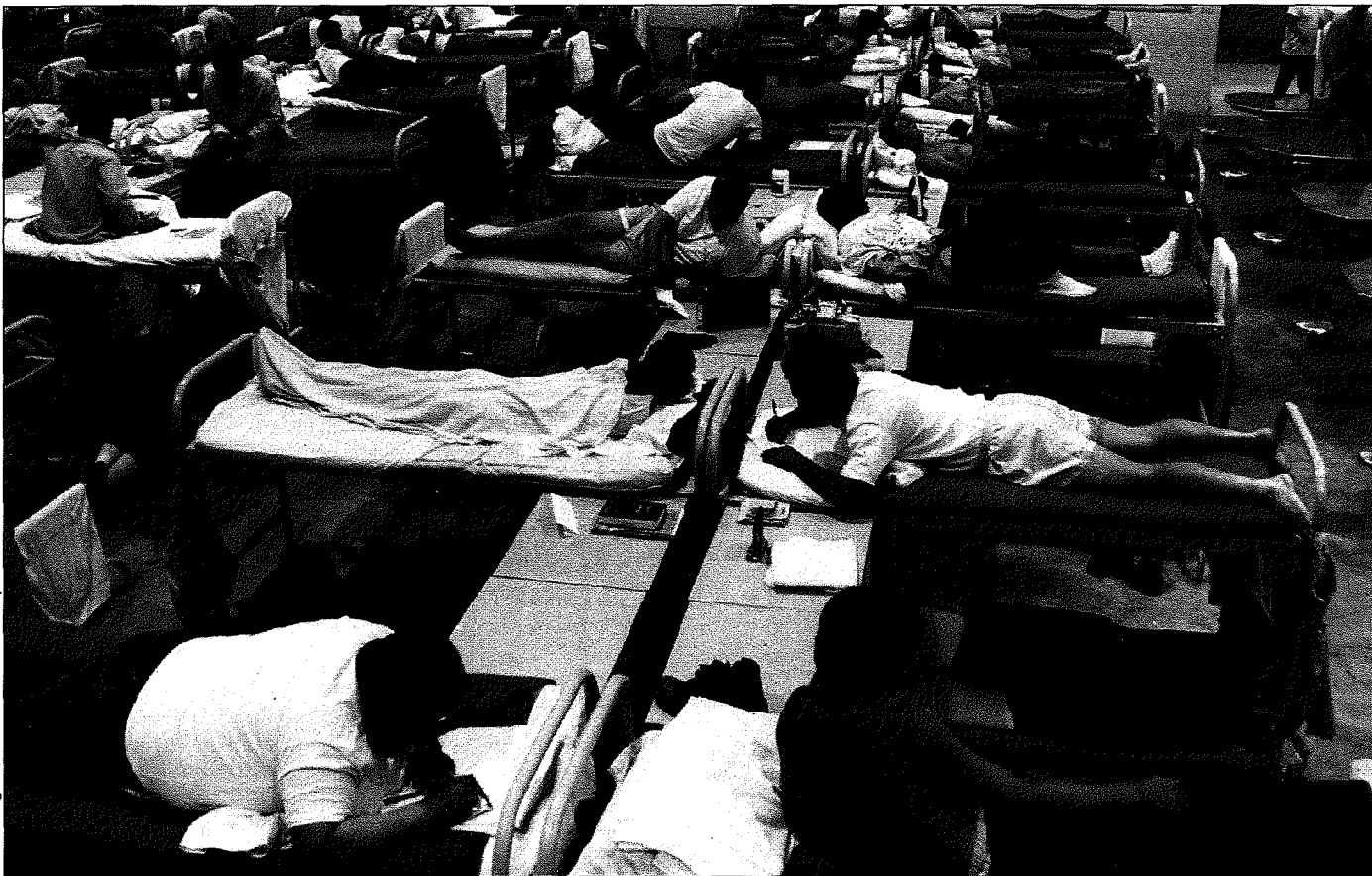
The California Institution for Men at Chino is operating under a settlement agreement providing for improved sanitation, classification, legal access, and other conditions. Compliance monitoring has ceased. *Boyd v. Rowland*, CV-86-1989-HLH.

The California Medical Facility at Vacaville is under a 1990 consent decree concerning the delivery of health-care and psychiatric services, including housing and programming for HIV-infected inmates. Compliance is being monitored. *Gates v. Deukmejian*, #S-87-1636-LKK-JFM (E.D. Cal.). *See also* 977 F.2d 1300 (9th Cir. 1992) (attorney fees). In 1992, plaintiffs filed a contempt motion concerning the staffing requirements of the order. A magistrate judge filed a report on this issue, and the district judge ordered limited further relief. (Order entered Apr. 3, 1992).

Two lawsuits concern the delivery of medical and mental health services to prisoners at the California Women's Institution at Frontera. *Whisman v. McCarthy*, #OCV-33860 (Superior Court, San Bernadino County) and *Doe v. California Department of Corrections*, A-Civ.-89-598-GLT (C.D. Cal.). In *Whisman*, a settlement was reached in May 1992, in which the parties agreed to a state DHS inspection and to correct problems with inadequate treatment and care identified by this inspection. *Doe* deals with the treatment of HIV-positive prisoners at CWI. Discovery continues. Substantial changes have occurred in the DOC policy that have changed the posture of the case.

In 1990, a lawsuit was filed challenging conditions, violence, and the delivery of health-care services to prisoners at the State's new "supermax" facility at Pelican Bay. *Madrid v. Gomez*, C-90-3094 (N.D. Cal.). A class has been certified and discovery is ongoing.

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



Overcrowding plagues nearly all U.S. prisons. Here, 160 inmates are housed in the gym of California's jam-packed Mule Creek State Prison.

agreements later approved by the court concerning general conditions, as well as specific areas such as legal access, double-bunking, and treatment of HIV-infected prisoners. On this last issue, see *Diaz v. Romer*, 961 F.2d 1508 (10th Cir. 1992).

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.). In 1992, the parties reached a comprehensive settlement on all of the issues. The district court approved this agreement in June 1992. 801 F.Supp. 405 (D. Colo. 1992).

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 in part, modified, and remanded*, 651 F.2d 96 (2nd Cir. 1981).

Other facilities under consent decree are Bridgeport Correctional Center, *Mawbinney 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.

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.) (order entered Oct. 3, 1984).

Compliance is being monitored in this case.

Litigation challenging violence and 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*. In *Bartkus*, the parties have been engaged in settlement negotiations.

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. Chan.) (order entered Nov. 22, 1988). On December 7, 1992, a supplementary agreement on overcrowding and tuberculosis control was approved by the court.

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. 1976), 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. In 1992, the parties agreed that the standards and terms of the population order would be embodied in a state statute and that the Correctional Medical Authority (CMA), an independent state-funded agency, would monitor and enforce com-

pliance. Class notice of this modification has been ordered.

A consent decree was entered on December 17, 1987 in *Costello* concerning health-care services. In 1991, the parties negotiated to end court supervision of the health-care order by turning over monitoring and enforcement to the CMA.

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 systems, 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* (now *Spear v. Waihee*), Civ. No. 84-1104 (D. Haw.). 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 reflect current conditions more accurately.

12. **Idaho:*** The men's Idaho Correctional

State Institution is under a court order concerning conditions. *Balla v. Idaho State Board of Corrections*, 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; the agreement will remain in effect until the DOC opens a new facility. *Witke v. Crowl*, Civ. No. 82-3078 (D. Idaho). Compliance is being monitored. Once the new facility is operational, the previous agreements reached in this case concerning programming, delivery of medical care, and legal access will continue to apply.

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 that 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.). A court monitor has been appointed and a classification evaluation by NCCD has been completed. Compliance monitoring continues. The district court ordered that protective-custody prisoners at the Stateville facility be provided with improved 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*, 488 U.S. 1047 (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 overcrowding and other conditions. *Hendrix v. Faulkner*, 525 F.Supp. 435 (N.D. Ind. 1981), *aff'd in part, vacated and remanded in part 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, 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 on 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.

On May 4, 1992, prisoners at the Maximum Security Complex at Westville (the State's so-called "supermax") brought an action in state court challenging placement and conditions. *Taiifa v. Bayh*, #49-DO-7-9205-CP-489 (Superior Court, Marion County). The State had the case removed to federal court. *Taiifa v. Bayh*, #S-92-429M (N.D. Ind.). The federal court remanded the state-law claims to the state court. Discovery is in progress. A settlement conference on both lawsuits has been scheduled.

15. Iowa: The Iowa State Penitentiary at Fort Madison is under court order on overcrowding and a variety of conditions; however, this decree is not being actively monitored for compliance. *Watson v. Ray*, 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, *Gavin v. Ray*, #78-62-2 (S.D. Iowa), and protective-custody practices, *Parrott v. Ray*. 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 due to construction delays. The court denied modification in two prisons that 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), *aff'd in part and dismissed in part*, 967

F.2d 418 (10th Cir. 1992).

17. Kentucky:* The Kentucky State Penitentiary (KSP) at Eddyville and the Kentucky State Reformatory (KSR) at LaGrange were 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 the defendants in substantial compliance with the consent decree, with the exception of 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. However, that court held that the district court could reinstate the case if plaintiffs could prove "a major violation" of the decree. *Kendrick v. Peters*, 931 F.2d 421 (6th Cir. 1991). On February 24, 1992, the district court, with respect to KSP, relinquished jurisdiction and dismissed the case. With respect to KSR, the court retained jurisdiction until all construction is completed and as long as major violations of the decree do not occur.

The women's prison, KCIW at Pee Wee Valley, was 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); *Canterino v. United States*, 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. *Canterino v. Wilson*, 869 F.2d 948 (6th Cir. 1989). The district court relinquished jurisdiction on July 13, 1992.

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 state-prison-overcrowding and local-jail-overcrowding cases in Louisiana before one district court judge. This decision included *Williams*. See *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. In 1991, the judge appointed a lawyer for the class of state prisoners; the lawyer has been actively involved in monitoring compliance with outstanding orders in the case. The case is now entitled *Williams v. McKeithen*. See 939 F.2d 1100, 1102 (5th Cir. 1991).

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 (D. Me). In March 1991, the parties reached an agreement to end double-celling in those units and to enhance programming opportunities. Compliance is being monitored.

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. Collins*, 455 F.Supp. 727 (D. Md. 1978), *aff'd in part sub nom. Johnson v. Levine*, 588 F.2d 1378 (4th Cir. 1978), *on remand*, Nos. H-77-113 and B-77-116 (D. Md. Jan. 5, 1981), *rev'd 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 that required that double-celling be eliminated and certain conditions improved. *Washington v. Keller*, 479 F.Supp. 569 (D. Md. 1979). The *Washington* and *Johnson* cases were later consolidated and further agreements were entered in October 1987 and February 1988. Compliance is being monitored. Subsequent 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 the prison officials' favor. On appeal, this decision was affirmed in part and reversed in part and remanded, 668 F.2d 52 (1st Cir. 1981), *cert. denied*, 456 U.S. 983 (1982).

At MCI at Walpole, numerous conditions, sanitation, and space issues—including housing prisoners in dayroom areas—are being challenged. *Nolan v. Fair*, #84-1360 (Superior Court, Norfolk County).

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 Judicial Court ruled in the prisoners' favor. New regulations have been promulgated; compliance is being monitored. *Hoffer v. Fair*, #85-71 (Supreme

Judicial Court, Suffolk County).

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 Court, Suffolk County).

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), *aff'd without opinion sub nom. Cornish v. Johnson*, 774 F.2d 1161 (6th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). Later, the Department of Corrections was found in contempt. 659 F.Supp. 621 (E.D. Mich. 1987), *vacated 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 in part and rev'd in part*, 934 F.2d 703 (6th Cir. 1991). Subsequently, a special administrator was appointed, and a compliance plan was ordered to be submitted.

Four men's prisons (Marquette, Michigan Reformatory, Riverside, and a portion of Jackson) are under a consent decree on overcrowding and other conditions. This case was brought by the U.S. Department of Justice under the Civil Rights of Institutionalized Persons Act (CRIPA). *United States v. Michigan*, 680 F.Supp. 928 (W.D. Mich. 1987). In 1992, the DOJ filed a motion to vacate portions of the decree under a new policy announced by Attorney General William Barr. On December 1, 1992, the court dismissed some relatively minor portions of the decree. Court orders in another case, *Knop v. Johnson*, cover issues not included in the consent decree in *United States v. Michigan*. The *Knop* court entered orders favorable to prisoners on various issues, including the provision of legal assistance. *Knop v. Johnson*, 667 F.Supp. 467 (W.D. Mich. 1987) (merits); 685 F.Supp. 636 (W.D. Mich. 1988) (remedy).

The Central Complex and most of the North Complex at the Jackson State Prison are operating under a consent decree. *Hadix v. Johnson*, #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. A court order requiring improved legal assistance to prisoners was affirmed on appeal. *Hadix v. Johnson*, 694 F.Supp. 259 (E.D. Mich. 1988),

aff'd, 871 F.2d 1087 (6th Cir. 1989).

The State appealed from various specific orders entered in both the *Knop* and *Hadix* cases. In 1992, the court of appeals, in a consolidated decision, affirmed on the issues of liability in not providing adequate legal assistance, the provision of winter clothing, and other matters; it reversed on racial harassment and the denial of access to toilets. *Knop v. Johnson*, 977 F.2d 996 (6th Cir. 1992).

23. **Minnesota:** The State has kept overcrowding in abeyance through the use of sentencing guidelines that take into account the number of available prison beds. 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.

A further complaint has been filed concerning conditions at the state penitentiary. This complaint includes sanitation, fire safety, and violence issues. *Wilson v. Moore*, #87-4516-CV-C-5 (W.D. Mo.). In 1992, a class was certified; the plaintiffs have begun discovery efforts.

26. **Montana:** On November 2, 1992, a lawsuit was commenced in state court challenging the inadequate delivery of medical services and the physical abuse of prisoners confined to the state prison at Deer Lodge. State and federal constitutional claims have been pleaded. *Baker v. State of Montana* (1st Jud. Dist. Ct., Helena). An answer by the defendants is due in January 1993.

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:** A class action has been filed challenging overcrowding and conditions of confinement at four general-population units of the Nebraska State Penitentiary. An evidentiary hearing was held in August and September 1991. The magistrate judge rendered a favorable report and recommendation. In late 1992, the district judge entered an order based on the magistrate judge's report. *Jensen v. Gunter*, CV 87-L-607, CV

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:

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

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

24 jurisdictions: Alabama,* Alaska,* Arizona,* Arkansas,* California,* 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:

4 jurisdictions: Minnesota, 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.

87-L-497, CV 87-L-377 and CV 87-L-476 (D. Neb.). The State has appealed.

There is an equal protection and conditions case involving the Nebraska Center for Women at York. *Klinger v. Nebraska Dep't of Correctional Servs.*, 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), *aff'd without opinion*, 950 F.2d 725 (8th Cir. 1991).

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 (name 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 1979, a lawsuit was filed challenging the delivery of mental health services to all Nevada prisoners. *Taylor v. Wolff*, CVN 79-162JMB (D. Nev.). An agreement and consent decree

were entered in 1986. Compliance is being monitored.

Women prisoners confined to Nevada Women's Correctional Center have filed a lawsuit alleging gender discrimination with respect to programming and conditions at the facility. Defendants' motion for summary judgment was denied. *McCoy v. Nevada Department of Prisons*, 776 F.Supp. 521 (D. Nev. 1991). Trial is scheduled for January 1993.

29. **New Hampshire:*** The state penitentiary is under court order dealing with total conditions. *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 its prisons by mandating that county jails take the overflow from the state system. However, most of the State's twenty-one 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 Aug. 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*, 493 U.S. 1056 (1990). Because the State is in substantial compliance with much of the decree, in August 1991 the parties agreed to an eventual vacating of the decree. In exchange, the State agreed to a permanent, nonmodifiable set of population controls, including a prohibition against double-celling. The district court approved this settlement in an order entered on September 20, 1991. The special master has filed reports evaluating compliance.

32. **New York:** While no statewide comprehensive lawsuits have been brought, numerous prison facilities are under court order, and injunctive relief has been obtained in many of 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, including improvements in the delivery of health care in general and the enforcement of services to HIV-positive prisoners. Compliance is being monitored.

A statewide 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 (2nd Cir. 1985). Compliance is being monitored.

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 federal district court held defendants liable for racial segregation in housing and job assignments at Elmira Correctional Facility. *Santiago v. Miles*, 774 F.Supp. 775 (W.D.N.Y. 1991). During 1992, the parties and the judge developed an order to correct the problem.

Prisoners at Clinton Correctional Facility brought a class-action suit in 1983 concerning the delivery of mental health services. *Tomasullo v. LeFevre*, 84 CV 1035 (N.D.N.Y.). A settlement was reached in early 1992, including improved access to recreation, improved supervision, and the installation of surveillance cameras.

Anderson v. Coughlin was filed as a class action on behalf of all mentally ill inmates in Green Haven Correctional Facility and Auburn Correctional Facility. In 1991, the magistrate judge consolidated *Anderson* and *Tomasullo* (above). A summary judgment motion was later filed by plaintiffs. Since 1992, the parties have been involved in settlement negotiations.

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). In 1992, a settlement was reached on the medical issues. The parties are working on an agreement with respect to mental health and access-to-law-library claims. Mental health discussions have been consolidated with the *Anderson* and *Tomasullo* cases.

In early 1992, prisoners housed in overcrowded dormitory facilities in ten New York prisons filed a lawsuit challenging these conditions on the ground that they increase the risk of exposure to tuberculosis. Tuberculosis screening and access to adequate treatment are also at issue. *Cunningham v. Coughlin*, #92-CV-0579 (N.D.N.Y.). A class has been certified and discovery is proceeding.

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 on the ground of qualified immunity was denied. *Langley v. Coughlin*, 709 F.Supp. 482 (S.D.N.Y.), *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).

A state court action was commenced in 1991 challenging aspects of the medical care system, the excessive use of restraints and cell shields, and other conditions at the Special Housing Unit prison at Southport (the State's so-called "supermax"). *Rivera v. Coughlin* (Supreme Court, Chemung County). Plaintiffs obtained a partial consent order and were successful on other issues. Counsel continue to monitor compliance with the orders.

A statewide 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.

33. North Carolina:* In September 1985, a consent judgment was entered covering overcrowding, staffing, programming, and medical services in 13 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 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*.

The Fourth Circuit reversed summary judg-

ment entered on behalf of defendant prison authorities in a conditions case concerning the Hoke Correctional Institution. The individual prisoner who brought this case seeking monetary damages was permitted to pursue his claim. *Williams v. Griffin*, 952 F.2d 820 (4th Cir. 1991).

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, concerning both the housing of prisoners by race and the use of certain physical restraints. *Stewart v. Rhodes*, 473 F.Supp. 1185 (S.D. Ohio 1979), *appeal dismissed*, 661 F.2d 934 (6th Cir. 1981). A consent decree was later entered in 1979, incorporating the provisions of the preliminary injunction. See 656 F.2d 1216 (6th Cir. 1981), *cert. denied*, 455 U.S. 991 (1982). The state prison was closed in 1985.

The Ohio State Reformatory at Mansfield was operating under a consent decree on various conditions. *Boyd v. Denton*, C-78-1679 (N.D. Ohio) (order entered June 1983). The prison was closed at the end of 1990. Medical care at Mansfield operated under a 1982 consent decree. *Register v. Denton*, C-78-1680 (N.D. Ohio). The plaintiffs presently are arguing that the decree is applicable to the successor facility (called the Mansfield Correctional Institution).

The Marion Correctional Facility was operating under various court orders concerning conditions and population. *Taylor v. Perini*, #C69-275 (N.D. Ohio). 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 1979). The remedial orders were vacated in 1991 following a report and recommendation of the special master.

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 vacated and remanded. 111 S. Ct. 2321 (1991). The district court on remand entered summary judgment against the plaintiff. The plaintiff filed a notice of appeal; however, because the prisoner was subsequently released, the case was dismissed as moot.

Wilson v. Seiter, #92-3332 (6th Cir. Aug. 20, 1992) (order).

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. 1977). The district court's decision in 1982 to retain jurisdiction to assure continued compliance was upheld. 708 F.2d 1523 (10th Cir. 1983), *cert. dismissed*, 465 U.S. 1014 (1984). Later, in 1984, the district court relinquished jurisdiction; that decision was affirmed. 788 F.2d 1421 (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 housing closed due to 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. *Beebler 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. *Tiller v. Owens*, 719 F.Supp. 1256 (W.D. Pa. 1989), *aff'd*, 907 F.2d 418 (3rd Cir. 1990), *cert. denied sub nom. Mikesell v. Morgan*, 112 S. Ct. 343 (1991). In 1990, the parties negotiated a remedial agreement, which the court then entered as an order. In early 1991, the district court entered further orders on legal access and staff supervision; these orders are now on appeal.

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 under way. On September 28, 1992, the district court entered a preliminary injunction ordering the

defendants to implement an effective tuberculosis-control program throughout the state prison system. Trial on all of the remaining issues is expected to begin in June 1993.

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. Palmigiano v. DiPrete*, 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.), *aff'd*, 887 F.2d 258 (1st Cir. 1989). In May 1990 the court made an additional finding of non-compliance with population-cap orders and required the release of certain prisoners. 737 F.Supp. 1257 (D.R.I. 1990). Currently the parties are in active settlement discussions with the assistance of the special master.

40. **South Carolina:*** The entire prison system is under a 1985 consent decree on overcrowding and conditions. *Plyler v. Evatt*, C.A. No. 82-876-0 (D.S.C.) (Jan. 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.), *cert. denied*, 488 U.S. 897 (1988). In 1990, the district court again denied the State's motion to modify the decree; 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. On June 1, 1992, the plaintiffs filed a state-court action to enforce the terms of the 1985 agreement to utilize extant state statutes to reduce population. *Plyler v. Evatt*, #92CP 402275 (Ct. Comm. Pleas, 5th Jud. Circuit). Also in 1992, incident to the federal action, the defendants moved to modify the classification and education terms of the 1985 consent decree.

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 unconstitu-

tional. 830 F.2d 912 (8th Cir. 1987) (en banc), *cert. denied*, 485 U.S. 906 (1988). In 1992, the district court conducted an evidentiary hearing on the plaintiffs' motion for enforcement of the order on environmental conditions. The motion for enforcement was granted on November 29, 1992.

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.

The Tennessee State Prison in Nashville was closed in 1992 as a result of a court order in the *Grubbs* case. 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 court.

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 County*, 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 and rev'd 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 was 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.

In 1992, the *Ruiz* parties filed a negotiated proposed final judgment in the case. The proposed order contains system-wide and facility-population limits and the provision of adequate medical care, including accreditation

by the NCCHC. Significant orders concerning staffing, a ban on the use of "building tenders," administrative segregation, and the use of force remain in effect. The agreement requires compliance with other provisions of the order, including renovation of facilities, by June 1, 1993, so as to permit the termination of the special master and the withdrawal of plaintiffs' class counsel. The final judgment was approved by the court on December 11, 1992.

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 jointly to 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*, 937 F.2d 984 (5th Cir. 1991), cert. denied sub nom. *Richards v. Lindsay*, 112 S.Ct. 1994 (1992).

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. On March 20, 1992, the district court accepted the report and entered an injunction. *Baker v. Holden*, 787 F.Supp. 1008 (D. Utah 1992).

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). On September 8, 1992, the parties signed a consent decree to improve mental health services.

Finally, a complaint was filed in 1989 concerning 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, including its death-row unit, is under a 1985 court order dealing with various practices and conditions. *Brown v.*

Hutto, 81-0853-R (E.D. Va.).

The 190-year-old 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.

On September 21, 1990, another lawsuit was filed challenging deteriorating conditions at the Richmond penitentiary, which on three occasions the State had announced 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. Compliance is being monitored.

A lawsuit filed in 1978 challenged conditions and delivery of medical care services at the State Reformatory at Monroe. *Collins v. Thompson*, #C-78-79R, #C-78-134 (W.D. Wash.). The parties agreed to a settlement in 1981 that includes a population cap. Since then, defendants have sought to have the decree vacated on four separate occasions. The last motion to vacate, which was filed in August 1992, is pending. Compliance monitoring continues.

48. **West Virginia:** The state penitentiary at Moundsville is under court order on overcrowding and conditions. *Crain v. Bordenkircher*, #81-C-320R (Circuit Court, Marshall County) (memorandum and order dated June 21, 1983). Plaintiffs challenged as insufficient a remedial plan prepared by defendants. The state Supreme Court of Appeals agreed with plaintiffs and ordered the defendants to develop a new plan. 342 S.E.2d 422 (W. Va. 1986). Since that 1986 decision, the Supreme Court of Appeals 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 (W. Va. 1988). Thereafter, opinions on the status of implementation have been filed on an annual basis. See 382 S.E.2d 68 (W. Va. 1989); 392

S.E.2d 227 (W. Va. 1990); and 408 S.E.2d 355 (W. Va. 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 County) (memorandum and order dated Feb. 22, 1985). Enforcement proceedings are ongoing.

In 1981, the Supreme Court of Appeals held that women prisoners had a state statutory and constitutional right to rehabilitation and education. *Cooper v. Guinn*, 298 S.E.2d 781 (W. Va. 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 that 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; that prison is now closed. A new prison was opened thereafter; in 1991, it 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. 1975), *aff'd in part and remanded*, 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.) (order entered July 15, 1985). A consent decree, which supplanted the initial order and required a reduction in population, was entered on August 22, 1985. Compliance is being monitored. In 1992, plaintiffs focused on the issues of medical and mental health services.

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). In 1992, the district court entered a further consent decree on various medical and mental health care issues in the Central case. (Order entered June 10, 1992).

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), rehearing en banc denied, 850 F.2d 796 (D.C. Cir. 1988) (containing dissenting opinions and separate statements). On remand, a second trial was held in January 1989. The facility was again 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 1992, the district court interpreted the mental health order to require that seriously mentally ill prisoners be transferred to the D.C. Jail and be provided an adequate treatment program.

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; the decree includes a population cap and requires improvements in medical care. (Order entered Dec. 14, 1990.) Compliance is being monitored.

On May 20, 1992, a complaint was filed challenging the delivery of medical care at three other District prisons at Lorton: the Medium Security Facility, the Minimum Security Facility, and the Youth Center. *Inmates of Three Lorton Facilities v. District of Columbia*, #92-1208 (D.D.C.).

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).

In 1990, defendants filed a motion to mod-

ify the space requirements of the 1986 stipulation; plaintiffs renewed their motion for contempt. In 1991, the court denied defendants' motion, granted plaintiffs' motion, and entered a prospective fine of \$10 per prisoner per day above the population cap. *Morales Feliciano v. Hernandez Colon*, 754 F.Supp. 942 (D.P.R. 1991). The court appointed a special master for the purpose of contracting on behalf of the defendants to prepare plans and to make evaluations on various environmental health issues. 771 F.Supp. 11 (D.P.R. 1991). Later in 1991, the court ordered the defendants to transfer the accumulated fine money, amounting to \$1 million per week, to the U.S. Treasury. 775 F.Supp. 487 (D.P.R. 1991).

A population cap was established at Ponce District Jail, where sentenced felons are housed. *Morales Feliciano v. Hernandez Colon*, 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), cert. denied, 494 U.S. 1046 (1990).

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). ■

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John P. Conrad 1913-1992

John P. Conrad, known for his contributions to correctional theory and practice, died on October 10, 1992 at the age of 79. Conrad was a scholar, writer, administrator, and researcher. He served as a corrections expert in many cases brought by the National Prison Project.

Conrad did extensive academic and consulting work in the field of criminal justice. He served as project director and member of the board of directors of the American Justice Institute. He held various positions in the California Department of Corrections during his career, served as chief of research of the U.S. Bureau of Prisons, and chief of the Center for Crime Prevention and Rehabilitation of the National Institute



John P. Conrad

for Law Enforcement and Criminal Justice, now the National Institute of Justice.

"John Conrad was among the first group of corrections experts to assist the National Prison Project in its work," said Alvin J. Bronstein, executive director of the Project. "Beginning with the historic challenge to prison conditions in Alabama in the mid-1970s, John guided us and the court in a series of important cases. He had a formidable mind but an even larger heart. He never forgot his experience in viewing 'the doghouse,' a horrible punishment building at one of the Alabama prisons. The degree of inhumanity he saw that day in 1975 so shocked him that he mentioned it in every conversation we had since that time and in nearly everything he wrote about prisons in the last 15 years. John Conrad was a wise and good man, and we will all miss him."

BY JOHN BOSTON

Highlights of Most Important Cases

USE OF FORCE

In *Hudson v. McMillian*, 112 S.Ct. 995 (1992), the Supreme Court defined the Eighth Amendment's limitations on misuse of force against convicted prisoners, holding that in all cases the legality of staff conduct depends on "whether force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically to cause harm." *Id.* at 998-99. If malicious and sadistic intent is shown, the prisoner need not prove that he or she sustained a "significant injury"; only "de minimis" uses of force escape Eighth Amendment scrutiny. *Id.* at 1000.

Hudson in the Lower Courts

An instructive early application of *Hudson* appears in a recent decision from a New York federal court. In *Jones v. Huff*, 789 F.Supp. 526 (N.D.N.Y. 1992), the plaintiff had alleged that a series of acts by officers at two state prisons constituted cruel and unusual punishment. After a bench trial, the court agreed in part and disagreed in part, nicely illustrating the focus of the *Hudson* holding on the motivation and justification for use of force rather than on its severity or consequences.

The plaintiff in *Jones* was involved in an inmate altercation in the medium-security Mt. McGregor Correctional Facility. After learning that he would be transferred, he refused to cooperate and struck one officer on the shoulder; another officer placed him in a headlock and punched him in the face. He was forced, still in a headlock, into a holding room; when he was released, he hit or pushed another officer. Several officers then forced him face down onto a bed, where they continued to kick and punch him. He refused, or was too slow, to remove his clothes for a strip search, and several officers ripped his clothes off. He was then handcuffed, and two officers punched, slapped, and kicked him

while he was standing naked facing the wall. A medical examination showed superficial bruises, swelling around both eyes, and lacerations on the wrist and leg.

The plaintiff was then transferred to Clinton Correctional Facility, a maximum security prison. At Clinton, the sergeant who interviewed him about the Mt. McGregor incident kicked him in the buttocks as he escorted him to the prison dispensary. Further medical examination at Clinton revealed some additional injuries from the Mt. McGregor incident, and the court found that he had suffered a blowout fracture of his left eye socket.

The court applied *Hudson v. McMillian* to this sequence of events, at least as to the actions of the officers who had been named as defendants. First, it found that the initial physical encounter, during which the plaintiff was punched in the face and placed in a headlock, did not violate the Eighth Amendment. The court reasoned that the punch was administered "in an effort to restore discipline" after the plaintiff disobeyed orders and struck an officer, and the headlock was justified by the fact that the plaintiff continued to struggle. Similarly, the court found that placing the plaintiff in a "chicken wing hold" and holding him face down on the bed were justified by the need to restore order. However, the punches and kicks administered in the holding room, inflicted while the plaintiff was pinned face down on a bed by two officers, could not plausibly have been thought necessary. Although these blows were inflicted by unknown officers, one defendant was held liable for failure to intercede to stop them. Both Mt. McGregor officers were held liable for ripping the plaintiff's clothes off, since at that point he had been subdued and was surrounded by numerous officers; the court concluded that this "was done maliciously with the intent to humiliate" the plaintiff. Slapping and punching the plaintiff as he stood handcuffed and naked was also found to violate the Eighth Amendment.

The court also found that the Clinton sergeant's kicks to the plaintiff's buttocks—administered despite the plaintiff's obvious injuries and the fact that he was carrying 25-

pound bags in either hand—violated the Eighth Amendment even though they concededly did not cause much physical pain.

Jones illustrates several important aspects of the *Hudson v. McMillian* analysis.

First, courts will be extremely reluctant to second-guess the actions of correctional staff who are actively engaged in bringing a resisting prisoner under control. In this case, whether the plaintiff could have been initially restrained without a punch in the face is a finer distinction than the court was prepared to make. *Accord, Caldwell v. Moore*, 968 F.2d 595 (6th Cir. 1992) (rejecting an Eighth Amendment claim based on the use of a taser against an inmate causing a disturbance while locked in his cell).

Second, courts will parse a complicated series of events into its components, within the limits of the evidentiary record, and will evaluate each part of the sequence separately. The fact that an inmate's conduct initially justified substantial force will not justify the continued use of force after the need has passed, even in a case like this where the plaintiff resisted staff and inflicted some injury on them. *Accord, Bogan v. Stroud*, 958 F.2d 180, 184-85 (7th Cir. 1992) (upholding jury verdict for plaintiff who cut an officer with a knife and was then beaten and stabbed after he had been disarmed and subdued).

Third, Eighth Amendment violations may be found in completely non-injurious uses of force if they are gratuitous or clearly intended to humiliate. Thus, the court based its conclusion that ripping the plaintiff's clothes off violated the Eighth Amendment partly on the fact that it was done "with the intent to humiliate him." A similar perception no doubt influenced the court's finding that two "unwarranted and cavalier" kicks to the buttocks were unconstitutional. *See also Winder v. Leak*, 790 F.Supp. 1403, 1407 (N.D.Ill. 1992) (denying summary judgment against a prisoner who walked with a leg brace and was pushed by an officer to speed him up, causing him to fall without injury). This approach is consistent with the Supreme Court's observation in *Hudson* that the Eighth Amendment "excludes from constitutional recognition *de minimis* uses of physical

force, provided that the use of force is not of a sort 'repugnant to the conscience of mankind.'" 112 S.Ct. at 1000 (citations and internal quotation marks omitted).

Detainees: The Missing Piece

Hudson's clarification of the Eighth Amendment use-of-force standard followed by three years the Supreme Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989), which set the Fourth Amendment standard for police brutality claims. In *Graham*, the Court held that the Fourth Amendment prohibits uses of force that are not "'objectively reasonable,' in light of the facts and circumstances confronting [the officers], without regard to their underlying intent or motivation." 490 U.S. at 397. The officers' good faith or malicious or sadistic intent is simply not an issue.

In *Graham*, the Court also stated, "It is clear...that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." 490 U.S. at 395-96, n.10. "Punishment," as applied to conditions of pretrial confinement, was defined by the Supreme Court in *Bell v. Wolfish*: in the absence of explicit punitive intent, conditions constitute punishment if they are not "reasonably related to a legitimate governmental objective." This inquiry "generally will turn on 'whether an alternative purpose on which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" 441 U.S. 520, 538-39 (1979), quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (a case that struck down forfeiture-of-citizenship provisions of the immigration laws).

The Supreme Court has never actually decided a detainee use-of-force case, so the application of the "punishment" standard to such cases has been left to the lower courts. They have almost unanimously relied on a pre-*Wolfish* statement of the due process use-of-force standard from the famous case of *Johnson v. Glick*:

Not every push or shove...violates a prisoner's constitutional rights....[A] court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

481 F.2d 1028, 1033 (2nd Cir.), cert. denied, 414 U.S. 1033 (1973).

Although *Johnson v. Glick* has also been cited in the Supreme Court's Eighth Amendment cases, its due process standard differs significantly from the Eighth Amendment rule in that the officer's state of mind is only one of four seemingly equal factors contributing to the court's conclusion. Under the Eighth Amendment, by contrast, malicious and sadistic intent is determinative, with the other three factors significant only as they may help answer the intent question. *Whitley v. Albers*, 475 U.S. 312, 320-22 (1986); accord, *Hudson v. McMillian*, 112 S.Ct. at 998. Under the Fourth Amendment, as noted, the officer's subjective intent is completely irrelevant.

No federal court has questioned the continuing viability of the *Johnson v. Glick* test in detainee cases or shown any interest in re-examining it in light of subsequent Supreme Court authority. See, e.g., *White v. Roper*, 901 F.2d 1501, 1507 (9th Cir. 1990); *United States v. Cobb*, 905 F.2d 784, 787 (4th Cir. 1990); *Powell v. Gardner*, 891 F.2d 1039, 1043-44 (2nd Cir. 1989); *Brooks v. Pembroke City Jail*, 722 F.Supp. 1294, 1299-1300 (E.D.N.C. 1989).

This reticence may be just as well, since such an examination leads quickly to problems. The *Bell v. Wolfish* definition of "punishment" as the lack of a reasonable relationship between ends and means is arguably inconsistent with the holding of *Wilson v. Seiter*, 111 S.Ct. 2321, 2325 (1991), that in the Eighth Amendment context "some mental element must be attributed to the inflicting officer" to support a finding of punishment. *Wilson* went on to quote a definition of "punishment" as "a deliberate act intended to chastise or deter." Id. (citation omitted). On the other hand, *Wolfish's* language of reasonableness is similar to that used in Fourth Amendment analysis, which yielded the objective, intent-free standard for use of force cases adopted in *Graham v. Connor*. Moreover, the *Wolfish* standard is the same as the reasonable relationship test set out for assessing prison rules infringing First Amendment and substantive due process rights of convicts—a test that turns entirely on objective factors. See *Turner v. Safley*, 482 U.S. 78, 89-91 (1987).

Thus, trying to harmonize all the relevant Supreme Court authority leads to one of two conclusions: either that "punishment" has different meanings under the Eighth Amendment and the Due Process Clause, or that "reasonable" has different meanings under the Due Process Clause and the Fourth Amendment. This is an ironic outcome for an analytical method that purports to rely on the "explicit textual source[s] of constitutional protection," *Graham v. Connor*, 490 U.S. at 395, and on the plain meaning of

words. See *Wilson v. Seiter*, 111 S.Ct. at 2326 ("An intent requirement is either implicit in the word 'punishment' or is not....")

Where Is the Line?

There is a further question about the due process use-of-force standard: at what point does it take effect? When does the "arrest," governed by the Fourth Amendment, end, and "detention," governed by the Due Process Clause, begin?

Graham v. Connor ducked this question. 490 U.S. at 396-97 n.10. The lower courts have come to different conclusions. Some have held or assumed that the Fourth Amendment standard governs until the arrestee is brought before a judicial officer for a probable cause determination. *Frobmader v. Wayne*, 958 F.2d 1024 (10th Cir. 1992); *Simpson v. Hines*, 903 F.2d 400, 403 (5th Cir. 1990); *Powell v. Gardner*, 891 F.2d 1039, 1044 (2nd Cir. 1989) (dictum); and *Henson v. Theban*, 717 F.Supp. 1330 (N.D.Ill. 1989).

Other courts have applied a due process standard to uses of force in police lockups and pre-arraignment holding areas. *United States v. Cobb*, 905 F.2d 784, 788 (4th Cir. 1990) (assault in "booking room" treated as a due process case); *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990) (arrestee's presence in jail and completion of booking invoked the due process standard); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (excessive force in questioning an arrestee is governed by due process), cert. denied, 110 S.Ct. 733 (1990); *Stewart v. Roe*, 776 F.Supp. 1304, 1307 (N.D.Ill. 1991) (force used against an arrestee in a holding cell is governed by a due process standard); and *Brooks v. Pembroke City Jail*, 722 F.Supp. 1294, 1299 (E.D.N.C. 1989) (assuming that use of force against an arrestee who had been placed in a police detention cell was governed by a due process standard rather than the Fourth Amendment).

Eventually this conflict will have to be resolved by the Supreme Court. As a functional matter, it would appear that an arrestee who has been brought to a facility controlled by law enforcement officials and designed to keep suspects in custody is in a more similar situation to a convict or a jail inmate than to an arrestee who is in police custody but outside any secure detention setting. However, the Supreme Court has insisted that the legal standards in this area be determined by the text of the relevant constitutional provision, *Graham v. Connor*, 490 U.S. at 394, so it is doubtful that it will take this functional approach.

The Fifth Circuit: Do They Get It?

As noted, the Supreme Court's recent use-

of-force adjudication has been closely tied to the actual language of the relevant Amendment. In *Graham v. Connor*, the Court explicitly rejected any notion of a "single generic standard" for §1983 use-of-force cases. 490 U.S. at 393. This lesson appears to have been lost on the Fifth Circuit, from which *Hudson v. McMillian* came to the Supreme Court.

The Fifth Circuit had declared in an earlier case that a plaintiff with a "Constitutional excessive force claim" must prove three elements:

- (1) a significant injury, which
- (2) resulted directly and only from the use of force that was clearly excessive to the need, and the excessiveness of which was
- (3) objectively unreasonable.

Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (en banc) (footnote omitted). In Eighth Amendment cases, the court added a fourth requirement, that the action constituted an unnecessary and wanton infliction of pain. *Huguet v. Barnett*, 900 F.2d 838, 841 (5th Cir. 1990). This line of cases was overruled by *Hudson v. McMillian* as to the requirement of "significant injury" in an Eighth Amendment case.

The Fifth Circuit's most recent pronouncement on use-of-force standards is *Knight v. Caldwell*, 970 F.2d 1430 (5th Cir. 1992), in which the plaintiff alleged that he was assaulted and threatened with death while in police custody, but sustained no injuries. The court held:

The Supreme Court's decision [in Hudson v. McMillian] makes clear that we can no longer require persons to prove "significant injury" under section 1983. The Court's holding, however, does not affect the rule that requires proof of injury, albeit significant or insignificant. In fact, the Supreme Court specifically denied constitutional protection for "de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind."

Id. at 1432 (citation omitted).

This decision fails to acknowledge the ground rules set by the Supreme Court in two important respects.

First, it ignores the command of *Graham v. Connor* that in use-of-force cases, courts must identify the particular constitutional protections relied upon and base their standards of adjudication on the text of those provisions. In *Knight*, the court never states whether it is applying the Fourth Amendment or the Due Process Clause to this police custody case, and it purports to apply a rule of law stated in an Eighth Amendment case. It poses the question whether there is an injury

requirement "under section 1983," despite *Graham v. Connor's* explicit rejection of a "generic" §1983 use-of-force standard. Second, it misconstrues the holding of *Hudson* with respect to injury by confusing a "de minimis use of physical force" with one that causes no injury. A use of force such as electric shock that inflicts transitory pain but no actual injury whatsoever can still be "repugnant to the conscience of mankind," as is a use of force that is purposely designed to humiliate, such as the ripping off of the prisoner's clothing in *Jones v. Huff*.

GAY RIGHTS/RELIGION

Homophobia, both penological and judicial, has reared its head in an unusually explicit fashion in a Kentucky case in which a gay inmate was excluded from prison religious activities. In *Phelps v. Dunn*, 770 F.Supp. 346 (E.D.Ky. 1991), the plaintiff, an openly gay Christian, had actively participated in chapel services for almost two years, singing solos, reading aloud from the Bible, and "shar[ing] his testimony of faith." A new chaplain, who began to conduct some of the services, believed that such participation by homosexuals was contrary to his interpretation of the Bible, and barred him from active participation. The plaintiff filed a grievance, which was denied by the deputy warden, who wrote that the plaintiff's desire to "lead" in services "is not acceptable because of his admitted homosexual activity. The other men attending the services support the position taken by the volunteer chaplain." On appeal, however, the warden ruled in the plaintiff's favor, stating that "All inmates should be afforded the opportunity to participate in leadership roles regardless of sexual preference." The plaintiff alleged that the warden's favorable decision was never carried out and that he was barred entirely from services.

The district court granted summary judgment for prison officials, holding that the exclusion of the plaintiff was justified because it bore a reasonable relationship to legitimate penological interests, given the security risk allegedly created by other inmates' hostility to the plaintiff's participation. It reached this conclusion despite the absence of any actual disruption and despite the warden's overruling of the exclusion. In fact, the court went on to declare the warden's decision "arbitrary and capricious in view of the very rights relied on by the plaintiff in asserting his claims." The plaintiff's participation, in the court's view, threatened to "deprive others of their equally protected right to worship without being exposed to offensive conduct." (The "offensive conduct" apparently consisted of being homosexual while singing hymns and reading the Bible; there is no indication that the plaintiff made his sexual orientation

an issue during the services.) The court went on to add, "History is replete with instances of prolonged conflict and bloodshed over the desire of people to worship with a *group of kindred mind*....[T]he warden lacked the courage to confront squarely the situation before him...." (emphasis supplied).

On appeal, the Sixth Circuit reversed the grant of summary judgment, holding that the warden's grievance decision and the views stated by the first chaplain created a disputed issue of fact as to the existence of a security risk. *Phelps v. Dunn*, 965 F.2d 93 (6th Cir. 1992). The appeals court defined the issues as narrowly as possible, holding that only the question of attendance, and not "leadership," was in dispute, despite the district court's emphasis on the latter point. The court was also careful to note that the case did not deal either with a policy of exclusion of homosexuals from religious services or "the rights of other prisoners or pastors to have a service without those they may consider sinners." It is difficult to come away from the district court's opinion without the impression that the judge's personal distaste for homosexuality played a large part in the outcome. The Sixth Circuit's opinion studiously avoids that question, an effort that is made easier by its narrow construction of the record and the issues on appeal.

Other Cases Worth Noting

SUPREME COURT OF THE UNITED STATES 1991-92 Term

Appeal

Smith v. Barry, 502 U.S. ___, 112 S.Ct. ___, 116 L.Ed.2d 678 (1992). The plaintiff filed a *pro se* notice of appeal that was invalid because it preceded the disposition of a motion for JNOV (judgment notwithstanding the verdict). The court nonetheless sent the plaintiff an "informal brief" form, which he returned within the time prescribed for filing a notice of appeal.

The "informal brief" was the equivalent of a notice of appeal. An appellate brief can serve as a notice of appeal as long as it contains the information required by the rules in a notice of appeal.

Psychotropic Medication/Pretrial Detainees

Riggins v. Nevada, 504 U.S. ___, 112 S.Ct. ___, 118 L.Ed.2d 479 (1992). The petitioner's criminal conviction is reversed because the state courts failed to make findings suffi-

cient to support forced administration of antipsychotic drugs during his trial. Pretrial detainees enjoy at least as much protection from forced medication as do convicted persons under *Washington v. Harper*. There must be "a finding of overriding justification and a determination of medical appropriateness." (489)

U.S. COURTS OF APPEALS

Attorneys' Fees and Costs/ Medical Care

Collins v. Romer, 962 F.2d 1508 (10th Cir. 1992). A Colorado "co-payment" statute required prisoners to pay \$3.00 for each medical visit; after suit was filed, the statute was amended to apply only to visits to a physician without a referral from a nurse or physician's assistant. (This amendment excluded most medical visits from the requirement.) The amended statute was found constitutional on its face and as applied to the named plaintiffs.

The plaintiffs are entitled to attorneys' fees under the "catalyst" test. There was ample evidence that the suit bore a causal relationship to the statutory amendment. The change was "required by law" in that the district court found that the earlier version was unconstitutional because it would have required days and in some cases weeks at inmate pay rates to earn the money, and would have fallen particularly harshly on the chronically ill. This opinion does not actually affirm that judgment, since the "required by law test" only requires the district judge to determine that the suit was not "frivolous or groundless."

Pretrial Detainees/Crowding

Williams v. McKeithen, 963 F.2d 70 (5th Cir. 1992). After the 1977 decision in *Williams v. Edwards* finding unconstitutional conditions in Louisiana prisons, the usual state-ready backup problem developed, and the appeals court ordered all crowding-related jail litigation consolidated in one district. All city and parish jails entered into consent decrees limiting population.

The district court did not abuse its discretion in directing that a court-appointed expert, in order to update the consent decrees, inspect each jail to determine an appropriate population limit, staffing levels, repairs or renovations required to meet fire, health, and constitutional standards, and any other information that would help the court set population limits. The order is "designed for the narrow purpose of monitoring compliance with the Decree." (71)

Color of Law/Publications

Skelton v. Pri-Cor, Inc., 963 F.2d 100 (6th

Cir. 1991). A private corporation operating a detention center "is no doubt performing a public function traditionally reserved to the state" (102) and therefore acted under color of law.

A policy forbidding hardcover books was not unconstitutional as applied to the plaintiff's Bible. At 103: "The determinative factor in the case is that the Center would allow Skelton to have a softcover Bible." The refusal, based on a concern that books could become weapons of assault or hiding places for contraband, was reasonable under the *Turner* standard, which is applied to this unsentenced prisoner with no discussion of its appropriateness.

Religion

Blair-Bey v. Nix, 963 F.2d 162 (8th Cir. 1992). Members of the Moorish Science Temple (MST), characterized as an "Islamic sect," are not entitled to a religious advisor separate from the Islamic advisor the prison provided. The court notes that MST members have many other religious rights.

The prison employed Catholic, Protestant, Jewish, Islamic and Native American representatives but "does not employ separate representatives to advise individual sects within the designated religions." (163) The court does not explain why Catholicism and Protestantism are "religions" while MST is a "sect."

Searches—Person—Prisoners/ Use of Force

Cornwell v. Dahlberg, 963 F.2d 912 (6th Cir. 1992). After a disturbance, inmates including the plaintiff were made to lie handcuffed in a cold, muddy area with the temperature in the low 40's. The plaintiff's shoes were taken and not returned. Strip searches were conducted outdoors in view of the whole group of inmates and any officers passing through the area, including some female staffers.

At 916:

...[A] convicted prisoner maintains some reasonable expectations of privacy while in prison, particularly where those claims are related to forced exposure to strangers of the opposite sex, even though those privacy rights may be less than those enjoyed by non-prisoners.

The district court's Fourth Amendment jury charge, which addressed whether defendants had acted in an "objectively reasonable manner," was appropriate only in a use-of-force case and not in a Fourth Amendment privacy case, which is governed by the *Turner* reasonableness standard.

Indemnification

Hankins v. Fimmel, 964 F.2d 853 (8th Cir. 1992). The plaintiff won \$3,000 in punitive damages against a prison employee who had sexually molested him. The state paid the award pursuant to its indemnity statute, then proceeded in state court under the Missouri Incarceration Reimbursement Act to try to recover 90% of the award. The plaintiff obtained an order from the federal district court barring the state from attaching his money.

The state Incarceration Reimbursement Act is pre-empted by §1983 because allowing the state to recoup §1983 awards would be inimical to the deterrent and compensatory purposes of the statute.

Access to Courts

Shango v. Jurich, 965 F.2d 289 (7th Cir. 1992). Prison officials bear the burden of proving the adequacy of their court access systems. However, the plaintiff must "allege some quantum of detriment caused by the challenged conduct of state officials resulting in the interruption and/or delay of plaintiff's pending or contemplated litigation." (292, citation omitted, emphasis supplied). The absence of any showing that any inmate was prejudiced, combined with the evidence that inmates were "prolific litigators," plus the many indicia of compliance with *Bounds*, supported the district court's finding that there was no constitutional violation.

Medical Care— Denial of Ordered Care

Aswegan v. Brubl, 965 F.2d 676 (8th Cir. 1992) (per curiam). A jury awarded \$500 in actual damages and \$1,500 in punitive damages to the 70-year-old plaintiff, who suffered from heart disease and arthritis, against the prison security director and a deputy warden based on a number of incidents including failure to deliver prescribed medications in a timely manner and to follow physicians' recommendations.

The finding of supervisory deliberate indifference is supported by evidence that one defendant deliberately refused the plaintiff access to medical personnel on one occasion; that both of them failed to take steps to eliminate repeated violations of orders that medication be timely provided and that he not be cuffed with his hands behind his back; and that he not be placed in shower stalls during shakedowns because of his breathing problems.

Medical Care

Taylor v. Bowers, 966 F.2d 417 (8th Cir. 1992). The plaintiff had severe stomach pain and vomited blood. His recommended transfer to a hospital was delayed while he was

questioned as to whether he had swallowed drug-laden balloons. Two days later exploratory surgery was performed and he was found to have a ruptured appendix. He continued to have pains but was not transferred to a hospital until two weeks after the original recommendation, where he had a second operation to drain an abscess. Apparently no drugs were found.

The plaintiff's allegation that medical treatment was withheld from him to coerce him into confessing that he had swallowed drugs states a violation of clearly established Eighth Amendment law. He produced sufficient evidence in support to withstand summary judgment as to one of three defendants.

Suicide Prevention

Titte v. Jefferson County Commission, 966 F.2d 606 (11th Cir. 1992). The defendants were arrested; the jail's suicide screening procedure revealed no cause for concern; they both hanged themselves.

Evidence of a known history of jail suicides by hanging from a horizontal bar raised an issue of material fact as to the municipality's deliberate indifference. At 612:

In this context, the question of whether or not these particular inmates had exhibited suicidal tendencies is irrelevant because the basis of the claim is that the jail itself constituted a hazardous condition and that the defendants were deliberately indifferent to that danger. It is true that prison officials are not required to build a suicide-proof jail. By the same token, however, they cannot equip each cell with a noose.

Searches—Person—Prisoners/ Pretrial Detainees

Covino v. Patrissi, 967 F.2d 73 (2nd Cir. 1992). The plaintiff, a pretrial detainee, was transferred to a state prison, where he was punished for refusing to submit to a random visual body-cavity search done pursuant to prison procedure.

At n.4: The court need not consider whether pretrial detainees have more extensive Fourth Amendment protections than convicts because what is at issue is a "prison regulation" subject to the *Turner* reasonable relationship standard, and the "legitimate penological interests" at issue are the same for detainees and for convicts.

Applying the *Turner* standard, the court concludes that the regulation is probably reasonable, since the searches promote institutional security from contraband. There are no alternatives to the searches, and the manner in which they are conducted (behind the closed door of the inmate's room with only

the search officers present) is a reasonable accommodation to the inmates' privacy rights.

The court distinguishes its prior decision in *Hurley v. Ward* on the ground that the searches in that case were found to have been accompanied by physical and verbal abuse not present here.

State Officials and Agencies/ Work Assignments

Hale v. State of Arizona, 967 F.2d 1356 (9th Cir. 1992). Inmates employed by Arizona Correctional Industries (ARCOR), which makes products for sale or use outside the prison, are entitled to receive the minimum wage under the Fair Labor Standards Act (FLSA), rather than the 50 cents an hour that they are paid, since state statutes provide that ARCOR is "deemed a private enterprise and subject to all the laws and lawfully adopted rules" applying to these.

The court concludes that the FLSA was intended to regulate prison labor. The Supreme Court has held that the terms "employer" and "employee" are to be defined expansively and not limited by traditional views. Congress set out an "extensive" list of workers exempted and did not include prisoners on that list, despite several modifications of the list. One of the statute's purposes was to eliminate unfair competition through cheap labor.

Pretrial Detainees/Contempt/Appeal/ Pendent and Supplemental Claims; State Law in Federal Courts/ Crowding/Remedies/Financial Resources/Monitoring and Reporting/ State-Federal Comity/Release of Prisoners

Stone v. City and County of San Francisco, 968 F.2d 850 (9th Cir. 1992). The city jail is governed by a consent decree containing a population cap. A subsequent order, agreed to by the City, provided for sanctions for noncompliance and the release of some inmates, and a further order gave the sheriff additional release powers in contravention of state and local laws. Eventually the defendants were found in contempt and sanctions of \$300 per day per inmate over the cap were imposed. The fines were directed to be placed in a fund to be controlled by the City and used for population-reduction programs.

Appellate courts defer to district courts' findings of contempt. At 856: "Moreover, deference to the district court's exercise of discretion is heightened where the court has been overseeing a large, public institution for a long period of time." The contempt standard is whether defendants "have performed 'all reasonable steps within their power to insure compliance' with the court's orders."

(856, citation omitted) "Intent is irrelevant to a finding of civil contempt and, therefore, good faith is not a defense." *Id.*

The deliberate indifference standard of *Wilson v. Seiter* is not applicable to the enforcement of a consent decree.

The long history of noncompliance with the population cap and with other parts of the consent decree support a finding of contempt. There was evidence that the recent upsurge in jail population was not really unforeseen, having been predicted by the National Council on Crime and Delinquency and the Special Master.

At 858:

The City argues that it faces a financial crisis that prevents it from funding these programs, but federal courts have repeatedly held that financial constraints do not allow states to deprive persons of their constitutional rights.

The language in *Rufo v. Inmates of Suffolk County Jail* concerning the importance of financial constraints applies only in the context of a modification motion based on unexpected or unanticipated circumstances.

At 861:

A federal court has broad remedial powers.... The court's choice of remedies is reviewed for an abuse of discretion....

In employing their broad equitable powers, federal courts should "exercise the least possible power adequate to the end proposed." ...

Courts have conceded, however, that when the least intrusive measures fail to rectify the problems, more intrusive measures are justifiable....

While there are federalism concerns in institutional reform litigation involving correctional facilities, they do not automatically trump the powers of the federal courts to enforce the Constitution or a consent decree. The amicus misstates the law when he argues that federal courts lack authority to employ the early-release and state-law-override mechanisms. The scope of the district court's power to fashion equitable remedies is highly contextual and fact dependent. One simply cannot state that there is no case in which the remedial scheme taken in this case is appropriate. The proper question is whether it is appropriate under the facts presented. [citations and footnote omitted]

Here, the defendants had several opportu-

nities to comply with the consent decree, and the district court did not prescribe a remedy. In this context, its grant to the sheriff of early-release and citation-release authority within the existing limits of state law was a proper exercise of authority. Since the sheriff retained discretion, "the early-release provision was an attempt to respect the institutional competence of prison administrators and minimize intrusion upon their authority." (863) However, the extension of the sheriff's authority to include overriding state law limits (i.e., by releasing sentenced inmates before service of their minimum sentences) was an abuse of discretion; the court should have waited to see if the threat of sanctions induced compliance and should have made findings that other measures were inadequate. At 864-65: "If the threat of contempt sanctions proves ineffective and if the district court finds that other alternatives are inadequate, the court could consider authorizing the sheriff to override certain provisions of state law to assure compliance."

DISTRICT COURTS

Procedural Due Process— Disciplinary Proceedings

Winston v. Coughlin, 789 F.Supp. 118 (W.D.N.Y. 1992). The filing of fabricated misbehavior reports does not deny due process, but an allegation that fabricated reports were filed to conceal the officers' Eighth Amendment violations is sufficient to withstand a motion to dismiss.

Searches—Living Quarters/ Searches—Person—Prisoners

Blanks v. Smith, 790 F.Supp. 192 (E.D.Wis. 1992). The plaintiff's allegation that he was subjected to strip and cell searches every day for two weeks stated "at least an arguable" Eighth Amendment claim.

Use of Force

Winder v. Leak, 790 F.Supp. 1403 (N.D.Ill. 1992). The plaintiff, who walked with a leg brace, stopped to regain his strength and was pushed by an officer to speed him up, causing him to fall. A reasonable jury could find that the officer's conduct was malicious, precluding a grant of summary judgment to the defendant. At 1407: "The exertion of force against a handicapped individual, knocking that person to the floor and causing pain, is not *de minimis* for Eighth Amendment purposes." The court ignores the fact that the plaintiff was a detainee and not a convict.

The plaintiff alleged that he was told that if he filed a grievance he would be given a disciplinary charge. He did, and he was, and spent 12 days in isolation as a result. The plaintiff's official-capacity claims against

county jail personnel are dismissed because he is unable to show a causal connection between an alleged policy of retaliation and his injury, since the isolation was imposed after an independent hearing and findings that he was guilty.

Religion—Practices

Munir v. Scott, 792 F.Supp. 1472 (E.D.Mich. 1992). The total ban on Muslim prayer oils, now rescinded, was unconstitutional under *Turner*. The new policy, which permitted nonflammable, nonfluorescent oils in plastic containers from an authorized vendor, is admissible in evidence notwithstanding the usual rule barring evidence of subsequent repairs, since it was not offered as direct evidence of negligence or culpability but as evidence of the feasibility of alternative measures.

The prohibition on incense is upheld because incense can be used to mask the smell of marijuana, "spud juice," or smoke from arson attempts, and other prisoners may take offense at the smell with resulting disruption.

Class Actions—Settlement of Actions/Modification of Judgments

Wyatt by and through Rawlins v. Horsley, 793 F.Supp. 1053 (M.D.Ala. 1991). In this latest incarnation of *Wyatt v. Stickney*, counsel for the plaintiffs and defendants submitted proposed consent decrees modifying several of the court's previous orders. The court received written objections from numerous mental health advocacy organizations, treatment professionals, and former patients, and heard "sharply negative" testimony. No evidence was presented in support of the agreements and no members of the court-created advisory committee appeared

to explain their supposed support for them.

The court declines to "rubber stamp" counsel's opinions. At 1055:

...Although the opinions of class counsel are a substantial factor in the court's evaluation of a proposed consent decree under this standard, the degree of deference accorded counsel's judgment depends on, among other things, the amount of support or opposition within the class to the settlement.... Where the class "speaks in several voices"—in other words, where there is disagreement among class members as to the desirability of a particular settlement—"it may be impossible for the class attorney to do more than act in what he believes to be the best interests of the class as a whole." ...However, the proportion of a class that objects to a proposed settlement may at some point become so large or the number of members endorsing the settlement so small, that in a very real sense it may be said that the attorney has settled the lawsuit unilaterally, without the backing, and presumably not in the best interests of, "the class." ...However difficult it may be to translate such a standard into a bright-line rule, the court has little difficulty concluding that this "point" is passed where, as in this case, a number of concerned parties have attacked the proposed changes, but not a single class member has come forward in favor of the consent decrees and,

NPP Announces New Booklet on TB

The National Prison Project announces the publication of *TB and Prisons: The Facts for Inmates and Officers*, an 18-page booklet which discusses tuberculosis (TB) in a simple question-and-answer format. Tuberculosis, once thought to be nearly eradicated in this country, has re-emerged as a serious public health threat. A number of outbreaks have been reported in prisons where crowded conditions have contributed to its spread. The booklet explains what tuberculosis is, how it is contracted, what its symptoms are, its treatment and medication, how HIV infection affects TB, and how multi-drug-resistant tuberculosis differs from ordinary TB. Single copies are free; bulk copies are as follows: \$25/100 copies; \$100/500 copies; \$150/1000 copies, prepayment requested. Please write: TB Booklet, National Prison Project of the ACLU, 1875 Connecticut Ave., N.W., Suite 410, Washington, D.C. 20009.

as far as the court can tell, plaintiffs' counsel has agreed to the settlement "without the participation or consent" of any "class members," named or absent.... [citations omitted]

The court declines to construe the lack of opposition from current members of the class as tacit support, since the class is one of mentally ill persons, and adds that "to the extent plaintiffs' counsel cannot receive input from class members, he must seek it from such secondary sources as public interest organizations, former mental patients, and family members and caregivers who have day-to-day contact with class members in the state's institutions." (1056)

The court spells out its substantive concerns, which include relaxed standards for the application of electroconvulsive therapy and the apparent authorization of indefinite continuation of emergency restraint and seclusion without physical examination. The court directs a schedule

for submitting additional evidence as to those matters that the parties really want to pursue.

Privacy

Riddick v. Sutton, 794 F.Supp. 169 (E.D.N.C. 1992). The assignment of female officers to all assignments in a male prison except for strip searches is upheld under the *Turner* standard, even though the plaintiff has "a constitutional right to privacy in not being viewed nude or partially nude by female correctional guards." (171) Defendants' practice is rationally related to security and to equal employment; prisoners have alternative ways to maintain privacy (e.g., taking a towel into the shower or a newspaper into the toilet area); restricting assignments by gender could cause staff shortages. There is no evidence of unprofessional behavior by female staff when they viewed male inmates nude or partially nude. At 173: "The court emphasizes that its holding in this case is not meant to confer judicial approval on flagrant violations

of the privacy rights of inmates."

Confiscation and Destruction of Legal Materials/Access to Courts

Duff v. Coughlin, 794 F.Supp. 521 (S.D.N.Y. 1992). Some of the plaintiff's legal materials were sent home as unauthorized property because officers thought they were not his own legal work; the package was returned to the prison and then lost.

In the absence of any evidence of prejudicial effects on pending legal actions or other concrete harm, the plaintiff has no claim for denial of access to courts. Mere negligence or sloppy management does not support a claim of denial of court access; "negligence resulting from a reckless disregard or deliberate neglect" might support liability in a proper case. ■

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.

For the Record

■ The nation's federal and state prison population climbed nearly 4% during the first six months of this year, to a record high of 855,958 prisoners, according to the Justice Department's Bureau of Justice Statistics (BJS). The six-month increase, however, of 31,449 inmates was well below the record increase of 47,000 prisoners recorded during the first half of 1989.

The federal prison population rose at a rate double that of the states.

The figures do not include jails, whose population numbers over 400,000.

For further information, contact the National Criminal Justice Reference Service, Box 6000, Rockville, MD 20850, 800/732-3277, or 301/251-5500.

■ Congress has approved legislation which will allow the Bureau of Prisons to collect "user fees" from federal inmates equal to the cost of one year's incarceration. An estimated 9% of the 30,000 new inmates who enter the federal prison system will be able to pay the cost of at least their first year of imprisonment. The Justice Department may raise up to \$48 million a year by forcing payment from inmates. Congress has specified that any money collected under the user fee program in the current fiscal year be placed in the U.S. Treasury fund. Starting in Fiscal Year 1994, however, the funds will be placed in a special account which will be made available to improve drug and alcohol abuse programs in the federal system, according to the Justice Department.

■ The Sentencing Project has announced the availability of a new 80-page collection of newspaper and journal articles on the

issue of racial disparity and the criminal justice system. The articles analyze sentencing issues, plea bargaining, incarceration rates, and the racial impact of the "war on drugs." Sources include major daily newspapers, legal journals, and other publications. "Selected Articles on Racial Disparity and the Criminal Justice System" is available for \$10 from the Sentencing Project, 918 F St., N.W., Suite 501, Washington, D.C. 20004, 202/628-0871.

■ Drawing on their award-winning reporting for the Louisiana State Penitentiary's uncensored newsmagazine, *The Angolite*, Wilbert Rideau and Ron Wikberg present the stark reality of life behind bars and the human, political, and fiscal costs of our war on crime in a new book, *LIFE SENTENCES: Rage and Survival Behind Bars*. Rideau says, "Most of the public's perception of prison comes from the film industry and the news media, and movies are interested in drama, newspapers in sensationalism. Riots and murders are part of prison life, but only a small portion. The carbon copy existence of nothingness, trying to find meaning and hope behind bars is never reflected to the outside world." *LIFE SENTENCES* is available for \$15. Please contact Kent Holland, senior publicist, Times Books, 212/572-2027.

■ The prison construction campaign conducted over the last 15 years has had very little impact on crime, according to a major study released by a panel of the National Research Council (NRC), an agency of the National Academy of Sciences. The 19-member panel, led by Dr. Albert J. Reiss Jr. of the Yale University Department of Sociology, concluded that, in order to reduce crime, strategies to prevent violence must be considered as primary as incarceration. Furthermore, the panel found, no single preventive strategy will solve the overall problem, because people commit violent acts under various circumstances and for different reasons.

D.C. Public Defender Works to Defend Prisoner Rights

BY ROBERT HAUHART

In 1987 the Council for the District of Columbia amended the Public Defender Service Act¹ to permit Public Defender Service (PDS) attorneys to represent District of Columbia prisoners in limited types of civil problems relating to the conditions of their confinement. The Council adopted this amendment on the heels of the 1986 Occoquan Facility riots, in which one of the District's largest prisons was burned and severely damaged,² and the continuous overcrowding problems the District's prisons and jail had been experiencing for almost two decades.³ The office opened with two attorneys and a secretary at a trailer on the grounds of the District's Lorton (Virginia) prison complex.

In principle, the Prisoners' Rights Program (PRP) was intended to serve the District's entire 8,400+ sentenced and detained population then held in District correctional institutions.⁴ PRP concentrated its efforts on certain types of cases. Unlike the National Prison Project, the Prisoners' Rights Program was conceived as an office that would undertake individual representation as well as class action litigation, since many District correctional facilities had already been the subject of major conditions and overcrowding cases.

Like the District of Columbia prison population, applications for assistance to PRP have increased year by year, ranging from 715 in the first full year of operation to more than 2,150 in 1992.

From the outset it was evident that two attorneys without paralegal support could not capably handle more than 700 requests annually for individual representation, even by pursuing such time-honored strategies as the class action. Two additional attorneys and a staff investigator joined the program in 1990. With the added staff, PRP continued to expand its legal services program to address the needs of its clients, although the number of applications for legal assistance also continued to increase.

The program of legal services that has evolved consists of a dynamic synthesis of individual representation and class advocacy; formal representation at prison administrative hearings, before other municipal agencies enforcing District law, and in state and federal courts; and infor-

mal negotiation and problem-solving. The substantive areas of emphasis include medical and dental care, administrative segregation, and disciplinary due process. In addition, individual cases and projects have challenged the D.C. Department of Corrections' (DOC) failure to provide youthful female offenders equal treatment under local law, and physical and bureaucratic barriers experienced by disabled residents. A thumbnail sketch of PRP's major initiatives provides the best summary of the program's diverse caseload.

Medical and Dental Care

From the start of the program, PRP has received a great many complaints regarding the denial and adequacy of health care within the D.C. DOC. As a consequence, PRP has actively pursued regular litigation in this area. Indeed, PRP's first case challenged the medical treatment provided a Lorton resident. The D.C. Superior Court issued an order directing the Department to provide the therapy recommended by plaintiff's expert.

Similarly, in *Yarbaugh v. Roach, et al.*, 736 F. Supp. 318 (D.D.C. 1990), PRP represented a D.C. Jail resident with multiple sclerosis, a demyelinating neurological disorder requiring ongoing drug treatment, routine-maintenance physical therapy, and regular monitoring by a neurologist. The court concluded that there was no dispute that multiple sclerosis constituted a "serious medical need" and that the Department and its personnel had been "deliberately indifferent" by failing to provide regular examinations, treatment, and acceptable living conditions for the resident, whose moderate-to-severe impairment had made him wheelchair-bound. Other cases have challenged the inordinate delays in providing artificial limbs to residents and systemic failures in dental care that make residents without teeth wait as long as three years for dentures.

Administrative Segregation

As in many prison systems, residents within D.C. DOC facilities routinely experience periods of lengthy, unwarranted detention on management segregation without proper due process review. Beginning in 1990, PRP has brought a continuing series of individual cases challenging improper administrative segregation detentions at the Maximum Security

Facility, Lorton. Representative of these cases, and the successful outcomes PRP has achieved, is the court's unpublished April 10, 1992 memorandum order in *Byrd v. Stempson and Ridley*, Case No. SP-2909-91 (D.C. Sup. Ct.) (Hon. Curtis von Kann).

Petitioner Byrd contended that he had been wrongly held in administrative segregation at the Maximum Security Facility without due process reviews, after his transfer from the Occoquan Facility, Lorton—a medium custody prison—in July 1991. The basis for the transfer was findings of misconduct in the form of "lack of cooperation," "out of place," and "willful disobedience to a general order" at two Occoquan adjustment board hearings in June, 1991. After a hearing, the court found that the Department could not justify its conclusion that Byrd constituted a "threat" to himself or others, and that the Department had failed to provide proper 30-day due process reviews, as required by the local Lorton Regulations Approval Act (LRAA) of 1982. The court ordered the Department to release Mr. Byrd back to medium custody.

Disciplinary Due Process

Like all contemporary U.S. prison systems, the D.C. DOC runs a disciplinary system. These rules provide for both adjustment board (disciplinary) and housing board hearings.⁵ PRP began offering individual representation at a limited number of prison disciplinary hearings under the LRAA. PRP is now on schedule to handle between 250-275 hearings in its third year of adjustment board representation.

In addition to representation at the disciplinary hearings and administrative appeals, PRP has litigated to ensure due process guarantees are provided in disciplinary cases. In one case brought in U.S. District Court, the magistrate concluded that plaintiff's right to procedural due process had been violated by the Department's failure to make specific factual findings and include those in its written finding of guilt. The magistrate recommended that because "significant adverse collateral consequences" attached to the insufficiently supported finding of guilt, the board's decision should be vacated and all references to the charges expunged.⁶

PRP has brought disciplinary due process cases in D.C. Superior Court also, achieving comparable results.⁷ Most recently, in fall of 1992, PRP initiated a law student clinic on LRAA disciplinary hearings in association with the Howard University School of Law. While the clinic

is only being conducted on an experimental basis for the current year, we hope that it will become an established program.

Other Initiatives and Cases

While PRP has a long-standing commitment to individual representation, many of its projects and cases address problems affecting groups or classes of prisoners in the D.C. Department of Corrections. One of PRP's earliest cases was a class action brought in D.C. Superior Court challenging the Department's failure to implement the District of Columbia's 1985 Youth Rehabilitation Act (YRA) with respect to women offenders. The YRA requires special educational, vocational, drug, and therapeutic counseling efforts directed at the youthful offenders convicted and sentenced under the Act. PRP charged that the Department had failed to create and maintain such programs for the class of women sentenced under the Act. On the eve of trial, the District signed a 30-page consent decree agreeing to more programs and better classification procedures.

In another class action, PRP filed a complaint with the D.C. Office of Human Rights urging that the DOC was in violation of the District's Human Rights law, D.C. Code Section 1-2501, et seq., and Section 504 of the Rehabilitation Act, by discriminating against the physically and mentally handicapped, failing to reduce and remove architectural and social barriers to full use

of Department facilities and programs, and failure to create and update a Section 504 Implementation Plan. This matter was also settled in 1992 and is monitored by the D.C. Department of Human Rights.

Similarly, PRP represented Muslim inmates in a consolidated series of cases in U.S. District Court. In this case, the DOC agreed to incorporate the changes PRP sought on behalf of the class in a new Departmental Order addressing regulations and procedures for assuring freedom of religion and religious observance. A monitoring panel of DOC representatives, Muslim residents, Department chaplains, and PRP attorneys addresses implementation of the new Departmental Order.

In two other cases,⁸ PRP attorneys participated in challenges to portions of the District of Columbia's Good Time Credit Act (GTCA) (1986) as they applied to individuals. While these cases were unsuccessful in the courts, both cases led to legislative revisions or wider applications of the beneficent intent of the GTCA. Similarly, PRP attorneys have chosen several *pro se* cases dismissed for failure to state a claim, or on summary judgment, in local United States District Court to challenge on appeal, in an effort to ensure that proper standards and procedures for reviewing cases are upheld in *pro se* actions.

The Public Defender Service is proud of the contribution to prisoners' rights it has been able to make in the District of

Columbia through the Prisoners' Rights Program. PRP will continue its efforts on behalf of D.C. prisoners whenever constitutional and statutory rights are at risk. ■

Robert Haubart is supervising attorney of PDS' Prisoners' Rights Program.

¹ Title 1 D.C. Code Section 2701, et. seq.

² See, generally, *Inmates of Occoquan v. Barry*, 650 F. Supp. 619 (D.D.C. 1986), on appeal 844 F.2d 828 (D.C. Cir. 1988), rehearing en banc 850 F.2d 796 (D.C. Cir. 1988).

³ See "Singing the D.C. Prison Blues," *Legal Times*, Washington D.C., August 8, 1988 at 1, and *Campbell v. McGruder*, 416 F.Supp. 100 (D.D.C. 1975), for some of the history of the overcrowding problem.

⁴ In addition to the D.C. prisoners held in D.C. correctional facilities, as many as 2,800 additional D.C. prisoners were held in U.S. Bureau of Prisons institutions (approximately 2,000) or state prisons or county jails outside D.C.

⁵ In both instances, D.C. Department of Corrections employees appointed by each facility administrator act as either the hearing officer or members of the three-person boards.

⁶ See *Horns v. D.C. Department of Corrections*, et al., Civ. No. 91-1217 (D.D.C.) (Report and Recommendation of Magistrate Patrick Attridge, October 23, 1991) (Order of Judge Thomas F. Hogan, November 25, 1991).

⁷ See *Cockrell v. Braxton*, et al., Case No. SP-251-92 (D.C. Sup.) (Judge Margaret Haywood's Order of May 19, 1992) (inmate was denied the right to call witnesses in violation of procedural guarantees of local governing law).

⁸*Moss v. Clark*, 886 F.2d 686 (4th Cir. 1989), and *Fields v. Keohane*, 954 F.2d 945 (3rd Cir. 1992).

"Dear Prison Project..."

The National Prison Project receives over 500 letters each week from prisoners. Many of those letters include legal questions which, unfortunately, we have neither the time nor the staff to answer individually. In order to give prisoners some of the information requested, we have begun an "advice" column, a sort of "Dear Abby" for prisoners on legal questions. This issue's "Dear Abby" is NPP fellow Amy Kraus.

Dear Prison Project:

I am a prisoner in a state correctional institution, and I am attempting to file a §1983 lawsuit. I have trouble using the law library, and my cellmate, who has experience with legal research, has offered his assistance. Can the prison officials prevent him from helping me?

Alone in the Law Library

Dear Alone,

The answer to your question depends on what kind of legal assistance program, if any, is in place at your prison. The issue of prisoner access to the courts has been litigated extensively in the Supreme Court as well as in many lower courts. The leading case on this issue is *Bounds v. Smith*, 430 U.S. 817 (1977). In

Bounds the Supreme Court held that prisoners have a constitutional right to adequate, meaningful, and effective access to the courts. This requirement can be satisfied by the provision of either adequate law libraries or adequately trained legal assistants. The emphasis of the litigation in this area following *Bounds* has been on what constitutes meaningful access. For instance, courts have held that simply providing access to an adequate law library may not satisfy *Bounds* if inmates, such as those who are illiterate or non-English speaking, are unable to use it. See *Johnson v. Avery*, 393 U.S. 483 (1969), and *Wolff v. McDonnell*, 418 U.S. 539 (1974). *Johnson*, a precursor to *Bounds*, held that prison authorities cannot prohibit jailhouse lawyers without providing an adequate alternative means of legal assistance. Recent decisions have continued to dictate that prisons must provide more than a law library for those inmates who cannot perform the legal work themselves. See *Gluth v. Kangas*, 951 F.2d 1504 (9th Cir. 1991). If your prison has a program that provides trained legal assistants, then they can legally prohibit jailhouse lawyers, such as your cellmate, from assisting other prisoners. However, if no alternative legal assistance is provided for those inmates who require it, then jailhouse lawyering must be permitted.

(cont'd from page 2)

for incorporation and developed preliminary plans for raising funds in anticipation of the inevitable transition of *Odyssey* to the community.

Meanwhile, the superintendent at Norfolk prison conducted a private investigation and became convinced of my innocence. Without his support at this critical juncture, *Odyssey* would have been aborted.

We worked even harder because we now understood that being competent and serious journalists was in itself an act of resistance and empowerment as important as the issues treated in our journal. "The process"—the commitment to excellence—bonded us together far more than the larger prison issues that brought us together in the first place.

By its second issue, *Odyssey* had become, by default, the only voice advocating rehabilitation within the state. A liberal approach to corrections and solving the problem of crime had become increasingly unpopular with the electorate, and its advocates remained aloof from the public debate because of the political and professional risks.

The superintendent was fired and escorted off the grounds. His removal from office marked the change from a somewhat liberal to very conservative state government.

Two weeks after the second edition was released, *Odyssey* was placed "under investigation" by the security forces at Norfolk. I was returned to "the hole." According to the disciplinary report filed by the prison authorities, the reason that I was locked in isolation was because I had refused to provide a "sufficient quantity of urine" for them to test for drug use. They claimed that this was a routine and random procedural request. I was found not guilty, a disposition that is rare at such hearings. Rather than be released into the general population of the prison as is the policy when acquitted, I was transferred to the state's maximum security facility. Due to a series of "clerical errors," I spent three months in solitary confinement with a loss of all my privileges and remained at maximum security for three more months.

The stereotypical image of prisoners as inherently inferior, irrational, angry, and violent was challenged by the existence of *Odyssey*. In fact, the rhetoric and ideology of the Weld administration was by comparison far more angry, irrational, and violent than anything we would even consider advocating. Governor William Weld of Massachusetts pronounced that he was "to the right of Attila the Hun" when it came to prison policy, and that prison should be

"like a tour through the circles of hell."

Relying on the mail and very limited telephone calls and visits, I worked feverishly with the community sponsors of *Odyssey* to coordinate the transition to the community. In addition to the onerous financial and administrative demands of the magazine, my stint in the hole had the effect of intimidating potential prison writers throughout the Massachusetts system. Emergency letters were sent to three of the nation's most celebrated prisoner writers; Dannie Martin, Tim Smith, and Jean Harris contributed articles to *Odyssey* in solidarity.

"Most prison journals become extensions of the warden's public relations department."

Many liberal prison activists claimed that writing for *Odyssey* might jeopardize their access to prison, upon which their work depended. Still, compared to prisoners, it was considerably easier to attract community writers for the magazine.

Our primary liaison between the prison and the community was a woman who had dedicated her life's work to achieving prison reform. Her involvement with *Odyssey* made her a threat to prison officials. After 20 years, she was suddenly investigated by the Department of Correction and barred from the prisons for several months.

Odyssey's third edition was published in defiance of all predictions of failure. It was an important statement that prisoners are capable of creating and organizing meaningful projects independent of support from the prison administration.

In light of recent court decisions curtailing prisoners' First Amendment rights, it should be painfully clear that reflexive claims of "security" by prison administrators will invariably and inevitably supercede prisoners' rights to free speech. Prisoners must establish their own publishing companies, creating independent legal entities beyond the reach of prison authorities. This will greatly complicate legal matters both for prison administrators and for the courts by introducing third-party interests. Judges will tend to be more cautious in deciding First Amendment issues if the rights of independent publishing companies are involved. The strategy, of course, is to entangle and interweave free speech rights of prisoners with those of established

media interests. This will compel the courts to decide on principle, rather than on political expediency.

If prisoners can establish their own publishing companies, they can establish similar projects in other areas. For example, prisoners could establish paralegal organizations to work exclusively on prisoners' rights issues, or develop collective funds to hire lobbyists to advance their political agenda with the legislature and the media. Prisoner organizations must transfer their base of operations to the community.

Prisoners cannot rely on the good will or good faith of prison officials to respect their right to free speech or their right to political expression. Nor should they be lulled into accepting the paternalistic tradition of liberalism which, though well-intended, has historically fostered a debilitating dependence. Only models of self-empowerment will result in meaningful resistance to "legitimate," but misused, authority.

The magazine was declared contraband at two state prisons in Massachusetts, but when the Massachusetts Chapter of the American Civil Liberties Union (ACLU) initiated formal inquiries and threatened the DOC with legal action, authorities there reversed the ban. Despite the formal acknowledgement by prison officials that *Odyssey* is not contraband, there have been numerous reports of the magazine mysteriously "disappearing" in the mail. The ACLU is actively monitoring the situation and advising our staff about strategic considerations. Unfortunately, the ACLU has conceded that virtually nothing can be done to protect *Odyssey* writers from harassment and retaliatory actions. Authorities will simply conjure up fictitious charges (as they did with me) and make it impossible to prove a conspiracy to restrict prisoners' First Amendment rights. The First Amendment is not a right that is granted, but a risk. *Odyssey's* future will depend on that risk. ■

Luke Janusz is the publisher and editor of Odyssey magazine. He was recently released from prison after serving more than 13 years. Odyssey needs your support to continue to publish. Anyone who would like to help, please write to: Odyssey, Box 14, Dedham, MA 02026. A year's subscription to Odyssey is \$19.95. The institutional price is \$25. Copies are furnished free to prisoners; however, a \$3 postage and handling charge is required with each edition.

¹ 107 U.S. 2254 (1987).

² 109 S.Ct. 1874 (1989).

BY JACKIE WALKER

Changes Brought by Activists for Prisoners with AIDS

ACT UP: A Voice On the Outside

On World AIDS Day, December 1, many ACT UP chapters focused attention on prisoners and HIV/AIDS. This focus was selected by ACT UP/San Francisco Prison Issues Working Group, one of a small but growing network of advocates for prisoners with HIV/AIDS.

Although there are ACT UP chapters in most states those working on prison issues are limited primarily to large metropolitan areas. The San Francisco chapter has recently been involved in supporting the hunger and medication strikes of prisoners at the California Medical Facility in Vacaville. Judy Greenspan, former NPP AIDS information coordinator, finds a particular irony about the conditions at Vacaville. "What's scary is there was a landmark settlement in *Gates v. Deukmejian*¹ where all these problems were supposed to be corrected, but the overall mission to lock up folks and not treat prisoners never actually changed," says Greenspan.

In New York City, the Prison Issues Committee has protested the treatment of prisoners with HIV/AIDS. The Wisconsin chapters have demanded investigations into the deaths of state prisoners Donald Woods, Ricardo Thomas and Dennis Hall (a person with AIDS who died a few days after being jailed for a traffic violation). On World AIDS Day, the Milwaukee chapter demonstrated at Racine County Jail in memory of Hall. As a collective force, ACT UP chapters have provided an outside voice in exposing inhumane living conditions and deaths of prisoners with HIV/AIDS that would have otherwise gone unnoticed.

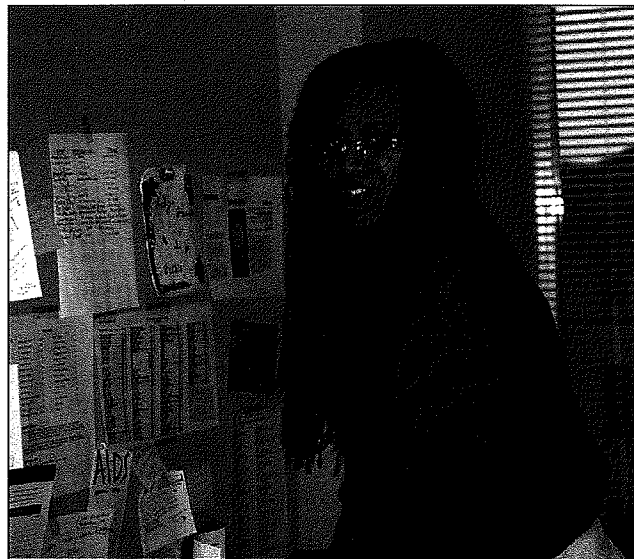
Coalitions: Developing Expertise and Advocacy

Other prisoners' rights and HIV/AIDS service organizations have formed coalitions that focus on HIV/AIDS and prisoners. The most effective have been the Correctional Services Program in Missouri, the Indiana HIV Advocacy Prison Issues Working Group, and the Alliance for Inmates With AIDS in New York City.

The Criminal Justice AIDS Network (CJAN) (now the Correctional Services Program) began in 1986 when a volunteer priest active in jail work encountered an HIV-positive woman prisoner. As a result of this meeting the priest organized a task force of Catholic charities, and eventually received funding for a program which provides post-test counseling and referrals for prisoners with HIV/AIDS. It also acts as a resource network, often connecting prisoners with HIV/AIDS to social services before their release.

In Indiana, the original catalyst was the Indiana HIV Advocacy Program and later the Indiana Community AIDS Action Network. The Indiana Community AIDS Action Network is a statewide advocacy program focused on eliminating the barriers of discrimination for people with HIV/AIDS. The Corrections Working Group has received funding to review correctional issues and HIV/AIDS in Indiana, and includes members from the HIV/AIDS community, ex-prisoners, social service groups, and corrections.

"We have opened up the channels of communication," says Paul Chase, director of the project, "with policymakers who realize the need to rely on us for information on HIV/AIDS and prisoners." As a result, the incoming Department of Corrections administrator called a meeting with the group to discuss comprehensive education for prisoners and staff.



Jackie Walker, AIDS information coordinator at the Prison Project.

NPP photo

For prisoners in New York State, the Alliance for Inmates With AIDS (AllIA) combines the strength of over 20 organizations. AllIA was founded as part of the Correctional Association's AIDS In Prison Project roundtable of people working in the field of HIV/AIDS and prison. Members of the AllIA provide a wide range of services for prisoners and parolees, including education, support groups, discharge planning, housing, referrals, and advocacy.

Housing for parolees and the Medical Parole Law have been two complicated areas the AllIA has tackled with success. AllIA members are always looking to identify transitional housing, creating space in existing programs, or talking with city agencies to expand housing for people on parole. The AllIA has also played a crucial role in monitoring the Medical Parole Law by sponsoring community forums on the process and pressuring the New York Department of Corrections and Governor Mario Cuomo to speed up review of medical parole applications. ■

Jackie Walker is the Project's AIDS information coordinator.

¹ No. CIV S-87-1636 LKK-JFM (E.D. Cal., filed Jan. 6, 1988).



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.

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 1993. \$5 prepaid from NPP.

QTY. COST

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.

TB: The Facts for Inmates and Officers

answers commonly-asked questions about tuberculosis (TB) in a simple question-and-answer format. Discusses what tuberculosis is, how it is contracted, its symptoms, treatment and how HIV infection affects TB. Single copies free. Bulk orders: 100 copies/\$25. 500 copies/\$100. 1,000 copies/\$150 prepaid.

QTY. COST

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

AIDS in Prisons: The Facts for Inmates and Officers

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

(order from ACLU)

ACLU Handbook, The Rights of Prisoners. Guide to the legal rights of prisoners, parolees, pre-trial detainees, etc., in question-and-answer form. Contains citations. \$7.95; \$5 for prisoners. ACLU Dept. L, P.O. Box 794, Medford, NY 11763.

QTY. COST

Fill out and send with check payable to:

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

Name _____

Address _____

City, State, ZIP _____

The following are major developments in the Prison Project's litigation program since October 1, 1992. 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. On November 19, 1992, the court held unconstitutional the state's policies restricting prisoners' access to the courts. These policies include denying legal assistance to prisoners under lockdown; naming as legal assistants prisoners who have no legal training; lack of assistance to illiterate or non-English-speaking prisoners; restricting access to legal supplies; and arbitrary denials of prisoners' right to confidential phone calls with attorneys. A special master has been named to develop statewide injunctive relief.

Cody v. Hillard challenges conditions at the South Dakota State Penitentiary. On November 25, 1992, the district court granted plaintiffs' motion for enforcement of its order concerning environmental conditions and reestablished a panel of experts to monitor physical plant issues.

Dickerson v. Castle challenges overcrowding and conditions in Delaware's

adult prisons. On December 7, the Court of Chancery accepted a settlement by the parties on overcrowding and tuberculosis control issues.

Hadix v. Johnson—The National Prison Project appears in the mental health portion of this case which concerns conditions at the State Prison of Southern Michigan in Jackson. On December 1, 1992, the plaintiffs filed a number of motions to enforce or modify the medical and mental health provisions of the consent decree, and defendants filed motions to dismiss these portions of the decree. The court deferred consideration of the defendants' motions pending resolution of plaintiffs' enforcement motions. An evidentiary hearing is scheduled for January 27-29, 1993.

Hamilton v. Morial challenges conditions at the Orleans Parish Prison, the municipal jail for the City of New Orleans, which includes a juvenile facility operated by the sheriff. In response to a contempt motion concerning disciplinary practices at the juvenile facility, the court-appointed expert issued a report recommending the development of disciplinary practices and procedures related to use of force and lockdown procedures.

Helling v. McKinney—On October 14, 1992, the NPP filed an *amicus curiae*

brief in this Supreme Court case, which involves the issue of whether the Constitution is violated when a prisoner is exposed to levels of environmental tobacco smoke (ETS) that pose a serious risk to his or her health. Oral argument was heard in the Supreme Court on January 13, 1993.

U.S. v. Michigan/Knop v. Johnson—These cases challenge conditions in the Michigan state prisons; the National Prison Project appears as *amicus* in *U.S. v. Michigan*. On December 1, 1992, in *U.S. v. Michigan*, the court ruled on a motion filed by the Department of Justice (DOJ) seeking to vacate most of the consent decree, a motion filed under a new DOJ policy which held that the Department would refuse to enforce consent decrees that went beyond constitutional requirements. In its ruling, the court dismissed some relatively minor portions of the decree. In *Knop*, on October 16, 1992, the Sixth Circuit Court of Appeals affirmed a favorable district court order on legal mail and winter clothing, but reversed orders on racial slurs and access to toilets. The court also affirmed the finding of a constitutional violation regarding access to the courts, but remanded to the district court for modification of the remedy. The court also affirmed Rule 11 sanctions against defendants. Plaintiffs filed a petition for writ of *certiorari* in the Supreme Court on January 14, 1993 on the issue of racial slurs.

National Prison Project

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