

COMMENTARIES ON PRISONER LITIGATION

It is both timely and fitting that this issue of *The Justice System Journal* is devoted to the subject of prison litigation. Very few other criminal justice subjects affect the entire political system as this one. Indeed, it is generally recognized that the prison systems are in a period of crisis. The most obvious current issue is the problem of crowding and the legal problems that have resulted from this crowding and related conditions. The problem has forced an examination of the nature and focus of prisons more deeply from a public policy position than ever before.

Prison systems today stand in sharp contrast to the past. Just a decade ago, no one raised serious questions about prison operations. Concepts such as rehabilitation went unchallenged. Research had not questioned these assumptions, courts were minimally involved with internal operations, and costs were acceptable. For the most part, prisons were institutions hidden from the rest of society. An "out of sight, out of mind" attitude prevailed. This perspective contrasts sharply with today's situation. Today, because of court decisions resulting from prison litigation and technological changes, the line between the outside world and prison society is blurred. Prison systems are seen as a part of a larger environment and that is affected by social and philosophical changes occurring in society. The articles in this issue of the *Journal* discuss how prison civil rights litigation has helped to bring about these changes in the prison system.

A most interesting discussion reflecting these changes is in the article by Alpert, Crouch and Huff regarding "Prison Reform by Judicial Decree: The Unintended Consequences of *Ruiz v. Estelle*." The authors discuss the impact of the U.S. Supreme Court decision *Ruiz v. Estelle* by using the theory of "rising expectations." This theory proposes that social unrest usually occurs during a period when things are expected to get better, not when there is little reason for hope.

The authors examine conditions in pre *Ruiz* and post *Ruiz* and find substantial information to suggest that the theory of "rising expectations" has policy implications for prison litigation. The idea is that judges must understand the implication of this theory when they fashion a decree so that the prison management will have time to absorb and adjust to the proposed changes in order to avoid more conflict within the prison. This theory has been applied to the urban unrest of the 1960s and many

domestic conflicts and revolutions worldwide. The ramifications of applying this theory to prison organizations must not be taken too lightly. Prisons are complex organizations as suggested by several articles in this issue. Their management consists of a bureaucracy in the policy structure. As pointed out earlier, prisons were once truly "hidden" institutions in our society. This was the atmosphere at the beginning of major prison litigation during the 1960s.

Changing complex bureaucracies such as prisons can be a difficult task. Indeed, the general behavior of institutions is to resist change, even if they are directed to do so by courts. One only has to review the history of school desegregation to note the difficult process of changing the behavior of policy-makers through court orders. Other areas such as voting and housing discrimination cases showed the difficult process of changing the behavior of governments and institutions therein. Therefore, even if judges understand the impact that their decisions will have on the prison institution, it may not be reasonable to temper them in accordance to the theory of "rising expectations."

Judges and prison administrators are not the only actors involved in affecting change in prisons. The article on "The Alabama Prison Litigation" by Yarbrough demonstrates clearly that the interpretation of court decisions by different actors in the policy-making process, such as governors and attorney generals, reflect how they will proceed in implementation of court decisions. In many instances, these individuals do not want to be "soft on crime"; their resistance to court decisions may reflect their ambitions to be elected to public office. The policies that crowd prisons and other conditions that lead to prison litigation are not established by the superintendents and correction commissioners. They are a result of policy decisions from efforts to control behavior as defined by criminal law.

Governors, attorney generals, and state legislators who have been elected on major "law and order" crusades have more to learn from prison litigation than prison officials. In many instances, prison officials have given warning that problems could exist or would exist if certain policies are implemented. Yet their suggestions generally fall on deaf ears when there is a call for tougher and longer sentences. Even where prison officials have indicated that a certain institution in the state was overcrowded, they, of course, could not prevent the legislature from enacting new laws to send more people to it. (Note, for example, that the recent crack-down on drunk drivers has contributed to jail overcrowding, and in some instances where individuals are unable to pay fines, they are sent to already overcrowded prisons.) Thus, the impact of prison litigation must be understood

by all members in the political process—judges, governors, legislators and attorney generals.

Given the continuous flow of prison litigation, and the fact that in recent years many of these decisions have gone against the prisoners, a new chapter in solving administrative and prisoner disputes should be advanced, rather than the litigation method. Cole and Silbert address this issue in "Alternative Dispute-Resolution Mechanisms for Prisoner Grievances." Their argument is a variation on the theme of the Civil Rights of Institutionalized Persons Act which was signed into law in 1980. This Act attempts to have certain mechanisms such as grievance procedures put in place in institutions to deal with prisoner claims against prison administration. The Act is designed to meet the dual objectives of protecting the rights of inmates and reducing the number of suits filed against prison administrators. Inmate grievance procedures also can provide an effective means of identifying management deficiencies within prisons. Through the development of appropriate policies, procedures, and training, prison administrators can reduce the prospects for adverse judgments in litigation. Development of grievance procedures and policies, however, will not prevent lawsuits relating to more fundamental problems in prison design and management, or in overall public policy which contributes to such things as overcrowding.

As emphasized earlier, the focus of state prisoner civil rights litigation must go beyond a discussion between the courts and prison administrators. There must be a comprehensive discussion involving governors, prosecutors, defense attorneys, legislators, police and the general public in an effort to understand that even though people are in prison, there are certain basic rights that they have which must and should be respected. In the court cases of the early 1970s, the courts brought to light the fact that these rights existed and prisoners were entitled to them.

This issue of the *Journal* continues the debate about prison litigation concerning civil rights. It also should awaken some policy makers to the many problems that exist as a function of prison litigation. The issues explored by these scholars must be continued and expanded. For example, there is a need to explore the impact of prison litigation on prosecutors. How has prison litigation affected their methods of prosecution? What effect does civil rights prison litigation have on the election of prosecutors, even judges? How do governors and legislators react to prison litigation, taking into account their concern for victims and the general public, and with due consideration of limited resources?

Answers to some of these questions will help policy makers plan for the

impact of prison litigation. It must be kept in mind that there is no single decision-maker who unilaterally determines prison policies. Numerous individuals and groups are involved ranging from judges, police and interest groups, to governors, state legislators, and a wide range of elected and appointed officials. Each of these individuals must understand his or her role in the prison crisis, and why state prison civil rights litigation is important. This issue of the *Journal* should begin this process of understanding.

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This special issue on prison litigation is well-timed. As Tinsley Yarbrough notes in "The Alabama Prison Litigation," we are nearing the twentieth anniversary of court decrees mandating changes in penal institutions. It is an appropriate occasion to reflect on what we have learned and what we have yet to know concerning the interaction between courts and prisons. The five articles in this volume provide information about a variety of problems, from sentencing and institutionalization to court reform and the use of alternative dispute-resolution in prisons.

The articles presented here, as well as other compilations and discussions, indicate that we have learned a good deal. We have gained a more complete appreciation of the complexity of the problem of prison reform. The somewhat naive hope that a court order, mandating "constitutional conditions of confinement" would result within a reasonable amount of time in great improvements within prisons has been replaced with a more somber appreciation for the enormity of that task. Court decrees have begun to mirror that understanding. These days, the parties to prison cases often negotiate the language of decrees prior to the entry of judgment, and the courts have become increasingly specific in detailing what is required for compliance.¹

1. For discussion of implementation of court decrees, see generally, David Rudenstine (1983) "Institutional Injunctions," 4 *Cordoba Law Review* 611; Paul Gewirtz (1983) "Remedies and Resistance," 92 *Yale Law Journal* 585; Note (1981) "Complex Enforcement: Unconstitutional Prison Conditions," 94 *Harvard Law Review* 626; Judith Resnik and Nancy Shaw (1980) "Prisoners of their Sex: Women's Health in Jails and Prisons," in I. Robbins (ed.) *Prisoners' Rights Sourcebook: Theory Litigation Practice*; Vincent Nathan (1979) "The Use of Masters in Institutional Litigation," 10 *Toledo Law Review* 419; Project (1978) "The Remedial Process in Institutional Reform Litigation," 78 *Columbia Law Review* 784.

But it is not only the size and content of decrees that have evolved over the past twenty years. We have also come to appreciate how important are factors beyond court papers. As Yarbrough ably demonstrates, court-ordered reform is highly dependent upon the political processes. Further, and again as discussed by Yarbrough, the court, the legislature and the executive are in a dynamic relationship; trial courts are responsive not only to appellate court orders but also to changes in political administrations and to the budgetary constraints faced by legislatures.

Professor Yarbrough's case study underscores the difficulty faced in responding to Erica Fairchild's call for additional research on the impact of prison litigation. Although such research would be helpful, the problem is how to conduct it. Fairchild, in "The Scope and Study of Prison Litigation Issues," suggests impact studies, but it is impossible to assess the impact of a court decree without considering the responses and initiatives of other branches of the political structure. And, measuring impact itself is an extraordinarily difficult task. Moreover, before any measurement can take place, we must determine what the variables are and how to weigh them. For example, the Alabama prison case cannot be understood in isolation. During the two decades of that litigation, the world of corrections has undergone substantial changes; professionalization has altered some of the approaches prison officials have taken. Further, litigation about prisons was affected by the upheavals of the Attica riots, which produced a sense of urgency about the necessity of improving prison conditions. Finally, as Candace McCoy documents in "Determinate Sentencing, Plea Bargaining Bans and Hydraulic Discretion in California," the prison system is a part of the larger criminal justice apparatus; changes in one aspect of the apparatus have an "hydraulic" effect on other aspects of criminal justice administration. In short, it is difficult to assess, in any specific sense, the precise impact of the federal district court orders as contrasted to the impact of changing views of corrections personnel, new pressures to incarcerate greater numbers of prisoners, and a heightened concern for the incarcerated. Fairchild's call to scholarship must be accompanied by careful caveats about expectations of what is to be learned.

Despite the difficulties in assessment of the specific effects, it is plain that some authors in this symposium herald the involvement of courts as "enforcers" of "rights," while other commentators are more skeptical, and some regret court "intrusion."² Whatever one's political views on the

2. Compare Yarbrough with Alpert, Crouch, and Huff's article, "Prison Reform by Judicial Decree: The Unintended Consequences of *Ruiz v. Estelle*."

appropriate allocation of authority among executive, judicial and legislative branches and between states and the federal government, we all must be struck by the information provided by George Cole and Jonathan Silbert in "Alternative Dispute Resolution Mechanisms for Prisoner Grievances," who describe approaches other than litigation to alleviating problems within prisons. Cole and Silbert provide a useful catalogue of the variations tried, and the authors suggest practical efforts to prevent litigation. However, footnote 4 of their article gives grounds for pause. According to the research available, when prison disputes were mediated in one prison, "an impasse was by far the most frequent outcome even after multiple sessions." Further, in another setting, during a twelve month period, mediation failed to produce a "single agreement." For me, the failure of mediation symbolizes fundamental problems—that prisoners are powerless unless empowered by entities such as courts, and that prisons are full of inevitable conflicts as the imprisoned and the imprisoners struggle over power.

The last twenty years of prison litigation seem to have taught us all that courts have some role to play in decisionmaking about prisons. Even those members of the U.S. Supreme Court who are the least sympathetic to prisoners' claims do not disavow that prisoners retain some qualities fairly described as "rights" and that some of those rights are constitutional rights, to be enforced by the federal courts.³ The struggle, of twenty years ago and of today, is to define what kind of custody is legally and morally permissible. Not only must we determine how long to incarcerate individuals, we also must decide how, in a world of limited resources, we can provide acceptable conditions of confinement. During the past twenty years, we have made some strides towards defining what is unacceptable. At least in theory, "grue" can no longer be the sole diet fed to prisoners⁴ and some access to medical services must be provided.⁵ However, with the luxury of hindsight, those decisions seem relatively easy and it is not clear how those rulings inform the decisions that must be made today: How to

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3. See, e.g., *Hudson v. Palmer*, 104 S. Ct. 3194, 3198 (1984) "[w]e have repeatedly held that prisons are not beyond the reach of the Constitution"; however, while prisoners have some constitutional rights, the fourth amendment does not protect them from searches of their cells; to the extent prisoners have any protection from such searches, those protections derive from state law; *id.* at 3204.
 4. *Finney v. Hutto*, 410 F. Supp. 251, 277 (E.D. Ark. 1976), affirmed, 548 F. 2d 740 (8th Cir. 1977); affirmed *sub. nom.* *Hutto v. Finney*, 437 U.S. 678, 686-687 (1978), held that service of such "food" for long periods of time violated the eighth amendment's prohibition of "cruel and unusual punishment."
 5. E.g., *Estelle v. Gamble*, 419 U.S. 97, 104 (1976) (prison officials must provide some medical care, for "deliberate indifference" to known medical needs violates prisoners' eighth amendment rights).

cope with overcrowding? What kinds of medical services must be provided? Must recreational facilities be made available? When may prison officials isolate prisoners? What kinds of foods must be served pregnant women? There are hundreds of specific questions which might be listed, but the central issue is to determine what the minimally acceptable conditions of confinement are. It is important that the struggle over who is to decide these questions—federal or state courts, legislatures or executive officials—should not obscure the fundamental moral issue of how we treat our prisoners.

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