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Commentaries on Prisoner Litigation

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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

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." Whatever one's political views on the

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 imprisoned 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. 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 prisoners and some access to medical services must be provided. 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

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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