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Legacy and Future of Corrections Litigation

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THE LEGACY AND FUTURE OF CORRECTIONS LITIGATION

SUSAN P. STURM†

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† Associate Professor of Law, University of Pennsylvania Law School. This Article began as an informal inquiry conducted at the request of the Edna McConnell Clark Foundation into the current status and future directions of corrections advocacy. The Clark Foundation has provided considerable financial support over the past 20 years to organizations such as the National Prison Project, the Youth Law Center, the Southern Center for Human Rights, and the Juvenile Law Center, each of which is deeply involved in providing representation to inmates in corrections litigation. The Clark Foundation provided me with a grant to conduct this study to aid the Foundation in assessing its future role in supporting corrections litigation. The research focused initially on gathering the information necessary to inform the Foundation's consideration of strategies for expanding the scope and quality of lawyers providing representation to inmates seeking to bring correctional institutions into compliance with the Constitution. This Article, along with a companion article entitled *Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy*, 27 MICH. J.L. REFORM (forthcoming 1994), builds on that research and makes the results of the inquiry available to academics and practitioners working in the area of public interest advocacy. These articles would not have been possible without the generous support of the Edna McConnell Clark Foundation.

This Article reflects the time, energy, and insight of many people. My student researchers provided extraordinary assistance in the course of this project. Glen Bernstein, Jennifer Spotila, and Amy Weigand went beyond the call of duty in their conduct and analysis of interviews. Along with Peter Mendelsohn, Carl Messineo, Jamie Palter, and Darren Rosenblum, they provided invaluable research and editorial assistance. I also want to thank Randall Berg, John Boston, Alvin Bronstein, Steve Bright, Colin Diver, Lani Guinier, Seth Kreimer, Howard Lesnick, Ed Rubin, Bob Schwartz, and Mark Soler for their thoughtful comments on an earlier draft of this Article.

Finally, I cannot adequately express my appreciation to the many individuals I interviewed in the course of conducting this research. I am particularly grateful for the generosity of the public interest advocates who devote their professional (and often personal) lives to corrections work—an extremely important and mostly uncelebrated activity. Their deep commitment, integrity, and steadfast pursuit of justice for their clients, often under difficult working conditions, is truly inspirational. This Article is dedicated to their efforts.

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INTRODUCTION

For the last twenty years, public interest litigation has been the preeminent tool of social reform in a wide variety of contexts. Building on the test case approach to law reform developed in *Brown v. Board of Education*,¹ lawyers have attempted to use litigation to achieve far-reaching changes in the distribution of public resources and the quality of life in public institutions.² Nowhere has this been more true than in the field of correctional reform. Since the late sixties, hundreds of suits have been brought and won by lawyers on behalf of inmates challenging the conditions and practices in our nation's prisons, jails, and juvenile correctional institutions. Many of these cases have resulted in court orders or consent decrees requiring substantial remedial actions.

Courts continue to serve as reluctant but active participants in the task of policing and reforming our nation's correctional institutions. As of January 1993, forty states plus the District of Columbia, Puerto Rico, and the Virgin Islands were under court order to reduce overcrowding and/or eliminate unconstitutional conditions of confinement.³ Twenty-five percent of all jails in the

¹ 347 U.S. 483 (1954).

² Observers of public interest lawyering frequently trace the origins of the law reform strategy to *Brown*. See, e.g., Owen M. Fiss, *The Supreme Court 1987 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) ("[S]tructural reform has its roots in the Warren Court era and the extraordinary effort to translate the rule of *Brown v. Board of Education* into practice." (footnote omitted)); Jack Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy*, 29 REC. ASS'N B. CITY N.Y. 321, 331 (1974) ("*Brown* and the cases preceding it are sometimes looked upon as a paradigm of law making in the courts and probably they have been the principle inspiration to others who seek change through litigation."); Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 253 (1976) ("*Brown* teaches us that, despite its vulnerability to various administrative avoidance responses, the 'big case' may have major law reform implications because of its educational value.");

³ See EDNA MCCONNELL CLARK FOUND., AMERICANS BEHIND BARS 4 (1992)

United States were under court order to reduce crowding in 1990, and thirty percent were under court order to improve conditions of confinement.⁴ In 1989, seven percent of the nation's 422 facilities detaining ten percent of all incarcerated youngsters were operating under consent decrees.⁵

Today, advocates, scholars, and financial supporters of public interest litigation are struggling to define the proper role of litigation in future efforts to achieve social reform.⁶ A major impetus for this reassessment is the growing conservatism of the federal courts, which have become increasingly reluctant to intervene to protect civil rights from government incursion.⁷ The shift in national politics to a Democratic administration has also prompted renewed interest in legislative and administrative advocacy.⁸

This change in judicial and political climate provides a natural point of reflection on the three decades of experience that now inform the evaluation of judicial efficacy. Judges, advocates, and scholars have learned much about the potential and limits of court-ordered reform.⁹ Strategies and expectations have evolved, and

[hereinafter AMERICANS BEHIND BARS].

⁴ See *id.* at 3; see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: JAIL INMATES 1991, at 4 (1992) [hereinafter JAIL INMATES 1991].

⁵ See ANNIE E. CASEY FOUND., FRAMEWORK PAPER ON JUVENILE DETENTION 5 (1992) [hereinafter CASEY FRAMEWORK PAPER].

⁶ See, e.g., GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 261-73 (1992) (describing a fictional activist lawyer's critique of § 1983 litigation); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 293-391 (1988) (arguing for an ethical theory of political advocacy); Mayer N. Zald, *Foreword* to JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE ix (1978) (confronting the question "Can the legal system be used to change society?"); Patricia M. Wald, *Ten Admonitions for Legal Services Advocates Contemplating Federal Litigation*, 27 CLEARINGHOUSE REV. 11, 13 (1993) (urging lawyers to "be realistic" and to "[l]earn to be a good negotiator [and] a creative settler [because l]itigation should be only a part of a broader strategy").

⁷ See *infra* notes 273-94 and accompanying text (discussing how courts have narrowed the scope of judicial intervention in First Amendment and due process cases).

⁸ See Wald, *supra* note 6, at 14 (advising public interest lawyers to "forge responsible relationships with new policymakers at every level" and arguing that the new administration "deserves a real try").

⁹ See Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1365-76 (1991) (describing efforts of courts and parties to improve the remedial process); Wald, *supra* note 6, at 12-13 (summarizing the evolution of poverty law

this evolution itself invites a critical perspective on the endeavor. Experienced litigators demonstrate a keen awareness of the difficulty and importance of the remedy in public law litigation.¹⁰ Participants on both sides of the aisle express dissatisfaction with the adversary process as a means of resolving public law disputes, and have begun to experiment with alternative approaches that reconceptualize legal advocacy to link formal adjudication, informal negotiation, and public education.¹¹

In addition, some scholars and activists have questioned the effectiveness of judicial intervention as a means of social change.¹² Some argue that the focus on litigation has discouraged the development of other potentially more effective forms of public interest advocacy such as lobbying and organizing.¹³

Finally, public interest litigation continues to lack reliable sources of funding and professional commitment, both of which are crucial to its survival. Private foundations, whose support for nonprofit public interest law firms has been crucial to the development of the public interest law, have substantially reduced their support.¹⁴ Government funding for and involvement in public

advocacy and calling on poverty lawyers to "meditate on and perhaps recast" their role).

¹⁰ See, e.g., Interview with Stephen Bright, Executive Director, Southern Center for Human Rights, in Atlanta, Ga. 2 (Aug. 11, 1991) [hereinafter Bright Interview] (transcript on file with author) (noting that it is "worthless to get a decree if you don't enforce it"); Interview with Alvin Bronstein, Executive Director, National Prison Project of the ACLU, in Washington, D.C. 3 (Aug. 15, 1991) [hereinafter Bronstein Interview] (transcript on file with author) (stating that remedy is the single most important area needing National Prison Project attention).

¹¹ See generally Sturm, *supra* note 9, at 1365-76 (discussing methods of remedies formulation that deviate substantially from the formal adjudicatory model).

¹² See, e.g., DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); Samuel J. Brakel, *Prison Reform Litigation: Has the Revolution Gone Too Far?*, *CORRECTIONS TODAY*, Aug. 1987, at 160, 164.

¹³ See LOPEZ, *supra* note 6, at 2-3, 261-73 (commenting on useful methods beyond traditional legal avenues such as grassroots mobilization); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 339 (1991) (noting that limited resources may be "more effectively employed in other strategies"); GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* 85 (1993) ("[M]inorities could . . . choose to forego a reliance on judicial review . . . and concentrate their efforts to advance minority interests in overtly political branches of governments.").

¹⁴ The Edna McConnell Clark Foundation, which sponsored the study leading to this Article, decided to discontinue general support for corrections litigation, notwithstanding their recognition of its continued significance. Similarly, the Ford Foundation dramatically scaled down its general support for public interest litigation. See NAN ARON, *LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S*

interest advocacy has been cut.¹⁵ Legal services programs continue to suffer from underfunding.¹⁶ Recent Supreme Court decisions have cut back dramatically on the availability of attorney and expert fees.¹⁷ The future of public interest litigation must also be considered in light of these resource constraints.

This Article attempts to provide a framework for assessing the legacy and future of public interest advocacy in one particular area—corrections. It documents a shift from a test case to an implementation model of advocacy, and urges the development of effective remedial strategies as a method of linking litigation to a broader strategy of correctional advocacy.

I have chosen to focus on this particular institutional context for several reasons. On a pragmatic level, the Edna McConnell Clark

AND BEYOND 52-53 (1989) (stating that the average public interest group experienced a 36% decline between 1979 and 1983, due in part to growth in the number of organizations and to foundations' dislike of advocacy, particularly litigation).

¹⁵ See *id.* at 53 (documenting substantial decline in government funding for public interest advocacy); Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 462 (1993) (documenting the elimination of federal funding through the Law Enforcement Assistance Administration ("LEAA")); Interview with Mark Soler, Executive Director, Youth Law Center, in Philadelphia, Pa. 3 (June 17, 1992) [hereinafter Soler Interview] (transcript on file with author) (stating that the Reagan administration cut funding to the Office of Juvenile Justice); Telephone Interview with Nancy Feldman, Director, Office of Inmate Advocacy, New Jersey Office of the Public Advocate 1 (July 15, 1992) (transcript on file with author) (reporting decision to phase out office of inmate advocacy and that other sections of the office are already closed). This may change under the Clinton administration.

¹⁶ See ARON, *supra* note 14, at 65 ("The decline in funding for legal services in recent years has been dramatic."); MARK KESSLER, LEGAL SERVICES FOR THE POOR: A COMPARATIVE AND CONTEMPORARY ANALYSIS OF INTERORGANIZATIONAL POLITICS 50 (1987) (providing that as a result of high volume caseload and certain policies, lawyers have little time to devote to any particular case); PENNSYLVANIA BAR ASS'N, REPORT OF THE PENNSYLVANIA BAR ASSOCIATION TASK FORCE FOR LEGAL SERVICES TO THE NEEDY I (1990) (stating that since 1979, state and federal funding for legal services to the poor has been severely reduced). Recent declining interest rates have reduced the availability of funding from IOLTA (Interest on Lawyers' Trust Accounts) Programs. See Barbara C. Clark, *Interest Rate Decline Jeopardizes Stable IOLTA Funding*, 14 NAT'L LEGAL AID & DEFENDER ASS'N CORNERSTONE, Fall 1992, at 2, 2 (stating that as a result of declining interest rates, 60% of IOLTA programs participating in the survey face income declines, resulting in cuts of up to 42% in funding for legal services).

¹⁷ See, e.g., *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83, 102 (1991) (limiting recovery of expert fees to travel expenses and a witness fee of \$30 per day for depositions and court appearances); *Blum v. Stenson*, 465 U.S. 886, 897-99 (1984) (holding that enhancements for quality work should rarely be made and only where there is specific evidence of extraordinary quality); *Hensley v. Eckerhart*, 461 U.S. 424, 436-40 (1983) (limiting plaintiffs' recovery for unsuccessful claims, even if plaintiff partially prevails).

Foundation, which for the last twenty years has been the primary source of funding for corrections litigation by private, nonprofit organizations, asked me to study the future of corrections litigation and the potential role of various organizations involved in corrections litigation to better inform the Foundation's decisions concerning its involvement in corrections litigation.

On a policy level, the area of corrections presents one of the most important policy issues facing our state and local governments. In many states it represents the single largest budget item,¹⁸ and the continued trend toward incarceration takes place at the expense of education, social services, and rebuilding the infrastructure of our cities.¹⁹ The dramatic overrepresentation of people of color in correctional institutions underscores the relationship of correctional policy to more basic social policies of the 1980s and the importance of corrections in developing an effective strategy for reversing the deterioration of urban communities.²⁰

On a more theoretical level, it is my view that the potential and role of litigation varies in different organizational settings, and that it is a mistake to ignore these organizational differences in assessing and planning the future role of litigation. The legal standards

¹⁸ A recent report prepared by the Edna McConnell Clark Foundation documents the soaring costs of corrections:

In 1992, the United States spent an estimated \$25 billion on corrections, including operations and construction. State and local governments have picked up almost the entire cost, spending roughly 16 times as much on prisons and jails as the federal government. Corrections spending is the second fastest growing item in state budgets after Medicaid, and continues to grow annually, although for the first time in many years, the rate of growth is slowing somewhat.

AMERICANS BEHIND BARS, *supra* note 3, at 4.

¹⁹ *See id.* at 5 ("Building and operating prisons means diverting funds from health care, job training, education, and from needed capital improvements on roads, bridges, and water systems.")

²⁰ As of January 1990, whites accounted for 48% of all prisoners under the jurisdiction of state and federal correctional authorities. *See* BUREAU OF JUSTICE STATISTICS, 1990 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 609 (Kathleen Maguire & Timothy J. Flanagan eds., 1991). African-Americans accounted for 47% of all state and federal inmates. *See id.* Hispanics accounted for 13% of the state prison census in 1986. *See id.* at 614. A 1990 report by the Sentencing Project found that on any given day in 1989 nearly one in four African-American men aged 20 to 29 was under the supervision of the criminal justice system—in prison or jail or on probation or parole. In 1991, in Baltimore, Maryland, 56% of young black males were under criminal justice system supervision. *See* Jerome G. Miller, *56 Percent of Young Black Males in Baltimore Under Justice System Control*, *OVERCROWDED TIMES*, Dec. 1992, at 1, 1 (1992).

defining the scope of judicial reform activity are more favorable to successful litigation in some contexts than others.²¹ The availability of plaintiffs willing to sue and lawyers willing to represent them varies across subject areas.²² The demands of litigation and the concomitant expertise and resources needed to handle advocacy also differ among subject areas.²³ The organizational dynamics contributing to the problems targeted by litigation and strategies for altering them may differ.²⁴ Perhaps the most significant difference involves the political context surrounding the institutions subject to litigation and the potential for mobilizing other forms of effective advocacy. Too often, scholars and advocates ignore these differences and offer overarching generalizations about litigation's impact and potential.²⁵ It is my hope that this study's focus on public

²¹ See *infra* notes 275-302 and accompanying text (noting that courts have limited First Amendment and programming issues more dramatically than Eighth Amendment conditions of confinement cases). The welfare context has suffered particularly from unfavorable decisions upholding the constitutionality of inadequate benefit levels and unfair practices. See, e.g., *Harris v. McRae*, 448 U.S. 297, 326-27 (1980) (upholding Hyde Amendment denying medicaid funding for medically necessary abortions); *Wyman v. James*, 400 U.S. 309, 318 (1979) (upholding mandatory home visits for welfare recipients); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (upholding constitutionality of regulation imposing ceiling on grant amount based on family size as "rationally based and free from invidious discrimination").

²² Even within the corrections area, there are wide differences in the availability of plaintiffs. Male prisoners are extremely willing to use the courts to express their dissatisfaction with prison conditions. See Ellen M. Barry, *Jail Litigation Concerning Women Prisoners*, 71 PRISON J. 44, 44 (1991). In contrast, juveniles and female inmates have complained relatively infrequently. See *id.*; Interview with Ruth Ann DeWolf, Legal Director, Correctional Law Project, Chicago Legal Assistance Foundation, in Chicago, Ill. 11 (Aug. 12, 1991) (transcript on file with author) (stating that juveniles are less likely to write to courts with a complaint); Soler Interview, *supra* note 15, at 7 (noting that occasionally a juvenile will call). Also, prison litigators reported that, despite interest in pursuing juvenile and women's cases, they pursued conditions cases in male institutions that they viewed as more likely to generate attorneys' fees. See Interview with Robert Cullen, Senior Corrections Attorney, Georgia Legal Services, in Atlanta Ga. 6 (Aug. 10, 1991) [hereinafter Cullen Interview] (transcript on file with author).

²³ See Susan P. Sturm, *Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy*, 27 MICH. J.L. REFORM (forthcoming 1994) (describing how expertise of legal services lawyers in providing individual service to clients in benefits and housing cases does not equip them to handle complex corrections litigation).

²⁴ See Susan P. Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 861-910 (1990) (identifying and analyzing four judicial approaches (the roles of deferrer, director, broker, and catalyst) in relation to their capacity to establish an internal normative framework, create incentives to undertake change, foster the development of an information-gathering system, and empower change agents within the prison).

²⁵ See, e.g., HOROWITZ, *supra* note 12, at 33-56 (1977) (developing general

interest advocacy in the corrections context will help identify themes and variations in public interest advocacy and contribute to the development of strategies of public interest advocacy that can build on common experience and yet respond to the particular demands of each institutional context.

Section I begins with an assessment of the legacy of the last twenty years of corrections litigation, with an eye toward understanding the future of litigation as a means of improving conditions in correctional institutions. An assessment of litigation's impact and potential as a change agent is a necessary starting point for developing a model of correctional advocacy for the future. If litigation has not been successful in the past, one must ask whether there is reason to devote substantial resources to it in the future. It is also important to understand why and under what circumstances litigation has prompted improvements in correctional institutions.

Section II presents the current status of conditions in correctional institutions, drawing on recent assessments by courts and investigators. If litigation has been successful in promoting significant reform, this success poses the question whether there is a continuing role for litigation in addressing the problems facing corrections.

Section III considers the question of whether plaintiffs can prevail in corrections litigation in the current judicial environment. The federal judiciary, which has been the primary bulwark of prisoners' rights, has become increasingly reluctant to intervene to protect civil rights from government intrusion.²⁶ If recent case law signals a return to a "hands off" approach to corrections cases, litigation threatens to become a frustrating and futile gesture.

Section IV identifies emerging trends in corrections advocacy, most notably the shift from a test case to an implementation model. It draws on the assessment of litigation's impact and potential and

characteristics of adjudication that ignore remedial process and fail to account for procedural adaptations in particular contexts); ROSENBERG, *supra* note 13, at 336 (generalizing across contexts to conclude that the courts' dependence on political support and their lack of implementation powers prevent them from producing significant social reform in all organizational settings).

²⁶ "Since the election of Ronald Reagan in 1980, the two Republican administrations have appointed nearly 67% of America's 749 federal judges, ending nearly a half-century of liberalism that began with President Franklin D. Roosevelt." Jeanne Cummings, *Path of Justice Hangs on Election: Clinton Could Halt Courts' Tilt to Conservatism*, ATLANTA J. & CONST., Oct. 4, 1992, at A2.

interviews with lawyers involved in corrections litigation over the past decade to suggest the future direction of effective corrections advocacy in the next decade.²⁷

I. THE PARTIAL HOPE: LITIGATION AS LIMITED BUT CRUCIAL TO CORRECTIONAL REFORM

Evaluating the impact of litigation on correctional institutions in particular and the corrections field in general is a tricky business. Because litigation is never the only factor influencing a corrections system, its impact is difficult to isolate. Moreover, litigation is an interactive, dynamic process involving judicial officers, litigators, and other public officials, which further complicates the task of determining its impact.²⁸

There is a developing literature on the impact of litigation on prisons and jails.²⁹ Much of this literature consists of case studies assessing the impact of judicial intervention on a particular institution or system. One of the earliest and most comprehensive studies,³⁰ sponsored by the American Bar Association and conducted by M. Kay Harris and Dudley Spiller, examined the impact of four cases on conditions in prisons and jails in Arkansas, Baltimore, Maryland, and two parish prisons in Louisiana.³¹ The Arkansas

²⁷ As part of this study, over 100 interviews were conducted with lawyers specializing in corrections litigation, legal services lawyers, private practitioners, clinical faculty who have handled corrections litigation, and special masters with extensive corrections experience concerning their involvement in corrections advocacy.

²⁸ See Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1771-72 (1993) (noting "the repetitive, dialogic nature of the interactions between courts, legislatures, agencies, and other social processes, as well as the political synergy that some litigation engenders").

²⁹ The literature on the impact of litigation on juvenile institutions is sparse. A recent publication entitled *STEPPING STONES: SUCCESSFUL ADVOCACY FOR CHILDREN* (Sheryl Dicker ed., 1990) [hereinafter *STEPPING STONES*], begins to fill this gap.

³⁰ At the time this study was undertaken, only one specific assessment of the post-decree stage of a corrections case had been published. More recently, academic interest in the impact of judicial intervention on prisons and jails has burgeoned.

³¹ See M. KAY HARRIS & DUDLEY P. SPILLER, JR., *AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS* (1976). The ABA project studied the following cases: *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972) (considering issues including disciplinary due process, medical care, conditions in solitary confinement, communications with those outside the Baltimore city jail); *Hamilton v. Schiro*, 338 F. Supp. 1016 (E.D. La. 1970), subsequent proceedings reported as *Hamilton v. Landrieu*, 351 F. Supp. 549 (E.D. La. 1972) (considering issues including discipline, medical care, general conditions, recreation, rehabilitative services, and overcrowding of Orleans Parish (New Orleans) Prison); *Holland v.*

case is particularly infamous because of its extreme cruelty and horror, vividly depicted by the United States Supreme Court in *Hutto v. Finney*.³²

Two book-length case studies examine the Texas case, *Ruiz v. Estelle*,³³ which challenged conditions in the state's entire correctional system.³⁴ Larry Yackle published a comprehensive examination of the progress and impact of litigation challenging the conditions of confinement in Alabama's main prison.³⁵ Both

Donelon, Civ. No. 71-1442 (E.D. La. May 16, 1972) (unreported decision) (considering issues including discipline, medical care, general conditions, overcrowding, and racial segregation of Jefferson Parish Prison); and *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969) (considering issues including inmate safety at the hands of trusty guards, medical care, sanitary and general conditions, and overcrowding).

³² 437 U.S. 678, 681 (1978) ("The routine conditions that the ordinary Arkansas convict had to endure were characterized by the District Court as 'a dark and evil world completely alien to the free world.'"). Arkansas's prison system represented the harsh realities of a plantation system of penal organization premised on inmate labor, management by inmate trustees, and financial self-sufficiency of the prison system. A more recent doctoral dissertation updated the analysis of the court's impact on Arkansas's prisons. See Mary L. Parker, *Judicial Intervention in Correctional Institutions: The Arkansas Odyssey* (1986) (unpublished Ph.D. dissertation, Sam Houston State University).

³³ 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part*, 679 F.2d 1115 (5th Cir.), *modified*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983).

³⁴ See BEN M. CROUCH & JAMES W. MARQUART, *AN APPEAL TO JUSTICE: LITIGATED REFORM OF THE TEXAS PRISONS* 117-238 (1989); STEVEN J. MARTIN & SHELDON EKLAND-OLSON, *TEXAS PRISONS: THE WALLS CAME TUMBLING DOWN* (1989). The court found constitutional violations in the areas of population, security and inmate supervision, health care, discipline, access to legal services, and sanitation and safety conditions. See *Ruiz*, 503 F. Supp. at 1391. The most controversial aspect of the case involved the state's reliance on inmates as guards. See *id.* at 1303-04. Prior to the litigation, Texas prided itself on its national reputation as a neat, orderly, and secure system tightly run by George Beto, a charismatic, prebureaucratic director who "made it clear that officials would control the prison and that inmates would be utterly subordinate." CROUCH & MARQUART, *supra*, at 39-43. The litigation exposed a brutal, dangerous, and arbitrary regime of building tenders that was dismantled pursuant to court order. See *Ruiz*, 503 F. Supp. at 1303-07, 1387-91. During the period immediately following the court-ordered elimination of the building tender system, inmate-on-inmate violence increased dramatically. See CROUCH & MARQUART, *supra*, at 188-89. After a transition period of administrative and bureaucratic reform, order reemerged, and studies suggest that the prison became a safer and more stable environment than it was under the "old order." See *id.* at 216-20.

³⁵ See LARRY W. YACKLE, *REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM* (1989). The Alabama case was the first case litigated and won on the theory that the totality of conditions in a prison constituted cruel and unusual punishment. See *id.* at 101. Judge Frank Johnson issued a comprehensive and detailed order requiring changes in virtually every aspect of prison life. See *id.* at 101-04. He appointed a Prison Implementation Committee to monitor compliance with the decree. See *id.* at 103. After the Court of Appeals found that the Human Rights Committee "impermissibly intrude[d] . . . upon

studies focused on cases involving celebrated, activist judges and Southern prison systems.³⁶

Bradley Chilton recently published a book focusing on litigation's impact on conditions in the Georgia State Prison,³⁷ and John DiIulio recently edited a collection of case studies concerning the impact of judicial intervention on corrections institutions in Texas,³⁸ Georgia,³⁹ New York City,⁴⁰ and West Virginia.⁴¹ Ad-

functions properly belonging to the daily operation of the Alabama prison system," *Newman v. Alabama*, 559 F.2d 283, 289 (5th Cir. 1977), Judge Johnson appointed the Governor of Alabama as receiver of the prisons. See YACKLE, *supra*, at 183. After more than 10 years, the court found substantial compliance with its order and relinquished jurisdiction. See *id.* at 250-51.

For an insightful review of the Texas and Alabama case studies, see generally Malcolm M. Feeley & Edward Rubin, *Prison Litigation and Bureaucratic Development*, 17 L. & SOC. INQUIRY 125 (1992).

³⁶ Judge Frank Johnson presided over the Alabama prison case. Judge William W. Justice handled the Texas prison case. For a thorough discussion of the Southern plantation model of corrections administration and its demise, see Malcolm M. Feeley, *The Significance of Prison Conditions Cases: Budgets and Regions*, 23 L. & SOC'Y REV. 273, 278-81 (1989).

³⁷ See BRADLEY S. CHILTON, *PRISONS UNDER THE GAVEL: THE FEDERAL COURT TAKEOVER OF GEORGIA PRISONS* (1991).

³⁸ See COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS (John J. DiIulio, Jr., ed., 1990) [hereinafter COURTS, CORRECTIONS, AND THE CONSTITUTION]. The three articles concerning the Texas prison litigation are condensed versions of book-length case studies of Ruiz, which is described above.

³⁹ See Bradley S. Chilton & Suzette M. Talarico, *Politics and Constitutional Interpretation in Prison Reform Litigation: The Case of Guthrie v. Evans*, in COURTS, CORRECTIONS, AND THE CONSTITUTION, *supra* note 38, at 115, 115-37. This essay is a condensed version of a Ph.D. dissertation on the Guthrie prison litigation, the focus of which was conditions in the Georgia state prison, and serves as a brief overview of a book subsequently published entitled *Prisons Under the Gavel: The Federal Court Takeover of Georgia Prisons*. See *supra* note 37.

In *Guthrie*, Judge Anthony A. Alaimo "condemned as cruel and unusual punishment the segregation, overcrowding, poor medical care, miserable conditions, and unfair treatment of black and white inmates." Chilton & Talarico, *supra*, at 117. The *Guthrie* case emerges as one of the success stories of corrections litigation. "The pre-*Guthrie* prison with its overcrowded dormitory wings, segregated facilities, discriminatory proceedings, limited medial treatment, and poor sanitation systems gave way to a prison accredited by the American Correctional Association and held out as a model for the rest of the state." *Id.* at 122.

⁴⁰ See Ted S. Storey, *When Intervention Works: Judge Morris E. Lasker and the New York City Jails*, in COURTS, CORRECTIONS, AND THE CONSTITUTION, *supra* note 38, at 138, 138. This case study examines the conditions in pre-trial detention facilities in New York City. It focuses on the shifting positions of political administrations regarding prison reform and judicial intervention, Judge Lasker's style of encouraging compromise and persistent nudging toward compliance, and the creation of the Office of Contract Compliance, an independent monitoring unit created by the parties.

⁴¹ See Bert Useem, Crain: *Nonreformist Prison Reform*, in COURTS, CORRECTIONS,

ditional empirical articles focus on particular aspects of judicial intervention, such as the role of special masters,⁴² the impact of prison disciplinary procedures,⁴³ and the attitudes of correctional officials concerning litigation.⁴⁴ Other empirical studies focusing on the dynamics of prisons and change also address the issue of judicial impact.⁴⁵ Finally, a growing number of masters theses and doctoral dissertations present case studies of judicial intervention in correctional institutions.⁴⁶

These case studies cover a wide range of institutions and geographical areas, and provide a basis for a general assessment of the impact of litigation on prisons and jails.⁴⁷ Although case

AND THE CONSTITUTION, *supra* note 38, at 223, 223. This essay describes the politics surrounding the implementation of litigation challenging conditions in the West Virginia penitentiary.

⁴² See Brakel, *supra* note 12, at 160, 164; Susan P. Sturm, Note, "Mastering" Intervention in Prisons, 88 YALE L.J. 1062, 1068-72 (1979).

⁴³ See Walter J. Dickey, *The Promise and Problems of Rulemaking in Corrections: The Wisconsin Experience*, 1983 WIS. L. REV. 285, 306-21; Harvard Ctr. for Criminal Justice, *Judicial Intervention in Prison Discipline*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 200, 203 (1972).

⁴⁴ See Donald P. Baker et al., *Judicial Intervention in Corrections: The California Experience—An Empirical Study*, 20 UCLA L. REV. 452, 491-524 (1973).

⁴⁵ See, e.g., LEO CARROLL, HACKS, BLACKS, AND CONS: RACE RELATIONS IN A MAXIMUM SECURITY PRISON 10, 43-45, 54-61, 198-99 (1974) (studying race relations in the Rhode Island prison system); MARK COLVIN, THE PENITENTIARY IN CRISIS: FROM ACCOMMODATION TO RIOT IN NEW MEXICO 5, 117-18 (1992) (examining the charges and conflicts preceding the 1980 riot at the penitentiary of New Mexico); JOHN J. DIJULIO, JR., GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT 173-74, 212-16, 246-50 (1987) (studying Texas, Michigan, and California prison systems); JAMES B. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY 9, 102, 105-19, 135-36 (1977) (studying Stateville penitentiary, the largest maximum security prison in Illinois); CURTIS PROUT & ROBERT N. ROSS, CARE AND PUNISHMENT: THE DILEMMAS OF PRISON MEDICINE 87-113 (1988); Sturm, *supra* note 24, at 861-909; Susan P. Sturm, *The Rhode Island Prison Decree*, in DAVID W. LOUISELL ET AL., CASES ON PLEADING AND PROCEDURE 1243, 1243-49 (6th ed. 1989) (discussing implementation of a judicial decree in the Adult Correction Institution in Rhode Island).

⁴⁶ See, e.g., Bradley S. Chilton, *Guthrie v. Evans: Civil Rights, Prison Reform, and Institutional Reform Litigation* (1988) (unpublished Ph.D. dissertation, University of Georgia); Deborah Little & Malcolm M. Feeley, *Courts, Jails and Organization Theory: A Case Study of Branson v. Winter* (Nov. 1989) (unpublished manuscript, on file with the Center for the Study of Law and Society, University of California at Berkeley); Jutta Lungwitz, *Stone v. City and County of San Francisco—Impact of a Consent Decree on the Medical and Mental Health Services of a San Francisco County Jail* (Nov. 1989) (unpublished manuscript, on file with author); Parker, *supra* note 32; Wayne Welch, *A Comparative Analysis of Court Orders Against California County Jails: Intervention and Impact* (1990) (unpublished Ph.D. thesis, University of California at Irvine).

⁴⁷ The studies, when considered as a body of work, avoid many of the pitfalls associated with case study research. See ROSENBERG, *supra* note 13, at 28-36 (criticizing case studies as a basis for constructing hypotheses about courts')

studies capture the richness of this dynamic, they cannot definitively establish the causal linkages between litigation and change. As their number increases, however, case studies provide a database from which to identify patterns of change in the wake of litigation. Case studies frequently trace the course of activities and conditions within the institutions under scrutiny, and thus afford at least a preliminary basis for assessing litigation's impact.

Most of the case studies of litigation's impact on correctional institutions conclude that courts have had a significant and positive, though limited, impact. However, several recent works, notably Gerald Rosenberg's *The Hollow Hope: Can Courts Bring About Social Change?*,⁴⁸ Donald Horowitz's *The Courts and Social Policy*,⁴⁹ and John DiIulio's *Governing Prisons*,⁵⁰ are quite pessimistic about courts' potential to achieve institutional reform. Because of the attention these works have attracted and their profoundly negative view of courts' capacity to achieve change in correctional institutions,⁵¹ these works warrant additional comment.

effectiveness in producing significant social reform). Although some of the studies examine celebrated cases presided over by judges who are widely known as judicial activists, *see, e.g.*, MARTIN & EKLAND-OLSON, *supra* note 34, at 83-111 (examining cases presided over by Judge William Justice); YACKLE, *supra* note 35, at 256-60 (examining cases presided over by Judge Frank Johnson), others involve more traditional, less celebrated cases, *see, e.g.*, CHILTON, *supra* note 37 (studying the Guthrie v. Evans, 828 F.2d 773 (11th Cir. 1987), lawsuit at the Georgia State Prison in Reidsville, Georgia); HARRIS & SPILLER, *supra* note 31, at 31-63 (examining how Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd and remanded*, 442 F.2d 304 (8th Cir. 1971), affected the Arkansas prison system). Some of the studies have spanned considerable time periods or revisited institutional settings after passages of time. *See, e.g.*, JACOBS, *supra* note 45, at 10, 64-67, 107-08, 111-12, 166 (discussing *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Johnson v. Avery*, 393 U.S. 483 (1969); *Cooper v. Pate*, 378 U.S. 546 (1964); *Arsberry v. Sielaff*, 586 F.2d 37 (7th Cir. 1978); and *Adams v. Pate*, 445 F.2d 105 (7th Cir.), *cert. denied*, 400 U.S. 1024 (1971)); John V. Baiamonte, Jr., *Holland v. Donelon Revisited: Jail Litigation in Jefferson Parish, Louisiana, 1971-1991*, 70 PRISON J. 38 (1990) (studying *Holland v. Donelon* and its impact in Louisiana). Interestingly, Rosenberg excludes the rich body of literature on correctional litigation from his general assessment of the value of case studies in assessing judicial impact. *See* ROSENBERG, *supra* note 13, at 305-14.

⁴⁸ ROSENBERG, *supra* note 13.

⁴⁹ HOROWITZ, *supra* note 12.

⁵⁰ JOHN J. DI IULIO, JR., *GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT* (1987).

⁵¹ All three of these books received extensive critical attention. *See, e.g.*, Stephen L. Carter, *The Courts and the Constitution: Do Courts Matter?*, 90 MICH. L. REV. 1216 (1992) (reviewing *THE HOLLOW HOPE*); Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) (same); Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027 (1992) (same); Feeley & Rubin, *supra* note 35, at 133-35 (reviewing *GOVERNING PRISONS*); Schuck, *supra* note 28, at

In *The Hollow Hope*, Gerald Rosenberg attempts to develop and test a theory of judicial effectiveness that explains and predicts courts' limited capacity to produce "significant social reform." He argues that courts are limited by three separate constraints built into the structure of the American political system: the limited nature of constitutional rights, the lack of judicial independence, and the judiciary's lack of power of implementation.⁵² These constraints can be overcome when: (1) there is "ample legal precedent for change"; and (2) there is "support for change from substantial numbers in Congress and from the executive"; and (3) "there is either support from some citizens or at least low levels of opposition from all citizens"⁵³ plus at least one of the following four conditions: (a) positive incentives to induce compliance, (b) costs to induce compliance (c) a market mechanism for implementation, or (d) administrators and officials crucial for implementation who are willing to act and see court orders as a tool for leveraging additional resources or for hiding behind.⁵⁴

To test his theory, Rosenberg sets out to compare "the contribution of courts vis-à-vis the Congress and the executive branch"⁵⁵ in a wide range of civil rights areas.⁵⁶ His most fully developed and controversial findings concern the impact of courts in the area of school desegregation.⁵⁷ Rosenberg argues that from 1954 to 1964, "the [Supreme] Court spoke forcefully while Congress and the executive [branch] did little."⁵⁸ Then, in 1965, Congress and the executive branch entered the field. Rosenberg claims that the courts acting alone had virtually no impact on the rate of integration, press coverage, legislative impact, change in public attitudes, and political activism.⁵⁹

Rosenberg thus purports to stand the conventional wisdom about judicial impact on its head. He argues:

[B]efore Congress and the executive branch acted, courts had virtually *no direct effect* on ending discrimination in the key fields

1763 (reviewing *THE HOLLOW HOPE*); Sturm, *supra* note 9, at 1406-08 (critiquing *THE COURTS AND SOCIAL POLICY*).

⁵² See ROSENBERG, *supra* note 13, at 10-21.

⁵³ *Id.* at 35-36.

⁵⁴ See *id.* at 33-36.

⁵⁵ *Id.* at 49.

⁵⁶ See *id.* at 39-71.

⁵⁷ See *id.* at 42-57.

⁵⁸ *Id.* at 49.

⁵⁹ See *id.* at 107-56.

of education, voting, transportation, accommodations and public places, and housing. . . . Only when Congress and the executive branch acted in tandem with the courts did change occur in these fields. In terms of judicial effects, then, *Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform.⁶⁰

In the corrections area, Rosenberg's assessment is more perfunctory and less definitive. He does not attempt a rigorous analysis of the body of case studies concerning corrections litigation, but instead repeats the bottom line assessments of selected studies concerning judicial impact. "Overall, the consensus view is that, while some changes have been made, serious problems remain."⁶¹ Rosenberg then attempts to explain the "uneven" results of corrections litigation by pointing to the varied levels of political support for court-ordered prison reform, the courts' lack of implementation power, and the presence of administrators willing to use court orders to achieve change.⁶²

Many scholars quoted by Rosenberg, including myself,⁶³ draw different conclusions from the same data concerning courts' effectiveness. The varying perspectives on the effectiveness of litigation result in part from differing expectations of the courts and standards for success. For example, Rosenberg appears to declare litigation a "hollow hope" despite his acknowledgement that "[m]any of the worst conditions have been improved to at least minimal standards."⁶⁴ Because "problems still abound" and "change has been uneven," Rosenberg suggests that corrections litigation is ineffective.⁶⁵ Rosenberg's negative assessment, however, depends on applying a somewhat utopian standard of success. Few, if any, social reform efforts have universal, nationwide impact—the standard Rosenberg uses to measure significant social reform. Indeed, Rosenberg never offers any meaningful standard against which to measure the effectiveness of litigation. Rosenberg's critique also lacks a comparative perspective. Judicial intervention should not be assessed in a vacuum, but rather in relation to other efforts to bring about institutional reform.⁶⁶

⁶⁰ *Id.* at 70-71.

⁶¹ *Id.* at 306.

⁶² *Id.* at 307-13.

⁶³ Rosenberg relies considerably on my student note entitled "*Mastering Intervention in Prisons*." See Sturm, *supra* note 42, at 1062.

⁶⁴ ROSENBERG, *supra* note 13, at 307.

⁶⁵ *Id.*

⁶⁶ See Sturm, *supra* note 9, at 1407-08. Studies of efforts to implement legislative

Although Rosenberg draws sweeping negative judgments about the courts' capacity, perhaps to support his sensational title and maverick conclusions, his theory and data are less controversial and original than his presentation suggests.⁶⁷ Scholars and activists have long recognized the interdependence of courts and other branches of government to achieve meaningful reform.⁶⁸

Rosenberg's methodology and analysis reveal a more fundamental failure of vision. The author fails to understand the crucial role of the remedial stage in public law litigation, and the central place that district courts play in carrying out this implementation function. Rosenberg proceeds to assess the effectiveness of a test case strategy of reform—a strategy that, as I demonstrate below, fails to depict accurately the tenor of recent civil rights advocacy, particularly in the corrections area.⁶⁹ The test case strategy focuses on developing new legal theories and doctrines to protect and further the civil rights and interests of underrepresented groups. It centers on obtaining Supreme Court decisions that expand the scope of legal protections. Thus, Rosenberg's study focuses on the impact of Supreme Court decisions and overgeneralizes by equating the Supreme Court's impact with that of the entire federal judiciary. Rosenberg's data testing the impact of judicial

and administrative policy initiatives reveal that the other two branches of government confront obstacles to reform similar to those documented in the judicial arena. *See generally* JEFFREY L. PRESSMAN & AARON WILDAVSKY, *IMPLEMENTATION* (1973) (analyzing the difficulties of carrying out a government policy through a study of the Oakland Project of the University of California). At least one study attempting to compare the relative effectiveness of courts and other branches of government concludes that, at least in some respects, courts have a number of significant advantages over legislative and executive agencies. *See* MICHAEL A. REBELL & ARTHUR R. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM* 10, 13-14, 65-70, 118-20 (1982).

⁶⁷ Other commentators have offered a similar critique. *See* Devins, *supra* note 51, at 1030; Schuck, *supra* note 28, at 1764-66. Peter Schuck has convincingly challenged the originality and value of Rosenberg's theoretical framework as a tool for explaining or predicting the impact of judicial decisions. *See id.* at 1771-72 (asserting that Rosenberg's theory is indeterminate; ignores certain dynamic effects unleashed by many court decisions; gives excessive weight to whether litigation advances the avowed agendas of public interest litigators; and fails to distinguish constitutional and statutory interpretation decisions).

⁶⁸ *See, e.g.*, JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 192 (1978) (discussing significance of "bureaucratic contingency" in success of judicial intervention); Sturm, *supra* note 24, at 885-95 (discussing the courts' dependence on responsible public officials for meaningful reform and assessing effectiveness of various judicial strategies in prompting cooperation by those officials).

⁶⁹ *See infra* notes 320-63 and accompanying text.

intervention are analyzed only in terms of the impact of particular Supreme Court decisions.

This methodological approach is inappropriate in the institutional reform area. Rosenberg fails to grasp the evolution of the judicial role toward what I call an implementation model of public interest advocacy—a model that focuses on implementing legal norms in particular institutional contexts.⁷⁰ Most of the significant activity in the area of institutional reform litigation takes place at the lower court level. Much of the media attention surrounding corrections litigation follows local litigation. Thus, Rosenberg's failure to take into account the impact of lower court decisions on official behavior, media attention, and institutional change makes his findings concerning judicial impact inconclusive at best.

Moreover, Rosenberg overstates the Supreme Court's involvement in civil rights enforcement. Contrary to Rosenberg's assertion, the Supreme Court did not vigorously enforce school desegregation and other civil rights laws after its decision in *Brown v. Board of Education*.⁷¹ In the corrections field in particular, the Supreme Court has been relatively quiet. Lower courts clearly dominate the field of judicial intervention in the corrections area.⁷² Rosenberg by and large neglects this central locus of judicial activity.

Rosenberg also ignores the impact of litigation on organizational structure and managerial capacity. His assessment of the indirect effects of litigation looks only to litigation's impact on public opinion and the views of political elites. At least in the corrections field, this narrow focus filters out some of the most significant consequences of litigation.⁷³

Finally, Rosenberg fails to grasp the dynamic and fluid character of public law litigation and its relationship to other branches of government. His analysis assumes three distinct branches of government with little interplay among them. He does not acknowledge or attempt to study the impact litigation has on the

⁷⁰ See *infra* notes 362-63 and accompanying text.

⁷¹ See Devins, *supra* note 51, at 1040-41.

⁷² Over the last 10 years, the Supreme Court has rarely addressed the issue of the appropriate remedy to redress cruel and unusual prison conditions. In contrast, lower courts have been extremely involved in developing and enforcing corrections remedies. See Edward I. Koren, *Status Report: State Prisons and the Courts—January 1, 1992*, NAT'L PRISON PROJECT J., Winter 1992, at 13, 13-20 (summarizing ongoing involvement by federal courts in corrections litigation in 40 states or territories).

⁷³ These consequences include contributing to the professionalization of corrections, and increasing the visibility and accountability of the corrections field. See *infra* notes 112-22, 132-34 and accompanying text.

capacity and willingness of public officials to engage in reform. The remedial process in corrections cases blurs the distinction between formal adversary proceedings and what he presents as nonjudicial, administrative, and political forms of intervention. His conclusion that change does not occur in the absence of cooperation by insiders is neither surprising nor particularly helpful in determining when litigation will be successful, because litigation is itself often a factor influencing the willingness of insiders to engage in reform activities.⁷⁴

Rosenberg's analysis shares an additional limitation with Horowitz's study concluding that courts lack the capacity to achieve effective reform.⁷⁵ Both authors assume that courts necessarily adhere to the traditional model of adjudication, and fail "to take into account the procedural innovations that enhance courts' capacity to find social facts, consider competing solutions, and facilitate negotiation."⁷⁶ Many of the studies relied upon by Rosenberg to support his view that litigation is a "hollow hope" were published ten or more years ago, and practice has evolved considerably in the public remedial area since then. Indeed, one of the significant findings of this Article concerns the changing character of the process used to develop remedies and the increasing interaction of litigation and other forms of public interest advocacy.⁷⁷

Governing Prisons, by John DiIulio, presents a particularly negative picture of judicial intervention in prisons.⁷⁸ His book does not focus on the question of the effectiveness of judicial intervention, but rather on the management of prisons. His thesis is that "[a] paramilitary prison bureaucracy, led by able institutional managers and steered by a talented executive, may be the best administrative response to the problem of establishing and maintaining higher custody prisons in which inmates and staff lead a calm, peaceful, and productive round of daily life."⁷⁹ He compares three different prison systems, including the Texas system,

⁷⁴ See *infra* notes 199-201 and accompanying text.

⁷⁵ Horowitz characterizes judicial processes as necessarily focused and piecemeal, "ill-adapted to the ascertainment of social facts," HOROWITZ, *supra* note 12, at 45, lacking provision for policy review, and inhospitable to negotiation. See *id.* at 22-23, 34-36, 45-51, 51-56.

⁷⁶ Sturm, *supra* note 9, at 1408.

⁷⁷ See *infra* notes 418-31 and accompanying text.

⁷⁸ See *supra* note 50.

⁷⁹ DI IULIO, *supra* note 50, at 256.

and concludes that the Texas prison prior to litigation constitutes the model of effective prison management.⁸⁰

DiIulio seems captivated by the allure of the charismatic, personality-driven model of administration employed by Director George Beto. He bitterly criticizes the court, particularly Judge Justice, for destroying Beto's system of management.⁸¹ He goes so far as to hold the court responsible for the breakdown in institutional order resulting in inmate deaths.⁸² However, the empirical support for this indictment lacks neutrality and methodological rigor. DiIulio's critique of Judge Justice's role in the Texas litigation differs dramatically from that of two other extensive and careful case studies that depict the Texas system prior to litigation as defective, violent, arbitrary, and corrupt.⁸³ These studies concede that litigation's impact fell short of expectations, but conclude that litigation was necessary to eliminate the abuses of the Texas system. As Feeley and Rubin convincingly demonstrate, DiIulio's treatment of the Texas prison system is idiosyncratic and fundamentally flawed.⁸⁴ He proceeds on the "pre-empirical notion" that order and cleanliness are the primary virtues of a

⁸⁰ See *id.* at 199-231 (comparing the Texas, Michigan, and California prison systems).

⁸¹ For example:

If the judge were more judicious, his information better, his appreciation for what TDC had achieved in the past less unkind, and his preoccupation with its sores less total, or if he and his aides had troubled themselves to consider the possible unintended consequences of their sweeping actions, there can be little doubt that things would not have degenerated as they did.

Id. at 229.

⁸² See *id.* ("The new legal framework imposed on TDC was . . . a poorly tailored and ill-fitting suit which the agency was rushed into wearing and which eventually, and predictably, burst at the seams.")

⁸³ See CROUCH & MARQUART, *supra* note 34, at 13-45, 117; MARTIN & EKLAND-OLSON, *supra* note 34, at 5-25, 247. DiIulio's research focused exclusively on interviews with administrators and guards. "[T]he bulk of [the interviews] were conducted on the fly in the course of observations inside the several prisons . . ." DI IULIO, *supra* note 50, at 5. The perspective of inmates or outsiders to the prison system does not inform his analysis. His presentation tends toward the rhetorical and conclusory, creating the impression that he developed his analysis and then used the interviews to buttress it. In contrast, the other two authors relied on in-depth research, including structured interviews with 70 prisoners and 40 officers, and hundreds of informal interviews with administrators, staff, officers and inmates in nearly all units of the system. The interviews were augmented with surveys of staff, officers, and inmates. See CROUCH & MARQUART, *supra* note 34, at ix-x; MARTIN & EKLAND-OLSON, *supra* note 34, at xvii-xxi (describing Martin's personal involvement with the Texas prison system).

⁸⁴ See Feeley & Rubin, *supra* note 35.

prison, and then conflates the concepts of bureaucracy and order.⁸⁵ The Texas model that DiIulio embraces is the opposite of the paramilitaristic bureaucracy that he endorses in principle. DiIulio has offered a more balanced perspective on litigation's impact in his subsequent compilation of case studies of judicial impact on corrections.⁸⁶

Despite these limitations, Horowitz, Rosenberg, and DiIulio do identify important concerns about courts' unilateral capacities to reform social institutions that must inform any serious assessment of judicial impact. Some of these concerns, such as the potential for unintended negative consequences from judicial intervention and the limitations of the adversary process as a means of achieving reform, emerge as recurring themes in the case studies of judicial intervention in corrections institutions. Rather than offer a bottom-line assessment of litigation as positive or negative, I have relied on this body of case studies that examine the impact of courts on correctional institutions to draw out the patterns in the direct and indirect impact of litigation.

A. *The Legal and Correctional Landscape in the Prelitigation Era*

Litigation challenging the conditions and practices in prisons, jails, juvenile detention facilities, and state juvenile institutions is a relatively recent phenomenon. Until the 1960s, courts adopted a "hands-off" approach to prison cases.⁸⁷ Correctional institutions were isolated from and invisible to society. They operated as closed communities largely without public scrutiny.⁸⁸ Inmate communica-

⁸⁵ *Id.* at 137-43. Feeley and Rubin thoughtfully assess and criticize the neutrality and methodological reliability of the study. *See id.* at 125.

⁸⁶ *See* John J. DiIulio, Jr., *Conclusion: What Judges Can Do to Improve Prisons and Jails*, in *COURTS, CORRECTIONS, AND THE CONSTITUTION*, *supra* note 38, at 287 ("[I]f the question is one of net assessment, then the impact of judicial intervention into prisons and jails over the last two decades has been positive—a qualified success, but a success just the same.").

⁸⁷ *See generally* Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 *YALE L.J.* 506 (1963).

⁸⁸ To preserve their autonomy, prison officials developed patterns of institutional display designed to give visitors an "appropriate image" of the institution, insulating the day-to-day conditions and forms of social control from outside scrutiny. *See* ERVING GOFFMAN, *ASYLUMS* 102 (1961); JACOBS, *supra* note 45, at 36 ("Ragen's Stateville was an autonomous institution accountable neither to other public agencies nor to the public at large.").

tion with the outside world was extremely limited. Inmates had no avenues of redress for the life-threatening abuses they endured.⁸⁹

Conditions and practices in prisons, jails, and juvenile facilities were frequently abysmal. "Violence, brutality, lack of medical care, unsanitary conditions, inadequate plumbing, lack of ventilation, and the absence of other necessities of life characterized the institutions."⁹⁰ Many facilities were overcrowded and poorly maintained.⁹¹ Juvenile institutions were often oppressive and dangerous.⁹² Moreover, juveniles were frequently incarcerated in adult jails where they were routinely subjected to extreme abuse.⁹³

⁸⁹ See James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts*, in 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 429 (Norval Morris & Michael Tonry eds., 1980); David J. Rothman, *Decarcerating Prisoners and Patients*, 1 CIV. LIB. REV. 8 (1973); JACOBS, *supra* note 45, at 36-37. Riots tend to attract immediate attention and give inmates a platform for airing their grievances. However, violence often leads to more repressive control measures, and tends to reinforce the image of inmates as unworthy and uncontrollable. See Sturm, *supra* note 24, at 844.

⁹⁰ HARRIS & SPILLER, *supra* note 31, at 4; see also YACKLE, *supra* note 35, at 11-12 ("[The] penal system [was] permitted to degenerate into unrelieved squalor. . . . Alabama prisons were nothing more than human warehouses that contained but hardly contended with an overwhelming population of idle criminal offenders."); Chilton & Talarico, *supra* note 39, at 117 (describing "segregation, overcrowding, poor medical care, miserable conditions, and unfair treatment of black and white inmates at Reidsville").

⁹¹ See, e.g., HARRIS & SPILLER, *supra* note 31, at 6 (noting that overcrowding was a serious problem in each of the institutions studied); YACKLE, *supra* note 35, at 11-12 (explaining that overcrowding was a recurring problem in the Alabama prison system and that the drive to make prisoners pay for their own upkeep, combined with the overcrowding, condemned the system to failure).

⁹² One authority describes the plight of juveniles in some jails in the following terms:

Most of the children in these jails have done nothing, yet they are subjected to the cruellest of abuses. They are confined in overcrowded facilities, forced to perform brutal exercise routines, punished by beatings by staff and peers, put in isolation, and whipped. They have their heads held under water in toilets. They are raped by both staff and peers, gassed in their cells, and sometimes stomped or beaten to death by adult prisoners. A number of youths not killed by others end up killing themselves.

Mark Soler et al., *Stubborn and Rebellious Children: Liability of Public Officials for Detention of Children in Jails*, 1980 B.Y.U. L. REV. 1, 5-6 (quoting CLEMENS BARTOLLAS & STUART J. MILLER, *THE JUVENILE OFFENDER: CONTROL, CORRECTION AND TREATMENT* 212 (1978)); see also Gary H. v. Hegstrom, 831 F.2d 1430, 1431-36 (9th Cir. 1987) (describing excessive use of isolation, inappropriate use of physical restraints, dirty and unsanitary conditions, lack of programming, and inadequate medical and mental health care in state juvenile detention facility); Martarella v. Kelley, 349 F. Supp. 575, 579-85 (S.D.N.Y. 1972) (detailing deplorable physical conditions, sexual abuse, beatings, and absence of mental health and other programs and services at juvenile institution for children designated as "persons in need of supervision").

⁹³ See Soler et al., *supra* note 92, at 2 (stating that "on March 15, 1970, some 7,800

Administrators frequently ran their institutions as fiefdoms, with little awareness of developments in legal norms or corrections administration.⁹⁴ In some systems, dominant inmates operating as building tenders or trustees wielded supervisory, administrative, and disciplinary authority over other inmates, and engaged in violent and predatory behavior with official acquiescence.⁹⁵ Guard brutality was a routine part of prison life.⁹⁶ Institutions routinely segregated inmates by race, and frequently provided grossly inferior conditions, programs, and opportunities to nonwhite inmates. Decisions concerning inmate discipline and control were made arbitrarily,⁹⁷ and inmates were prohibited from exercising basic rights of free speech and religion.⁹⁸

children were confined in adult jails in the United States”).

⁹⁴ See Feeley & Rubin, *supra* note 35, at 126.

⁹⁵ See, e.g., Ben M. Crouch & James W. Marquart, Ruiz: *Intervention and Emergent Order in Texas Prisons*, in COURTS, CORRECTIONS, AND THE CONSTITUTION, *supra* note 38, at 99-100 (describing building tender system in Texas prisons); HARRIS & SPILLER, *supra* note 31, at 49-51 (discussing that inmate trustees who “literally ran the prison system . . . had the power of life and death over other inmates” and “engage[d] in an incredibly wide variety of unlawful activities”).

⁹⁶ See, e.g., Sheldon Ekland-Olson & Steve J. Martin, Ruiz: *A Struggle over Legitimacy*, in COURTS, CORRECTIONS, AND THE CONSTITUTION, *supra* note 38, at 73, 77-78 (claiming that “[s]taff brutality . . . was routine in that it was deeply embedded in the subculture of prison life as a legitimate alternative”). Perhaps the most infamous form of brutality was the Tucker telephone, an instrument that

consisted of an electric generator taken from a ring-type telephone, placed in sequence with two dry cell batteries and attached to an undressed inmate strapped to the treatment table at the Tucker hospital by means of one electrode to a big toe and a second electrode to the penis, at which time a crank was turned sending an electric charge into the body of the inmate. . . . [S]everal charges were introduced into the inmate of a duration designed to stop just short of the inmate passing out.

HARRIS & SPILLER, *supra* note 31, at 36-37.

⁹⁷ Numerous judicial decisions documented and prohibited the use of formal or informal violence as a form of discipline, the threat of uncertain punishment, and the utilization of inmate trustees to maintain order. See, e.g., Ruiz v. Estelle, 679 F.2d 1115, 1140-42 (5th Cir.) (applying the Eighth Amendment to findings of overcrowding, inmate violence, staff brutality, and low guard-inmate ratios), *modified*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (prohibiting further use of whipping); Holt v. Sarver, 309 F. Supp. 362, 365, 383-84 (E.D. Ark. 1970) (holding trustee system as administered violated Eighth Amendment), *aff'd*, 442 F.2d 304 (8th Cir. 1971); see also JACOBS, *supra* note 45, at 42-43 (describing role of uncertainty and selective distribution of privileges in maintaining order).

⁹⁸ See, e.g., JACOBS, *supra* note 45, at 122 (describing as successful lawsuit challenging restriction of exercise of First Amendment rights by inmates); Jacobs, *supra* note 89, at 35 (“A prisoner who complained about arbitrary, corrupt, brutal, or illegal treatment did so at his peril.”).

B. *Litigation's Impact on the Organization and Management
of Correctional Institutions*

There is little doubt that litigation has profoundly changed the conditions and practices in correctional institutions. The most far-reaching and significant effects of litigation have been on the structure, organization, and relationship of corrections to the larger community.⁹⁹ These changes in turn affect the capacity of correctional leadership to manage and improve the quality of life in correctional institutions. The following are examples of such changes.

1. Litigation Has Contributed to a Greater Understanding
and Acceptance of Constitutional Standards
Governing Correctional Institutions

There is strong evidence that litigation has fostered the development of norms and standards of minimally adequate treatment of inmates within correctional systems.¹⁰⁰ Virtually every case study of judicial intervention in correctional institutions recounts the internal development of correctional standards to govern future practices and conduct within the institution, following major litigation invalidating the conditions and practices in those institutions. The court in *Holt v. Hutto*¹⁰¹ summarized the shift in Arkansas from official resistance to official adoption of judicially imposed norms and standards as the policy of the institution.¹⁰²

⁹⁹ See JACOBS, *supra* note 45, at 107 (indicating that "the indirect ramifications of judicial intervention into the prison have been far-reaching"). Rosenberg's assessment of judicial impact in *The Hollow Hope*, *supra* note 13, ignores these indirect effects of litigation, as well as the potential feedback effects of litigation on organizations' capacity to govern themselves.

¹⁰⁰ See, e.g., JACOBS, *supra* note 45, at 105 (providing that "the intrusion of the federal courts required a rational decision-making process based upon uniform rules, formal decision mechanisms, and ascertainable criteria"); Malcolm M. Feeley & Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature*, in COURTS, CORRECTIONS, AND THE CONSTITUTION, *supra* note 38, at 12, 25-28 (discussing the role of litigation as an impetus for changes such as the adoption of prison regulations and the emphasis on constitutional standards in the training of local jail officials); Jacobs, *supra* note 89, at 462 ("The prisoner's rights movement has contributed to a professional movement within corrections to establish national standards."); Sturm, *supra* note 24, at 861-64 (arguing that judicial intervention in the form of an announced normative framework results in various reforms).

¹⁰¹ 363 F. Supp. 194 (E.D. Ark. 1973).

¹⁰² The court stated:

The case studies also suggest that litigation has contributed to the internalization of these standards by staff and administration. For example, Crouch and Marquart report that after extensive judicial intervention invalidating the use of inmate trustees to maintain order, the Texas Department of Corrections officials began to adopt new, constitutionally sanctioned methods to maintain order.¹⁰³ The special master in the Texas litigation reported that the prison officials who previously embraced as necessary and inevitable the building tender system, which relied on inmate guards to maintain order and administer the prison, "came to hold the opposite view with equal commitment."¹⁰⁴ Larry Yackle observed among Alabama prison officials "a new sensitivity to the profound fact of human incarceration."¹⁰⁵ The Arkansas case study traced the development of constitutionally acceptable departmental policies and procedures as a result of litigation.¹⁰⁶ A number of states now employ compliance officers whose jobs are to monitor and evaluate conditions and practices in prisons and jails.¹⁰⁷

Of course, litigation is not solely responsible for the growing internalization of professional norms. Independent efforts within the corrections field, such as the emergence of a network of professional organizations that promulgate standards and the incorporation of these standards in state statutes and administrative regulations, have also contributed to this development.¹⁰⁸ Howev-

This litigation today stands in a posture quite different from that in which it stood in 1969 and 1970. In those years the Court was dealing with officially prescribed or sanctioned conditions and practices which were claimed to be unconstitutional, and the controlling facts were essentially undisputed. Today, most of the practices and conditions alleged by petitioners to exist and of which they complain are not officially approved or sanctioned, and a number of them are specifically prohibited by the rules and regulations of the Department

Id. at 198.

¹⁰³ See CROUCH & MARQUART, *supra* note 34, at 230-31.

¹⁰⁴ Sturm, *supra* note 24, at 863 n.253 (quoting Telephone Interview with Vincent Nathan, Partner, Nathan & Roberts (July 19, 1991) (transcript on file with author)).

¹⁰⁵ YACKLE, *supra* note 35, at 259.

¹⁰⁶ See Parker, *supra* note 32, at 374-75; see also Frank M. Dunbaugh, *Prospecting for Prospective Relief: The Story of Seeking Compliance with a Federal Court Decree Mandating Humane Conditions of Confinement in the Baltimore City Jail*, PRISON J., Fall-Winter 1990, at 57, 65 (reporting that "local, state and national standards have developed for such matters as sanitation, plumbing, ventilation, fire safety, officer training and health care"); Little & Feeley, *supra* note 46, at 40-41 (recounting development of procedures governing services and programs in the wake of jail litigation).

¹⁰⁷ See Feeley & Hanson, *supra* note 100, at 26-27.

¹⁰⁸ See *id.* at 27; Rod Miller, *Standards and the Courts*, CORRECTIONS TODAY, May

er, litigation and professionalization have not occurred in isolation. Litigators and courts rely on professional standards and experts to evaluate the adequacy of conditions and practices and to apply those standards in a particular institutional context.¹⁰⁹ The corrections field has, in turn, developed standards, rules, and regulations with an eye toward avoiding further judicial intervention.¹¹⁰ Litigation has thus played a major role in the development and further refinement of professional standards and oversight.¹¹¹

1992, at 58.

¹⁰⁹ The Supreme Court has rejected the wholesale adoption of professional standards as the basis for defining constitutional standards. See *Rhodes v. Chapman*, 452 U.S. 337, 348 n.13 (1981) (stating that expert opinions may be helpful and relevant with respect to some questions, but do not establish constitutional minima). Nonetheless, courts routinely refer to these standards to aid in assessing the constitutionality of conditions in correctional institutions. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 544 n.27 (1979) (finding that while professional recommendations do not establish the "constitutional minima" of cell space per inmate, they "may be instructive in certain cases"); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1285 (S.D. Tex. 1980) (noting that although *Wolfish* precludes the use of recommended standards alone to establish constitutional minima, *Rhodes* and other cases have used them as one factor relevant to the adequacy of an institution's housing facilities), *aff'd in part*, 679 F.2d 1115 (5th Cir.), *modified*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); see also *Tillery v. Owens*, 719 F. Supp. 1256, 1270 (W.D. Pa. 1989) (citing *Wolfish*, *Rhodes*, and *Ruiz* to justify reference to professional standards), *aff'd*, 907 F.2d 418 (3d Cir. 1990).

Professional correctional standards also come into play in developing appropriate relief. See, e.g., *Ruiz v. Estelle*, 650 F.2d 555, 563-64 (5th Cir. 1981) (quoting district court order incorporating professional standards of service delivery); *Newman v. Alabama*, 503 F.2d 1320, 1332 (5th Cir. 1974) (upholding remedial order which had prescribed certain standards of medical care); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 986 n.37 (D.R.I. 1977) (requiring that officials comply with certain specific standards published by "professional bodies").

¹¹⁰ See, e.g., YACKLE, *supra* note 35, at 27 (describing various standards for the operation of prisons and monitoring techniques which could be utilized without "appearance of judicial meddling"); M. Wayne Higgins & Charles J. Kehoe, *Accreditation Benefits Nation's Jails, Juvenile Detention Centers*, CORRECTIONS TODAY, May 1990, at 40, 42 ("[M]ost correctional administrators involved in the accreditation process see it as another form of insurance. . . . [S]tandards and accreditation are designed to avoid judgments."); Miller, *supra* note 108, at 58 ("The findings [of an ACA research team] indicate a solid relationship between standards and the courts. . . .").

¹¹¹ See Jacobs, *supra* note 89, at 462 (noting that the "prisoners' rights movement has contributed to a professional movement within corrections to establish national standards"); Feeley & Hanson, *supra* note 100, at 25-28 (discussing the role of litigation as an impetus for changes such as the adoption of prison regulations and the emphasis on constitutional standards in the training of local jail officials); Sturm, *supra* note 24, at 861-64 (describing the role of litigation in introducing and legitimizing norm of individual dignity and fostering development of professional standards). Indeed, many prominent figures in prison medicine and psychiatry have played crucial roles in litigation as experts, monitors, and consultants.

2. Litigation Has Contributed to the Professionalization of Corrections Leadership and Programmatic Staff

Corrections litigation has prompted the professionalization of correctional leadership, both in many individual cases and in the corrections field more generally.¹¹² Twenty years ago, many correctional administrators had little training or expertise in management.¹¹³ Often, the corrections commissioners or directors were purely political appointments.¹¹⁴ As long as administrators maintained a low profile and avoided major scandals or disturbances, their performance remained insulated from public scrutiny. The corrections field lacked any effective political or institutional incentives to develop performance standards and mechanisms for holding administrators accountable.¹¹⁵

Judicial intervention opened prisons and corrections administrators to public scrutiny and evaluation in relation to standards of performance. The high visibility of conditions litigation exposed existing management's inability to respond effectively to judicial requirements that conditions be brought up to minimal standards of decency. In many cases, this exposure triggered the replacement of correctional leadership with qualified, trained leaders possessing greater sensitivity to the demands of running constitutional facilities.¹¹⁶ Litigation challenging the adequacy of medical care

¹¹² See Jacobs, *supra* note 89, at 463 (noting that the professional organization of American prison officials has instituted an accrediting process "covering almost all aspects of prison management").

¹¹³ See TODD R. CLEAR & GEORGE F. COLE, *AMERICAN CORRECTIONS* 145-46 (1987) (criticizing correctional leadership for its "uncreative thinking, ungrounded and idiosyncratic conceptualization, and unwarranted commitment to traditionalism"); Alvin W. Cohn, *The Failure of Correctional Management*, 19 *CRIME & DELINQUENCY* 323, 323-31 (1973) (arguing that the lack of success of rehabilitation was due to incompetent correctional administration).

¹¹⁴ See, e.g., *REMEDIAL LAW: WHEN COURTS BECOME ADMINISTRATORS* 17 (Robert C. Wood ed., 1990) (stating that the prison administration in command in Rhode Island when litigation began was "strictly political" and had no experience with, or expertise in, corrections).

¹¹⁵ See Sturm, *supra* note 24, at 828 (noting that "[p]rison officials are essentially left alone as long as they maintain order").

¹¹⁶ See HARRIS & SPILLER, *supra* note 31, at 15 ("In *Holt, Hamilton, and Collins*, a change in personnel involving the highest level correctional official was believed to have aided the compliance process."); see also YACKLE, *supra* note 35, at 259 (describing new attitudes among even those administrators who had worked in the system for years); Robert G. Schwartz, *Litigation and Mediation Reduce Detention Center Overcrowding*, *PRISON J.*, Spring-Summer 1991, at 68 (following the filing of the *Santiago* complaint, the judges appointed a new Board of Managers, who in turn hired a new Executive Director); Marvin Zalman, *Wayne County Jail Inmates v. Wayne*

in correctional institutions has frequently resulted in the involvement of private professional health providers, such as university medical schools.¹¹⁷ A national commission on correctional health care now publishes a quarterly journal, certifies correctional health care professionals, and sponsors regular professional conferences.¹¹⁸ Several case studies report that this trend toward professionalization, however, has not permeated the lower levels of corrections administration.¹¹⁹ Consequently, some studies link litigation to a widening gap in perspective between administration and line staff and suggest that this gap has limited the managerial capacity of corrections administrators.¹²⁰ In some systems, lower level staff members have shown considerable resistance to reform-minded administrators and remarkable ingenuity in their capacity to frustrate the efforts of progressive administrators.¹²¹ There are

County Sheriff: *The Anatomy of a Lawsuit*, PRISON J., Spring-Summer 1991, at 15 (describing how appointment of receiver led to retention of new jail administrator, and new health and food directors); Chilton, *supra* note 46, at 145-47 (documenting appointment of experienced administrators whose abilities were crucial to reforms in prison); Little & Feeley, *supra* note 46, at 46 (noting that the county consciously replaced the sheriff with a professional administrator who was "committed to alternatives and diversion from incarceration").

¹¹⁷ See, e.g., YACKLE, *supra* note 35, at 258 (reporting vastly improved health care system provided under contract with Correctional Management Systems); Baiamonte, *supra* note 47, at 39 (reporting that litigation led to contracts with licensed physicians, a nurse-administrator, and medical assistants).

¹¹⁸ See *CGHP Program Nears 500: Over 100 Certified with Fall Exam*, CORRECT CARE, Spring 1992, at 11 (noting the results of a recent certification exam); *id.* at 7 (advertising national conference).

¹¹⁹ See CROUCH & MARQUART, *supra* note 34, at 54-55 (describing officer socialization subculture in the Texas Department of Corrections); LUCIEN X. LOMBARDO, GUARDS IMPRISONED: CORRECTIONAL OFFICERS AT WORK 162-63 (1981) (describing low status and stigma sometimes associated with position of correctional officers, discouraging them from developing strong professional identity); James B. Jacobs & Norma Crotty, *The Guard's World*, in JAMES B. JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 133, 135 (1983).

¹²⁰ See Feeley & Hanson, *supra* note 100, at 22 (pointing out one study that concluded that "court orders widen the gap between correctional leadership and prison staff by facilitating appointments of a new type of administrator whose values are more closely attuned to those of the court than traditional line staff"); see also LOMBARDO, *supra* note 119, at 129-32 (documenting guards' cynical attitudes toward correctional administrators and effectiveness of their programs); Jacobs, *supra* note 89, at 458-59 (stating that prisoners' rights movement has caused replacement of old wardens with a "new administrative elite, which is better educated and more bureaucratically minded").

¹²¹ See Richard McCleery, *Correctional Administration and Political Change*, in PRISON WITHIN SOCIETY 113, 122-27 (Lawrence E. Hazelrigg ed., 1968) (documenting staff resistance to administrative reform); Sturm, *supra* note 24, at 869-70 (describing officials' success in ignoring or sabotaging court orders).

some indications that this gap may be temporary and that the process of professionalization has begun to affect corrections staff as well.¹²²

3. Litigation Has Contributed to the Bureaucratization of Correctional Institutions

Court intervention has fostered the centralization of correctional management and the formalization of decision-making within correctional institutions.¹²³ Litigation requires corrections officials to account for a wide range of activities and conditions in their institutions. This requirement has prompted the development of improved information systems, extensive documentation, and rational, visible decision-making. Partly in response to litigation, officials have developed regularized procedures governed by written rules and regulations such that "every prison and jail in the United States . . . must work within the structure of modern bureaucratic organization."¹²⁴ Litigation's transformative impact occurred most dramatically in southern prisons, which moved from prebureaucratic plantation-style systems to modern bureaucracies.¹²⁵ The case studies document that governance by personal dominance and officially sanctioned brutality is a thing of the past. Many scholars

¹²² See YACKLE, *supra* note 35, at 257 (reporting change from prelitigation guard staff consisting primarily of poorly educated rural whites to a more diverse staff, nearly half of whom were college educated and all of whom received instruction in prison work); Dunbaugh, *supra* note 106, at 65 (stating that jail staff has become more professional); G. Larry Mays & William A. Taggart, *The Impact of Litigation on Changing New Mexico Prison Conditions*, PRISON J., Spring-Summer 1985, at 38, 51 (describing greater stability in upper and lower personnel levels, creation of a legitimate training program for correctional officers, increases in salaries for correctional officers, and recruitment of experienced corrections professionals).

¹²³ See, e.g., Chilton & Talarico, *supra* note 39, at 122 ("Under the scrutiny of the Guthrie litigation, the historical deference accorded to the warden gave way to a bureaucratic restructuring that put the prison squarely under the state's correctional authority."); Feeley & Rubin, *supra* note 35, at 126 (noting that prison management must now examine a "myriad of federal standards" daily to respond to court orders or avoid additional court action); Jacobs, *supra* note 89, at 458 (arguing that prison litigation had led to the "bureaucratization" of the prison); Wayne N. Welsh, *Jail Litigation in California: An Empirical Assessment*, PRISON J., Spring-Summer 1991, at 30, 39 (stating that litigation led to the creation of the new County Department of Correction); Zalman, *supra* note 116, at 15 (stating that litigation led to the assumption of responsibility for jail by the county).

¹²⁴ Feeley & Rubin, *supra* note 35, at 126.

¹²⁵ See Feeley & Hanson, *supra* note 100, at 26 (noting that "[i]n effect the courts rejected the southern model").

argue that the move toward bureaucracy has led to safer, less arbitrary, and more humane institutions.¹²⁶

4. Litigation Is Associated with Short-Term Demoralization of Staff and Disruption of Institutional Order

A number of commentators have observed that litigation contributes, at least in the short run, to inmate violence and staff demoralization by raising inmates' expectations, undermining prison officials' authority, widening the gap between administration and staff, and by limiting the discretion of prison officials vis-à-vis inmates.¹²⁷ The most frequently cited studies, however, fail to establish a causal chain between violence and litigation.¹²⁸ Others have attributed violence following litigation to abdication by prison administrators and staff of responsibility for developing legitimate forms of inmate control to replace the traditional, repressive control mechanisms invalidated by the courts.¹²⁹ Similar short-term

¹²⁶ See CROUCH & MARQUART, *supra* note 34, at 232-33 (noting that a survey of prisoners in the Texas Department of Corrections system conducted several years after litigated reform indicated that the prisoners perceive that the TDC is a "safer place"); JACOBS, *supra* note 45, at 209 (noting that under a "corporate" model of management, prisoners at Stateville receive treatment and opportunities commensurate with the law and fairness); Feeley & Rubin, *supra* note 35, at 145 (stating that "the protection of individual rights is only meaningful in the context of a strong bureaucracy, for bureaucratic organization . . . substitutes the rule of law for the will of the person").

¹²⁷ See, e.g., DIJULIO, *supra* note 50, at 219, 226 (noting an increase in "rapes, assaults, murders, and other forms of prison disorder" following prison litigation involving the Texas Department of Corrections, as well as "demoralized and beleaguered staff"); Kathleen Engel & Stanley Rothman, *Prison Violence and the Paradox of Reform*, PUB. INTEREST, Fall 1983, at 91, 94, 100-01 (describing the paradoxical rise in prison violence paralleling the expansion of the prison reform movement); Chilton, *supra* note 46, at 150, 169 (stating that the changes brought by institutional reform litigation involving the Georgia state prison disrupted prison social organization and may have led to an increase in violence).

¹²⁸ See Feeley & Hanson, *supra* note 100, at 19-21 (noting that generalizations that indicate an increase in violence have been drawn from a "skewed sample that overemphasizes resistance to change," and are based on small time frames that do not adequately reflect the real adjustment over a period of a number of years).

¹²⁹ See, e.g., Vincent Nathan, *Reflections on Two Decades of Court-Ordered Prison Reform*, Lecture at the Criminal Justice Workshop, New York University School of Law. Nathan notes that:

[V]iolence of the level suffered by [Texas Department of Corrections] prisoners and staff during 1984 and 1985 was not an inevitable of judicial intervention

. . . .

Quite apart from the lack of bureaucratic skills needed to deal with the complex task of restructuring an unconstitutional system, the attitude of

reactions have been observed in connection with purely administrative attempts to reform prison programs and organization, suggesting that any attempt at prison reform will initially trigger destabilization and resistance.¹³⁰ Case studies analyzing the impact of litigation suggest with virtual unanimity that even when violence and turmoil occur, they may well be short-lived and may give way to effective and legal methods of control over inmate behavior.¹³¹

5. Litigation Has Increased the Visibility and Accountability of Corrections

Litigation has opened corrections institutions to scrutiny by lawyers, judges, state and local agencies, and the media. Institutions previously insulated from rigorous scrutiny by their remote locations, the lack of public concern over their inadequacies, and their careful control over public access face regular evaluation by lawyers, state agencies, and the courts. The sustained presence of outsiders, particularly inmates' lawyers, has reduced some of the more egregious practices and has led to greater adherence to rules and regulations.¹³² In some cases, litigation has led to the institution of regular inspections by state agencies charged with overseeing

TDC leadership . . . played a major role in the precipitous deterioration of security that occurred.

Id. at 42-45.

¹³⁰ See JACOBS, *supra* note 45, at 79 (describing the "deeply imbedded resistance to change" at Stateville, where staff found ways to circumvent new rules); McCleery, *supra* note 121, at 113, 127-29 (describing how administrative reform efforts of a new warden in Hawaii prison system led to destabilization as the "old guard" battled to recapture authority).

¹³¹ See CROUCH & MARQUART, *supra* note 34, at 233 ("[W]hile intervention may initially promote disorganization and violence, negative consequences do not necessarily become a permanent feature of the prisoners' world. That is, the paradox of reform is only paradoxical for a relatively short period."); Feeley & Hanson, *supra* note 100, at 24-25 (summarizing several long-term or ongoing studies that found generally that court-ordered reform has not exacerbated continuing problems of inmate violence and may have resulted in less crowded and safer jails and a "new order and stability").

¹³² See JACOBS, *supra* note 45, at 123. Jacobs notes that:

It is the [Prison Legal Services] staff members' daily presence at the prison, their persistent questioning of the rules, their relentless demands to see files and records, and the fear they invoke in the hearts of many of the prison staff that has the most profound effect on the day-to-day administration of the prison. . . . Some of the more egregious practices were halted; short phone calls and meetings with the warden increased; adherence to the rules and regulations necessarily became more observable and explicit.

Id.

compliance with state health and safety regulations. Litigation has also generated considerable media coverage of prison conditions. Virtually every case study reports extensive media coverage of the litigation and the conditions and practices in the targeted institutions.¹³³ This media coverage exposed serious abuses and inhumane conditions in correctional institutions, and is widely credited with increasing public awareness of the inadequacies in correctional institutions and acceptance of the need for reform.¹³⁴

In sum, litigation has had a considerable effect on the organization, leadership, and structure of corrections institutions. It has fostered the acceptance of norms and standards governing correctional institutions, contributed to the professionalization of corrections leadership, prompted the rationalization and formalization of correctional institutions, and increased their visibility and accountability. Litigation has also been associated with short-term demoralization of staff and disruption of institutional order.

C. *Litigation's Impact on Conditions and Practices*

The case studies also show that court intervention generally has improved the living conditions and practices in the facilities at issue. In some cases, the improvements linked to court-ordered change have been quite dramatic¹³⁵ and have concerned virtually every

¹³³ This finding again conflicts with Rosenberg's assessment of the impact of court intervention, and illustrates the distorting effect of his exclusive focus on the response to Supreme Court decisions. See ROSENBERG, *supra* note 13, at 111-16 (minimizing courts' impact on media coverage of issues such as school desegregation and womens' rights).

¹³⁴ See, e.g., HARRIS & SPILLER, *supra* note 31, at 24 ("Repeated publicity about harsh conditions and brutal or uncaring treatment increased public receptivity toward correctional reform."); YACKLE, *supra* note 35, at 45, 66, 95 (describing extensive media coverage of Alabama litigation); Parker, *supra* note 32, at 144, 151-52, 159 (documenting media coverage of Arkansas litigation and prison conditions exposed through it). Public opinion surveys show that, when educated about the issues, the public "[is] not nearly as punitive as some of their leaders think. . . . Studies show that the public views rehabilitation as a primary purpose of criminal sanctions, and they consistently support treatment for drug-addicted offenders." AMERICANS BEHIND BARS, *supra* note 3, at 24.

¹³⁵ See, e.g., Chilton & Talarico, *supra* note 39, at 122 ("The pre-Guthrie prison with its overcrowded dormitory wings, segregated facilities, discriminatory proceedings, limited medical treatment, and poor sanitation systems gave way to a prison accredited by the American Correctional Association and held out as a model for the rest of the state."). As noted by Harris and Spiller:

A great many improvements in the prison system related to the environment of the prisons and the quality of life enjoyed by the inmates. Those improvements largely responded directly to requirements established by the

aspect of inmate life.¹³⁶ Yet, in many systems improvements have been limited to raising living conditions to minimal standards, and have failed to provide a systemic response to the overcrowding problem plaguing most correctional institutions.

The most blatant abuses, such as Arkansas's Tucker telephone, Alabama's "doghouses,"¹³⁷ and widespread use of officially sanctioned violence, have been virtually eliminated, often in direct response to litigation.¹³⁸ The case studies also show that in many instances, previous legislative and administrative efforts to eliminate these abuses had been unsuccessful, and that litigation was a crucial factor in exposing and correcting these abuses.¹³⁹

The case studies suggest that litigation may be particularly successful in improving the quality of medical care and physical conditions in targeted institutions. Even in cases where compliance has otherwise been uneven, litigation has led to the development and maintenance of a vastly improved system of medical care.¹⁴⁰

court order. . . . They were clearly attributable to the litigation The changes in the prison system were more than cosmetic; they were broad and profound. The system bore little resemblance in 1976 to the system that existed before 1969. Every aspect of prison life was improved by the litigation.

HARRIS & SPILLER, *supra* note 31, at 113; *see also* Storey, *supra* note 40, at 166 (noting dramatic improvements in quality of life in the Manhattan House of Detention, also known as "the Tombs").

¹³⁶ *See* Chilton & Talarico, *supra* note 39, at 151 ("[T]he overcrowded, run-down, violent, and poorly managed maximum security prison was rebuilt and restructured into the modern, single cell, relatively safe, ACA-accredited institution it is today.")

¹³⁷ The doghouse was the punishment cell in Alabama:

[It] measured only thirty-two square feet in area—the size of an ordinary door. The doghouse was accessible to visitors only with great difficulty. As much as a half hour might pass before a guard could locate the keys and open the main door, described by one witness as a "tombstone." . . . Inmates in the doghouse had no beds, no lights, no toilets, no running water, no reading matter. They were fed once a day and allowed to shower once in eleven days. They were never released for exercise. They were crushed together, as many as six men to a cell, for weeks at a time.

YACKLE, *supra* note 35, at 12-13.

¹³⁸ *See generally* MARTIN & EKLAND-OLSON, *supra* note 34, at 171 (documenting the role that the court played in forcing Texas officials to acknowledge and eliminate the building tender system—a system that gave inmates formal authority and weapons to manage and discipline other inmates).

¹³⁹ *See, e.g.*, CROUCH & MARQUART, *supra* note 34, at 91 (noting that litigation administrators had earlier tolerated the building tender system despite their recognition of its dangerous and violent character).

¹⁴⁰ *See, e.g.*, YACKLE, *supra* note 35, at 258 (stating that medical and mental health care, now under contract, are vastly improved); Baiamonte, *supra* note 47, at 39 ("[H]ealth care plans for inmates were 'far superior to the prior arrangements and

This relative success may be attributable to the independence and professionalism of medical care providers brought in to provide services in response to litigation. In addition, the case studies directly link litigation to the appropriation of funds for capital expenditures to renovate and expand correctional facilities.¹⁴¹ The quality of the food and lighting in prisons has improved markedly as the result of litigation. Several case studies suggest that corrections officials are less resistant to court-ordered changes in physical facilities, and that these types of reforms are easier to achieve.¹⁴²

Litigation has virtually eliminated the use of inmates as trustees or building tenders. This system of governance, which relied on inmates to manage other inmates and maintain order, prevailed in many Southern institutions and contributed strongly to the arbitrary and violent environment that characterized prison life. Its elimination dramatically transformed the structure of governance in Southern prisons and eliminated some of the worst abuses in those systems.¹⁴³ In many jurisdictions, staffing ratios improved dramat-

went far beyond what was required by the court orders.' . . . Undoubtedly, *Holland v. Donelon* was the impetus to the development of a correctional center medical unit that is today the only accredited facility in Louisiana . . ." (quoting a 1975 field study of Jefferson Parish jail conducted by students and doctors from Tulane University's Graduate School of Public Health)); Mark J. Lopez & Dudley P. Spiller, Jr., *The New Orleans Jail Litigation (1969-1991)*, PRISON J., Fall-Winter 1990, at 50, 52 ("The most significant gains were made in the areas of medical care and prison security."); Parker, *supra* note 32, at 233 (noting that investigators found medical care "to be adequate or above average with the exception of mental health care").

¹⁴¹ See, e.g., HARRIS & SPILLER, *supra* note 31, at 24 ("The amount of funds available to the correctional administrators increased significantly in each case."); MARTIN & EKLAND-OLSON, *supra* note 34, at 238-39 (stating that in order to meet the court-imposed standards the state increased its corrections budget significantly). It is less certain whether litigation has led to overall increases in the noncapital budget of corrections institutions. Taggart argues that the impact of litigation on operating costs is negligible in many states. See William A. Taggart, *Redefining the Power of the Federal Judiciary: The Impact of Court-Ordered Prison Reform on State Expenditures for Corrections*, 23 L. & SOC'Y REV. 241, 248-68 (1989) (examining the growing willingness of courts to mandate financial commitments in achieving financial reform and the link between court-ordered prison reform and state correction expenditures).

¹⁴² See Crouch & Marquart, *supra* note 95, at 101 ("On such issues as poor medical care, crowding, and sanitation problems . . . there was relatively little resistance to change. . . . The resistance came instead on those points in the decree that directly questioned the dominance of officers and their discretion to maintain control in ways they deemed effective."); Parker, *supra* note 32, at 362 ("Structural changes are not only the easier of the two to accomplish—they are also the most politically feasible changes to attempt.") (quoting R. Sarver, Commissioner of Corrections, Little Rock, Arkansas)).

¹⁴³ See Feeley & Hanson, *supra* note 100, at 26 ("Although the [Southern

ically in response to court orders.¹⁴⁴ In Alabama, once court-ordered reforms took hold, the rate of violence plummeted, and inmates reported that they felt safe in dormitories that were described as a "jungle atmosphere" prior to the litigation.¹⁴⁵ Crouch and Marquart report that the Texas Department of Corrections is a safer place as a result of the bureaucratic order instituted in response to court intervention.¹⁴⁶

In some cases, however, the implementation process has been unable to overcome internal and external resistance to change, particularly in areas requiring the cooperation of internal staff or public officials outside the prison. For example, Larry Yackle describes the failure of the court's effort to reform Alabama's system for classifying inmates for purposes of determining custody grades and program assignments.¹⁴⁷ The court ordered defendants to contract with an outside organization to implement a new classification plan. The Prison Classification Project ("PCP") developed new procedures and criteria for classification and

plantation] model . . . had long been under attack, intervention by the courts removed whatever vestiges of legal legitimacy [have] survived . . ."); Feeley & Rubin, *supra* note 35, at 143-44 (noting that before the era of prison litigation the Southern prison systems were based on a premise entirely different from the more familiar premise on which other American prison systems were based and that litigation rejected "not only conditions [in Southern prisons] but also the underlying vision of the prison").

¹⁴⁴ See, e.g., CROUCH & MARQUART, *supra* note 34, at 230 (noting that an important element in the new control structure was a much larger guard force); Parker, *supra* note 32, at 374 (describing employment of additional security personnel).

¹⁴⁵ YACKLE, *supra* note 35, at 257; see also HARRIS & SPILLER, *supra* note 31, at 23 (noting the contribution of *Hamilton v. Schiro* to the reduction of violent incidents and the reported improvements in personal safety from each of the cases studied).

¹⁴⁶ See CROUCH & MARQUART, *supra* note 34, at 232 ("Not only do institutional data reveal less violence, but also inmates in 1987 perceived [the Texas Department of Corrections] to be a much less dangerous place compared to the late 1970s and early 1980s.").

¹⁴⁷ See YACKLE, *supra* note 35, at 138. Yackle notes:

By all accounts, the classification of prisoners was central to the task of reforming the Alabama prison system. At the basic level of the theory in *Pugh*, it was essential to identify violent inmates in order to remove them from the dormitories [I]t was necessary to discover prisoners' needs and desires so that candidates for educational and vocational programs could be assigned accordingly.

Id. At the time of the trial in *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part per curiam sub nom. Alabama v. Pugh*, 438 U.S. 781, *cert. denied*, 438 U.S. 915 (1978), "there was no 'working' classification system in the Alabama prison system. . . . In general, inmates were assigned to any institution, any living quarters, and any program where space was available." YACKLE, *supra* note 35 at 139 (footnote omitted).

reclassified all inmates in the Alabama prisons. A year after PCP's departure, an expert found "little trace of the work that [PCP] had done."¹⁴⁸

Even in jurisdictions where litigation is credited with dramatically transforming conditions in correctional institutions, litigation's impact has often been limited to raising conditions and practices to minimal standards.¹⁴⁹ Harris and Spiller's study of judicial intervention in four correctional settings reports that conditions were improved, but there was considerable dissatisfaction with the quality of life.¹⁵⁰ In Alabama, Yackle reports that conditions were not "affirmatively good . . . merely better."¹⁵¹ Harris and Spiller report that "relief was intended to eliminate illegality and achieve minimal constitutional acceptability. It was not directed toward the creation of ideal or even progressive programs."¹⁵²

In most of the cases studied involving adult institutions, litigation has not resulted in the development of progressive, state-of-the-art facilities or deinstitutionalization of offenders. For example, there is wide consensus within the corrections field that corrections should move in the direction of small, decentralized living units governed by unit management, rather than large, centrally managed institutions.¹⁵³ Indeed, experience suggests

¹⁴⁸ *Id.* at 165. For other examples of prison officials' capacity to ignore, resist, or sabotage court orders, see Sturm, *supra* note 24, at 869-71.

¹⁴⁹ This is not a surprising finding in light of the courts' limited mandate. Courts that attempt to require defendants to exceed minimal standards will be reversed on appeal. See, e.g., Ruiz v. Estelle, 679 F.2d 1115 (5th Cir.) (reversing aspects of Judge Justice's order, inter alia, requiring state to use parole and furloughs to reduce overcrowding and to house only one inmate in cells of 60 feet or less), *modified*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). However, there are many instances where court intervention has prompted or enabled defendants to go beyond minimal standards in their programmatic responses. See *infra* text accompanying notes 180-182, 210-212.

¹⁵⁰ See HARRIS & SPILLER, *supra* note 31, at 22-23 (stating that most of the institutions were raised only to minimum standards and remained overcrowded, physical limitations imposed by antiquated structures were not overcome, and counselling, education, and other programs were not meaningfully available).

¹⁵¹ YACKLE, *supra* note 35, at 259.

¹⁵² HARRIS & SPILLER, *supra* note 31, at 28.

¹⁵³ See, e.g., Jim Bencivenga, *What Can Be Done Now?*, CHRISTIAN SCI. MONITOR, July 28, 1988, at 14, 15 (repeating call by John DiIulio for unit management to help create better prisons); Penny Wise on Rikers Island, N.Y. TIMES, Apr. 6, 1988, at A22 ("The city's corrections community offers nearly unanimous support for a shift to unit management. Correction Commissioner Richard Koehler is an articulate advocate. The Mayor's Criminal Justice Coordinator, the Board of Correction and the Legal Aid Society all urge its adoption, as does the National Institute of Correction."); Special Focus—Unit Management, CORRECTIONS TODAY, Apr. 1991, at 24-48 (describing the

that a move to unit management eliminates many of the problems prompting judicial intervention.¹⁵⁴ Yet, litigation does not mandate or necessarily increase the use of unit management.¹⁵⁵ Courts have not interpreted the Eighth Amendment to invalidate outdated institutions that warehouse inmates, even if levels of violence are predictably higher in those institutions, as long as inmates receive the basic necessities of life.¹⁵⁶ Methods of incarceration that are generally acknowledged to be ineffectual or undesirable, such as housing inmates in large, rural institutions with dormitory-style housing and little opportunity for work or education, persist in systems that achieved compliance with court orders concerning prison conditions.¹⁵⁷

The case studies also document the tendency of corrections administrators to respond initially to litigation by focusing tremendous attention and resources on institutions under court order at the expense of other facilities.¹⁵⁸ One case study observes:

value, success, and future of unit management).

¹⁵⁴ See John J. DiIulio, Jr., *Conflicts of Criminal Interest: A Program for Streets and Jails*, L.A. TIMES, Oct. 1, 1989, § 5, at 3 ("Where it has been tried on Riker's, unit management has reduced rates of violent incidents and improved inmate-staff relations.").

¹⁵⁵ In an earlier article, I noted that

[t]he constitutional prohibition against cruel and unusual punishment is essentially a negative doctrine, prohibiting certain practices and conditions, but containing no affirmative normative vision of prison practices. Constitutional doctrine therefore does not directly mandate the development of norms that promote and protect individual integrity, only the elimination of visible abuses.

Sturm, *supra* note 24, at 872-73.

¹⁵⁶ Indeed, when Judge Justice required Texas officials to build or restructure institutions that are amenable to unit management, he was reversed on appeal for exceeding the scope of the constitutional violation and impermissibly intruding into administrative discretion. See *Ruiz v. Estelle*, 679 F.2d 1115, 1145-63 (5th Cir.), *modified*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983).

¹⁵⁷ See *id.* at 1148 ("However inefficient the management of large prisons may be when compared with the administration of smaller ones, and however desirable it may be to locate prisons near large communities, the failure to do either does not cause confinement to be cruel and unusual."). Larry Yackle reports that Judge Johnson focused exclusively on the conditions in the institutions, and was unwilling to consider the systemic inadequacies that caused prison overcrowding, or to involve the actors whose policies and practices thwarted efforts to eliminate unconstitutional overcrowding. See YACKLE, *supra* note 35, at 89.

¹⁵⁸ One study concludes that "the judiciary's ability to alter pre-established spending patterns at the state level is partially a function of its willingness to broaden the scope of reform to focus on the entire prison system rather than on a single institution." Taggart, *supra* note 141, at 265.

The only facility affected by *Stone* is County Jail #1. CJ #1 has received more attention and resources in the past 10 years than the two other facilities. To a certain extent, these facilities have suffered from the priority given to CJ #1. They have frequently been used as an overflow reservoir to prevent overcrowding in CJ #1. CJ #2 and CJ #3 have far lower staffing levels and are not as well maintained as CJ #1. Many officials and employees on defendants' side would actually prefer if the entire system were under court order.¹⁵⁹

The case studies reveal considerable variation in litigation's long-term impact on conditions in correctional institutions. In some cases, particularly where systemic reforms have been achieved and effective local monitoring mechanisms have been institutionalized, changes appear to have endured over time.¹⁶⁰ In other cases, the studies reveal substantial backsliding in institutions that have previously made considerable progress toward achieving constitutional conditions.¹⁶¹

The impact of judicial intervention on incarceration rates and construction of new facilities is mixed. In many overcrowding cases, courts have used caps to limit the population in facilities.¹⁶² The

¹⁵⁹ Lungwitz, *supra* note 46, at 42 (describing the effect of litigation on the San Francisco county jail system).

¹⁶⁰ See, e.g., Chilton & Talarico, *supra* note 39, at 122 (claiming that in the Georgia maximum security prison at Reidsville changes were the result, in large part if not solely, of the *Guthrie* litigation); Mark Soler & Loren Warboys, *Services for Violent and Severely Disturbed Children: The Willie M. Litigation*, in STEPPING STONES, *supra* note 29, at 61, 107-10 (discussing changes in North Carolina's treatment of emotionally disturbed children that resulted from the *Willie M.* litigation); Baiamonte, *supra* note 47, at 39-48 (noting changes in prison conditions in Jefferson Parish, Louisiana that occurred as a result of the *Holland v. Donelon* litigation). Vincent Nathan, the monitor in *Guthrie v. Evans*, reports that the institutions targeted by the Georgia litigation remain "clean as a whistle constitutionally." Interview with Vincent Nathan, Partner, Nathan & Roberts and Special Master, in Washington, D.C. 9 (July 19, 1991) [hereinafter Nathan Interview] (transcript on file with author).

¹⁶¹ See, e.g., YACKLE, *supra* note 35, at 259 ("Even the new prisons in the north showed signs of wear; in the south, the threat of slipping back to ruin was palpable."); Lopez & Spiller, *supra* note 140, at 53 ("The list of deplorable conditions that resulted from the crowding generally tracks the findings made by Judge Chistenberry 20 years ago."); Parker, *supra* note 32, at 376 (reporting backsliding in overcrowding, verbal abuse, discipline, and staffing).

¹⁶² See, e.g., *Celestineo v. Singletary*, 147 F.R.D. 258, 261 (M.D. Fla. 1993) (adopting the Special Master's Report and Recommendation that "for the past several years the Defendant [prison] has been in no less than substantial compliance with the Overcrowding Settlement Agreement filed in 1949"); *Loya v. Board of County Commrs.*, 1992 U.S. Dist. LEXIS 11242, at *6 (D. Idaho May 4, 1992) ("The Court finds that a maximum of forty (40) prisoners at any one time will be allowed in the current jail facility."); *Vazquez v. Carver*, 729 F. Supp. 1063, 1069 (E.D. Pa. 1989)

direct impact of caps on institutions is obvious; if the court enforces its order the population of the targeted facilities falls.¹⁶³

The more difficult issue concerns the impact of court intervention on the system's overall approach to the overcrowding problem. The case studies do not answer this question definitively. Several patterns of response emerge from the case studies. In some cases, court intervention simply failed to have any significant effect on the overcrowding problem.¹⁶⁴ In a significant number of cases, administrators responded in the short run to population caps by transferring inmates to other facilities.¹⁶⁵ Population limits in state correctional institutions have in some cases caused delays in the transfer of sentenced prisoners to state custody, thereby dramatically increasing overcrowding in local jails.¹⁶⁶

(finding that "[w]ithout a population cap, the inmates . . . would be subjected to continued genuine 'privations and hardship'"); *Essex County Jail Inmates v. Amato*, 726 F. Supp. 539, 541 (D.N.J. 1989) (finding that a "maximum inmate capacity of 594 effective July 1, 1983" had not been met as of November 1989); *Benjamin v. Malcolm*, 659 F. Supp. 1006, 1007 (S.D.N.Y. 1987) ("There is no argument but that the population caps must be reimposed and that the overcrowding at the North Facility must end.").

¹⁶³ See, e.g., *HARRIS & SPILLER*, *supra* note 31, at 12-13 (reporting compliance with a population limit on Orleans and Jefferson Parish Prisons); William G. Babcock, *Litigating Prison Conditions in Philadelphia: Part II*, PRISON J., Fall-Winter 1990, at 74, 79 ("While the admissions moratorium certainly was not a long range solution to the problem of prison overcrowding, it did serve as an effective measure to keep the population at or near the [maximum allowable population] while the City searched for and implemented long-range means to alleviate the problem."); Allen F. Breed, *Prison Reform Leads to Jail Crisis*, PRISON J., Spring-Summer 1991, at 24, 25 (discussing decision by Judge Higgins to enjoin the state from admitting any new prisoners to the system until the institutions were brought within their capacity levels, thereby rapidly eliminating overcrowding in state prisons); Lopez & Spiller, *supra* note 140, at 52 ("To this day, Judge Polozola sets the population levels at all of Louisiana's prisons and jails.").

¹⁶⁴ See, e.g., *Welsh*, *supra* note 123, at 39 (arguing that new lawsuit filed challenging overcrowding after first suit failed to produce any significant progress toward dealing with overcrowding); *Parker*, *supra* note 32, at 362 (stating that Arkansas never reduced overcrowded conditions, particularly in 100-man barracks (citing *Finney v. Mabry*, 546 F. Supp. 628, 648 (E.D. Ark. 1982))).

¹⁶⁵ See *HARRIS & SPILLER*, *supra* note 31, at 159-60 (noting that in *Holland v. Donelon*, transfers were the primary device used to keep population within the court limit, resulting in the detention of Jefferson Parish prisoners at other facilities where they experienced overcrowding and other unsatisfactory treatment); *YACKLE*, *supra* note 35, at 171 (reporting that the Commissioner of Corrections in Alabama responded to each new population cap order by moving prisoners from the jail concerned to some other jail that was not yet subject to a court order).

¹⁶⁶ See, e.g., *YACKLE*, *supra* note 35, at 97 (stating that population cap in state case led to backing up of inmates in local jails); *Breed*, *supra* note 163, at 25 (noting that as a result of population limits in state system, population in local jails in Tennessee

A second type of response to overcrowding by state and local officials or the courts involves the use of emergency or stopgap measures, such as emergency releases of inmates.¹⁶⁷ In many instances, this approach has not been sufficient to alleviate overcrowding even in the short run.¹⁶⁸ This type of response has sometimes triggered a strong political backlash that has limited its future availability as a population control mechanism.¹⁶⁹

A third type of response observed in most of the case studies is the expansion of the capacity of the targeted system through prison construction and increased use of temporary housing. In some of these cases, plans were already in the works for construction of new facilities, but litigation was credited by some for pushing through previously unsuccessful bond issues or expediting construction.¹⁷⁰ In almost every case studied involving adult institutions, responsible officials responded to overcrowding orders at least initially by seeking to build new facilities.¹⁷¹ In some cases, "the promise of

began to increase rapidly).

¹⁶⁷ See Lungwitz, *supra* note 46, at 36 (discussing how the extensive use of pre-release powers given to sheriff by the court were inadequate in combatting overcrowding).

¹⁶⁸ See Babcock, *supra* note 163, at 79 (discussing diminishing effectiveness of population cap in part because of amendments expanding exceptions to admissions moratorium); Lungwitz, *supra* note 46, at 36 (stating that jail was in violation of overcrowding provisions prior to opening of new jail even though sheriff made extensive use of prerelease powers).

¹⁶⁹ See YACKLE, *supra* note 35, at 202-03. In Alabama, the Attorney General blamed the federal court and governor for the release of inmates, and attempted to "capitalize on public anxiety over the release of convicts and thus increase his political popularity—both affirmatively, by resisting the release order in court, and negatively, by suggesting that [the governor] favored the release of felons and contrasting the governor's stance with his own." *Id.* The Fifth Circuit has limited the availability of prisoner releases as a mechanism for enforcing population caps, directing district courts first to apply contempt sanctions for noncompliance. See *Newman v. Alabama*, 683 F.2d 1312, 1321 (11th Cir. 1982) (holding that the district court abused its discretion by ordering the release of prisoners to alleviate prison overcrowding), *cert. denied*, 113 S. Ct. 1050 (1993). Similarly, the Ninth Circuit reversed a district court order that gave the sheriff the power to supersede sentencing orders and release inmates when they complete 50% of their sentence. However, it left undisturbed a ruling allowing the sheriff to release inmates when they complete 70% of their sentence because this ruling did not require the sheriff to override state law. See *Stone v. San Francisco*, 968 F.2d 850 (9th Cir. 1992); see also Richard Barbieri, *9th Circuit OKs Jail Crowding Fines*, RECORDER, June 26, 1992, at 1, 1.

¹⁷⁰ See, e.g., HARRIS & SPILLER, *supra* note 31, at 25-26 (reporting that in two cases studied, voters approved bond issues for construction of new facilities in aftermath of litigation).

¹⁷¹ See, e.g., CROUCH & MARQUART, *supra* note 34, at 238 (reporting decision by Texas, California, and other large states to build more prisons); YACKLE, *supra* note 35, at 255 (noting that a commissioner regarded the futility of construction as a

a new jail slowed down effective action" toward dealing with the overcrowding problem.¹⁷² Invariably, the hope that construction of new facilities alone would solve the overcrowding problem proved illusory; within a short time, the new facilities were full and population pressures continued.¹⁷³

Finally, in some cases the initial reliance on construction eventually gave way to a more systemic and potentially successful approach to overcrowding. For example, in Jefferson Parish, which continued to face overcrowding and renewed litigation after constructing two new jails, local authorities "ordered its Criminal Justice Coordinating Council ("CJCC") staff to begin a systemic and coordinated approach so that all parts of the criminal justice system would contribute to the alleviation of jail overcrowding."¹⁷⁴ Local officials report that the costs of building and maintaining new facilities have led them to turn to nonconstruction methods to alleviate the problem.¹⁷⁵

In Tennessee, the Sixth Circuit faced a situation in which separate population caps had been imposed on the state system and county jails, making it impossible for the commissioner to comply

means of solving overcrowding yet proposed massive construction program to keep pace with burgeoning inmate population); Baiamonte, *supra* note 47, at 41 (discussing construction of new 302-bed facility in response to overcrowding); Dunbaugh, *supra* note 106, at 65 ("[T]he need for more beds diverted much of this budget and most of next year's capital improvements budget to the construction of two new 50-bed dormitories . . ."); Parker, *supra* note 32, at 374-75 (describing new facilities).

¹⁷² Zalman, *supra* note 116, at 12.

¹⁷³ See, e.g., YACKLE, *supra* note 35, at 122 (reporting that a new, larger prison was built but that it did not offer relief); Zalman, *supra* note 116, at 12 (noting that new jail opened in 1985 with authorized room for 750 inmates but was soon occupied by 1300 inmates); see also *Rufo v. Inmates of Suffolk Co. Jail*, 112 S. Ct. 748 (1992) (documenting the failure of construction of new facility to solve county jail's overcrowding problem).

¹⁷⁴ Baiamonte, *supra* note 47, at 41-42. This approach included the use of citations-in-lieu-of-arrest by police, tracking cases, alternative release programs, releases, "good behavior" reductions in sentences, post-arrest screening by the district attorney, case scheduling practices, increased use of nonincarcerative sentencing options, and more lenient bail practices. See *id.* at 42-45.

¹⁷⁵ See *id.* at 46; see also Thomas Ostrowski, *Judicial Intervention and Jail Reform*, in *CRIMINAL CORRECTIONS: IDEALS AND REALITIES* 167, 175 (Jameson W. Doig ed., 1983) (discussing adoption by judge of systemic approach to defining problems and solutions of overcrowding, with subsequent gradual and steady decline of jail population and dramatic improvement in living conditions in the jail); Wayne N. Welsh & Henry N. Pontell, *Counties in Court: Interorganizational Adaptations to Jail Litigation in California*, 25 L. & SOC'Y REV. 73, 94-95 (1991) (noting that litigation contributed to the eventual development of interagency coordination and "more proactive responses").

with both. The circuit court responded by initiating a mediation process facilitated by its senior conference attorney to seek a comprehensive solution to the overcrowding problem. The mediation produced an agreement that led to the appointment of a Consultant for Local Corrections ("CLC") and the creation of an Implementation Coordinating Committee ("ICC") composed of attorneys and county executive officers, sheriffs, the chair of the parole board, the commissioner of corrections, and legislators. The CLC performed a population capacity analysis which revealed that in every county the capacity levels were smaller than existing populations. The CLC then developed an array of suggestions as to how to reduce the jail population, which was turned over to the ICC for review and comment. A final report, appealed by only one county, was submitted to the court, which ordered the implementation of the CLC's recommendations. This federal court order initiated a process that led each county to develop a range of population reduction mechanisms.¹⁷⁶

Reports and case studies concerning litigation involving overcrowding in juvenile institutions suggest that systemic responses to overcrowding may be easier to achieve in the juvenile justice system.¹⁷⁷ A case study of the *Willie M.*¹⁷⁸ litigation involving North Carolina's treatment of aggressive, emotionally disturbed children reports that the case led to the complete restructuring of the system for delivering services to these children.¹⁷⁹ The state reduced the number of children confined in juvenile detention centers, training schools, and other secure facilities and the number of days children spent in those institutions.¹⁸⁰ Since the *Willie M.* settlement, there has been an increase in the number of days children are receiving appropriate treatment, an increased use of

¹⁷⁶ See Breed, *supra* note 163, at 26-28 (discussing different population control mechanisms, including new construction, early release, and other "creative" options).

¹⁷⁷ This view was strongly articulated by Barry Krisberg, president of the National Council on Crime and Delinquency, an organization conducting major research and consulting in both juvenile and adult corrections. See Interview with Barry Krisberg, President, National Center for Crime and Delinquency, in San Francisco, Cal. 3 (July 17, 1993) [hereinafter Krisberg Interview] (transcript on file with author) (noting that in the juvenile area there are some clear successes in moving toward community-based programming, and more openness to these innovations).

¹⁷⁸ *Willie M. v. Hunt*, 657 F.2d 55 (4th Cir. 1981).

¹⁷⁹ See Soler & Warboys, *supra* note 160, at 107.

¹⁸⁰ See *id.*

less restrictive settings, and an increase in the use of ancillary non-residential services.¹⁸¹

In Pennsylvania, litigation also prompted the development of a system-wide approach to overcrowding in the juvenile justice system. At the initiation of the Juvenile Law Center, participants in the juvenile justice system negotiated a resolution of litigation concerning conditions and overcrowding in Pennsylvania juvenile justice institutions.¹⁸² The parties used interest-based mediation, facilitated by a neutral mediator, to develop a short-term agreement to end overcrowding in the juvenile detention center and a long-term plan of regular meetings among responsible officials to develop a unified approach to juvenile justice in Philadelphia. The implementation of these agreements has led to a reduction in population and the development of effective population control mechanisms.

D. *Accounting for Litigation's Mixed Success*

A careful analysis of case studies of court intervention in correctional institutions suggests that the impact of litigation on conditions and practices varies considerably. In some cases litigation has prompted dramatic, systemic change that has endured for years after a court ceased active involvement. In other cases court intervention has had a more superficial impact, and positive reforms appear to be short-lived. Before attempting to explain these varying results, it is important to understand how litigation ever has a significant impact on conditions, practices, and organizational capacity in correctional institutions.

Given the view articulated by some commentators that courts lack the capacity to implement their orders, one might ask why litigation has been at all successful in promoting reform.¹⁸³ Analysis of the case studies suggests several factors that prompt government officials to change in response to court intervention. First, discovery mechanisms and monitoring devices serve to uncover the existence of gross inadequacies in prison conditions

¹⁸¹ See *id.* at 107-08.

¹⁸² See Schwartz, *supra* note 116, at 72-75; Robert F. Schwartz, *Philadelphia Solves Juvenile Overcrowding by Mediation*, OVERCROWDED TIMES, March 1991, at 1, 16 (reporting that three days of mediation resulted in agreements, a process for continued management of juvenile justice system, and population levels below court-ordered population cap for the first time in over a year).

¹⁸³ For a more thorough discussion of the attributes enabling courts to prompt correctional reform, see Sturm, *supra* note 24, at 846-48.

that are otherwise insulated from sustained public scrutiny. Extensive and sustained media attention paid to corrections litigation creates pressure to address these inadequacies. Second, the case studies suggest that corrections officials are motivated to achieve compliance with court orders by an overwhelming desire to get rid of judicial involvement and oversight. "The decision makers don't like to be sued, hate going to court, and fear personal liability."¹⁸⁴ Corrections officials are accustomed to considerable autonomy, resent the outside intrusion into their domain, and are extremely anxious to eliminate it.¹⁸⁵ This response appears to be particularly pronounced where judicial oversight has been active and where courts have used judicial sanctions to respond to noncompliance.¹⁸⁶ Third, major corrections litigation is frequently accompanied by an influx of expertise and resources that expands the capacity of government officials to manage the process of reform and to maintain constitutional facilities.¹⁸⁷

Finally, prisoners' rights litigators have developed a considerable presence in the corrections world and have been able to pursue litigation on a wide scale.¹⁸⁸ In systems that have a centralized administration, administrators are likely to be aware of litigation against a major institution, even if the entire system is not under scrutiny.¹⁸⁹ Unlike many areas of public interest advocacy, there

¹⁸⁴ JACOBS, *supra* note 45, at 118 (citation omitted).

¹⁸⁵ See HARRIS & SPILLER, *supra* note 31, at 17, 401-03 (discussing defendants' active pursuit of compliance to persuade court to relinquish jurisdiction); YACKLE, *supra* note 35, at 259 (stating that primary goal of administration is freedom from court supervision).

¹⁸⁶ See HARRIS & SPILLER, *supra* note 31, at 19 (describing cases in which active judicial supervision fostered compliance); see also Sturm, *supra* note 24, at 893-94 (describing the importance of using sanctions to create incentives for public officials to develop an effective remedy).

¹⁸⁷ See HARRIS & SPILLER, *supra* note 31, at 24-25, 28 (outlining changes in correctional systems as a result of correctional litigation); Sturm, *supra* note 24, at 881-84 (describing access to resources and expertise afforded by judicial intervention); *supra* note 141 and accompanying text.

¹⁸⁸ For example, the National Prison Project is involved in 29 of the 40 states or territories that are under court order to improve prison conditions. See Edward I. Koren, *Status Report: State Prisons and the Courts—January 1, 1993*, NAT'L PRISON PROJECT J., Winter 1993, at 3, 3-11. The future of funding for organizations specializing in corrections litigation is uncertain. The Edna McConnell Clark Foundation recently decided to discontinue general support for corrections litigation. For a discussion of the current future state of legal representation of inmates in cases challenging conditions of confinement in correctional institutions, see generally Sturm, *supra* note 23.

¹⁸⁹ See HARRIS & SPILLER, *supra* note 31, at 26-27, 383-84, 409-10 (discussing official awareness of litigation against a single institution within a system).

is no shortage of individuals willing to file corrections litigation challenging conditions of confinement in prisons.¹⁹⁰ Prisoners have both the time and inclination to file litigation. Although most of these cases never make it past a motion to dismiss,¹⁹¹ some do lead to the appointment of extremely competent counsel.¹⁹² Thus, many correctional administrators view litigation as a fact of life that must be addressed.

However, litigation has not been uniformly effective in either promoting constitutional compliance or prompting systemic reform. The case studies provide a basis for offering several tentative explanations for this variation in response, although they are necessarily preliminary and exploratory.

First, litigation has been identified as having the most dramatic and far-reaching structural effects in the South, where prisons previously were modeled on the plantation system, and were self-sufficient and dependent on agriculture.¹⁹³ In the South, the courts "repudiated a longstanding and deeply ingrained approach to prisons and replaced it with an alternative model, one that was in line with the dominant view of corrections officials and organizations across the nation."¹⁹⁴ This observation may reflect a more fundamental pattern: litigation may be most effective in transforming institutions that deviate from a widely shared professional and social norm.

Second, case studies and assessments of litigation in corrections and other areas highlight the importance of enlisting the support of

¹⁹⁰ See Eisenberg, *supra* note 15, at 419 ("In fiscal year 1991, more than 26,000 prisoner civil rights cases were filed in the United States district courts. This represented 12% of all district court civil filings, and substantially exceeded the total of all other civil rights cases combined." (citations omitted)). This feature of corrections litigation, along with the centralization of state corrections administration, was not taken into account in Rosenberg's sweeping pronouncements concerning the failure of the judiciary as a tool for social reform.

¹⁹¹ See William B. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 660-61 (1979) (detailing statistics in five judicial districts concerning survival of motions to dismiss in prisoners' rights cases).

¹⁹² See YACKLE, *supra* note 35, at 50-51 (outlining appointment of counsel in prison rights cases); Sturm, *supra* note 23 (describing involvement of private practitioners in prisoners' rights cases through court appointments). For a discussion of the inadequacy of current approaches to court appointments of private counsel in prisoner civil rights cases, see Eisenberg, *supra* note 15, at 455-56 (a review of all prisoner civil rights files in three federal districts revealed that no case was filed by an attorney).

¹⁹³ See Feeley, *supra* note 36, at 278 (describing old plantation-style systems).

¹⁹⁴ *Id.* at 279.

crucial insiders within the targeted system to achieve lasting reform. Both supporters and critics of judicial intervention have noted the significance of this factor in achieving system reform. For example, Sheryl Dicker, the editor of a volume containing five case studies of child advocacy efforts, concludes that "advocates must find a 'partner' inside government to achieve successful implementation of reforms."¹⁹⁵ Gerald Rosenberg, who is generally skeptical of the capacity of courts to achieve significant reform, concludes that courts can be effective producers of significant social reform when "[a]dministrators and officials crucial for implementation are willing to act and see court orders as a tool for leveraging additional resources or for hiding behind."¹⁹⁶ Joel Handler also observes that the "bureaucratic contingency" that thwarts much judicially mandated change can be overcome by forming alliances with crucial government agencies.¹⁹⁷ Harris and Spiller identified "unwillingness or inability to comply on the part of one or more necessary actors" as one of two variables explaining noncompliance with court orders.¹⁹⁸

Although cooperation of crucial insiders is an important ingredient of successful implementation, it is not a variable that remains constant or unaffected by the courts. Judicial intervention frequently affects the stance of key decision-makers toward reform. Leaders who were sympathetic to litigation at the outset sometimes become more hostile as the litigation proceeds and the adversary process takes over.¹⁹⁹ Some officials who were initially skeptical or hostile to judicial intervention become more supportive as a result of constructive interactions with judicial officers or recognition of potential benefits flowing from the litigation.²⁰⁰ In addition, new leaders and staff often accompany litigation.²⁰¹ The dynamic character of the litigation process makes reliable predictions about the level of cooperation with and the likely success of court intervention difficult.

The strategy of judicial intervention is a third factor accounting for the differential success of litigation. I have argued elsewhere

¹⁹⁵ Sheryl Dicker, *Introduction* to STEPPING STONES, *supra* note 29, at 7.

¹⁹⁶ ROSENBERG, *supra* note 13, at 36.

¹⁹⁷ See HANDLER, *supra* note 6, at 196-97.

¹⁹⁸ HARRIS & SPILLER, *supra* note 31, at 5.

¹⁹⁹ See *id.* at 87 (detailing shift of prison administrators' attitudes during litigation).

²⁰⁰ See *id.* at 10-13, 26 (describing more receptive climate to judicial intervention).

²⁰¹ See *id.* at 15, 24-25 (outlining cases in which prison staffs have grown or been replaced); *supra* note 116 and accompanying text.

that a court's capacity to intervene effectively in correctional institutions depends, at least in part, on the approach adopted by the court to manage the compliance process.²⁰² I identify the catalyst approach combining a deliberative remedial formulation process with the use of traditional sanctions to induce compliance as the approach most likely to lead to successful intervention, drawing on case studies to support this conclusion.²⁰³ Recent case studies confirm the significance of judicial approach in defining the court's potential. Case studies also suggest that approaches encouraging mediated remedies, such as the use of court-appointed officials to assist in developing and monitoring a decree, contribute to the success of judicial intervention.²⁰⁴

Finally, the case studies suggest that progress has been made over the last twenty years in the development of creative and constructive approaches to judicial intervention, and that the use of these approaches enhances the likelihood of achieving institutional reform.²⁰⁵ Judges and litigators have developed more cooperative forms of factfinding, remedial formulation, and monitoring that minimize the adverse effects of the adversary process and enhance the possibility of cooperative approaches to solving the problems identified through litigation or the threat of litigation.²⁰⁶ These approaches include: (1) the use of expert panels selected by the parties to perform factfinding, assist in developing remedies and monitor compliance;²⁰⁷ (2) the use of court-supervised mediation to achieve a consensual remedy that addresses the problems underlying constitutional violations;²⁰⁸ (3) the use of existing oversight mechanisms in the enforcement stage, such as state regulatory agencies and the accreditation process; (4) the use of monitoring mechanisms that employ defendants' employees as

²⁰² See Sturm, *supra* note 24, at 848.

²⁰³ See *id.* at 856-60 (outlining "catalyst" approach and its effectiveness).

²⁰⁴ See, e.g., Chilton, *supra* note 46, at 106-07 (describing successful use of mediation and/or negotiation to achieve ultimate settlement and compliance in South Carolina and Georgia prison cases).

²⁰⁵ See, e.g., STEPPING STONES, *supra* note 29, at 56-59 (discussing the successful use of a variety of advocacy strategies in selected case studies); Schwartz, *supra* note 182, at 16-17 (describing successful mediation of issues raised by three cases challenging conditions and overcrowding in Philadelphia's juvenile institutions); *infra* text accompanying notes 418-31.

²⁰⁶ See Sturm, *supra* note 9, at 1373-76 (describing cases employing collaborative remedial approaches).

²⁰⁷ See *id.* at 1366-67, 1371-73.

²⁰⁸ See *id.* at 1373-75.

compliance officers; and (5) consolidation of cases involving related institutions to avoid the tendency to displace problems to institutions not under the purview of a particular court.²⁰⁹

A related development involves the emerging recognition by advocates, defendants, and judges of the importance of systemic approaches to court intervention. The most successful court interventions identified in the literature are those that take into account the systemic nature of the problems in defining the litigation and developing remedial solutions.²¹⁰ Other studies suggest that litigation is most likely to increase the resources devoted to criminal justice if it targets the entire system.²¹¹ Particularly in the juvenile area, where litigation is more likely to target agencies with overlapping or complementary responsibilities, case studies suggest the potential for significant systemic reform.²¹²

II. THE CONTINUED NEED FOR CORRECTIONS LITIGATION

The corrections field has progressed considerably over the past twenty years, in part as a result of litigation.²¹³ This progress, along with the limited role of litigation in corrections reform,²¹⁴ poses the issue of the continued significance of corrections litigation in the next decade. Has litigation run its course?

There is strong evidence that litigation continues to play a crucial role in achieving and maintaining minimally adequate correctional institutions, and that this need will continue through the next decade.²¹⁵ This Section summarizes the circumstances justifying the continued need for litigation concerning conditions and practices in correctional institutions.

²⁰⁹ See *supra* notes 174-76 and accompanying text; see also Sturm, *supra* note 9, at 1373-76; Interview with Nancy Ortega, Staff Attorney, Southern Center for Human Rights, in Atlanta, Ga. 4 (Aug. 11, 1991) [hereinafter Ortega Interview] (transcript on file with author) (describing coordinated litigation in Virginia, Texas, and Alabama).

²¹⁰ See *supra* text accompanying note 160 (stating that systemic reforms have endured).

²¹¹ See Taggart, *supra* note 141, at 263-65.

²¹² See *supra* notes 177-82 and accompanying text.

²¹³ See *supra* text accompanying notes 100-18 (discussing effects of corrections litigation).

²¹⁴ The issue of the continued viability of litigation with the federal courts' increasing conservatism is addressed in the next Section. See *infra* notes 273-319 and accompanying text.

²¹⁵ See generally Sturm, *supra* note 24, at 815-46 (describing the dynamics of "organizational stasis" in prisons).

A. *Conditions in Corrections Institutions Continue to Deprive Inmates of Minimally Adequate Living Conditions*

Conditions threatening the health and safety of inmates continue to plague many correctional institutions, even in institutions that have been subject to suit.²¹⁶ Compliance with minimal standards of constitutional decency has yet to be achieved in many of the state institutions and systems currently under court order.²¹⁷ In numerous cases lacking vigorous judicial enforcement, little progress toward achieving and developing systems for

²¹⁶ See, e.g., *DeGidio v. Pung*, 920 F.2d 525, 527-31 (8th Cir. 1990) (documenting serious and longstanding failure of prison officials to respond to tuberculosis outbreak); *Tillery v. Owens*, 719 F. Supp. 1256, 1259 (W.D. Pa. 1989) (condemning the State Correctional Institution at Pittsburgh as an "overcrowded, unsanitary, and understaffed firetrap"), *aff'd*, 907 F.2d 418 (3d Cir. 1990); *Inmates of Occoquan v. Barry*, 717 F. Supp. 854, 855, 858-64 (D.D.C. 1989) (finding that sanitation in the dorms was "deplorable," the bathrooms were in terrible condition, a serious fire safety hazard problem existed, food services posed a health risk, medical services experienced major failures, and mental health services were grossly inadequate), *appeal dismissed in part, aff'd in part*, 874 F.2d 147 (3d Cir.), *vacated*, 493 U.S. 948 (1989); *Inmates at the Allegheny County Jail v. Wecht*, 699 F. Supp. 1137, 1139, 1147 (W.D. Pa. 1988) (noting that although conditions were a vast improvement over what they were when the case began in 1976, "[s]evere overcrowding, inadequate cell size, inadequate staffing and the insufficient medical and psychiatric services [did] not provide even minimally adequate care"); *Fisher v. Koehler*, 692 F. Supp. 1519, 1562 (S.D.N.Y. 1988) (finding "systemic deficiencies" in failure to control violence), *aff'd*, 902 F.2d 2 (2d Cir. 1990); Erin Hallissy, *Prison Rights Groups Call for FBI Probe at Vacaville*, S.F. CHRON., July 11, 1991, at A20 (reporting that after heat-related deaths of three inmates, prison rights groups called for investigation of "the inhumane treatment of prisoners, lack of medical attention in all areas, unhealthy living conditions, food and dietary needs"); Dan Weikel, *Report Assails Conditions at State Prison for Women*, L.A. TIMES, Apr. 11, 1990, at A3 (stating that a legislative committee report on prison conditions documented poor medical care, drug trafficking, charges of sexual assaults, filthy conditions, dangerous conditions, and spoiled food); Thomas D. Williams & Colin Poitras, *Reports Show Poor Conditions at Prison*, HARTFORD COURANT, July 4, 1992, at C1 (reporting that monthly reports filed by warden revealed overcrowding, fire-code violations, inmate violence, and poor inmate health care).

²¹⁷ See, e.g., *Twelve John Does v. District of Columbia*, 855 F.2d 874, 874-75 (D.C. Cir. 1988) (upholding contempt citation for District's failure to take steps adequate to eradicate overcrowding problem); *Palmigiano v. DiPrete*, 737 F. Supp. 1257, 1259 (D.R.I. 1990) ("Because of the increase [in population] and the resultant overcrowding, . . . conditions in the ISC now were 'much, much worse, much, much worse' than they were in 1985."); *Fambro v. Fulton County*, 713 F. Supp. 1426, 1428-31 (N.D. Ga. 1989) (finding health-threatening defects in medical care system, unsanitary conditions). For a general discussion of current conditions in prison, jails, and juvenile institutions, see generally HUMAN RIGHTS WATCH, *PRISON CONDITIONS IN THE UNITED STATES* (1991) (suggesting that the use of excessive force, inadequate physical conditions, sexual abuse, grossly inadequate medical care, and absence of programming are characteristic in many correctional institutions).

maintaining constitutional conditions has occurred.²¹⁸ Overcrowding has undermined the progress toward compliance made in many jurisdictions, and conditions in many jails appear to be particularly poor.²¹⁹

The pressures of increasing populations and limited budgets account for a significant portion of the recent deterioration of conditions in correctional institutions. Between 1980 and 1990, the number of people incarcerated in the United States doubled.²²⁰ At the beginning of 1991, "state and federal prisons were operating

²¹⁸ See *Morales Feliciano v. Romero Barcelo*, 672 F. Supp. 591, 621-23 (D.P.R. 1986), *enforced sub. nom.* *Morales Feliciano v. Hernandez-Colon*, 697 F. Supp. 26 (D.P.R. 1987) (citing prison for contempt of earlier court order); OFFICE OF THE COURT MONITOR, CASE SUMMARY: *MORALES FELICIANO V. HERNANDEZ COLON* (1992) (documenting extreme overcrowding, violence, excessive use of force, and deplorable sanitary conditions that persisted for years following the issuance of a court order, and the stipulation recently entered as a result of active judicial oversight); Lopez & Spiller, *supra* note 140, at 53-55 (documenting neglect of court orders requiring elimination of severe overcrowding, dangerous physical conditions, and other serious deprivations in the absence of monitoring activity by plaintiffs' lawyers or the court).

²¹⁹ See, e.g., *Carver v. Knox County, Tenn.*, 753 F. Supp. 1370, 1376-79 (E.D. Tenn. 1989) (finding that overcrowding routinely forced inmates to sleep on mattresses on the floor, two of the three toilets were nonfunctioning and served as locations on which inmates sleep, inmates were forced to share mattresses, inmates were deprived of blankets and towels during periods of gross overcrowding, and the level of violence increased dramatically), *aff'd in part, rev'd in part*, 887 F.2d 1287 (6th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990); *Gilland v. Owens*, 718 F. Supp. 665, 686 (W.D. Tenn. 1989) ("The proof at trial plainly established a high level of violence at the Shelby County jail and a pervasive and constant threat of personal harm to inmates from attacks by other inmates."); *Fambro v. Fulton County, Ga.*, 713 F. Supp. 1426, 1428 (N.D. Ga. 1989) (stating that sheriff concluded that "Fulton County Jail rests in an unsafe and insecure condition, making it difficult if not impossible to provide an adequate level of basic human services to the inmate population"); *Brock v. Warren County, Tenn.*, 713 F. Supp. 238, 243-44 (E.D. Tenn. 1989) (awarding damages to children of inmate who died as a result of being housed in cell with no ventilation, extremely high heat and humidity, characterized by sheriff as "not fit to house prisoners during the summer"); *Jackson v. Gardner*, 639 F. Supp. 1005, 1008, 1011 (E.D. Tenn. 1986) (finding that jail conditions in which inmates were confined 24 hours daily in physically dilapidated, insect infested, dimly lit, poorly ventilated area, averaging under 20 square feet per inmate with inadequate sanitary facilities, recreation, and fire escape plans constituted cruel and unusual punishment); *Albro v. County of Onondaga*, 627 F. Supp. 1280, 1287 (N.D.N.Y. 1986) ("[C]ontinuous overcrowding resulting in inmates being housed in corridors—particularly those not provided cots; inmates not being segregated—particularly persons not mentally unstable being housed with the mentally unstable inmates . . . and the lack of activities outside of the cell blocks [does not] comport with contemporary standards of decency."); *Inmates and Guards Join in Suit on Conditions*, N.Y. TIMES, Mar. 16, 1989, at A21 (reporting that inmates and guards joined forces in lawsuit challenging overcrowding and understaffing in tense county jail in Seattle).

²²⁰ See BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, BULLETIN: PRISONERS IN 1990, at 1 (1991).

at 25.1 percent over capacity. . . . The National Council on Crime and Delinquency projects that by 1994, the state and federal prison population will reach one million, an increase of more than 200 percent since 1980."²²¹ Jails and juvenile facilities are experiencing similar increases in population.²²²

Overcrowding threatens to overwhelm the capacity of correctional systems to maintain minimally adequate living conditions.²²³ Case after case recounts the dramatic and devastating effects of overcrowding on the conditions in corrections institutions. The observations of the court in the Rhode Island prison litigation are typical: "Overcrowding at the ISC, in Mr. Gordon's opinion, has overwhelmed the institution's maintenance and support services and, therefore, it represents 'an immediate and overt threat to the inmate population.'"²²⁴ The implications of overcrowding were highlighted by expert testimony in *Palmigiano v. Garrahy*,²²⁵ an earlier, related, Rhode Island case:

[Overcrowding] leads to tension and frustration; the potential is created for magnification of problems; small misunderstandings become large ones; retaliation becomes inevitable. Over the past three and one-half years, the rate of assaults at the ISC has increased; the level of inmate assaults on staff approximate one every two weeks. In addition, . . . the double-celling had a negative impact on classification because it prevented the proper separation of certain kinds of prisoners.

. . . Predictably, the overcrowding has also created numerous environmental health problems. . . . The ventilation, plumbing, noise levels, and food services are all being over-taxed with commensurate maintenance problems impacting on the general living conditions.²²⁶

²²¹ AMERICANS BEHIND BARS, *supra* note 3, at 1.

²²² In 1989, the average occupancy of jails was 108%. The largest facilities—those with more than 1000 inmates averaged 126% of capacity. See HUMAN RIGHTS WATCH, *supra* note 217, at 18-19. "In 1988, a one-day census of publicly operated juvenile detention centers found that more than half of all youth were detained in overcrowded facilities and that 27.5 percent of the total of 422 facilities were over capacity." CASEY FRAMEWORK PAPER, *supra* note 5, at 4.

²²³ See, e.g., *Palmigiano v. DiPrete*, 700 F. Supp. 1180 (D.R.I. 1988); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 985-86 (D.R.I. 1977) (holding state officials would be in contempt if they failed to comply with court-mandated prison reforms), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980).

²²⁴ *DiPrete*, 737 F. Supp. at 1260.

²²⁵ 639 F. Supp. 244, 249 (D.R.I. 1986).

²²⁶ *Id.*; see also *Inmates of Occoquan v. Barry*, 717 F. Supp. 854, 858-64 (D.D.C. 1989) (documenting effects of chronic overcrowding); *Fambro v. Fulton County, Ga.*,

In many systems that have previously achieved compliance with court orders to improve conditions and programs, overcrowding has led to a recurrence of such basic problems as violence, inadequate service delivery, unsafe living conditions, and renewed activity by the courts in response to these conditions.²²⁷ Many defendants have responded to population increases by seeking to modify caps to allow facilities to house additional inmates even though those facilities have already been found to be constitutionally deficient at existing population levels.²²⁸

713 F. Supp. 1426, 1428 (N.D. Ga. 1989) (“[D]ue to this excessive population . . . in my professional opinion the Fulton County Jail rests in an unsafe and insecure condition.”); Jackson v. Gardner, 639 F. Supp. 1005, 1009 (E.D. Tenn. 1986) (“The primary cause of Sullivan County’s constitutional violation is the overcrowding.”); Albro v. County of Onondaga, 627 F. Supp. 1280, 1285-86 (N.D.N.Y. 1986) (“Overcrowding has adversely affected many aspects of living conditions at the PSB There is increased tension and propensity for physical threats and violence because of the housing situation, the failure to segregate inmates by statutory classification, and the apparent inability of the deputies to adequately perform their supervisory duties.”).

²²⁷ In *Palmigiano*, for example, the defendants sought to be released from injunctive obligations based on a Special Master’s report showing substantial improvement in their compliance with a 1977 injunction. The court denied the motion, citing the lack of complete compliance and the dangers posed by overcrowding. See 639 F. Supp. at 257-58. In 1990, the court held defendants in contempt and in “continuing contempt” based on a “record of sordid and explosively dangerous conditions” brought about largely by worsening overcrowding. See *DiPrete*, 737 F. Supp. at 1261-62. Similar deterioration of compliance efforts were reported in other prison systems. See Babcock, *supra* note 163, at 75 (Philadelphia); Baiamonte, *supra* note 47, at 40 (Baltimore); Lungwitz, *supra* note 46, at 29 (San Francisco); Parker, *supra* note 32, at 213 (Arkansas); see also Storey, *supra* note 40, at 163 (New York City). The American Public Health Association has reported:

Other states in which significant noncompliance has been alleged or proved after a lapse of years without controversy include Kansas (1980 decree reopened in 1988, injunctive relief granted, new decree in 1989), Louisiana (case reopened in 1989, investigations pending), Michigan (contempt found in 1989), New Hampshire (contempt motion pending), and Utah (new litigation filed, restraining order issued, contempt proceedings filed in 1989).

Brief of the American Public Health Association as Amicus Curiae at 36 n.32, Wilson v. Seiter, 111 S. Ct. 2321 (1991) (No. 89-7376). “Unchecked overcrowding has devastating effects on the entire institutional program.” Interview with John Boston, Legal Director, Prisoners Rights Project, Legal Aid Society of New York, in New York, N.Y. 10 (July 23, 1991 and Aug. 7, 1991) [hereinafter Boston Interview] (transcript on file with author).

²²⁸ See OFFICE OF THE COURT MONITOR, *supra* note 218, at 5, 12 (noting that despite conditions in which inmates were “stacked like cordwood in institutions throughout the island,” defendants filed second motion to modify crowding stipulation).

The fiscal crisis currently facing state and local governments is an additional factor undermining the progress made toward achieving minimally adequate conditions in correctional institutions.²²⁹ Many states and localities have attempted to cut staff and slash operating and capital budgets for corrections, even in the face of court orders and increasing populations.²³⁰ In many cases, drastic judicial action has been needed to prevent states from cramming inmates into already overcrowded facilities with reduced staff and services.²³¹

Overcrowding is not the type of problem that corrections administrators ordinarily can remedy without outside support. In many instances, without pressure from the courts, they receive neither the legislative and executive support necessary to redirect correctional policy, nor the resources necessary to maintain adequate levels of service delivery.²³²

B. No Effective Check on the Conditions in Correctional Institutions Other than Litigation or the Threat of Litigation Has Emerged

Litigation has served to open correctional institutions to public scrutiny, to hold officials accountable for the institutions they run,

²²⁹ See Carleton R. Bryant, *Senators Told of Cities' Plight Amid Cutbacks*, WASH. TIMES, Jan. 9, 1992, at A3 (describing necessity of cutting services due to "triple whammy" of "federal funding reductions, state cutbacks, and the continuing recession"); Leila Corcoran, *City Finances Crumble Across the Nation, League Says*, REUTERS BUS. REP., July 8, 1991, at 1 (stating 61% of the nation's municipalities face a budget deficit in 1991); Osborn Elliot, *End the Federal Abandonment of U.S. Cities*, USA TODAY, May 4, 1992, at 13A ("[D]uring the past 10 years, . . . federal aid to states and cities was cut by \$78 billion.").

²³⁰ See, e.g., Dunbaugh, *supra* note 106, at 65 (stating that city's fiscal difficulties have led to budget restrictions that limit needed staff increases, and delay sorely needed capital improvements and maintenance); Lungwitz, *supra* note 46, at 37 ("In addition to increasing populations, the Department of Public Health had to accommodate a 10% budget cut in 1988 and face the AIDS epidemic.").

²³¹ See, e.g., *Duran v. Anaya*, 642 F. Supp. 510, 511, 525 (D.N.M. 1986) (holding that lack of funds was no defense to failure to meet minimum constitutional standards, and enjoining proposed budget and staff cuts directed at medical care, mental health care, and security staffing in statewide class action previously resolved by consent judgment); Zalman, *supra* note 116, at 12 (noting that "budgetary disputes . . . ultimately required the Court to enter an order . . . delineating the staff positions at the Jail deemed necessary for compliance" with previous court orders (quoting from Receivership Order designating a county executive as receiver of the prison)).

²³² See Sturm, *supra* note 24, at 840-42 (explaining that administrators have only a limited ability to control overcrowding due to resistance from legislators and executives, and the nature of judicial sentencing processes).

and to create pressure to achieve and maintain constitutional prisons and jails. The pressures toward isolation and insulation, however, lurk on the horizon. External scrutiny and accountability are crucial to prevent prisons and jails from routinely subjecting inmates to the brutal conditions that characterized the isolated institutions of yesteryear.²³³ In most jurisdictions, effective methods of holding corrections accountable have not yet developed.

There is persuasive evidence that without litigation many correctional systems will insulate themselves from outside scrutiny and thus prevent the disclosure of inadequate conditions that is so crucial to correctional reform. Human Rights Watch, an organization that investigates the human rights aspects of imprisonment in the United States and abroad, reports:

We were discouraged by the difficulty and slowness of the process of obtaining permission to visit American prisons (which compared unfavorably with our experience in several less democratic countries).

Human Rights Watch's experience in gaining access to U.S. prisons and in seeing what we needed to see there provides a telling illustration of how difficult it is for the American public to obtain a reliable picture of the situation within prisons.²³⁴

Human Rights Watch investigators report that in some institutions, their visits were carefully managed, and they were unable to visit the areas and facilities that they had specifically requested.²³⁵ Indeed, the report relies heavily on reported cases for its description of conditions in correctional institutions. Similarly, much of the media coverage of prison and jail conditions in recent years concerns information and assessments obtained through litigation. Without litigation, the salutary role played by the media in exposing inadequacies in prison conditions will be diminished.²³⁶

²³³ See generally *id.* (arguing that because of entrenched normative frameworks, incentive structures, information processing systems, and power dynamics, correctional institutions are incapable of internal reform without judicial intervention).

²³⁴ HUMAN RIGHTS WATCH, *supra* note 217, at 9.

²³⁵ See *id.* at 1-2. In an informal discussion with the author at the 1992 National Legal Aid and Defender Association Conference, the individual responsible for conducting many of the needs assessment studies for legal services reported similar difficulty in obtaining access to correctional facilities.

²³⁶ Recent case law limiting prisoners' access to the media and the right of reporters to obtain access to prisons adds to this concern. See, e.g., *Smith v. Delo*, 995 F.2d 827, 830 (8th Cir. 1993) (holding that regulation requiring that inmates' mail be sent to the prison mailroom unsealed for inspection is rationally related to prison

In addition, without the realistic threat of litigation, corrections advocates lack any effective means of influencing public officials to take seriously inmates' concerns. Inmates lack political power to advocate effectively on their own behalf; in most states they are not allowed to vote, even after they have completed their sentences.²³⁷ The plight of criminal offenders rarely inspires effective political mobilization.²³⁸ At least for adult offenders, coalitions with the political clout to influence governors and legislators do not exist.²³⁹ Without external pressure to correct serious deficiencies, the dynamics of organizational stasis predispose responsible officials to avoid rocking the boat.²⁴⁰

Nor is there persuasive evidence that the American Correctional Association ("ACA") or any other professional organization within the corrections field currently performs an effective oversight role in the absence of litigation. The American Correctional Association

officials' legitimate interests); *Mann v. Adams*, 846 F.2d 589, 590-91 (9th Cir. 1988) (finding no special deference for mail from the media to prisoners required in the light of security considerations), *cert. denied*, 488 U.S. 898 (1988); *Gaines v. Lane*, 790 F.2d 1299, 1305-07 (7th Cir. 1986) (denying privileged status to mail from the media and rejecting prisoners' First Amendment claim that mail inspection process denied access to the media as an alternate means for petitioning the government); *Jersawitz v. Hanberry*, 783 F.2d 1532, 1534 (11th Cir.) (upholding regulation that limits interview access for inmate interviews to representatives of the news media employed by radio or television stations holding FCC licenses), *cert. denied*, 479 U.S. 883 (1986).

²³⁷ See Judy Goldberg & Nadine Marsh, *Ex-Offenders Find Doors Closed on Voting Rights*, NAT'L PRISON PROJECT J., Spring 1985, at 3, 3-4 (stating that ex-offenders may find it difficult, if not impossible, to regain voting rights after being released in most states).

²³⁸ Although there is greater sympathy and potential for political advocacy for children, there is little public sympathy for children who have committed serious offenses. See Soler Interview, *supra* note 15, at 4 (noting that juvenile offenders can elicit antipathy as well as sympathy); Interview with Allen Breed, Director, National Institute of Corrections, in San Francisco, Cal. 3 (July 19, 1991) [hereinafter Breed Interview] (transcript on file with author). Breed, who is a former commissioner of the California Youth Authority, and who currently serves as a master in various corrections cases, notes a rising public perception that juvenile offenders are dangerous and should be treated like adults. See *id.* at 3.

²³⁹ See Breed Interview, *supra* note 238, at 3; see also BARBARA L. MCÉLENEY, CORRECTIONAL REFORM IN NEW YORK: THE ROCKEFELLER YEARS AND BEYOND 30 (1985) ("Because Corrections had traditionally been accorded a low priority and there were . . . no public riots nor demonstrations within the prisons that demanded gubernatorial reaction, the Division of the Budget was granted virtual autonomy in the trimming or amendment of the original Correction Department budget.").

²⁴⁰ See Sturm, *supra* note 24, at 832 ("The governor is often concerned with keeping inmates in, costs down, and visible disturbances out of the news. . . . Because change is perceived as posing a substantial risk of disruption, the governor's office frequently enhances the pressure toward custody, order, and the status quo.").

has created a set of standards for all correctional functions, and is currently in the process of auditing state and local agencies to assess their compliance with these standards and accrediting those that do.²⁴¹ Although more than 100 facilities and programs sought accreditation in 1991, accreditation does not adequately assure that the institutions are constitutional.²⁴² Moreover, the accreditation process lacks any sanctions for lack of accreditation.²⁴³ Indeed, corrections professionals themselves report that a major incentive for participation in the accreditation process is the avoidance of litigation.²⁴⁴ Litigation has been a necessary catalyst for involvement in the accreditation process in many instances of successful change through accreditation.²⁴⁵ Moreover, the accreditation

²⁴¹ See CLEAR & COLE, *supra* note 113, at 143.

²⁴² See *LaMarca v. Turner*, 662 F. Supp. 647, 655 (S.D. Fla. 1987) (finding that accreditation had "virtually no significance because accredited institutions have been found unconstitutional by the courts"); see also Lynn S. Branham, *Accreditation: Making a Good Process Better*, 57 FED. PROBATION 11, 11 (1993). Branham, a member of the Commission on Accreditation for Corrections, reported that she is "not confident that accreditation adequately ensures that the conditions of confinement in certain institutions are constitutional." *Id.* She found that auditors rarely take steps to investigate the status of litigation pending against a facility that has applied for accreditation. See *id.* at 13. Branham was concerned that auditors "gloss over" problems they have observed in a facility, and characterizes some auditors' reports as "incomplete and misleading." *Id.* at 14. Finally, she noted instances in which auditors failed to mention or explore substantial questions concerning compliance with accreditation standards. See *id.* at 14-15.

²⁴³ Although more than 1000 facilities are participating in the accreditation process, see George M. Phyfer, *Accreditation: Corrections' Foundation*, CORRECTIONS TODAY, May 1992, at 8, the process is purely voluntary. Because states and federal officials have no opportunity to close down or withdraw funds if institutions fail to comply, and inmates cannot choose to go elsewhere if an institution is substandard, correction accreditation lacks the sanction necessary to give it teeth. See John P. Conrad, *Charting a Course for Imprisonment Policy*, 478 ANNALS AM. ACAD. POL. & SOC. SCI. 123, 124 (1985) (noting an absence of "disadvantages accruing to an unaccredited prison such as those that can ruin an unaccredited university or hospital"). Although the ACA believes that "the prospect of accreditation will be the carrot to lead funding sources to open their purses . . . , [i]n practice, correctional operations of such dubious quality have been funded that the entire accreditation process has lost credibility." CLEAR & COLE, *supra* note 113, at 143.

²⁴⁴ See M. Wayne Huggins & Charles J. Kehoe, *Accreditation Benefits Nation's Jails, Juvenile Detention Centers*, CORRECTIONS TODAY, May 1992, at 40, 42 ("[M]ost correctional administrators involved in the accreditation process see it as another form of insurance. . . . designed to avoid judgments."); Rod Miller, *Standards and the Courts: An Evolving Relationship*, CORRECTIONS TODAY, May 1992, at 58, 60 ("Accreditation officials are now experimenting with [a checklist] that attempts to apply judges' priorities in assessing a facility's overall acceptability.").

²⁴⁵ See Paul E. Humphries, *Mandatory Accreditation: Ensuring Quality Care in Tennessee's Juvenile Facilities*, CORRECTIONS TODAY, Oct. 1986, at 82 (describing how Tennessee passed mandatory accreditation legislation in response to a court order

process has not been able to hold the line against the pressures of limited budgets and increasing populations.²⁴⁶ In response to pressures on corrections administrators to manage their facilities with fewer resources for greater numbers of inmates, the ACA diluted the standards governing adequate living space.²⁴⁷ The National Prison Project and the American Bar Association provided the only organizational opposition to this move. "The power within the field of corrections augmented by the pressures of political arena will dilute the standards and the very meaning of accreditation."²⁴⁸

Meaningful grievance mechanisms can permit correctional institutions to respond promptly to trouble spots and personnel problems, and can provide prompt resolution of disputes without the necessity of litigation.²⁴⁹ To be effective, these mechanisms must include some form of independent review, participation by inmates and staff in their design and operation, short enforceable time limits, written responses with reasons for adverse decisions, and effective administrative oversight of the system.²⁵⁰ Some

requiring improvements in state correctional facilities); W. Hardy Rauch, *Keeping Our Own House in Order—Consent Decree Lifted in Kentucky*, CORRECTIONS TODAY, Dec. 1987, at 117 (stating that Kentucky agreed to use accreditation standards to comply with a consent decree requiring improvements in two state prisons); Raymond N. Roberts, *How Accreditation Helped Revitalize a Penitentiary Under Court Order*, CORRECTIONS TODAY, May 1992, at 52 (describing how judge ordered compliance with ACA accreditation standards as a means of correcting deficient conditions).

²⁴⁶ See Conrad, *supra* note 243, at 123-24 (noting that states continue to operate their penal systems as usual despite being unaccredited by the ACA).

²⁴⁷ See William C. Harrell, *ASCA Proposes Watering Down of Single-Celling Standards*, NAT'L PRISON PROJECT J., Summer 1991, at 14, 14 (describing a proposed change in the ACA standards that would water down single cell standards and permit housing of medium security prisoners in a multiple occupancy or dormitory facility with up to 50 other inmates); *ACA Committee Relaxes Double-Celling Standard*, NAT'L PRISON PROJECT J., Winter 1992, at 5 (noting that the Standards Committee of ACA voted to adopt new standards); Breed Interview, *supra* note 238, at 5-6 (noting that modifications reducing cell size requirements have been proposed at ACA meetings with little opposition).

²⁴⁸ Breed Interview, *supra* note 238, at 6.

²⁴⁹ See Turner, *supra* note 191, at 641 (explaining the benefits of prisoner grievance mechanisms). See generally J. MICHAEL KEATING, JR. ET AL., U.S. DEP'T OF JUSTICE, *GRIEVANCE MECHANISMS IN CORRECTIONAL INSTITUTIONS* (1975) (outlining the need for grievance mechanisms to avoid litigation and inmate violence).

²⁵⁰ See Turner, *supra* note 191, at 642 (listing principles that the Center for Correctional Justice believes all effective grievance systems must have). These requirements are essentially incorporated into the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. §§ 1997, 1997a-j (1988). Section 1997e permits federal district courts to compel inmates to exhaust state grievance procedures if those grievance procedures have been certified by the Attorney General or a federal

states have adopted grievance mechanisms that have been certified by the Department of Justice or the courts to comply with these general requirements.²⁵¹

However, grievance procedures do not provide an effective substitute for litigation concerning conditions of confinement in correctional institutions. Many grievance systems do not meet the standards required for accreditation under the Institutionalized Persons Act,²⁵² and there is some question as to whether systems that have recently been certified in fact comply with the requirements of effective dispute resolution.²⁵³ Even those that do qualify are not generally designed to address systemic problems.²⁵⁴ They do not accept class-wide complaints, and do not empower corrections officials to involve other state actors whose participation is frequently necessary to address systemic problems such as overcrowding and poor living conditions. Similarly, other dispute resolutions internally administered by the corrections department, such as ombudsmen, deal primarily with individual problems, such as failure to deliver mail.²⁵⁵ Moreover, most grievance officers

district court to comply with statutory standards.

²⁵¹ As of April 1991, five states obtained statewide certification of their grievance procedures by the Justice Department. The Justice Department has certified the grievance plans of particular institutions within three states, and five states have received court certification of grievance systems in one or more judicial districts within the state. See Note, *Resolving Prisoners' Grievances Out of Court: 42 U.S.C. § 1997e*, 104 HARV. L. REV. 1309, 1316 (1991). In addition, 11 states and the District of Columbia are in the process of obtaining certification from the Justice Department and five states are pursuing judicial approval of their plans. See *id.* at 1317.

²⁵² See Turner, *supra* note 191, at 639 n.18 (reporting the findings of a General Accounting Office survey that no state or large city systems meet the generally accepted principles for an effective grievance mechanism).

²⁵³ See Telephone Interview with Randall Berg, Executive Director, Florida Justice Institute 2 (Feb. 4, 1992) [hereinafter Berg Interview] (transcript on file with author) (stating that the "inmate grievance procedure [in Florida] is a joke but [is] close to being certified by the [Department of Justice]").

²⁵⁴ See Turner, *supra* note 191, at 645 (noting that "several large categories of prisoner suits cannot be reached by an administrative mechanism"). For example, an American Arbitration Association Report noted that no brutality case had been resolved through grievance procedures. See *id.* at 644 n.165 (citing COMMUNITY DISPUTE SERV., AMERICAN ARBITRATION ASS'N, REPORT AND RECOMMENDATIONS REGARDING THE DEVELOPMENT OF AN INMATE DISPUTE RESOLUTION PROCEDURE IN RHODE ISLAND 31-32 (1977)).

²⁵⁵ See *id.*; Telephone Interview with Linda Singer, Director, Center for Community Justice and Partner, Lichter, Tristman, Singer & Ross 1 (Feb. 13, 1992) [hereinafter Singer Interview] (transcript on file with author) (stating that the Center is the organization that pioneered the development and implementation of standards for prison administrative remedies and noting that ombudsmen generally deal with problems such as lost mail); see also KEATING ET AL., *supra* note 249, app. A.

and ombudsmen depend on the administration for their position. This seriously limits their capacity to hold their departments to constitutional standards, particularly when additional resources are required to do so.²⁵⁶ Indeed, experts on dispute resolution state that alternative forms of dispute resolution, such as negotiation and mediation, have worked as agents of systemic reform in corrections only when linked in some significant way with litigation.²⁵⁷

*C. Litigation Has Only Begun to Address the Problems Facing
Jails and Juvenile and Women's Institutions*

The reform of jails has not progressed to the same extent as state correctional facilities over the past two decades. The combination of the decentralized and rural character of many jails insulates them from scrutiny.²⁵⁸ Inmates in jails remain incarcerated for relatively short time periods, and often leave the institution before their case can be heard or certified.²⁵⁹ Many jails, particularly in rural areas, remain untouched by litigation.²⁶⁰ Jails are more likely than prisons to subject inmates to the brutal, primitive conditions that characterized prisons twenty years ago.²⁶¹ In many jurisdictions, jails are run by sheriffs whose background and primary concern is law enforcement²⁶² and who typically lack the expertise

²⁵⁶ See KEATING ET AL., *supra* note 249, at 15-21 (noting that many state programs have limitations because "ombudsmen are departmental employees hired by and responsible to the directors of the agency they are supposed to monitor").

²⁵⁷ See Singer Interview, *supra* note 255, at 1.

²⁵⁸ As of June 30, 1988, approximately two-thirds of the nation's jails were small facilities with capacity for 50 inmates or fewer. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: CENSUS OF LOCAL JAILS 1988, at 6 (1990) [hereinafter CENSUS OF LOCAL JAILS 1988].

²⁵⁹ See Turner, *supra* note 191, at 644 & n.166 ("The average time served [in jails is] . . . not long enough to process fully any formal claim for relief, either administrative or judicial."); Ortega Interview, *supra* note 209, at 3 (describing difficulties of maintaining a law suit on behalf of jail inmates due to high turnover rate).

²⁶⁰ According to the Bureau of Justice Statistics, 30% of the nation's jails were under court order to improve conditions of confinement, and 27% were under court order to reduce crowding. See JAIL INMATES 1991, *supra* note 4, at 1 (1992); see also Interview with Ed Koren, Staff Attorney, National Prison Project, and former Director, National Jail Project, in Washington, D.C. 7 (July 31, 1991) [hereinafter Koren Interview] (transcript on file with author) (noting that litigators have gotten on top of problems in cities, but that "[r]ural areas are totally untouched").

²⁶¹ See *supra* notes 89-98 and accompanying text.

²⁶² See M. Kay Harris, *Judicial Intervention in Local Jails: An Editorial Overview*, PRISON J., Fall-Winter 1990, at 1, 1; Feeley & Hanson, *supra* note 100, at 27-28 (noting that jails run by sheriffs have difficulties institutionalizing responses to litigation); Russ Immergeon, *The Context of Jail Litigation in the United States*, PRISON J., Fall-

and resources necessary to manage decent facilities.²⁶³

Serious problems also persist in juvenile facilities. According to the Office of Juvenile Justice and Delinquency Prevention, by October 1989, only 34 of 56 participating states and territories had demonstrated compliance with the requirement of separation of juvenile and adult offenders.²⁶⁴ Similarly, although the largest state juvenile systems, such as Florida, California, and Texas, have been the subject of litigation, many institutions with extremely poor conditions have yet to be tackled.²⁶⁵ Despite the fact that a disproportionate number of children in juvenile justice institutions have a history of multiple problems, "the services they receive are likely to be insufficient and/or unresponsive to their needs."²⁶⁶ Moreover, juvenile justice advocates report that children are far less likely to complain about brutal conditions than adults.²⁶⁷

Historically, litigation has rarely focused on the problems of incarcerated women. Until recently, women have been less likely to litigate, although there are indications that this reluctance is diminishing.²⁶⁸ In cases challenging conditions in both men's and

Winter 1990, at 12, 16 (noting that criminologist Hans W. Mattick and the Commission on Law Enforcement and the Administration of Justice both view local administration of jails by law enforcement officials as central to the jail problem).

²⁶³ See Feeley & Hanson, *supra* note 100, at 27-28 ("[Local jails] lack administrative depth and expertise, and counties lack the capacity to provide correctional law specialists other than in response to litigation.").

²⁶⁴ See HOUSE SELECT COMM. ON CHILDREN, YOUTH, AND FAMILIES, NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA, H.R. REP. NO. 395, 101st Cong., 2d Sess. 43 (1990) [hereinafter NO PLACE TO CALL HOME].

²⁶⁵ According to a recent report, "seven percent of the nation's 422 facilities detaining 10 percent of all youngsters in 1989 were operating under consent decrees." CASEY FRAMEWORK PAPER, *supra* note 5, at 5. Forty-one cases in 22 states have been brought on behalf of children in the juvenile justice system who have been placed in adult jails, juvenile detention centers, training schools, and secure residential facilities. See NO PLACE TO CALL HOME, *supra* note 264, at 193-204. The conditions in juvenile facilities are often terrible. As one worker at an institution in Maryland testified, "When I arrived at Montrose, evidence of neglect [was] everywhere. Overcrowded, understaffed, badly in need of repair; it seemed to me that virtually everyone had given up. Best description I can give is it was a human warehouse." *Id.* at 71 (quoting *Children in State Care: Ensuring Their Protection and Support, Hearings Before the Select Comm. on Children, Youth, and Families of the House of Representatives*, 99th Cong., 2d Sess. 106 (1986) (statement of Patricia Hanges, Franciscan Lay Volunteer)).

²⁶⁶ NO PLACE TO CALL HOME, *supra* note 264, at 50.

²⁶⁷ See Interview with Robert Schwartz, Director, Juvenile Law Center, in Philadelphia, Pa. 1 (July 8, 1991 and July 10, 1992) [hereinafter Schwartz Interview] (transcript on file with author) (observing that "children were without mouthpieces in key areas"); Soler Interview, *supra* note 15, at 4 (noting that when a facility is overcrowded, staff tend to use severe methods to control situations to "[k]eep kids quiet"); *supra* note 22.

²⁶⁸ See Ellen M. Barry, *Jail Litigation Concerning Women Prisoners*, PRISON J., Spring-

women's institutions, the problems of women tend to be neglected,²⁶⁹ and court-ordered improvements are often not extended as fully to women's institutions.²⁷⁰ Furthermore, the population in women's facilities is growing at a much faster rate than men's institutions, and overcrowding problems in women's institutions are severe.²⁷¹ Nonetheless, corrections advocates have also noted an increased public interest in addressing the problems facing incarcerated women.²⁷²

III. CORRECTIONS LITIGATION AND THE REAGAN/BUSH JUDICIARY: THERE IS A FUTURE

Analysis of Supreme Court and lower court decisions and discussions with judges and advocates suggest that, despite the increasing conservatism of the courts and narrowing of the scope of legal protection, litigation challenging the adequacy of "the minimal civilized measure of life's necessities"²⁷³ in corrections institutions will continue to be successfully prosecuted. Although the changing character of the federal courts may affect the nature and scope of such litigation, the days of judicial intervention in corrections are not over.²⁷⁴

The Supreme Court has dramatically narrowed the scope of judicial intervention in First Amendment and due process cases.

Summer 1991, at 44, 44 (1991); *supra* note 22 and accompanying text.

²⁶⁹ See Bronstein Interview, *supra* note 10, at 7 (discussing neglect of women's facilities in state litigation, causing severe overcrowding, including up to 300% capacity at one facility).

²⁷⁰ See Feeley & Hanson, *supra* note 100, at 35.

²⁷¹ See CENSUS OF LOCAL JAILS 1988, *supra* note 258, at 3 (reporting that women's imprisonment has expanded disproportionately to population increases experienced by men between 1983 and 1988). See generally Russ Immarigeon & Meda Chesney-Lind, Women's Prisons: Overcrowded and Overused 5, 9 (Mar. 1991) (unpublished manuscript, on file with author) (documenting that "female populations in jails and prisons have increased disproportionately to the increase in women's involvement in serious crime," and that "states that failed to develop sufficient community resources experienced severe overcrowding" in women's prisons).

²⁷² See Telephone Interview with Rebecca Isaacs, Acting Director, Legal Services for Prisoners with Children I (July 17, 1992) (transcript on file with author) (describing 1992 as the year of the woman in prison, and noting that women's correctional issues have captured the attention of the National Association of Women Judges, the ABA, and a state commission in California).

²⁷³ Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

²⁷⁴ One appeals court judge has stated: "I certainly don't think the game is over by a long shot. There are areas that are going to survive even the most conservative of rulings." Telephone Interview with Judge Jon Newman, United States Court of Appeals for the Second Circuit I (Feb. 13, 1992) (transcript on file with author).

Until recently, many lower courts subjected any policy or practice that infringed upon freedom of speech or religion to strict scrutiny, invalidating those that prison officials could not demonstrate to be necessary. In *Turner v. Safley*²⁷⁵ and *O'Lone v. Estate of Shabazz*,²⁷⁶ the Supreme the Supreme Court held that a lesser standard of scrutiny is appropriate in determining the constitutionality of prison rules.

Turner involved a challenge to regulations relating to inmate-to-inmate correspondence and inmate marriages. The court of appeals applied a strict scrutiny analysis and concluded that both regulations violated inmates' constitutional rights.²⁷⁷ The Supreme Court held that "when a prison regulation impinges on inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."²⁷⁸ This deferential standard places the burden on plaintiffs to demonstrate that the connection between a particular policy or practice and legitimate penological concerns is so remote as to be arbitrary or irrational. Applying this lesser standard of scrutiny, the Supreme Court agreed that the constitutional right of inmates to marry was impermissibly burdened by the challenged regulation.²⁷⁹ However, the Court found the inmate correspondence regulation to be valid because it was "logically connected to . . . legitimate security concerns."²⁸⁰

In *O'Lone*, Islamic inmates challenged prison policies that prevented them from attending Jumu'ah, a Muslim congregational service held on Friday afternoons.²⁸¹ The court of appeals held that the challenged regulations could be sustained only if the prison officials demonstrated that they "were intended to serve, and d[id] serve, the important penological goal of security, and that no reasonable method exists by which [prisoners'] religious rights can be accommodated without creating bona fide security problems."²⁸² The Supreme Court reversed, holding that the Court of Appeals erred in placing the burden on prison officials to disprove

²⁷⁵ 482 U.S. 78, 89 (1987).

²⁷⁶ 482 U.S. 342, 349 (1987).

²⁷⁷ See *Safley v. Turner*, 777 F.2d 1307, 1316 (8th Cir. 1985), *aff'd in part, rev'd in part*, 482 U.S. 78 (1987).

²⁷⁸ *Turner*, 482 U.S. at 89.

²⁷⁹ See *id.* at 97.

²⁸⁰ *Id.* at 91.

²⁸¹ See *O'Lone*, 482 U.S. at 345.

²⁸² *Shabazz v. O'Lone*, 782 F.2d 416, 420 (3d Cir. 1986), *rev'd*, 482 U.S. 342 (1987).

the availability of alternative methods of accommodating prisoners' religious rights.²⁸³ The Court found that this approach failed to reflect the appropriate respect and deference for the judgment of prison administrators under the Constitution. The Court agreed with the district court's conclusion that the challenged policies were reasonably related to legitimate penological interests, and therefore did not offend the Free Exercise Clause.²⁸⁴

The Supreme Court has not overruled its prior holding in *Wolff v. McDonnell*,²⁸⁵ which requires that inmates receive notice and a hearing prior to the imposition of disciplinary sanctions.²⁸⁶ In *Wolff*, the Court held that the procedure for imposing sanctions had to observe minimal due process requirements.²⁸⁷ Although prison disciplinary proceedings do not implicate the full panoply of rights due a defendant in a criminal prosecution, the Court held that such proceedings must be governed by a mutual accommodation between institutional needs and generally applicable constitutional requirements.²⁸⁸

A series of subsequent Supreme Court cases, however, limited prisoner due process rights and virtually eliminated privacy rights for prisoners.²⁸⁹ Unless a statute or regulation creates a liberty interest, government may impose any treatment that is "within the normal limits or range of custody which the conviction has authorized the State to impose."²⁹⁰ Deference to prison administrators has become the guiding principle in prisoners' rights cases.

This deferential standard does not mean that First Amendment

²⁸³ See *O'Lone*, 482 U.S. at 351-52.

²⁸⁴ See *id.* at 350-51.

²⁸⁵ 418 U.S. 539 (1974).

²⁸⁶ See *id.* at 564.

²⁸⁷ See *id.* at 555.

²⁸⁸ The Court held that due process requires that an inmate receive written notice of charges at least 24 hours before the disciplinary hearing; that there be a written statement by the factfinders as to the evidence relied on and the reasons for the disciplinary action; and that an inmate be allowed to call witnesses and present documentary evidence in his or her defense where doing so does not jeopardize institutional safety or correctional goals. See *id.* at 563-67. Inmates are not entitled under the Due Process Clause to cross-examine witnesses or be represented by counsel. See *id.* at 567-70.

²⁸⁹ See *Hudson v. Palmer*, 468 U.S. 517 (1984) (holding that prisoners do not have a reasonable expectation of privacy in their prison cells); *Block v. Rutherford*, 468 U.S. 576 (1984) (allowing blanket prohibition on contact visits); *Meachum v. Fano*, 427 U.S. 215 (1976) (holding that prisoners not have any "right" to stay in a certain type of prison); *Montanye v. Haymes*, 427 U.S. 236 (1976) (holding that a hearing is not required when transferring a prisoner).

²⁹⁰ *Meachum*, 427 U.S. at 225.

and due process cases are unwinnable. Applying the rational basis standard articulated above, the Supreme Court invalidated regulations prohibiting marriages between inmates.²⁹¹ Lower courts have relied on this decision as support for invalidating restrictive speech policies that are based on speculative concerns.²⁹² Moreover, a review of recent case law reveals that actions to enforce well-established First Amendment and due process rights, such as the right to a prior disciplinary hearing and the right to meals that conform to religious dietary rules, continue to be brought and won.²⁹³ However, cases seeking to expand First Amendment or due process protections beyond existing boundaries have, for the most part, been unsuccessful.²⁹⁴

The Supreme Court's recent "conditions of confinement" cases also impose new hurdles for plaintiffs to overcome, but continue to

²⁹¹ See *Turner v. Safley*, 482 U.S. 78, 97-99 (1987).

²⁹² See, e.g., *Mujahid v. Sumner*, 807 F. Supp. 1505, 1508-11 (D. Haw. 1992) (holding that rules restricting correspondence and visitation among inmates and members of the media and barring outgoing correspondence with specific members of the news media were facially unconstitutional), *aff'd*, 996 F.2d 1226 (9th Cir. 1993); *Lyon v. Grossheim*, 803 F. Supp. 1538, 1552-55 (S.D. Iowa 1992) (finding that application of regulations pertaining to receipt of literature violated inmates' First Amendment rights); *Stone-El v. Fairman*, 785 F. Supp. 711, 716 (N.D. Ill. 1991) (holding that prison officers had no justification whatsoever for opening or reading correspondence addressed to or from the courts).

²⁹³ See, e.g., *Mosier v. Maynard*, 937 F.2d 1521, 1522 (10th Cir. 1991) (denying summary judgment to defendants in case challenging denial of religious exemption from haircut rule to Native American), *cert. denied*, 114 S. Ct. 260 (1993); *Ramer v. Kerby*, 936 F.2d 1102, 1104 (10th Cir. 1991) (stating that a policy barring prisoners from calling staff members as witnesses denied due process); *Whitney v. Brown*, 882 F.2d 1068, 1074, 1077-78 (6th Cir. 1989) (affirming Jewish prisoners' right to travel in the complex to attend weekly Sabbath services); *Richardson v. Coughlin*, 763 F. Supp. 1228, 1239 (S.D.N.Y. 1991) (granting summary judgment on First Amendment claim and denying summary judgment on due process claim), *aff'd sub nom. Richardson v. Selsky*, 5 F.3d 616 (2d Cir. 1993).

²⁹⁴ See e.g., *Smith v. Massachusetts Dep't. of Corrections*, 936 F.2d 1390, 1396-97 (1st Cir. 1991) (holding that procedural regulations governing reclassification and transfer to higher custody did not trigger liberty interest requiring due process procedures, and that placement of plaintiff in "awaiting action" status did not violate due process); *Johnson v. Moore*, 926 F.2d 921, 922-23 (9th Cir. 1991) (holding that denial of hearing before placement in lockdown and transfer from federal to state prison without procedural protections did not violate due process, and that absence of a paid chaplain of plaintiff's faith did not deny plaintiff a "reasonable opportunity" to practice his religion); *Weaver v. Toombs*, 756 F. Supp. 335, 337-38 (W.D. Mich. 1989) (holding that opening and reading of correspondence and confiscation of legal materials of two inmate co-plaintiffs pursuant to policy permitting inmates to render legal assistance to each other only with prior written approval was reasonable under *Turner* standards), *aff'd*, 915 F.2d 1574 (6th Cir. 1990), *cert. denied*, 499 U.S. 923 (1991).

leave room for significant litigation involving grossly inadequate prison conditions. In *Wilson v. Seiter*,²⁹⁵ the Supreme Court held that plaintiffs must prove deliberate indifference to prevail in conditions of confinement cases.²⁹⁶ The Court rejected the view, held by the majority of the circuits, that conditions of confinement depriving prisoners of basic necessities of life violate the Eighth Amendment regardless of the intent of prison officials.²⁹⁷ The Court also rejected the lower court's holding that prison officials must be shown to have acted with "persistent malicious cruelty" to establish an Eighth Amendment violation.²⁹⁸ Some commentators and practitioners have expressed the view that *Wilson* significantly toughens the standard for conditions of confinement cases and may even sound their death knell.²⁹⁹ However, a careful analysis of the decision leads to the conclusion, in accord with the overwhelming consensus of experts in the area of prison litigation, that *Wilson* does not significantly toughen the standard for establishing an Eighth Amendment violation in conditions of confinement cases, although its tone may harden the attitudes of prison officials and judges predisposed to resist such litigation. As John Boston states in an excellent analysis of the case:

the deliberate indifference standard is already well established, particularly in litigation concerning medical care, inmate-inmate violence, and other threats to prisoners' health and safety—areas in which prisoner litigants have enjoyed their most consistent success. In cases involving other conditions of confinement, something like the deliberate indifference standard has been

²⁹⁵ 111 S. Ct. 2321 (1991).

²⁹⁶ *See id.* at 2326.

²⁹⁷ *See id.* at 2324.

²⁹⁸ *Id.* at 2328.

²⁹⁹ *See, e.g.,* Linda Greenhouse, *Justices Restrict Suits Challenging Prison Conditions: Limit on Cruelty Pleas*, N.Y. TIMES, June 18, 1991, at A1 (indicating that *Wilson* will "likely make it more difficult for prisoners to prevail in [conditions of confinement] lawsuits"). Private practitioners and nonlitigators were much more likely to express the view that *Wilson* makes conditions litigation virtually impossible to win. *See, e.g.,* Interview with David Casey, Partner, Peckham, Lobel, Casey, Prince & Tye, in Boston, Mass. 9 (Aug. 20, 1991) (transcript on file with author) (stating that the *Wilson* standard is tough and will make it more difficult for his firm to become involved in prison litigation); Interview with Beth Parker, Partner, McCutchen, Doyle, Brown & Enersen, in San Francisco, Cal. 1 (July 7, 1991) (transcript on file with author) ("*Wilson* is really problematic. . . . [It is] extremely difficult to do these cases."); Telephone Interview with Aryeh Neier, Executive Director, Human Rights Watch 1 (Feb. 13, 1992) (transcript on file with author) (stating that the era in which courts appointed masters and intervened has come to an end, based on composition of the U.S. Supreme Court).

routinely applied, though often without using the term. . . . In short, the effect of [*Wilson*] is chiefly to ratify the long-standing *status quo* in the courts.³⁰⁰

The Court's recent decision in *Helling v. McKinney*³⁰¹ supports this reading of *Wilson*. In *Helling*, the Court held that involuntary exposure to environmental tobacco smoke could constitute cruel and unusual punishment if the plaintiff established that prison officials were deliberately indifferent to "an unreasonable risk of serious damage to his future health."³⁰²

One other area of Supreme Court jurisprudence affecting prisoners' rights cases deserves mention.³⁰³ In *Rufo v. Inmates of Suffolk County Jail*,³⁰⁴ the Supreme Court determined the appropriate standard for modifying consent decrees in public law cases. *Rufo* involved a decree that prohibited double celling in a jail designed for single occupancy.³⁰⁵ This issue is extremely important to corrections litigation because many jurisdictions are currently operating under consent decrees that impose population caps.³⁰⁶ The pressures of overcrowding and budgetary constraints have prompted many state officials to seek modifications of existing consent decrees to remove or increase population caps and reduce the obligations previously incurred by the state.³⁰⁷ The defendants in *Rufo*, along with a coalition of state Attorneys General and the United States Attorney General, urged the Court to adopt the view that modification is warranted whenever the constitutional standard is clarified.³⁰⁸ The Court conclusively rejected this standard, holding that "[a] proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor."³⁰⁹ The Court held that: "a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modifica-

³⁰⁰ John Boston, *Highlights of Most Important Cases: Modification of Judgments/Consent Judgments*, NAT'L PRISON PROJECT J., Spring 1992, at 6, 7.

³⁰¹ 113 S. Ct. 2475 (1993).

³⁰² *Id.* at 2481.

³⁰³ For a discussion of the Supreme Court's decisions limiting recovery of attorneys' fees and expenses under 42 U.S.C. § 1988, see *infra* part IV.B.

³⁰⁴ 112 S. Ct. 748 (1992).

³⁰⁵ *See id.* at 756-57.

³⁰⁶ *See* Brief of the American Public Health Association as Amicus Curiae at 35 n.32, *Wilson v. Seiter*, 111 S. Ct. 2321 (1991) (No. 89-7376).

³⁰⁷ *See infra* note 406 and accompanying text.

³⁰⁸ *See Rufo* 112 S. Ct. at 763.

³⁰⁹ *Id.* at 764.

tion is suitably tailored to the changed circumstance."³¹⁰ Although the Supreme Court rejected the lower court's view that prison officials seeking modification must show a "grievous wrong evoked by new and unforeseen conditions,"³¹¹ its adoption of a flexible standard "left things pretty much as they were."³¹²

The question remains: will the federal judiciary, two-thirds of which has been appointed by Presidents Reagan and Bush,³¹³ be willing to rule in favor of prisoners and enforce orders requiring significant correctional reform? The answer may be "yes." Over and over, advocates have reported that some of the most conservative judges, when faced with grossly inadequate and unsafe prison conditions, have ruled in favor of inmates.³¹⁴ A review of recent published decisions supports this view: although courts are rejecting claims that may have been successful fifteen years ago,³¹⁵ plaintiffs continue to prevail in cases challenging core conditions of confinement.³¹⁶ One survey of cases with published opinions filed

³¹⁰ *Id.* at 765.

³¹¹ *Id.* at 757 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932)).

³¹² Boston, *supra* note 300, at 7.

³¹³ See Cummings, *supra* note 26, at A2 (indicating that the Reagan and Bush administrations had appointed 67% of the federal judges). Cummings points out that "[i]n the last four years, Mr. Bush has appointed 180 judges, who have been overwhelmingly young, white, male and wealthy. Mr. Reagan and Mr. Bush together appointed only two blacks to the federal appellate courts, including Supreme Court Justice Clarence Thomas." *Id.*

³¹⁴ See Ortega Interview, *supra* note 209, at 3-4 (stating that she prefers to take cases arising in an "extremely conservative county" with a right wing judge, and that, using this strategy, "we have yet to lose a case"); Telephone Interview with Marvin Sparrow, Director, North Carolina Prisoners Legal Services 2 (Aug. 2, 1991) (transcript on file with author) (stating his organization has had good success with very conservative judges).

³¹⁵ See, e.g., *Smith v. Fairman*, 690 F.2d 122, 125-26 (7th Cir. 1982) (commenting that double celling, while "unpleasant and regrettable," was not a constitutional violation), *cert. denied*, 461 U.S. 946 (1983); *Frohmader v. Wayne*, 766 F. Supp. 909, 914 (D. Colo. 1991) (granting defendant summary judgment despite plaintiff's allegation that he was "hit, kicked, beaten, and tortured all night long," on the ground that these allegations were "conclusory"), *rev'd in part*, 958 F.2d 1024 (10th Cir. 1992); *Harris v. Murray*, 761 F. Supp. 409, 413 (E.D. Va. 1990) (stating that failure to receive a hearing prior to administrative segregation does not deny due process); *Kitt v. Ferguson*, 750 F. Supp. 1014, 1020-22 (D. Neb. 1990) (stating that double bunking and other conditions did not violate inmates' constitutional rights under totality of circumstances test), *aff'd*, 950 F.2d 725 (8th Cir. 1991); *Dohner v. McCarthy*, 635 F. Supp. 408, 427 (C.D. Cal. 1985) (finding permanent double celling constitutional).

³¹⁶ See, e.g., *McCord v. Maggio*, 927 F.2d 844, 846-47 (5th Cir. 1991) (stating that Eighth Amendment violation exists where plaintiff spent months in a "closed-cell restriction" cell that was flooded with sewage and foul water with a bare mattress to sleep on); *Moore v. Morgan*, 922 F.2d 1553, 1555 (11th Cir. 1991) (stating that

during the eight years following *Bell v. Wolfish*³¹⁷ found that inmates were successful in 73.8% of prison and jail overcrowding cases, and that inmates were just as successful from 1983 to 1986 as they were from 1979 to 1982.³¹⁸ Another recent study suggests that "more 'Republican' judges on the federal bench does not spell the end of judicial activism in [prison cases]; such background characteristics of judges are powerful predictors neither of judicial intervention nor of the extent of that intervention."³¹⁹

In sum, the federal courts have not closed the door on litigation challenging conditions and practices in correctional institutions. They have, however, reduced the likelihood of success by adopting a standard of deference to prison officials, dramatically limited the likelihood of success in First Amendment and due process cases, and narrowed the range of cases in which federal courts will intervene.

IV. FROM A TEST CASE TO AN IMPLEMENTATION MODEL: THE FUTURE OF CORRECTIONS LITIGATION

Litigation's legacy as a necessary but limited form of corrections advocacy poses questions concerning the potential and direction of litigation over the next decade. This Section explores the emerging trends in corrections litigation, with an eye toward developing a model of legal services delivery that maximizes the potential of advocacy to improve conditions of confinement in correctional institutions. It is based upon interviews of lawyers with corrections background and expertise and is supplemented by studies of public interest lawyering.

inmates routinely slept on floor in bullpens with 15 square feet per inmate and cells with 20 to 22 square feet per inmate, and noting the complete absence of time outside of the cell); *Tillery v. Owens*, 907 F.2d 418, 427-28 (3d Cir. 1990) (holding that double ceiling and unsanitary conditions violate the Eighth Amendment), *cert. denied*, 112 S. Ct. 343 (1991); *Lyons v. Powell*, 838 F.2d 28, 31 (1st Cir. 1988) (holding that a requirement that inmates sleep on the floor may be unconstitutional); *Carver v. Knox County*, 753 F. Supp. 1398, 1402 (E.D. Tenn. 1990) (holding that various conditions of confinement violate Eighth Amendment), *cert. denied*, 495 U.S. 1919 (1990).

³¹⁷ 441 U.S. 520 (1979).

³¹⁸ See Jack E. Call, *Lower Court Treatment of Jail and Prison Overcrowding Cases: A Second Look*, FED. PROBATION, June 1988, at 34, 35.

³¹⁹ John J. DiIulio, Jr., *Enhancing Judicial Capacity, in COURTS, CORRECTIONS, AND THE CONSTITUTION*, *supra* note 38, at 3, 8 (summarizing Robert C. Bradley, *Judicial Appointment and Judicial Intervention: The Issuance of Structural Reform Decrees in Correctional Litigation, in COURTS, CORRECTIONS, AND THE CONSTITUTION*, *supra* note 38, at 249, 262-65).

Corrections advocacy is in the midst of a shift from a test case, law reform model to an implementation model of correctional reform. In the early days of the prisoners' rights movement, the test case model of law reform dominated the legal strategy of plaintiffs' advocates. This strategy, which grew out of the litigation strategy that culminated in *Brown v. Board of Education*,³²⁰ focused on bringing cases that would establish new constitutional protections for inmates. Litigators chose cases based on their potential to establish favorable precedent, particularly at the appellate level, and to affect the broadest possible range of persons who were "similarly situated who are not themselves parties."³²¹

³²⁰ 347 U.S. 483 (1954). Commentators agree that the test case strategy of law reform was developed in the school desegregation area and is exemplified by the litigation campaign culminating in *Brown*. See HANDLER, *supra* note 6, at 26 (stating that the "traditional" method "sought to change the political, economic, and social system" through the use of test case litigation); Charles R. Halpern & John M. Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095, 1116 (1971) (stating that past public interest efforts have been directed at segregated public schools, criminal courts, and the welfare system); Rabin, *supra* note 2, at 221-23 (discussing strategy of the Legal Defense Fund); Stephen L. Wasby, *The Multi-Faceted Elephant: Litigators Perspectives on Planned Litigation for Social Change*, 15 CAP. U. L. REV. 143, 144 (1986) (stating that race relations have been "most closely associated with the planned litigation 'model,' most notably through the campaign leading to *Brown*"); Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1077-79 (1970) (discussing impact and drawbacks of test case litigation); see also *supra* note 2 (listing scholars who attribute the origins of law reform strategy to *Brown*).

³²¹ Greenberg, *supra* note 2, at 320; see also Rabin, *supra* note 2, at 223; Boston Interview, *supra* note 227, at 2. The National Prison Project and the Youth Law Center, two national organizations specializing in corrections litigation, continue to view the potential impact of a case on the law or on other institutions or jurisdictions as a significant factor in determining whether to accept a case. See Interview with Elizabeth Alexander, Associate Director for Litigation, National Prison Project, in Washington, D.C. 14 (Nov. 15, 1990 and July 13, 1991) [hereinafter Alexander Interview] (transcript on file with author) (stating that it is inappropriate for her organization to take cases that deal with a small number of persons); Interview with Adjoa Aiyetoro, Associate Director for Administration, National Prison Project, in Washington, D.C. 2 (July 31, 1991) [hereinafter Aiyetoro Interview] (transcript on file with author); Bronstein Interview, *supra* note 10, at 7 (stating that when selecting cases his organization looks at potential impact of case); Koren Interview, *supra* note 260, at 6 (stating that criteria used to select cases are where case is located, chance of success, harshness of conditions, and type of complaint); Soler Interview, *supra* note 15, at 6 (indicating that cases are selected based on impact on state legislature, coverage by various media, and the number of people being harmed).

A law school textbook published in 1974 lists some of the concerns that should inform a lawyer's decision as to whether to proceed with a test case: (1) "Is the issue one whose time has come?" (2) "How much damage will be done if the issue is raised and the case lost?" (3) "Is anyone else promoting an orderly development of the issue?" (4) "Is the contemplated jurisdiction the appropriate place to make the

The test case model has had considerable appeal, particularly in the corrections area. Through the 1950s, the courts had refused to intervene at all in corrections institutions, and thus virtually no legal standards specifically governed conditions and practices in prisons. In the 1960s, for the first time, courts began to apply the First Amendment and Due Process Clause to prisons, invalidating the rules and procedures widely employed by correctional institutions.³²² Prisoners' rights advocates, faced with relatively undeveloped legal doctrine and an emerging judicial receptivity to corrections cases, developed theories such as the least restrictive alternative for pretrial detainees and the totality of conditions standard for cruel and unusual punishment under the Eighth Amendment.³²³ Their early successes were striking.

Where possible, litigation challenged existing procedures and rules in institutions and argued for imposition of constitutional standards to govern conditions and practices. Many of the early cases involved challenges to acknowledged institutional rules and practices, such as arbitrary disciplinary procedures, censorship, and prohibitions of religious observance.³²⁴ Central administrative policy typically maintained these practices, which were amenable to change through a test case strategy resulting in the imposition of new rules and practices.³²⁵ Once courts announced a new legal

challenge?" (5) "Is the issue as posed in the contemplated lawsuit the right first step?" (6) "If the case is won, will the victory be reduced or eliminated by an adverse political reaction?" (7) "Are the goals of the individual client different from the goals of those who will benefit from a successful resolution of the test issue?" MICHAEL MELTSNER & PHILIP G. SCHRAG, PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION 78-82 (1974).

³²² See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (requiring due process in prison disciplinary proceedings); *Procunier v. Martinez*, 416 U.S. 396, 413-15 (1974) (finding mail censorship of political, religious, and other material was unconstitutional under the First and Fourteenth Amendments); *Cooper v. Pate*, 378 U.S. 546, 546 (1964) (per curiam) (finding that allegation that prisoner was denied ability to purchase certain religious publications stated sufficient cause of action to overcome summary judgment).

³²³ The National Prison Project undertook to ground the totality of conditions theory in the Constitution in the Alabama prison case. See *Newman v. Alabama*, 349 F. Supp. 278, 280-81 (M.D. Ala. 1972) (holding that insufficient medical care could violate the Eighth Amendment), *aff'd*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); YACKLE, *supra* note 35, at 38-41 (outlining the importance of the *Newman* holding); Boston Interview, *supra* note 227, at 6 (stating that allegation that entire Alabama system was "rotten" and had to be dismantled was made early in litigation).

³²⁴ See *supra* note 322.

³²⁵ See HANDLER, *supra* note 6, at 19-22 (arguing that the challenge lies in getting bureaucracies to enforce, implement, or change rules); SUSAN M. OLSON, CLIENTS

standard in these areas, institutions could comply by changing their general policies in these areas.

Early corrections cases also had a shock value that advocates hoped would reverberate to other institutions and systems.³²⁶ Because litigation in correctional institutions was a relatively new phenomenon that exposed outrageous conditions that were previously insulated from scrutiny, advocates relied on these cases to attract public attention and to create broader public pressure for reform.

These strategic justifications for the test case model reinforced lawyers' predisposition to embrace the law reform model as a result of their professional incentives and orientation.³²⁷ Many advocates exhibited tremendous confidence in the normative power of law and its potential as a social change agent.³²⁸ They focused on law as a body of legal rules and on the capacity to change those rules through adjudication. This emphasis on changing legal norms coincided with the training and skills of those orchestrating the legal reform movement. Legal education emphasized appellate decision-making and socialized lawyers to place their faith and role identity in adjudication.³²⁹

AND LAWYERS: SECURING THE RIGHTS OF DISABLED PERSONS 170 (1984) (stating that the likelihood of success improved where benefit is tied to one time managerial decision and minimal administrative discretion in the field).

³²⁶ See Boston Interview, *supra* note 227, at 6 (describing premise of test case model as assumption that ruling involving one institution would have a multiplier effect).

³²⁷ Neil Komesar and Burton Weisbrod have identified the visibility of test case litigation as an approach that fulfills public interest lawyers' need for "publicity maximization." See Neil K. Komesar & Burton A. Weisbrod, *The Public Interest Law Firm: A Behavioral Analysis*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 80, 88 (Burton A. Weisbrod et al. eds., 1978); see also HANDLER, *supra* note 6, at 31 (stating that "tendencies toward test case litigation fit the training and role models of the public interest lawyers"); Rabin, *supra* note 2, at 232-33 (noting public interest lawyers' tendency to exploit newly developed expertise).

³²⁸ See, e.g., HARRIS & SPILLER, *supra* note 31, at 21 (stating that the impact of judicial intervention in the cases studied was "broad and substantial" and that it "reverberated outside the walls" of the prisons to affect the "broader community"); Wald, *supra* note 6, at 12 ("We felt confident in 'going for it,' 'doing the right thing,' raising constitutional issues freely—almost profligately—seeking activist intervention from the courts . . ."); Boston Interview, *supra* note 227, at 6 (noting that in the 1970s it was "[n]ot unreasonable to think that you [could] get a ruling and the problem [was] solved").

³²⁹ See, e.g., Gerald P. Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 319 (1989) (arguing that legal education focuses too greatly on appellate cases); Harold A. McDougall, *Lawyering and the Public Interest in the 1990s*, 60 FORDHAM L. REV. 1, 10

The test case model also responded to the resource constraints facing many public interest advocates.³³⁰ The relative efficiency of the law reform model was one of its selling points.³³¹ A litigation campaign focused on changing national precedent could conceivably be managed by a small group of committed lawyers. The earlier cases focusing on rule changes and shocking conditions were not fact-intensive or complicated in nature. Indeed, the conditions in many of the institutions targeted early on were so horrendous, and the cases so poorly defended, that trials were relatively simple and inexpensive to conduct. According to the associate director of the National Prison Project, "[a]necdotal accounts were sufficient. Plaintiffs could use one expert for everything."³³² For example, the entire liability trial in *Pugh v. Locke*³³³ cost approximately \$4000.³³⁴ Defense counsel and administrators were consistently outmatched in experience, ability, and resources. Litigation was typically highly adversarial, and defendants frequently resisted resolving litigation through settlement.

The significance of the test case model of corrections reform has diminished considerably in recent years and no longer characterizes the efforts of many prisoners' rights advocates. Some look wistfully back at the era of its preeminence, and many celebrate its significance in cementing law's place in social reform movements.³³⁵

(1991) (indicating that traditional legal education did not look beyond litigation); Lani Guinier et al., *On Becoming Gentlemen: The Education of Women at the University of Pennsylvania Law School* (unpublished manuscript, on file with author).

³³⁰ See ARON, *supra* note 14, at 86 ("In the early years, the lack of resources meant that public interest lawyers' first priority was filing lawsuits."). For a discussion of the impact of resource constraints on the nature of corrections representation, see Sturm, *supra* note 23.

³³¹ See HANDLER, *supra* note 6, at 31 (describing efficiency of law reform activity as compared to complex test case litigation); Rabin, *supra* note 6, at 223 ("The potential staggering expenses of litigation are . . . minimized through careful selection of test cases.").

³³² Alexander Interview, *supra* note 321, at 21. Alexander adds that "cheap victories are now nonexistent." *Id.*; see also Boston Interview, *supra* note 227, at 12 (stating that advocates formerly tried most prison cases on an anecdotal basis).

³³³ 406 F. Supp. 318 (M.D. Ala. 1976) (class action seeking declaratory and injunctive relief with respect to cruel and unusual punishment in Alabama penal system), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part per curiam sub nom.* Alabama v. Pugh, 438 U.S. 781, *cert. denied*, 438 U.S. 915 (1978).

³³⁴ See Elizabeth Alexander, *Prisoners' Lawyers Face Critical Issues*, NAT'L PRISON PROJECT J., Fall 1987, at 22, 25.

³³⁵ See, e.g., Wald, *supra* note 6, at 11-12 (describing the late 1960s as a "heady time: the first wave of poverty law reform coughed up big issue cases; the federal

However, the model no longer provides a useful framework for planning and conducting most corrections litigation.

Commentators and advocates often attribute the demise of the test case model to the increasing conservatism of the federal courts.³³⁶ Corrections advocates share a sense that their strategies must adapt to the change in judicial climate and lack of receptivity to expanding rights and developing legal theories.³³⁷ Opportunities for developing innovative, path-breaking constitutional theories are rare.³³⁸ Advocates generally bring cases only when they have established precedent supporting them.³³⁹

Judicial conservatism does not fully account for the decline of the test case model of law reform. To some extent, the decline of the model's significance is a natural development in the life cycle of social change and litigation. As legal norms developed to govern conditions and practices, advocates no longer faced completely lawless institutions or blanket resistance to the imposition of legal norms. Instead, they faced the challenge of implementing the legal regime they helped create. Much of the lawyers' energy involved enforcing orders already on the books. New cases increasingly focused on implementing previously established legal norms. More recent corrections cases pose problems that cannot be eliminated solely through rule changes.³⁴⁰ Amelioration of conditions and overcrowding typically require additional resources and changes in the behavior of complex systems, and are unlikely to be generalized

courts were hospitable, even eager to help us make new law for the poor and disadvantaged").

³³⁶ See *id.* at 12 (noting increasingly conservative tendencies of federal bench); *supra* text accompanying notes 273-302 (noting increasing conservatism of Reagan/Bush judiciary).

³³⁷ Indeed, this has been the subject of several annual meetings of public interest advocates, including the ACLU, the Cover retreat, and the juvenile justice section of the ABA.

³³⁸ *But see infra* part IV (describing emerging significance of state law and statutory causes of action).

³³⁹ See Ortega Interview, *supra* note 209, at 3 (noting that advocates now do extensive legal research and information gathering before taking a case); Soler Interview, *supra* note 15, at 8. The National Prison Project weighs heavily the potential negative consequences of losing, both on the possibility of reform within a particular jurisdiction and on the law. The organization places a high priority on winning, and is reluctant to bring litigation viewed as risky. See Alexander Interview, *supra* note 321, at 12.

³⁴⁰ See Sturm, *supra* note 24, at 813-14 (describing "dynamics of organizational stasis" that make conditions and practices in prisons "notoriously resistant to change").

to other systems without substantial enforcement efforts in those systems.³⁴¹

This evolution tracks the life cycle of other social reform efforts. The early stages of reform often revolve around defining the norms and goals of the reform effort, and the later stages move to the process of building institutions and methods for implementing those goals.³⁴² The shift also reflects the life cycle of institutional reform litigation, the centerpiece of which is remedial enforcement.³⁴³

The decreasing significance of the test case model also stems from the success of early efforts to institutionalize legal norms in correctional settings. As this Article has documented, litigation has been quite successful in eliminating the worst abuses in correctional settings.³⁴⁴ As litigation became more commonplace and the most visible abuses were alleviated, the shock value of new cases diminished. Also, the prebureaucratic, arbitrary regimes of governance have generally given way to more bureaucratic, legalistic structures.³⁴⁵ Corrections administrators now view litigation as a fact of life, and effective litigation management is one of a portfolio of skills required for successful corrections management.³⁴⁶

Finally, the inherent limitations of the law reform model play a role in limiting its preeminence. Advocates learned through experience that formal legal victories did not mean actual success in achieving correctional reform. In many cases, defendants simply ignored court orders requiring major changes in prison policy and practice.³⁴⁷ Legal rules were not self-executing; change required

³⁴¹ See *id.* at 815 (“[Prisons are] particularly resistant to change in the absence of outside intervention Internal reformers have limited power to generate the resources and cooperation necessary to achieve change”). I am indebted to John Boston for the development of this point.

³⁴² See, e.g., PRESSMAN & WILDAVSKY, *supra* note 66, at 168-73 (describing evolutionary relationship between policy formulation and implementation); Alan W. Houseman, *Poverty Law Developments and Options for the 1990s*, 24 CLEARINGHOUSE REV. 2, 9 (1990) (noting most AFDC representation “has entered into a ‘late’ phase”).

³⁴³ See *infra* notes 399-415 and accompanying text.

³⁴⁴ See *supra* notes 135-46 and accompanying text.

³⁴⁵ See *supra* notes 100-07, 123-28 and accompanying text.

³⁴⁶ See Telephone Interview with Ted F. Webb, gubernatorial consultant on appointing corrections commissioners 1 (Feb. 21, 1992) (transcript on file with author).

³⁴⁷ See Sturm, *supra* note 24, at 865. Prison officials may thwart efforts in the following ways:

Defendants may ignore the existence of the court order or fail to inform lower level workers of its mandate. They may deliberately undermine court-

creating political and administrative incentives and capacity to implement legal norms.³⁴⁸

The test case model ignores the significance of implementation in any effort to achieve lasting institutional reform. Its emphasis on the liability stage of litigation and the development of legal rules misdirects the energy and strategies of corrections advocates. Success at trial orients lawyers' goals and strategies, rather than actually alleviating unconstitutional conditions and practices. The test case model does not prepare plaintiffs' lawyers to address the challenges of monitoring and enforcement.³⁴⁹ Plaintiffs' lawyers frequently fail to recognize and account for the dynamics of running a correctional institution in their remedial decrees.³⁵⁰ The top-down approach emphasizing changes in central administrative policy ignores the institutional dynamics that account for many of the problems plaguing corrections institutions and the significance of local advocacy to reform.³⁵¹ This approach also masks conflicts among clients about remedial strategies, and inflates the power of lawyers to make value choices without taking into account competing perspectives and concerns.³⁵² Moreover, the model's preoccu-

ordered changes by promulgating them with a win and a nod. Or, they may engage in passive resistance by translating the broad constitutional directives that minimize judicial involvement or impact.

Id. (footnotes omitted).

³⁴⁸ See *id.* at 828-29 (describing the lack of incentives to "embrace a reform agenda" and the "risks and costs associated with seeking change").

³⁴⁹ See, e.g., HARRIS & SPILLER, *supra* note 31, at 45-46 (plaintiffs' lawyers attributed periods of inactivity during the compliance phase in part to "his uncertainty as to how to proceed as well as his frustration"); cf. PRESSMAN & WILDAVSKY, *supra* note 66, at 35 ("Although EDA officials had thought that designing the innovative policy, committing funds, and obtaining initial local agreements were the most crucial parts of the program, the implementation of the program proved surprisingly difficult.").

³⁵⁰ See Storey, *supra* note 40, at 35 (noting that plaintiffs' counsel "goal was to make the decrees as specific as would reasonably be appropriate"); Sturm, *supra* note 24, at 876 (noting that "[l]awyers frequently adopt extreme positions to enhance their bargaining strength and cut their potential losses"); see also Nathan Interview, *supra* note 160, at 4 (describing a lack of sensitivity to correctional culture and context as a common deficiency of private firms involved in this litigation).

³⁵¹ See Sturm, *supra* note 24, at 837-39 (describing the limits of administrators' ability to effect change).

³⁵² See LOPEZ, *supra* note 6, at 3 (noting that activist lawyers employing the "top-down" approach in the 1960s and early 1970s "paid at best only sporadic regard to whether litigation made more sense than some other strategy . . . , to whether litigation itself might not accommodate significant involvement by people in the community, to whether litigation . . . had a chance of penetrating the economic situation they hoped and often claimed to change"); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1205-21 (1982) (discussing how attorneys

pation with changing legal norms overlooks the significance of remedy and enforcement in determining whether meaningful reform occurs as a result of litigation.³⁵³

This failure to appreciate the significance of remedy is important for a number of reasons. Effective lawyering at the remedy stage requires different skills and processes than those needed to participate effectively in formal adjudication. Much of the remedial process takes place outside the courtroom and the adversary model of dispute resolution. Because cooperation by crucial insiders is critical to implementation,³⁵⁴ effective remedial advocacy requires creative uses of negotiation, mediation, and experts. The test case model simply ignores the political and institutional dimension of implementation, and relies on legalistic approaches to compliance that do not take into account the complexities of organizational change. The model also blinds advocates to the importance of building coalitions with insiders in the corrections field and linking litigation to other methods of advocacy, such as public education as well as administrative advocacy and legislative advocacy.³⁵⁵

The test case model's emphasis on winning legal battles reinforces advocates' predisposition to rely exclusively on formal, adversary process.³⁵⁶ Its dependence on the adversary model saddles the test case strategy with the many limitations of adversary process as a means of developing and implementing effective

"active in institutional reform class actions [are] subject to a variety of . . . pressures that constrain [their] responses to class conflicts" and lead them to make decisions without considering the varying remedial preferences among class members). For a fuller discussion of need for forms of participation and representation that enable meaningful participation by clients, see Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. (forthcoming 1994).

³⁵³ Early critics of the test case law reform strategy recognized the significance of politics and implementation to successful law reform. See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* xi-xii (1974) (examining litigation and political change in order to shed light "on the broader problem of understanding the influence of legal values on political outcomes"); Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1055-56 (1970) (discussing an alternative manner of practicing public interest law that takes into account political considerations and emphasizes informing and educating clients so that they can use their lawyers' knowledge); Comment, *supra* note 320, at 1077 (quoting Gary Bellow's comment that test case litigation is a dead end because it fails to address inequalities in power and to provide for implementation).

³⁵⁴ See *supra* text accompanying notes 195-98.

³⁵⁵ See *infra* text accompanying notes 417-31.

³⁵⁶ See SCHEINGOLD, *supra* note 353, at 141 (stating that "lawyers are by training, socialization, and expertise inclined to exclusive use of litigation"); *supra* text accompanying notes 327-29.

remedial solutions. Advocates frequently adopt a reactive posture of waiting for problems to arise and then returning to court for an adjudication of continuing violations of the court order.³⁵⁷ This approach typically prolongs implementation. Nothing happens for a period of time, and then the parties return to court to fight over the adequacy of the defendants' efforts. This scenario fails to create a framework for developing workable solutions to the legal violations, and perpetuates the defensive posture that predisposes responsible officials to resist judicial involvement.³⁵⁸

The test case model also creates a false picture of the relative significance and demands of trial and remedy. Advocates who embrace the test case model frequently fail to understand at the outset that the remedial stage will consume the bulk of their time and resources. Corrections advocates, particularly those with a national reform agenda, often allocate insufficient time and energy to the remedial stage.³⁵⁹

These problems, however, do not mean that test case litigation has not and cannot play an important role in pursuing institutional reform through the law. Certainly, the development of legal norms has profoundly and positively affected the corrections field.³⁶⁰ The earliest cases brought in any new institutional context necessarily act as test cases that will affect the contours of future legal challenges. However, the test case model cannot achieve lasting institutional reform on its own. It must be linked to a broader advocacy strategy that recognizes and builds on the importance of implementation.³⁶¹

³⁵⁷ See, e.g., HARRIS & SPILLER, *supra* note 31, at 157-60 (stating that plaintiffs' monitoring activity consisted of responding to inmates' complaints of noncompliance by filing contempt motions); Alexander Interview, *supra* note 321, at 10 (noting that NPP will return to court where orders get "screwed up"); Bronstein Interview, *supra* note 10, at 4 ("We want to be called back in where there are national implications.").

³⁵⁸ See HARRIS & SPILLER, *supra* note 31, at 14 (noting that noncompliance often resulted from an "unwilling or unresponsive attitude"); Sturm, *supra* note 42, at 1394-95 (describing the tendency of the adversary process to produce hostility, and resistance and the incompatibility of adversary participation with the demands of remedial implementation).

³⁵⁹ See HARRIS & SPILLER, *supra* note 31, at 20 ("[T]he efforts of plaintiffs' attorneys to monitor compliance diminished over time, suggesting that they should not be relied on as the only source of compliance information."); Sturm, *supra* note 23.

³⁶⁰ See *supra* text accompanying notes 100-07.

³⁶¹ See Aiyetoro Interview, *supra* note 321, at 24 (discussing various methods for achieving reform, including using the media, lobbyists, and prisoners' rights organizations to educate the community); Boston Interview, *supra* note 227, at 13-14 (same);

In reaction to the changes in the judicial, political, and administrative environment, corrections advocates have begun to recast their roles to conform to an implementation model of law reform. This model focuses on achieving and maintaining institutional reform, and is characterized by two simultaneous and somewhat competing developments, each of which is discussed further below. Cases that go to trial focus on implementing well-established, minimal standards of decency in a variety of institutional settings. This litigation has become increasingly complex, fact intensive, adversarial, and costly to litigate.³⁶² At the same time, effective advocacy now requires the development of informal means of factfinding, remedial formulation, and monitoring, and the linkage of litigation to broader strategies of correctional reform.³⁶³ The challenge facing public interest advocacy over the next decade is to reconcile and sustain these two prongs of the implementation model, and is likely to reflect and be affected by the following trends.

A. *Prison and Jail Litigation Will Concentrate on Gross Inadequacies in Core Conditions of Confinement*

Litigation currently undertaken by prisoners' rights organizations targets institutions that fail to provide inmates with the minimal necessities of civilized existence.³⁶⁴ This trend is likely to

infra text accompanying notes 418-31.

³⁶² This development resulted from a combination of factors: the toughening of Supreme Court evidentiary standards for establishing liability, the fact-intensive nature of the problems at issue, the developing competence and adversariness of the defense bar, and in some cases, the greater subtlety of some of the problems targeted by litigation. See Breed Interview, *supra* note 238, at 1, 2 (noting increasingly adversarial attitude on the part of state officials, and the challenges of presenting a case that will stand up against more and more effective defense people); see also Houseman, *supra* note 342, at 2 & n.4 (noting similar trends in welfare law); Alan W. Houseman, *A Short Review of Past Poverty Law Advocacy*, 23 CLEARINGHOUSE REV. 1514, 1521 (1990) (discussing developing trends of welfare law in the 1980s, including increasingly complex, fact-based litigation).

³⁶³ See ARON, *supra* note 14, at 85-93 (noting increasing combination of advocacy strategies by public interest lawyers); Sturm, *supra* note 9, at 1365-67 (discussing ways in which public remedial litigation differs from the traditional adversary process).

³⁶⁴ See, e.g., Alexander Interview, *supra* note 321, at 21 (stating that NPP focuses its resources on conditions and practices that are life-threatening, particularly overcrowding combined with some deprivation of a basic human need); Boston Interview, *supra* note 227, at 2-3 (stating that YLC selects cases targeting dangerous practices); Soler Interview, *supra* note 15, at 5 (same); Telephone Interview with Bob Stalker, Staff Attorney, Evergreen Legal Services (July 16, 1991) (transcript on file with author) (same).

continue. Virtually every specialist reported a shift away from First Amendment, due process, and programmatic issues towards an emphasis on overcrowding, environmental health and safety, violence, and medical and mental health care.³⁶⁵ Many report a particularly significant increase in the number of cases challenging the adequacy of medical care in correctional facilities.³⁶⁶ Advocates also noted a growing recognition of the problems confronting women in correctional institutions, and a burgeoning interest in addressing these issues.³⁶⁷ Advocates are increasingly reluctant to bring litigation unless conditions or practices are dramatically and unequivocally inhumane or arbitrary, or a substantial nonconstitutional claim can be asserted.³⁶⁸ If a facility or system meets minimal standards in most areas, litigation is unlikely to be brought.

Advocates attribute this concentration on core conditions of confinement to the confluence of several factors. First and foremost, they point to the deterioration of the law in the area of civil liberties and the toughening of the standards in conditions of confinement cases.³⁶⁹ Second, advocates identify health and safety

³⁶⁵ See Alexander Interview, *supra* note 321, at 20-21 (noting that the National Prison Project does not foresee bringing new cases on First Amendment or due process grounds alone); Boston Interview, *supra* note 227, at 2 (discussing an increased concentration on health and safety issues at Prison Legal Services); Soler Interview, *supra* note 15, at 9 (noting the same for the Youth Law Center).

³⁶⁶ As of 1991, the Prisoners' Rights Project had more cases challenging medical, dental, or psychiatric care than any other subject matter area. See Interview with Angus Love, Director, Institutionalized Persons Project, Pennsylvania Legal Services, in Philadelphia, Pa. 4 (July 12, 1992 and July 14, 1992) [hereinafter Love Interview] (transcript on file with author) (reporting that the greatest number of complaints concern medical care). The Prison Law Office in San Quentin, California, reports more medical care cases than any other subject matter category addressing prison conditions and practices. See Letter from Bonnie Cash, Office Manager, Prison Law Office, San Quentin, Ca. 3 (Dec. 5, 1991) (on file with author) (providing data for the fiscal year from July 1, 1990 to June 30, 1991).

³⁶⁷ See National Prison Project, Litigation Overview (Sept. 5, 1989) [hereinafter Litigation Overview] (on file with author); *supra* note 272 and accompanying text.

³⁶⁸ See Boston Interview, *supra* note 227, at 2 (discussing increasing concentration on threats to health and safety); Ortega Interview, *supra* note 209, at 4 (noting that if jails are fairly adequate, SCHR will decide not to litigate); Soler Interview, *supra* note 15, at 8-9 (stating that YLC generally does not bring cases without good law behind them, and now focuses more on statutory issues than constitutional doctrine).

³⁶⁹ See Boston Interview, *supra* note 227, at 2; Litigation Overview, *supra* note 367, at 2; see also Clark Foundation Grantees, Corrections Litigation 2 (unpublished report, on file with author).

In prison cases, the primary focus today is on five issues: overcrowding, environmental health and safety, medical and mental health care, violence, and sex discrimination in practices and programs. In juvenile cases, the major issues are lack of classification systems, inadequate health services,

as the most important problems facing inmates of correctional institutions.³⁷⁰ Given the limited resources of the lawyers representing inmates and the growing expense and complexity of corrections litigation,³⁷¹ litigators generally accept the importance of limiting their efforts to the problems threatening the survival and bodily integrity of their clients.³⁷² Third, specialists in corrections litigation have developed substantial expertise in the areas of health and safety and thus face lower start-up costs to each new litigation. A number of those interviewed spoke of the efficiencies and virtues of not having to "reinvent the wheel" with each new case.³⁷³ Their familiarity with the area creates considerable incentives to use this expertise to tackle similar problems in new institutions.

Finally, advocates describe earlier decrees targeting virtually every aspect of prison life as unwieldy, difficult to implement, and more likely to create resentment on the part of prison officials.³⁷⁴ Experience has led veteran corrections litigators to focus their remedial efforts on "issues which state officials understand and are easy to monitor for required change."³⁷⁵

inadequate training and supervision of employees, sanitation, and use of restraints and isolation.

Id.

³⁷⁰ See Boston Interview, *supra* note 227, at 2; Love Interview, *supra* note 366, at 3 (citing medical services as one of the biggest areas of concern after overcrowding).

³⁷¹ For a comprehensive discussion of the extent and nature of representation of inmates in corrections cases, see Sturm, *supra* note 23.

³⁷² The issue of the appropriate norms and processes for rationing scarce legal resources is a controversial one. See Gary Bellow & Jeanne Kettleon, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 342-45 (1978); Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 282, 282-86 (1982); Marie A. Failing & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1, 32-51 (1984).

³⁷³ See, e.g., Alexander Interview, *supra* note 321, at 15, 29 (noting that a "specialized office saves time" and avoids "reinventing the wheel"); Boston Interview, *supra* note 227, at 2 ("We have the resources [and] background to do [these cases] without having to reinvent the wheel with every new case."). The phenomenon of specialization in public interest practice has been observed in other contexts. See, e.g., Rabin, *supra* note 2, at 232-33 (noting that "[a]fter mastering the intricacies of [a particular agency practice], the public interest lawyer is reluctant to ignore the efficiencies of further application of his newly developed expertise").

³⁷⁴ See Litigation Overview, *supra* note 367, at 2.

³⁷⁵ *Id.*

B. *Corrections Cases Will Be More Complex and Costly to Litigate, Requiring Sophisticated Litigation Tools and the Extensive Use of Experts*

Cases that target conditions and practices in bureaucracies, rather than rules and regulations, tend to be more fact intensive and expensive to litigate.³⁷⁶ Higher standards of proof, more sophisticated and aggressive defenses, and less sensational forms of abuse and deprivation further increase the difficulty and expense of corrections cases. Formerly, plaintiffs could often prevail by presenting essentially anecdotal evidence.³⁷⁷ The Supreme Court's decisions over the last fifteen years, particularly in *Bell v. Wolfish*³⁷⁸ and *Rhodes v. Chapman*,³⁷⁹ toughened the evidentiary standards for demonstrating that overcrowding and other conditions are depriving inmates of basic human needs. Proving that an institution's population significantly exceeds design capacity or violates minimum professional standards is not enough. Plaintiffs must demonstrate the connection between the prison conditions and a particular harm to inmates.³⁸⁰

³⁷⁶ See HANDLER, *supra* note 6, at 192-93 (describing the costly and time-consuming process of targeting bureaucratic processes); John Tull, *Implications of Emerging Substantive Issues for the Delivery System for Legal Services to the Poor*, 24 CLEARINGHOUSE REV. 17, 29 (1990) ("Litigation also may involve more frequently complicated factual matters . . . [T]he costs to a [legal services] program will be increased.").

³⁷⁷ See Boston Interview, *supra* note 227, at 12 ("A great deal of what we do now is put together evidentiary [presentations] of [a] scope unthinkable 10-15 years ago. [We formerly] tried these cases essentially on [an] anecdotal basis."); Michael B. Mushlin, *Rhodes v. Chapman Analyzed for Effect on Prison Overcrowding*, NAT'L PRISON PROJECT J., Winter 1987, at 4, 5 ("In my days as a prisoners' rights litigator before *Chapman*, we were able to address prison overcrowding by presenting straightforward evidence . . .").

³⁷⁸ 441 U.S. 520 (1979).

³⁷⁹ 452 U.S. 337 (1981).

³⁸⁰ See *id.* at 348-49 (holding that violations of design standards are inadequate to prove cruel and unusual punishment, and requiring a showing that violations of professionally recognized minimum standards causes "unnecessary or wanton pain or is grossly disproportionate to the severity of the crimes warranting imprisonment"). The Supreme Court has never articulated the constitutional standards by which to judge the conditions in state juvenile detention facilities. Lower courts have generally held that the Due Process Clause governs the treatment of juveniles under the supervision of the juvenile justice system. See, e.g., *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987) (holding that the Due Process Clause is the standard governing conditions of confinement of detainees who are not yet convicted); *Santana v. Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983) (holding that juveniles confined in an industrial school "have a due process interest in freedom from unnecessary bodily restraint"), *cert. denied*, 466 U.S. 974 (1984). The issue of whether juveniles confined in juvenile justice institutions can challenge the state's failure to provide them with

This increased evidentiary burden has dramatically increased the difficulty and expense of conditions of confinement cases. "There are no cheap victories any more. *Rhodes* has introduced a much more complex litigation model. Successful litigation requires massive discovery and greater reliance on expert opinions based on close study of a particular institution."³⁸¹ *Wilson v. Seiter*³⁸² continues this trend: "[Advocates] must anticipate [a] lack of resources and lack of cooperation [by nonparties] and go down the line in proving deliberate indifference."³⁸³

Plaintiffs' lawyers now require expertise in complex litigation, class actions, and the vagaries of § 1983 issues to provide adequate representation in conditions of confinement cases.³⁸⁴ The emerging recognition of the importance of systemic approaches to institutional litigation has prompted experimentation with novel procedural devices, such as defendant class actions, innovative case assignment systems, and sophisticated approaches to monitoring.³⁸⁵ Plaintiffs' lawyers increasingly use methods such as computerized tracking that provide a comprehensive picture of the functioning of the institution and an informed basis of selecting representative examples of more systemic problems.³⁸⁶

minimally adequate treatment also remains unresolved. Lower courts have relied on the Supreme Court's decision in *Youngberg v. Romeo*, 457 U.S. 307, 324-25 (1982) (holding that civilly committed persons have a right to minimally adequate treatment to ensure their safety), to establish the framework for analyzing this issue. *Youngberg* held that in determining whether a substantive right protected by the Due Process Clause has been violated, a court must balance the individual's interest in liberty against the state's asserted reasons for restraining liberty. *See id.* at 320. The proper standard for determining whether the proper balance has been struck is whether "professional judgment" has been exercised. *Id.* at 321. Federal courts have interpreted *Youngberg* differently, some finding very broad guarantees of treatment and others strictly limiting the amount of treatment guaranteed by the Constitution to that granted in *Youngberg*. Compare *Scott v. Plante*, 691 F.2d 634, 636-38 (3rd Cir. 1982) (reading *Youngberg* expansively) with *Phillips v. Thompson*, 715 F.2d 365, 368 (7th Cir. 1983) (reading *Youngberg* narrowly).

³⁸¹ Alexander Interview, *supra* note 321, at 21. There is an "arms race in [the] degree of sophistication" required by these cases; the evidentiary presentations used today are "of a scope unthinkable" 10 or 11 years ago. Boston Interview, *supra* note 227, at 12.

³⁸² 111 S. Ct. 2321 (1991).

³⁸³ Bronstein Interview, *supra* note 10, at 5.

³⁸⁴ *See* Interview with Stephen O. Kinnard, Partner, Jones, Day, Reavis & Pogue, in Atlanta, Ga. 2-3 (Aug. 12, 1991) (transcript on file with author); Cullen Interview, *supra* note 22, at 9.

³⁸⁵ *See supra* text accompanying notes 174-82 (describing recent procedural innovations).

³⁸⁶ *See* Boston Interview, *supra* note 227, at 12 (describing use of computerized

The role of experts in corrections litigation has become more complex and indispensable as parties show greater willingness to litigate.

The use of expert witnesses has become essential to investigation, the framing of the issues, and to analysis of the likelihood of success before a complaint is filed. Experts also are now involved in all phases of pretrial preparation. Their presence is invaluable when depositions are taken or when interrogatories are drafted. They assist in the review and analysis of documents, selection of exhibits, and preparation of cross-examination.³⁸⁷

The use of experts differs from that of noninstitutional litigation in that experts interact with the administration, staff, and inmates to develop a common factual basis and a workable remedy. They not only assess the causes and likely impact of particular conditions; they help develop a plan of action. Their interactions with those who must live with a remedy can determine the future course of implementation.³⁸⁸ If experts can work effectively with management and staff, judicial intervention can develop into a cooperative endeavor that can enhance the quality of service delivery in the institution and avoid protracted litigation.³⁸⁹

The response of the defense bar to the increasingly stringent standards of proof in corrections cases has also contributed to the expense and difficulty of litigating these cases. Litigators report that attorneys general have responded to the increased evidentiary burdens by hardening their positions and becoming more willing to litigate.³⁹⁰ There are indications that the defense bar is becoming

tracking system in dental care case and increasing use of computerization in trial preparation).

³⁸⁷ Claudia Wright, *Expert Witnesses: Expanding Their Role in Prison Cases*, NAT'L PRISON PROJECT J., Fall 1987, at 12, 12.

³⁸⁸ This is one of many areas of potential overlap between formal adjudication and consensual dispute resolution and problem solving approaches in corrections litigation.

³⁸⁹ See generally Sturm, *supra* note 42, at 1062-72, 1090-91 (noting that successful implementation of effective remedies is enhanced by cooperation and interaction between experts and participants in the prison system).

³⁹⁰ See Breed Interview, *supra* note 238, at 2 (describing an "attitudinal change" on the part of attorneys general against settlements). This litigious posture is not necessarily shared by the Department of Corrections. Advocates reported numerous instances of disagreement between leadership in the corrections department and the attorney general over whether to settle. In fact, the conflict of interest between the government's attorney and the agency itself was a recurring theme. See, e.g., Boston Interview, *supra* note 227, at 17 (noting genuine conflicts facing attorneys general); Nathan Interview, *supra* note 160, at 3 (noting importance of competent defense

more organized and combative in its approach to this litigation.³⁹¹

Thus, the corrections litigation of the next decade will require considerable expertise in complex litigation and adequate resources to enable plaintiffs to employ experts and engage in extensive discovery. The involvement of experts, although crucial to successful litigation, dramatically increases the cost of litigation.³⁹² The Supreme Court's recent decision in *West Virginia University Hospitals, Inc. v. Casey*,³⁹³ prohibiting the recovery of expert fees under 42 U.S.C. § 1988, ensures that organizations will not recover costs they incur in major conditions litigation.³⁹⁴ This unavailability of attorneys' fees for experts dramatically limits the capacity of many lawyers to bring this litigation.³⁹⁵ The increased complexity and expense of corrections litigation heightens the challenge of finding resources adequate to support this litigation. Whether private foundations will continue to provide significant support for

counsel in achieving reform and describing "complex representational problem[s]" facing defendants' lawyers who must meet the needs of conflicting interests and parties as well as take action that can be defensible politically").

³⁹¹ For example, a group of attorneys general filed an amicus brief in *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992), urging the Court to adopt a standard allord modification of consent decrees to conform to the constitutional floor. See Brief for the United States as Amicus Curiae at 19-22, *Rufo*, 112 S. Ct. 748 (No. 90-954). The firm representing the attorneys general is reported to have developed a specialty in advising governments on fighting this litigation. See Nathan Interview, *supra* note 160, at 2, 3 (describing role of the law firm Oneck Klein as defense counsel in prison litigation). One conservative commentator suggests that the *Rufo* decision has invited "a flood of successful government petitions to overhaul consent decrees." Bruce Fein, *Consent Decrees and the Consent of the Governed*, TEX. LAW., Feb. 17, 1992, at 13, 13.

³⁹² See Alexander Interview, *supra* note 321, at 25. The Department of Justice alone spent over one million dollars in litigation costs in *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part*, 679 F.2d 115 (5th Cir.), *modified*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); see also *Knop v. Johnson*, 712 F. Supp. 571, 588 (W.D. Mich. 1989) (plaintiffs incurred \$97,530.61 in expert witness fees).

³⁹³ 499 U.S. 83 (1991).

³⁹⁴ See *id.* at 102. In *Casey*, the Supreme Court held that expert witness fees could only be recovered in the court's discretion as costs pursuant to 28 U.S.C. §§ 1920 and 1821(b), which limit recovery to travel expenses and a witness fee of \$30 per day for each day the witness appeared at a deposition or in court. See *id.* Section 1821 has since been amended to increase the allowable per diem from \$30 to \$40. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 314(a), 104 Stat. 5081, 5115 (codified as amended at 28 U.S.C. § 1821 (Supp. IV 1992)). This amount does not begin to cover the cost of expert's testimony. It also ignores the extensive informal and preparatory role experts play, particularly at the remedial stage.

³⁹⁵ A survey conducted of legal services, law school clinics, and private firms revealed that the expense of litigation is a considerable deterrent to lawyer involvement in corrections litigation. See Sturm, *supra* note 23.

national organizations specializing in corrections litigation is uncertain.³⁹⁶ The future of this litigation may well depend on the willingness of Congress to amend § 1988 to allow recovery of expert fees, private bar involvement in litigation, expansion of the role of legal services,³⁹⁷ and commitment by the Department of Justice to the mandate of the Civil Rights of Institutionalized Persons Act to protect inmates' right to minimally adequate conditions in correctional institutions.³⁹⁸ Resource constraints also require corrections advocates to exercise care in deciding whether and where to bring litigation.

³⁹⁶ The Edna McConnell Clark Foundation, which has been the primary private funder of corrections litigation, has recently decided to phase out its general support of corrections litigation.

³⁹⁷ For a discussion of the current and potential involvement of each of these sectors of the legal profession in litigation involving conditions of confinement in corrections institutions, see Sturm, *supra* note 23.

³⁹⁸ See 42 U.S.C. § 1997 (1988). Under the Carter administration, the Special Litigation Section of the Justice Department devoted considerable resources to prison litigation. For example, they reportedly spent over one million dollars litigating *Ruiz v. Estelle*, see *supra* note 392, and private counsel in that case reports that *Ruiz* would not have been possible without Department of Justice resources. See Interview with Donna Brorby, Partner, Turner & Brorby and plaintiffs' counsel in *Ruiz*, in San Francisco, Cal. 3 (July 19, 1991) [hereinafter Brorby Interview] (transcript on file with author). They also paid for all the reports and experts in *United States v. Michigan*, 680 F. Supp. 270 (W.D. Mich. 1988). See Alexander Interview, *supra* note 321, at 3.

Under Presidents Reagan and Bush, however, the Justice Department essentially abandoned its role in promoting constitutional prisons through litigation. The Bush administration took the position that "the ability of many states to manage their own prisons and jails efficiently has been hampered by the involvement of courts in their day-to-day operations." William P. Barr, Expanding Capacity for Serious Offenders, Remarks at the Attorney General's Summit on Corrections 24 (Apr. 27, 1992) [hereinafter Expanding Capacity] (transcript available at the Department of Justice); see also William P. Barr, Remarks to the California District Attorneys Association, 1992 Winter Conferences (Jan. 14, 1992) (transcript available at the Department of Justice) ("I recognize that the ability of states to manage their own prisons has been hampered by the involvement of federal courts in the day-to-day operations of state facilities."). The Attorney General at that time also adopted a policy against the use of consent decrees to resolve corrections cases. Consistent with these positions, the Justice Department switched sides in particular lawsuits to assist states in avoiding judicial intervention, filed amicus briefs urging the lifting of population caps, and offered to assist states and localities tied up in litigation. See Expanding Capacity, *supra*, at 27 (describing the importance of the Department of Justice's activities in support of defendant states); *United States' Memorandum of Law in Support of Defendants' Motion for Relief from Judgment* at 4, *Ruiz v. Collins*, 981 F.2d 1256 (5th Cir. 1992) (No. H-78-987). The role of the Justice Department under President Clinton in enforcing its mandate under CRIPA remains to be seen.

*C. Considerable Attention and Resources Will Be Devoted to
Preserving and Enforcing Existing Court Orders*

The remedial stage is in many respects the most important and difficult aspect of correctional litigation. Establishing liability is merely the first step in a long process of eliminating illegal practices and conditions.³⁹⁹ Many of the institutions that were sued in the 1970s and 1980s have yet to achieve and maintain substantial compliance with court orders.⁴⁰⁰ As of January 1991, forty states (plus the District of Columbia, Puerto Rico, and the Virgin Islands) were operating under court orders, some of which were issued as far back as the early 1970s.⁴⁰¹

Corrections advocates have come to realize the significance of the remedial stage. Experience has shown that compliance is unlikely to be achieved without the active involvement of plaintiffs' counsel. Many correction litigation specialists report that they devote increasing amounts of energy to implementation.⁴⁰² For example, in twenty-four of the twenty-six active cases in 1992 on the docket of the Prisoners Rights Project of the Legal Aid Society in New York City ("PRP"), a judgment had been entered on all or part of plaintiffs' claims, whereas in 1973, only eight out of the PRP's twenty-eight active cases were post-liability.⁴⁰³ Similarly, twenty-one out of the twenty-six active cases reported in the June 30, 1991 quarterly report of the National Prison Project ("NPP") are in the post-liability phase of litigation.⁴⁰⁴ PRP's director, John Boston, reports that a considerable proportion of the resources in his office

³⁹⁹ See Sturm, *supra* note 24, at 809 (describing the many stages that comprise the remedial process).

⁴⁰⁰ See *supra* notes 216-19 and accompanying text.

⁴⁰¹ See Koren, *supra* note 188, at 1-4.

⁴⁰² When asked about her expectations for implementation, Elizabeth Alexander, the associate director of litigation for NPP, stated that condition cases are expected to remain permanently on the docket. She also stated that if there is not a commitment to carry through with implementation, there is no reason to bring the case. See Alexander Interview, *supra* note 321, at 43. Adjoa Aiyetoro estimates that 50 to 60% of her litigation work is post-litigation compliance work. See Aiyetoro Interview, *supra* note 321, at 1; see also Bright Interview, *supra* note 10, at 2.

⁴⁰³ See John Boston, *The Prisoners' Rights Project Then and Now* (Feb. 1992) (unpublished report, on file with author).

⁴⁰⁴ See *Quarterly Report* (ACLU/National Prison Project, Washington, D.C.), June 30, 1990, at 1-28. This figure includes cases resolved by consent decrees. See *id.* at 16.

are devoted to enforcement, and predicts that this trend will continue.⁴⁰⁵

Efforts by local, state, and federal officials to modify or vacate existing orders add to the significance of enforcement activities by corrections advocates. Many defendants are using recent increases in inmate populations and new case law toughening the standards for finding an Eighth Amendment violation to support motions to modify outstanding decrees.⁴⁰⁶ Although the Supreme Court has rejected the view that these factors alone warrant modification of decrees, its articulation of a more flexible standard for modifying orders and its increasing deference to official discretion will likely encourage defendants to try nonetheless to seek modifications of outstanding decrees on these grounds.⁴⁰⁷

Defendants have also intensified their efforts to eliminate active judicial supervision of correctional institutions. The Supreme Court has held that a district court may grant partial relief from active court supervision,⁴⁰⁸ and that a district court must release a school board from the court's jurisdiction once it has eliminated the effects of its discriminatory conduct.⁴⁰⁹ Some lower courts have relinquished active supervision, or even vacated outstanding decrees in corrections cases upon a finding that defendants have achieved substantial compliance.⁴¹⁰ Corrections officials, plaintiffs' counsel,

⁴⁰⁵ See Boston Interview, *supra* note 227, at 1.

⁴⁰⁶ See, e.g., *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 763-65 (1992) (adopting a more flexible standard for modifying consent decrees and remanding to district court to determine whether population increases constituted a significant change in facts warranting a modification of consent decree prohibiting double celling); *Ruiz v. Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987) (affirming district court's refusal to modify consent decree on grounds that defendants had acknowledged and accepted the possibility of increased prison population upon entering into "crowding stipulation"); *Twelve John Does v. District of Columbia*, 861 F.2d 295, 298-302 (D.C. Cir. 1988) (affirming district court's denial of modification of consent decree on grounds that, inter alia, increases in prison population were foreseeable); *supra* text accompanying notes 304-12.

⁴⁰⁷ See Fein, *supra* note 391, at 13.

⁴⁰⁸ See *Freeman v. Pitts*, 112 S.Ct. 1430, 1445 (1992) (holding that district court may in its discretion terminate judicial supervision of school districts incrementally before full compliance has been achieved).

⁴⁰⁹ See *Board of Educ. v. Dowell*, 498 U.S. 237, 249 (1991) (remanding to district court to determine whether school board was entitled to relief from desegregation decree). For a careful discussion of Supreme Court cases governing modification and termination of injunctions, see David Levine, *The Later Stages of Enforcement of Equitable Decrees: The Course of Institutional Reform Cases After Dowell, Rufo, and Freeman*, 20 HASTINGS CONST. L.Q. 579, 610-11 (1993).

⁴¹⁰ See, e.g., *Kendrick v. Bland*, 931 F.2d 421, 423 (6th Cir. 1991) (affirming district court's placement of case on inactive docket upon finding of substantial compliance

judges, and masters have all expressed keen interest in developing an exit scenario for corrections cases.⁴¹¹ Indeed, experienced corrections advocates have begun to use defendants' interest in terminating judicial supervision as an incentive to develop alternative forms of accountability.⁴¹² This move is prompted in part by the recognition that the court often shares defendants' interest in ending the litigation. It also reflects the insight that the incentive to terminate the litigation may be plaintiffs' strongest leverage, and that a vision of an acceptable endpoint to the litigation should inform the entire remedial process.

The increasing significance of the remedial stage presents both challenges and opportunities for corrections advocates over the next decade. Successful advocacy depends on recognition of the importance of the remedial stage, a commitment to continued active involvement through the implementation process, and the development of skills and expertise that differ in important respects from formal litigation skills developed in other complex litigation.⁴¹³

and denying motion to restore case to active docket absent showing of institution-wide violation of consent decree); *Black v. Ricketts*, No. 84-111 PHX-CAM, (D. Ariz. Feb. 1988); *Finney v. Mabry*, 546 F. Supp. 628, 641 (E.D. Ark. 1982) (relinquishing jurisdiction on finding of substantial compliance).

⁴¹¹ See Breed Interview, *supra* note 238, at 5 (urging foundations to look at how to help special masters successfully conclude their cases); Nathan Interview, *supra* note 160, at 9 ("If cases are brought to conclusion in careful and sophisticated ways and are not terminated prematurely, and if you build in certain mechanisms at the end, backsliding will not be [a] problem [I am] spending more and more of [my] time on the endgame process.").

⁴¹² See, e.g., Breed Interview, *supra* note 238, at 5 (urging use of departure of special master to bring about change); *supra* text accompanying notes 184-86. One strategy described in recent conversation with David Rudovsky, a private practitioner currently representing inmates in a state-wide challenge of conditions in Pennsylvania prisons, consists of developing and agreeing to a remedial plan and giving the state an agreed upon period to implement it. If the state fails to do so, the case goes to trial.

⁴¹³ See Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1170-73 (1992) (discussing how public interest lawyers can help their clients more effectively through "political mobilization" than through litigation successes); Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1664 (1989) (advocating a need for nontraditional lawyering in order to "fight for social change"); McDougall, *supra* note 329, at 35 (discussing how "a public policy approach [to law] requires teaching students different lawyering skills to cope with the world"); Sturm, *supra* note 9, at 1365-67 (noting that nonadversarial interaction between advocates and nonparties is of greater value in formulating and implementing remedies than are the "tools" of the "traditional adversary process"); Lucie E. White, *To Learn and Teach: Lessons from Drie Fontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 764 (discussing how this type of lawyering "bears little resemblance to traditional professional practice").

Under the implementation model, the remedial stage becomes the focus of litigation planning, resource allocation, and development of an overall advocacy strategy. The potential for successful implementation of a court-ordered institutional reform frames the advocacy strategy, rather than the likelihood of national impact or law reform. Factors such as the potential involvement of capable and supportive insiders, the political environment, or the existence of a local advocacy network may take precedence over the significance of the legal principle at stake.

The implementation model also mandates strategic identification of appropriate participants in the case. The involvement of parties beyond those with formal responsibility for managing the system may prove essential to achieving effective remedies for institutional problems.⁴¹⁴ The problem-solving orientation that characterizes remedial formulation and implementation also blurs the line between formal litigation and other forms of administrative and political action. Effective lawyering at the remedial stage requires an understanding of the corrections context and culture, and an ability to use creative processes of dispute resolution such as mediation and expert involvement in fact-finding and negotiating remedies.⁴¹⁵

Finally, implementation of corrections decrees is frequently time-consuming and expensive. Although this work typically generates attorneys' fees, many organizations have not devoted sufficient time and energy to the enforcement stage of corrections litigation.⁴¹⁶ Corrections litigators have begun to develop systems for ensuring regular payment of fees to compensate them for monitoring activities. They have also begun to develop other incentives for lawyers to play an active role in enforcing decrees.⁴¹⁷ If judicial intervention is to produce more than paper

⁴¹⁴ See *supra* text accompanying notes 174-82, 210.

⁴¹⁵ See Brorby Interview, *supra* note 398, at 3-4 ("[You] must get into prisons as institutions The [implementation] stage doesn't resemble complex litigation. . . . [You must know] who in the organization will do the work so they get assigned. [It is about the] interplay between litigation and pressure."). The Introduction of this Article identifies the use of creative dispute resolution mechanisms and understanding of the systemic nature of the problems in correctional institutions as important factors in the success of past litigation. See *supra* introduction.

⁴¹⁶ In fact, a study conducted of corrections litigators, the results of which are reported in a forthcoming article, finds that the remedial area is the most problematic for all the organizations involved in this litigation. See Sturm, *supra* note 23.

⁴¹⁷ For instance, some consent decrees or orders include an agreement to pay attorneys' fees for enforcement work on a quarterly basis. Any undisputed amounts

victories; this aspect of the litigation must be the focus of considerable energy and thought over the next decade.

D. *Corrections Adjudication Will Increasingly Link Up
with and Come to Resemble More Informal
and Systemic Forms of Advocacy*

With the shift to an implementation model of correctional reform, innovation now emerges not in the formulation of legal theory, but in the processes used to develop and implement remedies for legal violations. At first glance, this development seems inconsistent with the trend toward the complex, adversarial litigation described above. In reality, however, jurisdictions which have endured the expense and pain of litigation, as well as those willing to acknowledge their constitutional responsibilities, have sometimes turned to more cooperative forms of dispute resolution to avoid the costs and inefficiencies of adversary processes.⁴¹⁸ Plaintiffs' lawyers, judges, masters, and defendants have developed strategies that enlist the cooperation of responsible public officials in the implementation process.⁴¹⁹ These strategies frequently blur the distinction between litigation and other forms of problem solving, and attempt to capitalize on the strengths of each.⁴²⁰ Where possible, cases are resolved not through formal courtroom adjudication, but rather through mediation involving plaintiffs' counsel, experts, and the officials responsible for addressing the problems in question.⁴²¹ Plaintiffs' lawyers are experimenting with

are paid immediately, and disputed items are held until the end of the year. Courts have also awarded interim fees. See Interview with Michael W. Bien, Partner, Rosen, Bien & Asaro, in San Francisco, Cal. 4-5 (July 18, 1991) [hereinafter Bien Interview] (transcript on file with author) (discussing the collection of legal fees in prison reform cases).

⁴¹⁸ In fact, it is not uncommon for constructive dialogue to emerge only with the threat of warfare. See Schwartz Interview, *supra* note 267, at 4 (referring to a statement by Mark Soler that litigation is the "atomic bomb of strategies" and noting that "[the] availability of an option you don't use empowers other options").

⁴¹⁹ See Bronstein Interview, *supra* note 10, at 5 ("[The] [r]elationship between nonlitigative work and litigation [is] extraordinarily important and growing in importance. The fact that we do things other than litigate gives us a lot of credibility with the other side. We are not just in the business of beating them up in court. . . . They recognize us as experts in their field.").

⁴²⁰ Cf. Sturm, *supra* note 24, at 856-59 (the catalyst approach to judicial intervention in prisons combines the strengths of formal and informal processes).

⁴²¹ A prime example of this approach is the mediated resolution of litigation concerning conditions and overcrowding in Pennsylvania juvenile justice institutions. See *supra* text accompanying note 182.

consensual approaches to formulating remedies which avoid the risk, expense, and adversarial quality of formal adjudication.⁴²² Faced with the threat of a court-imposed remedy, many public officials have agreed to use structured negotiations, jointly selected expert panels, and other collaborative approaches to develop remedies.⁴²³

This emerging emphasis on implementation is prompting litigators to expand their roles to include diverse forms of corrections advocacy, including mediation, training of corrections staff, and legislative and administrative advocacy. Litigators have discovered that they can capitalize on the skills and access afforded them through formal adjudication, and enhance their effectiveness by combining formal and informal approaches to problem solving.⁴²⁴ Organizations with continuity in the field and a good track record in bringing and resolving litigation use their reputations as corrections litigation experts to engage in nonlitigation advocacy and problem solving: "One reason that administrative advocacy and

⁴²² For a general description and analysis of this approach to public remedial formulation, see Sturm, *supra* note 9, at 1373-76.

⁴²³ See *id.* at 1417-27 (emphasizing potential of collaborative remedial formulation approaches to educate parties, forge working relationships, devise creative solutions and generate input from range of participants); see also LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 80-81 (1987) (arguing that collaborative efforts at devising remedies can resolve public policy disputes more effectively than litigation).

⁴²⁴ Repeat players are at a distinct advantage in their ability to prompt informal problem solving. For example, the National Prison Project and the Youth Law Center have worked to develop national reputations as experts in the field who are willing to go anywhere with "big guns." They report that this reputation has given them a leg up in settlement negotiations. See Telephone Interview with Howard Belodoff, Associate Director, Idaho Legal Aid Services 3 (July 24, 1991) [hereinafter Belodoff Interview] (discussing the "intangible effect of a big organization behind a case . . . [which] makes defendants more inclined to settle, especially with an AG who doesn't know what to do"); Cullen Interview, *supra* note 22, at 10 (stating that "NPP's visibility is a strength"); Interview with Ralph Knowles, Partner at Doffermyre, Shields, Canfield & Knowles, former Associate Director of the National Prison Project, and former member of the Implementation Committee in *Pugh v. Alabama*, in Atlanta, Ga. 2 (Aug. 10, 1991) (transcript on file with author) (discussing importance of expertise in correctional culture for negotiating effective remedies); Soler Interview, *supra* note 15, at 9, 16 ("[The] Youth Law Center is well known for its track record, [its] willingness to spend whatever [is] necessary, . . . [and its] greater resources."). Expertise in the substantive law and familiarity with the institutional setting can also enable them to settle cases without lengthy discovery. See Interview with John Sparks, Partner, Brobeck, Phleger & Harrison, in San Francisco, Cal. 3 (July 18, 1991) (transcript on file with author) (stating that it would have been "difficult to develop early settlement without extensive discovery" if help from the Youth Law Center had not been available).

policy work are successful is that officials take seriously the threat of litigation; because [Prisoners Legal Services Project] is a successful litigator, discriminating in the choice of cases, and doing cases that affect large numbers of people, they are respected.⁴²⁵ The directors of organizations such as the National Prison Project, the Prisoners' Rights Project, the Youth Law Center, and the Southern Center for Human Rights have developed reputations in their fields that enable them to have considerable informal influence on public officials.⁴²⁶

Corrections specialists are involved in other forms of nonlitigation advocacy which are likely to gain significance over the next decade. They do extensive amounts of public speaking on corrections issues. YLC and NPP have recognized the significance of the media in attracting attention to corrections issues and creating pressure to eliminate abuses. They have begun to explore new ways of capitalizing on this important role of the media in defining public policy on corrections issues. They work with legislatures, advocacy organizations, and insiders in the corrections field wherever possible as an adjunct to litigation efforts.⁴²⁷

⁴²⁵ Telephone Interview with Grace Lopes, Managing Attorney, D.C. Prisoners Legal Services Project 4 (July 15, 1991) [hereinafter Lopes Interview] (transcript on file with author); see also Boston Interview, *supra* note 227, at 14 ("We have developed such credibility that no one messes with us institutionally."); Soler Interview, *supra* note 15, at 9 ("YLC is well known for its track record and willingness to spend whatever is necessary. . . . [This] has a deterrent effect. . . . [It enables us] to reach that critical mass of reform, when everyone jumps on the bandwagon instead of impeding progress.").

For example, YLC is frequently asked to give technical assistance to corrections officials outside the context of litigation. NPP has "provided technical assistance" to prison officials in Hawaii and Rhode Island. Bronstein Interview, *supra* note 10, at 3. Attorneys from NPP and YLC regularly participate in conferences held by corrections administrators and others in the corrections field. The Southern Center for Human Rights and the Youth Law Center have used their potential for litigation to prompt defendants to work with experts such as the National Council on Crime and Delinquency ("NCCD") and the National Center on Institutions and Alternatives ("NCIA") to address overcrowding and develop alternatives to incarceration. See Ortega Interview, *supra* note 209, at 7 (discussing the use of the NCIA for "educational effort[s]"); Soler Interview, *supra* note 15, at 5-6 ("[We] worked with NCCD to draft legislation.").

⁴²⁶ See, e.g., Telephone Interview with Lance Liebman, Dean and Professor of Law, Columbia University School of Law 1 (July 15, 1991) (transcript on file with author) (reporting that staffers on the hill often pay close attention to positions expressed by Stephen Bright, the executive director of the Southern Center for Human Rights).

⁴²⁷ The juvenile area presents greater opportunities for nonlitigation advocacy because children's organizations—and some political support for children's issues—exist in many states. The YLC has used a multifaceted approach to advocacy for children since its inception. The organization attempts to build on existing advocacy

State and local organizations specializing in corrections are particularly well situated to engage in nonlitigation advocacy as an adjunct to litigation. Those organizations that have developed credibility with the local and state correctional institutions, such as Prisoners' Legal Services in New York and the Juvenile Law Center in Philadelphia, are in a position to resolve many issues informally.⁴²⁸ They also have the opportunity to use forms of advocacy other than litigation as a result of their contacts within the prison and the local political and legal community.⁴²⁹

This shift toward an implementation model of litigation also suggests different criteria for determining whether to undertake litigation in a particular jurisdiction. Litigators are beginning to speak in terms of targeting systems instead of institutions. Instead of focusing on the jurisdictions most likely to serve as a national or regional example, advocates are beginning to assess how to get the

efforts for children and to avoid litigation where possible by using other forms of advocacy. Indeed, Mark Soler estimates that only one-eighth of attorney time at YLC is devoted to formal litigation. See Soler Interview, *supra* note 15, at 10.

Opportunities for political advocacy and coalition building are more limited in adult corrections, particularly at the national level. Although NPP does play an important role in policing the conduct of Congress and the ACA, its role has developed mainly as a litigation organization. For example, NPP recently took an active role in opposing the ACA's decision to weaken the standards for overcrowding. See Love Interview, *supra* note 366, at 7. In addition, an NPP lawyer is coordinating a community legislative component to accompany the statewide overcrowding litigation in Pennsylvania. See Aiyetoro Interview, *supra* note 321, at 1. NPP also provides material or testimony at the state level at the request of local affiliates. See Bronstein Interview, *supra* note 10, at 6. Prison Legal Services in D.C. "coordinated the formulation of a policy proposal on HIV and prisoners" that enlisted the support of experts, the local advocacy community, and the government. Lopes Interview, *supra* note 425, at 4.

⁴²⁸ See Cullen Interview, *supra* note 22, at 6 ("[I] have good access to the [prison administration]. . . [I] write a lot of letters and describe allegations [of inmates]. They respond routinely and fast. If [the case] has any merit, I can get it fixed at that level. If [the case involves] a systemic issue, [I can] go to the media where I have good contacts.").

⁴²⁹ See Aiyetoro Interview, *supra* note 321, at 3 ("Legislators won't listen to national people, but to the local community."). For example, John Gresham of Prisoners Legal Services of New York reports that he regularly interacts with the prison administration, the legislature, and the media about prison issues. See Interview with John Gresham, Associate Director, Prisoner Legal Services of New York, in St. Petersburg, Fla. 5 (July 29, 1991) [hereinafter Gresham Interview] (transcript on file with author). He and others in the organization have made a major effort to cultivate contacts beneficial to the client group, including the bar, church groups, health care organizations, philanthropic organizations, and the media. See *id.* Prisoners Legal Services in D.C. has been very successful in becoming involved in the local community and in political issues, and in pulling in the bar and the business community. See Koren Interview, *supra* note 260, at 5.

“maximum leverage in an enormous multiinstitutional system.”⁴³⁰ One manifestation of this is an increasing recognition of the importance of avoiding suits that will have predictable, negative spillover effects on other institutions. For example, experienced litigators resist bringing overcrowding cases against a single institution within a larger corrections system, recognizing that these cases merely shift the overcrowding problem from one institution to another. Assessments of the political and administrative circumstances surrounding particular correctional problems are also playing greater roles in the case selection process, and, at times, even dictate whether or not litigators become involved.⁴³¹ This trend is likely to continue.

E. Advocates Will Explore the Possibility of Bringing Successful Claims Under State Law and Federal Statutes

The federal judiciary's increasing conservatism and deference to state action has prompted interest in exploring state law and federal statutes as alternatives to federal constitutional causes of action. Some advocates have reported greater success pursuing litigation in selected state forums where the law or the particular court may be more amenable to judicial intervention.⁴³² Many of those litiga-

⁴³⁰ Boston Interview, *supra* note 227, at 3.

⁴³¹ See Alexander Interview, *supra* note 321, at 13 (discussing importance of local politics and political climate in determining whether to accept a case); Krisberg Interview, *supra* note 177, at 4, 6-7 (recommending that litigators spend less money and time in adversarial states and look for states that, because of fiscal constraints or political opening, could respond progressively to litigation); Soler Interview, *supra* note 15, at 6.

⁴³² Advocates suing in New Jersey, California, North Carolina, Idaho, New Hampshire, and Massachusetts described the shift towards state courts and state court claims. See Interview with Barry Barkow, Director, Massachusetts Correctional Legal Services, in Boston, Mass. 11 (Aug. 15, 1991) [hereinafter Barkow Interview] (transcript on file with author) (noting that some pro se prisoner cases won in state court would be unwinnable in federal court, and foreseeing shift to state courts); Belodoff Interview, *supra* note 424, at 2 (stating that he will seriously consider bringing cases in state court because Idaho Supreme Court is not as strict in its application of federal law); Telephone Interview with Elliot Berry, Senior Staff Attorney, New Hampshire Legal Services 1 (Aug. 22, 1991) (transcript on file with author) (urging a shift towards state courts and offering example of New Hampshire double ceiling case producing “significantly better result than they would have gotten in federal court”); Interview with Dick Taylor, Executive Director, North Carolina Legal Services, in Chicago, Ill. 3-4 (Aug. 12, 1991) (transcript on file with author) (describing workshop on bringing claims under state constitutions, which contain broader language than the U.S. Constitution, as well as the use of state tort laws, whose available administrative remedies are faster than constitutional remedies).

tors interviewed, however, expressed considerable reluctance to proceed in state court. They questioned the capacity of state courts to handle the complex remedial challenges posed by corrections litigation, and expressed concern that the technical and procedural obstacles present in many state court systems would make large scale corrections litigation unworkable.⁴³³ Some admitted candidly that they were simply unfamiliar with state court procedure and unwilling to venture into foreign territory. Finally, some of those experienced with state court judges expressed skepticism that the judges would take a "visible position around an unpopular issue" (such as favoring inmates' rights) if they had to "stand for election."⁴³⁴

Advocates expressed greater interest in using statutes as footholds into correctional institutions, particularly in the juvenile area, and predicted that more special education cases will be brought in the next decade. For example, one expert noted that practically all jurisdictions are in violation of the Individuals with Disabilities Act, and about half of the children in juvenile corrections institutions qualify for protection under the statute.⁴³⁵ Because the statute relates to a range of services within these institutions, it has the potential to change many aspects of the institution. Advocates also observe the potential to address the problems of AIDS in prison via the Rehabilitation Act and the Americans with Disabilities Act.⁴³⁶

Despite the ongoing exploration of alternative legal approaches, constitutional litigation is likely to remain the staple of corrections advocacy. Many of the most pressing problems facing corrections, notably overcrowding, are not covered by existing statutes.

⁴³³ See Alexander Interview, *supra* note 321, at 6 (describing a "strong prejudice" at National Prison Project for federal courts, since the "NPP knows what it's doing," and the court has the capacity to deal with procedural complexity); Belodoff Interview, *supra* note 424, at 2-3; Boston Interview, *supra* note 227, at 13 ("[S]tate courts institutionally lack structure of thought and doctrine and procedure necessary to sustain this type of work."); Love Interview, *supra* note 366, at 10 ("State court rules tie you up too much."); Telephone Interview with Neil Himelein, Managing Attorney, Community Legal Aid Society of Delaware 2 (Aug. 28, 1991) (transcript on file with author).

⁴³⁴ Breed Interview, *supra* note 238, at 2.

⁴³⁵ See NO PLACE TO CALL HOME, *supra* note 264, at 35 ("Juvenile authorities report that approximately two-thirds of the children in their system are severely emotionally disturbed.")

⁴³⁶ See Alexander Interview, *supra* note 321, at 20; Boston Interview, *supra* note 227, at 12-13.

Moreover, there is some possibility that the courts will limit the applicability of broad remedial statutes to correctional institutions.

F. *The Need for Effective State and Local Corrections Advocacy Is Likely to Increase over the Next Decade*

The increasing emphasis on implementation also suggests that state and local advocacy will play a significant role over the next decade. The process of monitoring and enforcing a remedy requires the continued presence and involvement of plaintiffs' counsel. State and local counsel frequently assume this responsibility.⁴³⁷ The state and local organizations specializing in corrections litigation have the advantage of day-to-day interaction within the institutions in their jurisdiction. They are familiar with the procedures, problems, and players of the institutions they regularly sue, and many have ongoing relationships with the corrections administration.⁴³⁸ Many of these organizations are in the correctional institutions on a regular basis, and are thus in a good position to investigate and evaluate problems.⁴³⁹ Knowledge of the local political scene, the day-to-day problems of the institutions, and the key players within a particular system can be invaluable to the implementation process. The regular presence of lawyers raising questions can itself improve the quality of service delivery within an institution, and resolve some issues without litigation.⁴⁴⁰ Ongoing

⁴³⁷ See Alexander Interview, *supra* note 321, at 16; Berg Interview, *supra* note 253, at 3 (arguing that "real work has to be done at local level on implementation"); Cullen Interview, *supra* note 22, at 5 (stating that prison culture can only change if advocates are able to be on site).

⁴³⁸ See Barkow Interview, *supra* note 432, at 6 ("Arms length, on-site assistance programs are the most effective and economical. Issues get addressed more effectively because they can often be handled administratively."); Boston Interview, *supra* note 227, at 1 ("[In New York City, we have] contact with people in the prison system and . . . private provider[s] of medical care. We are engaged with the . . . Department of Corrections on a regular basis on a very broad range of issues because of the consent judgments. . . . Familiarity breeds better communication."); Gresham Interview, *supra* note 429, at 8 ("[NPP is] covering the nation so [they] cannot know any system in detail. I know [the Commissioner]. . . . We know all kinds of facts about how things work, how records are kept, how [the] staff is deployed, what they can do to screw people over . . .").

⁴³⁹ One commentator notes that prison law office staff "have a better feel of what is going on day to day. They are really in there more. That is crucial for us. They can find witnesses, potential plaintiffs. They know people, what works, [and the] scope of cases pending in California." Bien Interview, *supra* note 417, at 7; see also Interview with Luther Ortin, Partner, Brobeck, Phleger & Harrison, in San Francisco, Cal. 4 (July 18, 1991) (transcript on file with author) ("[The] PLO had a lot of contact with inmates. . . . They knew what kinds of reports to ask for.").

⁴⁴⁰ See Brorby Interview, *supra* note 398, at 5 (arguing that on-site advocates raising

relationships with the officials responsible for implementation enable advocates to address problems informally.⁴⁴¹ Local and state organizations may also be better situated to link litigation to political strategies for correctional reform.⁴⁴²

CONCLUSION

Corrections litigation has played an important role in upgrading the organizational capacity of corrections institutions and prompting government officials to assume responsibility for maintaining minimally adequate conditions of confinement. Overcrowding, fiscal crisis, and the absence of effective internal mechanisms for holding the corrections system accountable ensure the continued need for conditions-of-confinement litigation. Corrections advocacy will present significant challenges to the legal profession over the next decade. It will require the development of a wide range of skills, from mastery of complex litigation to the ability to engage in mediation and organizational advocacy. Significant resources to support both the formal litigation and the informal advocacy will also be necessary.

Although this study has focused on correctional institutions as the target of judicial intervention, it contains important lessons for public interest advocacy involving other institutions as well. The study underscores the importance of institutional context in assessing the need and potential for litigation to accomplish social change, and suggests some general patterns cutting across institutions.

Litigation involving corrections institutions is distinctive in several important respects. First, the information-generating

questions has real effects on prison operations); Cullen Interview, *supra* note 22, at 6 (stating that ability to have long-term relationship with officials enables advocates to maintain steady pressure to address problems); Gresham Interview, *supra* note 429, at 10 (explaining that it is a good idea to have people "in all prisons" and "at all transfer sites").

⁴⁴¹ John Boston reports that the Legal Aid Society is "engaged with the New York City Department of Corrections on a regular basis on a broad range of issues." Boston Interview, *supra* note 227, at 1. John Gresham describes a similar relationship with the state system in New York. See Gresham Interview, *supra* note 429, at 3-4, 9-10. Bob Cullen of Georgia Legal Services also describes good long-term relationships with the Bureau of Prisons, the state Department of Corrections, and the legislature, and the ability to resolve many issues administratively as a result of their past litigation success and their ongoing presence in the system. See Cullen Interview, *supra* note 22, at 6.

⁴⁴² See *supra* notes 427-29 and accompanying text.

capacity of litigation can play a transformative role in corrections because of the institutional predisposition toward isolation and neglect. Other contexts that share this tendency, such as institutions caring for the mentally ill, may respond similarly to litigation. Second, the corrections field lacks any credible mechanism of accountability to substitute for litigation. Inmates lack the potential either to exit the system or to voice their concerns internally in the absence of litigation. Inmates' constant and predictable lack of political power undercuts the potential for effective political advocacy, and they clearly cannot go elsewhere if they are dissatisfied. Prison officials can rest assured that their institutions will not be closed down if they fail to meet minimal standards of decency. Thus, political and professional sanctions available in other institutional contexts, such as hospitals and nursing homes, do not exist. In other contexts with greater potential for effective independent political and organizational advocacy, litigation may be less important as a basic component of an advocacy strategy.

The prospects for successful legal challenge also play a role in framing the continued importance of litigation in a particular field. In the corrections area, overcrowding and fiscal crises combine to perpetuate conditions sufficiently deplorable to prompt judicial intervention despite increasing judicial conservatism. This may not be true in other areas, such as poverty law, where politics and policy arguments may well be more compelling than legal precedent. Moreover, corrections institutions have no shortage of willing plaintiffs and, at least in some jurisdictions, the system for handling *pro se* complaints offers some prospect that these plaintiffs will be heard. The impact of institutional context on litigation's potential to achieve reform is important and warrants further study.

Despite these contrasts between corrections and other fields of public interest advocacy, several common themes and trends emerge that cut across institutional contexts. The shift in corrections from the test case to the implementation model of advocacy appears to be part of a more general trend.⁴⁴³ Poverty law advocates and others have noted the growing significance of remedies, administrative enforcement, informal advocacy, and local initiatives designed

⁴⁴³ See, e.g., Houseman, *supra* note 362, at 1521 (discussing the need for greater local and state-wide policy advocacy for public interest law); Houseman, *supra* note 342, at 15 (arguing that new types of practice will be necessary to ensure effective advocacy as new substantive issues and new problems of resource allocation arise in broad spectrum of public interest issues).

to institutionalize reform across broad categories of need. Similarly, public interest advocates in a wide range of areas are expanding their conceptions of advocacy. Within the judicial arena, this expansion portends a willingness to question the primacy of the adversary model, to rethink the forms of public interest litigation, and to experiment with more consensual forms of fact-finding and dispute resolution. More generally, lawyers are exploring means of linking litigation to public education, legislative advocacy, and administrative reform. Commentators in a variety of fields have noted the importance of linking litigation to a more systemic approach to social change.

These developments have important implications not only for the structure of legal services delivery in the corrections area in particular, but for public interest advocacy in general. Many existing organizations segregate their litigation staff from those engaged in other forms of advocacy, and devote most of their resources to formal adjudication. This study suggests the need to rethink this division of labor.

Collaborative efforts among public and private lawyers will also become more common and necessary for effective representation in major corrections litigation and other areas of public interest law. As cases become larger and more complex, few organizations will have the resources, expertise, and inclination to handle major corrections litigation on their own and still pursue a broader strategy of institutional reform. As in other areas of public interest law, corrections litigators are discovering the value of spreading the load among groups of lawyers with different strengths and abilities. A forthcoming article explores the various sectors of the legal profession that have provided legal representation to inmates in corrections litigation, with an eye toward facilitating the creation of effective models of public interest advocacy.⁴⁴⁴

The emerging emphasis on implementation also suggests the need to rethink the form and character of litigation and lawyering. The classic emphasis on courtroom advocacy and a formal adversarial process, although still important, does not respond to the range of skills and processes required to provide effective advocacy. As others have begun to recognize, litigation is being redefined to include more collaborative processes, and advocates must face the challenge of integrating litigation with other forms of advocacy.

⁴⁴⁴ See Sturm, *supra* note 23.

The singular focus in most law school clinics and classrooms on traditional litigation skills and analysis fails to prepare future lawyers to meet this challenge.

This Article uses the legacy of corrections litigation to discern and guide its future. It underscores the importance of continued litigation to maintain constitutional corrections litigation. Yet, it signals the pitfalls of litigation and the limitations of traditional adjudication as the sole or defining strategy for change. The implementation model developed in this Article offers a workable framework for corrections advocacy into the next century.