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Taking Stock of the Accomplishments and Failures of Prison Reform Litigation

Have the Courts Made a Difference in the Quality of Prison Conditions? What Have We Accomplished to Date?

Vincent M. Nathan*

These are deceptively simple questions on their surface: Have the courts made a difference in the quality of prison conditions? What have we accomplished in the more than thirty years of effort to improve prison and jail conditions? Beneath the surface of these inquiries, however, lies the work of generations of prison reformers and certainly that of many of the persons in this room. Thus, these seemingly straightforward questions raise a host of personal and professional memories and insights that each of us brings to this meeting after, in the case of many of us, decades of effort.

Those memories and insights, of course, result in the unique and distinct perspectives that each of us brings to this conference. I have not been a director of corrections or a prison warden. I have not been a federal judge. Although I am an attorney, I have not been a litigator attempting, by dint of extraordinary efforts against sometimes seemingly overwhelming odds, to win rulings calculated to bring about constructive

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change in America's prisons and jails. Nor have I been a prisoner or a correctional officer.

What I do bring to these discussions is almost thirty years of experience working as a corrections consultant, an expert witness and a court monitor or special master in the remedial phase of prison reform litigation. During that time I have learned a good deal about how judges think and operate, and about the attitudes that other actors bring to the table in an effort to translate a judicial order into tangible changes for the better. I have learned much—sometimes more than I have wanted to—about the range of character traits and actions, for better and for worse, that characterize individual prisoners and those whom they sue.

So, it is from this perspective that I shall attempt to address, as briefly and coherently as I can, these two fundamental questions: whether the courts have made a difference and what have we accomplished in the more than thirty years of effort to improve prison and jail conditions.

My answer to both questions, in a word, is yes. Judicial intervention over the past three decades has had an enormously positive impact on the operation of correctional institutions in the United States, and on the conditions in which prisoners live and staff work. There is no doubt that some of the limitations on the exercise of judicial power that the Supreme Court has imposed through its decisions of late trouble many of us, and we regret the reactionary political response to effective judicial intervention that the federal legislative and executive branches adopted in the form of the Prison Litigation Reform Act (PLRA).¹ Nonetheless, the current constitutional floor established for prison and jail conditions by the United States Supreme Court, lower federal courts, and some state courts is a far cry from the slave of the state doctrine the Court of Virginia enunciated in *Ruffin v. Commonwealth*,² in 1871. Indeed, it would be nothing less than hyperbolic to say that the courts

1. Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997-1997h).

2. 62 Va. (790 Gratt.) (1871) (finding that "[t]he bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons . . . [s]uch men . . . are the slaves of the State . . .").

have returned, or are even in the process of returning to, the "hands-off" doctrine that held sway until the 1960s.³

To me, the more interesting of the two questions is what have "we" (I assume attorneys representing individual prisoners and classes of inmates, judges, prison and other government officials, and a hodgepodge of prison reformers) actually accomplished over the past three decades of reliance on the judicial process. Let me begin by suggesting some things that do not fall into that category.

First, we have not reduced reliance on incarceration as a punitive sanction. Although I agree that over-reliance on imprisonment is a major, perhaps the most pressing, problem facing the criminal justice system and our society in general today, I do not believe that it is fundamental, that is to say, *sine qua non*, to the objective of improving prison and jail conditions. While increased incarceration rates (even in the face of declining crime rates) have strained capacity, most jurisdictions with which I am acquainted have ameliorated this unhappy consequence to a significant extent through the construction of additional facilities. There are many practical and ethical reasons to be concerned about the fact that some 1.4 million men and women were held in adult correctional institutions (prisons) on June 30, 2002.⁴ Despite the enormous management problems these numbers have created, they do not equate, or at least need not equate, with unconstitutional conditions of confinement. Indeed, the courts have intervened effectively in several of the systems in which I have worked as a court monitor or special master to reduce populations or to expand capacity to achieve livable conditions.⁵ In summary, a large prison or prison system is not, by virtue of its size alone, an unlawful one.

3. The Supreme Court rejected the "hands off" doctrine in *Wolf v. McDonnell*, 418 U.S. 539 (1974), finding that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." *Id.* at 555-56. See Kenneth C. Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 DETROIT C. L. REV. 795.

4. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, BULL. NO. 198877, PRISON AND JAIL INMATES AT MIDYEAR 2002 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim02.pdf>.

5. See, e.g., *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), amended and vacated in part by, 688 F.2d 266 (5th Cir. 1982).

It also is the case that reformers have not persuaded the general public or its political representatives that over-reliance on prisons is too expensive to sustain. Again, while I agree with those who criticize the preference to fund prisons over public schools and other more constructive public engagements, I do not believe that this is a failure by which one should measure the efficacy of judicial intervention in improving conditions of confinement. Quite properly, it was the very insistence on the maintenance of constitutional prisons and jails, even in the face of increased populations, that led in large part to the enormous growth in correctional budgets over the past several decades.⁶ These expenditures, therefore, suggest progress toward improved conditions of confinement, not the obverse. While we may be disappointed that the general public did not buy into what some of us thought was an inevitable economic (though hardly a popular political) result of widespread reduction in the use of prisons, we cannot deny the positive impact that disproportionate expenditures on corrections has had on physical conditions, the quality of staff and other elements of central importance to the operation of constitutional prisons and jails.

Judicial intervention has had only a limited impact in certain areas that, though they are legitimate subjects for correctional reform, manifest themselves in virtually every facet of our criminal justice system and the larger society—not simply in corrections. Racial discrimination is perhaps the best example of a problem that appears to be near intractable at every level of the criminal justice system—the police, prosecutors, judges and juries, parole and probation officers, and correctional staff. Progress in this area in any segment of our society has been slow in coming and of limited effect. For this reason, it is unrealistic to expect judicial intervention in correctional operations or conditions to be more effective with respect to racial prejudice in prisons and jails than it has been in areas such as housing and schools, let alone in those of general social and eco-

6. The total operating budgets for prisons alone, in the fifty states and the federal system, for fiscal year 2001 was \$31,789,983,925. When costs of construction are added, total correctional expenditures rose to \$35,623,638,163. CRIM. JUST. INST., *THE CORRECTIONS YEARBOOK: ADULT CORRECTIONS 2001 99-100* (2002) [hereinafter *CORRECTIONS YEARBOOK*].

conomic conditions.⁷ Thus, in attempting to identify the positive impact on prisons of judicial intervention, we must address goals that are related directly to conditions of confinement, and we must accept that the reform of prisons in many instances will require more basic changes in the way in which our nation functions and our people relate to each other.

Having said all of this let me describe the effect judicial intervention has achieved in prisons. In doing so, I shall rely to some extent, but not exclusively, on cases in which I have played a direct role, such as an expert witness, a court monitor or a special master. I shall mention only a few examples.

Perhaps the most tangible impact of the courts has been on environmental conditions. Judicial orders have resulted in eliminating widespread environmental hazards and in the wholesale retrofitting of prisons like Georgia State Prison in Reidsville, Georgia, replacing dangerous open dormitories with cellblocks in this maximum-security facility.⁸ In Ohio, two nineteenth century facilities—the Mansfield Reformatory and the Columbus Correctional Facility—were taken out of service altogether.⁹

Litigation in New Mexico largely ameliorated the horrendous crowding that contributed directly to the infamous riot of February 1980.¹⁰ All medium, close and maximum-security facilities in that state now contain only single occupancy cells.¹¹ Prison litigation has eliminated or substantially reduced crowding in a number of other jurisdictions as well.¹²

Litigation at the Central Punitive Segregation Unit on Rikers Island, as well as at several other facilities in New York

7. Nonetheless, courts have made substantial efforts to address this problem in a correctional setting. *See, e.g.*, *Taylor v. Perini*, 413 F. Supp. 189 (N.D. Ohio 1976).

8. *See Guthrie v. Evans*, 93 F.R.D. 390 (S.D. Ga. 1981).

9. *See Stewart v. Rhodes*, No. C-2-78-220 (S.D. Ohio Dec. 1979) (consent decree setting out, among other things, a timetable for the closing of the Columbus Correctional Facility); *see also Boyd v. Denton*, C-78-1679 (N.D. Ohio 1978) (consent decree closing the Mansfield Reformatory).

10. *See Duran v. Anaya*, 642 F. Supp. 510 (D.N.M. 1986); *see also Mary C. Bounds, Warden Hopes for Less Violence in '85*, DALLAS MORNING NEWS, Jan. 3., 1985, at 29A. .

11. *Duran v. Carruthers*, 678 F. Supp. 839, 842 (D.N.M. 1988).

12. *See, e.g., Morales Feliciano v. Hernandez Colon*, 672 F. Supp. 27 (D.P.R. 1987).

City, resulted in substantial improvements in the control of unnecessary and excessive force by staff against prisoners.¹³ Similar litigation is in progress against the remaining New York City facilities that are not already subject to court orders regarding the use of unnecessary and excessive force.¹⁴ Counsel in the infamous Pelican Bay litigation tells me that the *Madrid v. Gomez* case brought similar excessive force under control at California's supermax prison.¹⁵

In response to litigation that the American Civil Liberties Union National Prison Project counsel brought, the Arizona Department of Corrections vastly improved the delivery of medical care to prisoners.¹⁶ Litigation in Ohio resulted in exceptional improvements in the provision of mental health services to prisoners in the Ohio Department of Rehabilitation and Corrections.¹⁷ Medical and mental health budgets in many systems have soared as a result of successful litigation on these issues.¹⁸

I could offer other important examples in the areas of disciplinary procedures, the integration of women and minorities into the ranks of professional and line staff, improved food services and enhanced preventive maintenance, among others. In the limited space this article permits, however, I want to describe two other facets of prison reform that I think are as important as any other.

First, judicial intervention has had a vast impact on the thinking and the mindset of correction administrators, as well as that of mid-level and line staff, in many and perhaps most correctional systems. It is no longer unusual to find correctional leadership that includes humane and constructive treatment of prisoners among its practical goals. Of particular interest to me is the extent to which many systems are eschew-

13. See *Sheppard v. Phoenix*, 210 F. Supp. 2d 450 (S.D.N.Y. 1991).

14. *Ingles v. City of New York*, No. 01 CIV 8279(DC), 2003 U.S. Dist. LEXIS 2453, 2003 WL 402565 (S.D.N.Y. Feb. 20, 2003).

15. See *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

16. See *Casey v. Lewis*, 834 F. Supp. 1477, 1546-47 (D. Ariz. 1993).

17. See *Dunn v. Voinivich*, No. C1-93-0166 (S.D. Ohio July 1, 1995) (consent decree).

18. Total medical budgets in U.S. state prisons reached \$3,060,693,306 during fiscal year 2001. CORRECTIONS YEARBOOK, *supra* note 6, at 98. The comparable figure for fiscal year 1996 was \$2,456,300,000. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NO. NCJ 172211 STATE PRISON EXPENDITURES 1996 6 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/spe96.pdf>.

ing opportunities the Supreme Court has given them to reduce services and to relax due process. How many states do we know that have taken advantage of *Sandin v. Connor*¹⁹ by eliminating all aspects of due process in administrative disciplinary hearings resulting only in a sentence to segregation? How many corrections directors do we know (though there are a few) who have eliminated law libraries as *Lewis v. Casey* invited them to?²⁰ How many prisons today adhere to the minimum of an hour per day, five days a week, of physical exercise and recreation, which some courts have indicated would meet minimal constitutional standards?²¹

While I am not so naïve as to suggest that correctional litigation has changed for the better the hearts and minds of everyone who works in a correctional environment, I do believe it is safe to say that reform efforts by the courts have altered in very substantial ways the psychological and physical status quo courts found when they began to confront prison conditions in the early 1970s. In some important ways, the new and more constructive status quo is resisting efforts at change, just as did its less laudable predecessor.

Furthermore, correctional litigation has brought a measure of newly found self-respect to many prisoners. They know that they are no longer entirely outside the scope of legal protection—mere castaways from society about whom the laws have nothing to say or do. Prison conditions surely are harsh and in many ways continue to be destructive of the human personality. Even so, prisoners are not without fundamental rights and they recognize and demand their entitlement to humane treatment and decent surroundings and services. They are no longer anyone's slaves.²²

In conclusion, though every case in which I become involved is a chilling reminder of how long the road is that lies

19. *Sandin v. Connor*, 515 U.S. 472 (1995) (holding that a state's imposition of disciplinary segregation for a period of time not exceeding the sentence of confinement, but imposed without affording the prisoner full process, did not violate the prisoner's due process liberty interests).

20. *Lewis v. Casey*, 518 U.S. 343 (1996) (holding that "an inmate cannot establish relevant actual injury simply by establishing that his prison's library or legal assistance program is sub par . . .").

21. See, e.g., *Watts v. Ramos*, 948 F. Supp. 739 (N.D. Ill. 1996).

22. See *supra* note 2.

ahead of us, I believe, as I have for many years, that prisons can be something other than a profound embarrassment to the society that maintains them. The strength of the effort at judicial reform in the United States that began in the 1960s and continues today, despite admitted and severe setbacks on some fronts, continues to be a movement with great momentum. I strongly believe that we will overcome the obstacles to continued reform and that prisons one day, in the words of my late and great friend, John Conrad, truly will become "lawful, safe, industrious, and hopeful."²³

23. John Conrad, *Ending the Drift and Returning to Duty: Two Scenarios for the Future of Corrections*, in PROCEEDINGS OF THE 111TH CONGRESS OF CORRECTIONS OF THE AMERICAN CORRECTIONAL ASSOCIATION (1981).