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The courts and the politics of prison reform

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THE COURTS & THE POLITICS OF PRISON REFORM

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A few years ago, my boyfriend and I were having a heated debated about litigation when I made the comment that litigation was important because when someone takes their case to the court, the court has to listen, and if that person has been wronged, the court has to provide a remedy. I ended my point by saying that "the court's decision in that case becomes law and so the courts are one tool to change the public policy." Then, my boyfriend said, "Well, how effective are they?" My answer was "probably pretty effective" but it should have been "I don't know" because at the time I hadn't given that question it much thought.

This paper will attempt to answer my boyfriend's question: How effective are the courts at making public policy? It will do so through an examination of the prison reform movement that began with the demise of the hands off doctrine during the Warren Court era and ended with the passage of the Prison Litigation Reform Act of 1996.

The paper will begin by discussing literature that addresses this important question. Donald Horowitz and Gerald Rosenberg both have written books that assert that the courts' ability to bring about social change is limited by the courts' incapacities or constraints. I will then discuss the "Model of Judicial Implementation and Impact" outlined by Bradley Canon and Charles Johnson, which will provide the reader with a model for how judicial decisions are implemented. I will discuss some of the literature that deals specifically with the courts' ability to bring about change in the prison system.

The paper will then provide a history of prison reform before moving onto an examination of the success of court order prison reform. This examination will be done through two case studies: the Alabama Prison System and the Texas Department of Corrections. Both case studies will look at:

- Conditions in the prison system prior to court intervention,
- In what way the court intervened,
- The immediate response to the court order,
- And the conditions in the prison system after court ordered reform.

Prior to researching this topic, I skeptical about the efficacy of court ordered reform in the area of prison policy because I knew that American prisons were not free from human and civil rights abuses despite court orders to reform. After completing the case-studies, I found that the literature had alluded to what the case studies revealed: that prisons prior to court intervention sorely needed reform so the courts acted and that the success of their actions was constrained by the inherent limitations on their power. Conditions improved despite these constraints but only to the extent that reformers can now say that the prisons are better than they used to be, but there are still problems in the prison system.

LITERATURE REVIEW

Horowitz's Judicial Incapacities

In his book, *The Courts and Social Policy*, Donald Horowitz describes the adjudication process. When using the phrase "adjudication process," Horowitz is referring to the process in which a judge hears evidence and arguments for the purposes of determining fact and rendering a decision. In an adversarial system, such as the one used in the United States, two disputing parties come before a judge and present their case. Both parties have a stake in the case; there is no neutral party to present a tempered account of the facts in question. After the disputing parties have presented their case, the judge renders a decision based on what he or she has heard. The judge's decision becomes common law or precedent. Because

court decisions become part of the body of law, they can be a vehicle for social policy (Horowitz 23-67).

According to Horowitz, there has been there has been a considerable expansion of the use of the courts as a means to achieve policy changes (4). He attributes this expansion to the perceived success of the school desegregation cases (10), doctrinal shifts that have loosened the standards of concepts like standing and jurisdiction (10), and shift towards looking for legalistic answers to society's problems. Reformers also recognize that there are advantages of going to the courts to bring about social change. For example, unlike the other branches of government, the courts are required to hear the cases brought to them. Judicial decrees viewed as being direct, powerful, and providing immediate relief (Horowitz 22).

However, Horowitz is quick to caution that there are also disadvantages of going to the courts, and he speaks at length about these disadvantages. He begins by arguing that the courts are generalist institutions that are not geared toward making specialist decisions and policies. Judges receive training in the law and the judicial process, but beyond that, they do not have a specialty. (Horowitz 25). Yet judges are required to not only process large amounts of specialized information, but they also must determine which specialized information is more accurate since judges will often hear conflicting testimony from expert witnesses who have a bias to one side or the other (Horowitz 26).

Horowitz also argues that the adjudication process also limits the courts effectiveness in several ways. Judicial decisions focus on creating a remedy for the right that was violated in a particular case (Horowitz 34). The larger implications of a decisions, alternatives, and considerations of what makes good public policy take a back seat to correcting the problem at hand. Furthermore, the facts of a given case are limits for judges and they prevent judges

from implementing comprehensive reform with a single decision. These limits tend to force judicial policy to be made one small piece at a time (Horowitz 35).

Horowitz also points out that the method of fact-finding makes the finding of social fact difficult- social fact being defined as "patterns of behavior on which policy must be based" (45). In the adversarial system, there are two parties, each making their best case before a judge who spends the hearing acting as mediator between these two extreme sides. At the end of the hearing the judge must make a decision after hearing two extreme sides of a story. The adversarial system is more adept at finding historical or adjudicated facts than finding what the larger implications of a policy will have, in part because there is no voice that presents a moderate or centrist point of view in the adjudication process (Horowitz 47).

The adjudication process also leaves little room of judges to review the implementation and impact of their decisions (Horowitz 51). The ability and capacity for judges to monitor how or if their orders are complied with is limited. Further complicating the issue of compliance is the fact that judges measure compliance by whether their orders are obeyed, not whether the person who is responsible for implementing the order has the ability to implement the order (Horowitz 51). Courts are especially limited in their ability to monitor the unintended consequences of compliance with their decisions. Even if a judge recognizes the unintended consequences of their decision, that judge has no way of returning to the issue unless a plaintiff files another case (Horowitz 52).

It is important to point out that while Horowitz is skeptical of the courts' ability to make sound social policy, he points out that other branches may not necessarily be in a better position to make sound social policy. Sometimes there are pressing problems in society and

if the other branches of government refuse to act to remedy those problems, then the courts may be in the best position to remedy the problem (22).

Rosenberg: Constraints on the Courts

Gerald Rosenberg provides a more recent assessment of judicial capacity in his well-known book *The Hollow Hope.* Throughout the book, Rosenberg attacks the idea that the Supreme Court has had a profound impact on the shape of American Society. In order to demonstrate his point Rosenberg looks at a number of different issues including prison reform. Through his discussions of these issues, Rosenberg asserts that there are three constraints on the courts that prevent them from being an effective public policy machine.

The first constraint is that the nature of constitutional rights is limited (Rosenberg 10). In other words, there are a limited number of rights outlined in the Constitution and the courts are limited to providing remedies when a right as defined by the Constitution has been violated. Precedent can further constrain the courts ability to act by defining something as not being a constitutionally protected right... Judges are often reluctant to act out of line with precedent because, even if they disagree with precedent, judges understand the importance of the continuity and predictability of the law. However, once a precedent is overturned or a court defines a right that was not previously acknowledged as being a constitutionally protected right, the door is open for judges to provide remedies to protect that right (Rosenberg 10-12). This is precisely what happened with the prison cases. Prior to *Cooper v. Pate*, the courts simply refused to hear prison cases because the precedent defined prisoners as not having standing (the right to be heard in court) for their grievances. After *Cooper v. Pate*, courts were able to take prisoners cases.

The second constraint outlined by Rosenberg is the "lack of judicial independence" (35). As a prime example of how the judicial branch is not independent, Rosenberg points to the issue of judicial selection. "Judges," Rosenberg points out, "do not select themselves." (Rosenberg 13) Federal judges are nominated by the executive branch and confirmed by the senate. Through the selection of federal, other branches have control (in at least a minimal capacity) over the decisions of the courts since the membership of a particular court has been known to change the prevailing view of that court. In addition to confirming federal court nominees, Congress also has the power to override courts' decisions either through enacting legislation or amending the Constitution (Rosenberg 14).

The third constraint outlined by Rosenberg is that the judiciary lacks the necessary powers for implementation (Rosenberg 21). As Alexander Hamilton points out the judiciary holds neither sword nor purse to ensure the implementation of its decisions (Federalist Papers, No. 78). There is not a judicial enforcement squad to force bureaucrats and other branches to comply with judges' orders, so the court depends on the cooperation of the bureaucracy and other branches. Rosenberg explains that administrators were responsible for implementing court decisions, but that these administrators relied on the legislative branch for funding and the executive branch was responsible for the enforcement of these decisions (Rosenberg 305-310).

Rosenberg acknowledges that these constraints can be overcome and he outlines the conditions that must be present for that to happen. To overcome the first constraint, some type of precedent must be created to allow the court to act (35). To overcome the lack of independence of the judicial branch, there needs to be political support from other branches of government and social support from other branches of government (Rosenberg 36). So if

there is a general consensus among the branches and the public that change is needed, the opinions of the judicial branch can be more effective (Rosenberg 36).

Rosenberg outlines four conditions that must be present for the third constraint to be overcome. Rosenberg outlines four conditions that must be present for the third constraint to be overcome. These conditions are: incentives for compliance with rulings, costs (fines and fees) for non-compliance, market pressures, and the ruling is viewed as being positive for the implementing population/administrators. If any one of these conditions is present and there is at least some support for change from the secondary population, then the third constraint can be overcome.

Canon & Johnson: Interpreting and Implementing Populations

A better understanding of how Rosenberg's constraints work can be derived from the *Model of Judicial Implementation and Impact* outlined by Bradley Canon and Charles Johnson. Canon and Johnson explain that when a court makes a decision there are different "populations" that work at different levels of the implementation process. The population at the top is the decision maker or the court that issuing the order. Just below the decision maker is the interpreting population. Consisting primarily of judges in the lower courts, the members of the interpreting population are responsible for interpreting the decision of the higher courts and explaining what the decision means to a given case. It is up to the implementing population to carry out the decision as interpreted by a judge or other member of the implementing population. At the bottom of this model is the consuming population, which is the group for which the policy is intended to impact (Canon and Johnson 16-21).

At each level, the populations have the ability to distort the decision that was made by the decision maker. Judges, as members of the interpreting population, may simply refuse to apply the decision of a higher court, avoid taking cases that would require them to apply the decisions of higher courts on procedural grounds, or use their power to interpret the meaning of the decision of a higher court as it applies to the case before them and thereby limit the application of the decision (Canon and Johnson 38-42). Members of the implementing population, which can include members of the bureaucracy and the legislature, also interpret judicial decisions, and as such they may interpret a judicial decision as not applying to them. There are also times when members of the implementing population fail to make organizational changes to comply with the decision or they make "cosmetic" changes to give the appearance of conformity with the order (Canon and Johnson 61-72). The efficacy of a court decision is also affected by those who are directly impacted by decision (the consuming population) in that if members of the consuming population are unclear how a right or restriction defined by a court applies to them, then their reactions to the court order may be inconsistent with the courts' intentions (Canon and Johnson 104-105).

Taken together, the literature of Rosenberg and Canon and Johnson indicates that the different populations have different abilities to constrain the courts ability to implement policy changes. However, while Canon and Johnson do take the time to point out these constraints, they disagree with Rosenberg on the degree to which these constraints handicap the courts in their ability to ultimately bring about change. Though Canon and Johnson are critical of Rosenberg's assessment of the court as a whole, they concede that Rosenberg's evaluation in the area of criminal justice may be accurate (Canon and Johnson 211).

Judicial Capacity in Prison Reform

The literature that I have discussed thus far deals with the broad issue of judicial capacity to bring about social change in general. There is a body of literature that deals specifically with judicial capacity in dealing with prisoners' rights issues. In fact, it is one of the issues addressed by Rosenberg in *The Hollow Hope*. In his assessment of the changes in prisons that have occurred since the prisoners' rights revolution, Rosenberg calls the results "uneven" (Rosenberg 307). He credits court involvement for alleviating the most egregious violations of prisoner's rights. For example Rosenberg notes that "arbitrary" abuse of prisoners by prison guards seems to have decreased, but prisoner-on-prisoner abuse seems to have increased (Rosenberg 306-307). It should be noted the word "seems" is used because there is no data set in existence that shows prisoner victimization prior to the revolution, nor after the revolution and Rosenberg's statements are based on literature reporting conditions in the prisons. Rosenberg points to the assessments of Jan Brakel's 1986 paper that concluded that people involved in corrections feel that prisons are not as safe as they were before the prisoners' rights revolution, as an example of a group that may feel that the prisoner's rights revolution may have actually been a disservice to prisoners in terms of prisoner on prisoner violence (Rosenberg 307).

The view that court involvement in prison reform has had mixed success is supported by *Judicial Policy Making and the Modern State*, a book by Malcolm Feeley and Edward Rubin. This book is devoted in its entirety to the court involvement with the issue of prison reform. In a chapter devoted to assessing the success of court mandated reforms, the authors concede that they cannot answer whether or not the courts have had a positive impact on the prison system or society, but they do summarize what the impact has been.

Feeley and Rubin begin by speaking of what the courts have accomplished since the *Cooper v. Pate* decision, the case in which the Supreme Court acknowledged that prisoners have rights under the Constitution. Freedom of speech, religion, and due process are examples of rights that prisoners now have that they did not have prior to the Warren Court. These rights, similar to all the other rights that prisoners have, are subordinated to issues of safety and security that are unique to prisons (Feeley and Rubin 367). The courts also had a hand in abolishing the plantation prison system of the South (Feeley and Rubin 367). This prison regime was highly repressive and the courts worked alongside the other branches of government to cease the practice. Feeley and Rubin also credit the courts for making big changes in the way prisons were operated (368). They did this in several ways such as encouraging the professionalization of the corrections industry, establishing national standards for prisons, and encouraging the creation of the prison bureaucracy so that there is some accountability in the administration of the prison system (Feeley and Rubin 369).

The parties involved with prison reform had expectations. Some of those expectations were met but others were not. Feely and Rubin list some of the areas in which the courts failed to meet expectations. Reformers that were involved in prisoner litigation had hoped that the increased costs of administering prisons would encourage the legislature to look for alternative means of punishing people (377). By all accounts, this has not happened and incarceration remains the preferred method of punishment. So, in this task, the courts have failed. Prisoners are obviously affected by the courts decisions, and while many may argue that it would be a futile task to ask prisoners what they expect, there was little effort made to ascertain what the prisoners would like to see (Feeley and Rubin 377). Consequently, the special needs of individual prisoners were often overlooked to serve a larger policy purpose.

Prison administrators might say that the judicial involvement did bring necessary funding to complete important projects, but the judicial involvement in the prison system tended to bring its own problems and left other problems unsolved such as prisoner on prisoner violence (Feeley and Rubin 378). The courts made rulings that declared the physical structure of prison facilities unconstitutional but did not give sufficient guidance on what administrators had to do to make the facility constitutionally acceptable. Furthermore, while courts have ordered the construction of new prisons or placed population caps, the courts have not done anything to remedy the source of overcrowding (Feeley and Rubin 379). Feeley and Rubin contend that trends in the growing use of incarceration erode whatever ground is gained by building new prisons (379).

In the end, Feeley and Rubin deliver a mixed review of judicial involvement in prison reform. They call it both extraordinary but inadequate. It is extraordinary because the courts acted when the other two branches were either unwilling or unable to address the problem. On the other hand, it is also inadequate because only some of the problems have been solved and by and large, prisons remain "a major social problem" (Feeley and Rubin 380).

History of the Court Ordered Prison Reform

Throughout most of the country's history, the courts used the hands-off doctrine to avoid hearing suits brought by prisoners. The Supreme Court defended the hand-off doctrine in three different ways. First, the Supreme Court wanted to avoid the separation of powers issues that their involvement could cause since the executive branch is responsible for the administration of prisons. Secondly, judges acknowledged that they were not penology experts and consequently they were not in a good position to make penal policy.

Thirdly, there was fear about how judicial intervention would affect the administration of prisons (Palmer and Palmer 260). The hands of doctrine fostered a culture of extreme deference to prison officials in which prison officials were often allowed to literally get away with murder.

Since the founding of the country, American penologists have explored a variety of different ways to punish and reform criminals. By the 1960's the states in the North had abandoned hope for reforming prisoners and resigned themselves to warehousing criminals in what is commonly called "the big house." Though the big house was more humane than its predecessor, the big house was a miserable place to spend years of your life. The chief goal of the big house was to maintain order and this was often done through the unauthorized but liberal use of corporal punishment (Johnson 41). Prisoners were required to follow a monotonous routine and there was little concern providing inmates with a balanced diet, exercise, or services like a law library or healthcare.

In the South, a different and harsher regime had emerged. Since the end of the Civil War, prisoners in the South labored in plantation prisons. Prisoners replaced the labor that slaves had provided prior to the abolition of slavery. But unlike slave labor, there was no incentive to keep your prison labor alive. Consequently, prisoners were often worked to death. The failure to work fast enough could result in being whipped, beaten, or shot. Escapees were either shot or chased down by dogs (Crouch and Marquardt 14). The plantation prison was reserved almost exclusively for African Americans since most white convicts were not sentenced to work in the fields with the African American convicts (Johnson 45).

The horrifying details of life in Southern prisons worked their way into the courts through complaints filed by prisoners. In the case *Newman v. Alabama* (1972), the plaintiff

explained what he saw happen to another prisoner when he wet the bed. The summary of the plaintiff's account as it appeared in *Reform and Regret* by Larry Yackle describes not only the harsh punishment that was meted out to inmates, but the apparent disregard by staff and poor healthcare services that were typical in a southern prison:

> *"[The staff] attempted to discourage bedwetting by forcing the inmate to sit upright on a wooden bench next to his bunk. There the prisoner sat for 'days and weeks and months' until 'both feet and legs were solid sores.' The prisoner's 'flesh turned black.' In the end, one leg was amputated to save the inmate from gangrene. 'He lived for one day after the amputation.'"* (Yackle 12)

In 1964, the Supreme Court ruled in *Cooper v. Pate* that prisoners did have the standing to sue under the Civil Rights Act of 1871 (Rosenberg 305). After Cooper, prisoners suffering the conditions described above were allowed to bring their cases to the federal courts. *Cooper* came at a time when the prison system was taking in prisoners at a higher rate than the system could expand its capacity. Not only were there more prisoners to complain, but the prison overcrowding gave prisoners more reasons to complain (Rosenberg 305). The expanding prison population coupled with the courts' willingness to hear prisoners' grievances gave rise to the flood of prisoner litigation that followed *Cooper*.

For over two decades following the *Cooper* decision, the courts embarked on mission to reform prisons (Feeley and Rubin 39). The mission began with a district court decision in *Talley v. Stephens*, a case in which a group of prisoners had filed a petition stating that the superintendent of the prison had denied them access to medical services, forced them into labor under harsh conditions, and used extreme forms of corporal punishment to discipline inmates (Feeley and Rubin 55). As the true nature of the Arkansas prisons were revealed to the district court, the judge ordered the Arkansas Prison system to make more and more

adjustments. In 1970, the district court declared the entire Arkansas Prison System unconstitutional. This was the first such court decision (Feeley and Rubin 39) but, it was the beginning of a pattern to be repeated over and over throughout the country. By 1999, 48 of the 54 districts in the United States (including Washington DC, Puerto Rico, and the US Virgin Islands) had at least one facility in their district that the federal courts had determined was unconstitutional (Feeley and Rubin 40). The conditions in southern prisons were seen as a symptom of larger social ills in the South. In the South, the courts saw prison reform as an extension of civil rights reforms that were already taking place such as school desegregation and the improvement of conditions in mental health care facilities (Feeley and Rubin 159-160, Yackle 21-28).

Alongside the Eighth Amendment cases that had entire prison systems being declared unconstitutional, the Supreme Court also affirmed the rights of prisoners in other areas. In the 1960 case *Barnett v. Rodgers*, the Supreme Court ruled that the free exercise of religion could not be "suppressed or ignored without adequate reason" (Palmer and Palmer 92). The right to free exercise of was reiterated in a footnote to a per curium opinion in the case of *Cruz v. Bedo* (1972), where the court noted that "reasonable opportunities must be afforded to all prisoners to exercise religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty" (*Cruz v. Bedo* 1972).

In addition to First Amendment protections, the Supreme Court also asserted that prisoners have a right due process (within certain limits) as guaranteed in the Fifth and Fourteenth amendment *Wilwording v. Swenson* (1971) *Haines v. Kerner* (1972) both restated the right to due process for prisoners that was first articulated in 1945 in *Screws v. United States* (Palmer and Palmer 488). While the standard of due process in prison proceedings in

much lower than civil or criminal proceedings, the Supreme Court has ruled that prison disciplinary regulations must have some type of due process. The standards of due process in disciplinary proceedings were outlined in *Wolff v. McDonnell* (1974) and they include the requirement that an inmate be notified in writing of claimed violation before the hearing, the inmate's right to call witnesses in their defense (within limits set by prison officials), and the requirement that appropriate documentation of the results of the proceedings must be retained (Palmer and Palmer 493). Because liberty and property are at stake in such proceedings, due process must be observed, even if the standards are lower for prison due process (Palmer and Palmer 488).

Throughout the 1970's and 1980's courts at all levels made rulings that were geared towards eliminating Eighth Amendment violations as well as defining the other constitutional rights that prisoners enjoy. During this period of intervention by the courts, the courts did not question whether or not they should return to the hands-off doctrine as their involvement with the prison systems in the country became more and more extensive (Feeley and Rubin 40). While Supreme Court involvement with the prison cases was limited (most of the decisions to reform the prisons were coming out of the district courts) the Supreme Court did not reverse any of the decisions of lower courts until the late 1970's. The Supreme Court's *Bell v. Wolfish* opinion, which admonished the lower courts for their level of their involvement, signaled the beginning of the Supreme Court's retreat (Feeley and Rubin 47). The retreat continued in the *Rhodes v. Chapman* (1981) case, when the Supreme Court reversed a decision made by a lower court which held that the double bunking practices in a New York City federal prison constituted an Eighth Amendment violation. The Supreme

Court stated that the harsh and restrictive treatment of prisoners was part of the punishment criminals must face in prison (Feeley and Rubin 48).

Congress aided in the courts' retreat with the passage of the Helm's amendment as part of the Violent Crime Control and Enforcement Act of 1994, which prevented prisoners from receiving Pell Grants for higher education. Anger and resentment that prisoners were being given access to free educational opportunities was behind the push to eliminate Pell Grants for prisoners. These same emotions led to the creation of the Prison Litigation Reform Act of 1996 (PLRA), which limited prisoners' ability to challenge prison conditions in federal court. Since the enactment of the PLRA, complaints brought by prisoners must be handled in a specific manner prior to being brought to the federal courts. The PLRA requires that prisoners try to resolve the issue using the institution's grievance procedure. Prior to filing a lawsuit, the prisoner must "exhaust" all of the remedies outlined in the grievance policy for each complaint. If prison officials have not resolved the problem after all remedies have been exhausted, then the prisoner may take his or her claim to the federal court (American Civil Liberties Union 2).

Prior to the enactment of the PLRA, a prisoner who was unable to pay the filing fee required to bring a lawsuit in federal court could claim *in forma pauperis* and they would not need to pay any of the fees associated with their lawsuit. Under the PLRA, a prisoner wishing to file suit must come up a percentage of the filing fee up front. The rest of the filing fee will be deducted from their prisoner account over the following months (American Civil Liberties Union 12). In order to discourage frivolous lawsuits, the PLRA included a provision that prevented prisoners who have claimed *in forma pauperis* to file three frivolous suits from claiming *in forma pauperis* a fourth time (American Civil Liberties Union 16).

Under the PLRA, lawsuits that are filed by prisoners face increased judicial scrutiny from the earliest phases of the case. The PLRA states that all complaints filed by a prisoner against an employee of a government entity or a government entity must be reviewed after they are docketed by a federal court. If upon review the judge finds the claim to be frivolous, malicious, or if the prisoner fails to state a claim that the court is able to remedy, the complaint will be dismissed (Palmer and Palmer 342). Any party in the case can make a motion for a federal judge to investigate whether there have been any recent court orders that may provide relief in the case at hand. If there is an order that would have an impact on the case, a stay will be issued (Palmer and Palmer 339).

The PLRA also restricts what types of remedies can be offered. In the case of mental and emotional injury, the court is limited to granting injunctive or declaratory relief that is narrowly tailored to address only the claim at hand (American Civil Liberties Union 18). If there is physical injury, any mental or emotional injury that followed as a result of the physical injury may be compensable; however the courts are divided on what constitutes a physical injury so it can be difficult for prisoners to collect any monetary compensation for damages- physical or otherwise. Under no circumstances can a prisoner collect monetary damages if there is no physical injury. The courts are also divided on whether Constitutional claims without injury follow the same rules as mental and emotional injury (American Civil Liberties Union 20).

Despite the fact that the PLRA limits the courts' discretion in cases involving prisons, the Act has withstood challenges in the courts, perhaps because the courts have little interest in resuming their extensive involvement with prison reform. Nevertheless, it is safe to say that the courts' involvement with the issue has effectively ended (Feeley and Rubin 50). Given

that the era of extensive policy making has been over for a number of years, we are in a good position to look back on the era of court ordered prison reform and evaluate its success.

Success of the Court Ordered Prison Reform

The success of court ordered prison reform cannot be measured quantitatively because there is simply a lack of data to support such research. By looking at the qualitative data available on prison reform, it is apparent that the courts' involvement with prison reform has certainly had an impact on conditions prisons. Examination of the Alabama Prison System and Texas Department of Corrections both indicate that conditions after the courts got involved were markedly better than prior to the courts' involvement. However, this does not mean that all problems within these prison systems have been resolved. Human rights organizations are quick to point out that many problems still remain unsolved, including some problems which the court has addressed before. Moreover, the case studies seem to indicate that while court involvement eliminated some problems, it also created some new problems.

The Alabama Prison System

Larry Yackle's book *Reform and Regret* provides a narrative of Federal District Court's involvement with the prisons in Alabama from 1971 to 1984. Judge Johnson saw a number of constitutional issues in the Alabama prison system, for example, all prisoners, from the petty thief to the hardened murderer and rapist, were forced to live in squalid dormitories where they were underfed, they were at risk of contracting a variety of diseases, racial tensions ran high, and the weaker, younger inmates were likely prey for older, more powerful inmates. In an unsuccessful attempt to maintain order and discipline, guards used brutal force against the inmates. Medical resources for sick or wounded inmates were

somewhere in between non-existent and completely overwhelmed (Yackle 11-13). These were the conditions that the plaintiffs were seeking relief from in *Newman v. Alabama (*1972*)*, *Pugh v. Sullivan (*1974*)* and *James v. Wallace (*1974*)*.

In *Newman v. Alabama*, the plaintiffs charged that they were denied access to adequate health care by the Alabama Penal System (*Newman v. Alabama* 1972). A number of specific charges were made by the plaintiff Newman in this case, including that maggots were found in a prisoner's wounds, a prisoner died from gangrene after being strapped to a bench by prison staff, and a number of prisoners had died after they did not receive medical care (Yackle 13). Judge Johnson found for the plaintiff and ordered prison officials to improve the delivery of health care services in the prisons by doing the following:

- The prison begin maintaining medical records,
- Provide regular physicals for all inmates,
- Provide emergency care for prisoners including an ambulance to the hospital if necessary,
- Hire staff that are licensed and trained,
- Cease the use of inmates to provide medical care),
- And see patients within a certain time frame of their arrival at the prison medical facility (*Newman v. Alabama* 1972).

In 1975, the Alabama prison system found itself in Federal District Court before Judge Johnson once again. This time the system was facing charges brought by prisoners Jerry Lee Pugh and Worley James. Pugh was a prisoner who was beaten and left for dead by fellow inmates in 1973 when authorities lost control of the dormitory and violence erupted. James was a repeat offender who filed suit against the system because the system failed to provide

medical care and rehabilitate him to the point where he would not return to the life of crime that had brought him to prison in the first place (Yackle 13, 54). These cases were being tried together. After the fifth day of the trial, the defense counsel stated that the defendants had "nothing further to offer" and they rested their case having never called a single witness to refute the plaintiff's claims (Yackle 14). On January 13, 1976, Judge Johnson issued his opinion in the *Pugh* and *James* cases. While noting that the orders of *Newman v. Alabama* had not been carried out, Judge Johnson said:

> *The living conditions in Alabama prisons constitute cruel and unusual punishment. Specifically, lack of sanitation throughout the institutions -- in living areas, infirmaries, and food service -- presents an imminent danger to the health of each and every inmate. Prisoners suffer from further physical deterioration because there are no opportunities for exercise and recreation. Treatment for prisoners with physical or emotional problems is totally inadequate.* (James v. Wallace, Pugh v. Locke *1974).*

Judge Johnson's opinion declared the entire Alabama prison system unconstitutional. His order was designed to improve the conditions in Alabama prisons. This improvement was expected to come through:

- A reduction in overcrowding and population caps,
- The development of a classification system for inmates that separated those with a propensity for violence from those without a propensity for violence,
- Setting limits on the use of administrative segregation,
- Providing mental health care,
- Providing ample safe food,
- Allowing visitation,
- Providing education, work, and recreation opportunities,

- Providing prisoners with basic hygienic items,
- Meeting minimum cell size requirements,
- And addressing the racial disparities between inmates and prison guards. (*James v. Wallace* and *Pugh v. Locke* 1974).

To ensure that his decision was carried out, Judge Johnson also ordered the creation of a Human Rights Commission which was a third party monitoring body that was supposed to cooperate with prison officials and the government (Yackle 110).

Judge Johnson quickly found out that it would not be easy to see his order carried out and progress was slow coming for a number of reasons. The decision faced political opposition because of expenses associated with implementing the order and there was general feeling that this was just another example of the federal government becoming involved in the state's business. The Human Rights Commission was the vehicle for change that Judge Johnson was relying on and the HRC was supposed to cooperate with other branches of government and the bureaucracy to insure that the orders were carried out (Yackle 110). Unfortunately, relations between the HRC and the Board of Commissioners soured early in the process, ending any hopes of cooperation (Yackle 114, 116). Rather, what ensued was a mess of political jockeying for power and prestige. Governor Wallace, Attorney General Baxley, and Lieutenant Governor Beasley were all trying to co-opt the issue for political gain while the commissioner of the Board of Corrections, Judson Locke was trying to defend his career. As an example of the political games being played, Locke went to the legislature and expressed that funding was needed to carry out the court orders and Lieutenant Governor Beasley fired back that there was to be no more funding until the problems were fixed (Yackle 109-138).

Improvements were made, especially in the area of overcrowding, despite the ongoing political wrangling. Unfortunately, some of improvements led to other problems. The reduction in overcrowding in prisons led to an increase in overcrowding in local jails because inmates who would have been sent to the prison system prior to court intervention were being held in the jails. Other improvements were only temporary For example, after the HRC hired consultants to design a working classification system for prisoners and the systems was implemented, the HRC was dismayed to find that the new classification system was being used as a form of punishment by wardens and correctional officers and was not effective in protecting non-violent inmates from violent inmates (Yackle 109-138).

In 1978, information collected by the Legislative Prison Task Force indicated that while progress had been made, conditions had improved only "marginally" and in a hearing that same year Judge Johnson was of the opinion that not much progress had been made. (Yackle 170, 178). By this point the *Pugh* and *James* litigation had already outlived the careers of many public officials. Even Judge Johnson was eventually replaced by Judge Varner, who continued to guide prison reform in Alabama into the 1980's.

Eventually, the slow progress translated into improved prison conditions, but it took two judges, countless public officials and over a decade. Yackle concedes that prison conditions in 1986 were better than in 1976, but that, as Yackle points out, does not mean that they are "affirmatively good" (257). Yackle notes that while housekeeping of these facilities had improved, the facilities are steal, concrete, and razor wire and the minimum space requirements that Judge Johnson laid out in his orders are not observed, the proper classification of prisoners is almost secondary, and the "dog house" is still a disciplinary tool of the guards (Yackle 259).

Yackle's book was completed sixteen years ago, but there is evidence from other sources that some problems that Judge Johnson addressed still exist, for example providing prisoners with adequate mental health care services. In his January 13, 1976 orders, Judge Johnson ordered that mental health care be available to those who need it in prison. However, a 2003 Human Rights Watch Report calls Alabama system for dealing with prisoners with mental illness, a "system in crisis." The report details a number of problems with the Alabama Prison System's provision of mental health care, including:

- There is insufficient numbers of trained staff to perform vital functions such as the proper administration of medication or thorough assessments of patients' mental health status. For example, in a facility housing 20,000 inmates there were three psychiatrists, plus a director whose license to practice had been revoked in two different states (136).
- Inmates with acute psychosis are put in lock-down for long periods of time rather than being provided with prompt medical care. Similarly, prisoners with severe mental illness who act out are often punished for behavior associated with their illness, including being put in lock-down (137).
- Only one type of treatment is consistently available to prisoners, that being psychotropic medication. While available, it is frequently administered improperly or given without a psychiatrist having actually evaluated the patient. Absent from the treatment regimen is any type of therapy that is traditionally used along side medication (137).

The report also reveals that the women's prison- Tutweiler, strays further from the vision of Judge Johnson. Tutweiler is overcrowded (Human Rights Watch 139) thirty years after

the explicit demand to eliminate overcrowding. The prison lacks facilities and staff to provide adequate medical and mental health care service. Often, the only way to get needed mental health care services is for inmate to intentionally harm themselves or another inmate(Human Rights Watch 139).

The Texas Prison System

Prior to judicial intervention, Texas prisons appeared to operate so flawlessly that they were the envy of prison administrators around the country (Crouch and Marquardt 2-3). As the second largest prison system in the country (behind only California), this was no small feat. But beyond the apparent order and discipline, there was a prison system rife with constitutional and human rights issues (Crouch and Marquardt 1-12)

Since the end of the Civil War Texas had used the plantation system. By day, prisoners were required to work in the fields to generate revenue for the prison system. At night, they returned in the evening to a dilapidated, squalid facility where the strong inmates preyed on the weak inmates. All of the prisons in the Texas prison system were dangerous, horrid places, but the facilities intended to house blacks were the worst in the system (Crouch and Marquardt 16-30).

In 1961, George Beto took control of the Texas Department of Corrections after his predecessor died of a heart attack during a prison board meeting. He continued with his predecessor's plan of instituting order and improving conditions in the Texas prison system. Early in his career there was a strike on one of the farms which he ended quickly by arming correctional officers with wet ropes and rubber hoses and putting them on horseback (Crouch and Marquardt 39). He was a visible presence around the prisons, sometimes stopping in the mess halls to taste the food (Crouch and Marquardt 40). His persistence paid

off. In terms the safety of the prisoners and quality if the facilities, the system had improved greatly under Beto (Crouch and Marquardt 40-42). Beto retired in 1972 and recommended W.J. Estelle to replace him.

Under Estelle, control was maintained in two ways. First, the guards were strong and clearly in charge. Secondly, there was a system of building tenders who were essentially inmate employees with a substantial amount of power over the general population and they received formal and informal rewards as payment for their work. Inmates were required to move through the facility silently in a single file line. There were strict dress codes to be adhered to. Inmates complied with these rules and the orders of the "bosses" and BT's because they knew what would happen if they did not. Inmates were wary of bending the rules even when the bosses were not around because there was an expansive network of snitches operating in the prison system (Crouch and Marquardt 37-77). Violations of any of the prison's numerous statutes were often met with beatings that ranged from a slap across the face to several officers beating a single inmate to near death. While severe beatings were covert, they were pervasive (Crouch and Marquardt 78-81).

Early in his career, Estelle was allowing a greater use of physical force than Beto had (Crouch and Marquardt 118). By the middle of the 1970's, the prison population began to expand much more rapidly than it had under Beto's watch, and this was about the same time that non-profit interest groups like CURE and the Texas Civil Liberties Union began to take an interest in what was going on in the Texas prisons (Crouch and Marquardt 121). By 1974, reports of abuse had made it to a legislature that was already less sympathetic to the TDC because of redistricting and the legislature began conducting an investigation of prison policy and practices (Crouch and Marquardt 118).

In the summer of 1972, one of the most famous and protracted cases in prison policy was filed by David Ruiz. Ruiz took his case to Judge William Justice who was known for issuing orders reforming juvenile facilities (Crouch and Marquardt 123). Judge Justice ruled in favor of the plaintiff and ordered the Texas Department of Corrections reduce overcrowding, increase paid staff, eliminate building tenders, provide adequate medical care, improve the conditions in solitary confinement, provide inmates with a disciplinary hearings, allow unfettered access to the courts, upgrade building fire safety equipment and sanitation in order to meet code, reduce inmate population, provide each inmate with is own cell, and build new smaller units closer to urban rather rural areas (Crouch and Marquardt 123).

The TDC and the state legislature were infuriated with Judge Justice's order (Crouch and Marquardt 123-126). The legislature saw this as an example of the federal court getting involved with the state's business (Crouch and Marquardt 123). The TDC accepted parts of the ruling particularly the parts about providing medical care, and the TDC entered into a consent decree regarding the provision of medical and mental health care (Marquardt and Crouch 128). But as Crouch and Marquardt point out these are "non-control" issues (128). The TDC accepted that there were issues with medical services in the prison system and had even begun addressing these issue prior court involvement. The TDC did not, however, accept the court's orders regarding methods of maintaining order and control in the prison (Crouch and Marquardt 128). The TDC claimed that their control policies were constitutional and that any reports of abuse were "isolated" and not a reflection of daily prison operations (Crouch and Marquardt 125). Resistance to the court's orders to revise prison policies aimed at maintaining social control came in two different forms that included

formal resistance through appeals to higher courts and informal resistance in the implementing population (Crouch and Marquardt 128).

In 1981, the state appealed the ruling to the Fifth Circuit Court of Appeals where several aspects of Judge Justice's ruling were reversed. In particular, the Fifth Circuit reversed his orders to reduce the prison population through certain means, build new units close to urban areas, bring buildings up to state fire, safety and health codes, and provide each prisoner with his own cell (Crouch and Marquardt 129). Other areas were upheld, including the appointment of a special master and the elimination of the building tender system (Crouch and Marquardt 130). Shortly after the ruling, the state legislature took the position that the TDC must comply with the remaining court orders and began to put pressure on the TDC to comply (Crouch and Marquardt 143). A final settlement in the case was not reached until 1985. The Texas legislature committed money for programs to bring the facilities to capacity, hire necessary staff and provide inmates with certain necessities and programs (Crouch and Marquardt 147).

Inside the prison, prison guards, wardens and administrators were resisting the court orders by maintaining a business as usual attitude. The TDC had put new policies in place to limit the use of force but reports prepared by the special master revealed that force was still used by guards to maintain control. Attempts to investigate violent incidents were resisted and the incidents themselves were covered up by prison personnel. To take control of the investigations, the assistant director of the TDC ordered that all investigation related questions and requests come through him. Conveniently, he never seemed to be available when the special master had requests for information and so the special master gave up on the investigation process. The TDC had been ordered to eliminate the building tender

system. Initially they complied with this order by removing building tenders' title and calling them "support service inmates" but for the most part the kept their responsibilities and privileges (Crouch and Marquardt 130-132).

It wasn't until May of 1982 that the building tender system was completely dismantled and their jobs were turned over to staff (Crouch and Marquardt 131, 186). Gradually, prison guards of the "old way" were replaced –both through attrition and disciplinary actions for the failure to comply with new policies (Crouch and Marquardt 148). The reforms were eventually forced on the implementing population by the legislature (which had stopped siding with TDC officials after the appeal) and a new TDC director (Crouch and Marquardt 132-140).

These changes created problems with inmate control and in 1984 a number of different problems began to rise to the surface including drug trafficking, coerced and forced sexual encounters, and increased racial tensions. This left prisoners uncertain of their safety in prisons and the level of violence in Texas prisons exploded in 1984 and 1985 (Crouch and Marquardt 195). The need for protection led to the rapid development of gangs (Crouch and Marquardt 203). Some blame the violence on court intervention, while others blame the way the court decision was implemented.

Gradually, Texas prisons became stable as guards were given alternative methods of maintaining control in the prison system such as issuing tickets for infractions. In their 1989 evaluation of the courts' involvement, Crouch and Marquardt report that despite the temporary rise in violence, conditions have improved since the *Ruiz* days because inmates' rights are recognized and they have more freedom but the post-Ruiz TDC still has problems

that need solutions. Since proliferation of prison gangs in the mid-1980's, violence associated with prison gang activity has been a part of life in the TDC.

One gang related phenomenon plaguing prisons is prostitution. Gang members will force or coerce other prisoners into prostitution so that the gang can make money on the prison and in return the prisoner received protection from the gang. Sexual violence in prison is a problem in prisons across the country and Texas is no exception. Compounding the problem is the fact that prison administrators and correctional officers often do little to prevent or punish prisoner rape. Human Rights Watch 2001 Report "No Escape" points out numerous incidents of sexual assault that have taken place in Texas prisons that have been met with "deliberate indifference." Over two decades after Judge Justice noted that there were problems with rape in Texas prisons (Crouch and Marquardt 126) sexual predation among inmates remains a major problem in Texas Prisons.

DISCUSSION

Limitations on the Courts' Power

Reflect back to the discussion of David Horowitz and Gerald Rosenberg's literature on court capacity and recall that both felt that there are certain constraints on the courts ability to make social policy. Through the examination of the Texas and Alabama case studies, we can see how some of the constraints worked against reform in these prison systems.

The Alabama Case Study

In his book *The Courts and Social Change*, Horowitz explains why people turn to the courts to bring about social change. Sometimes there are pressing problems in society that the legislative and executive branches are unwilling to address. Unlike other branches of government, the court must act when these issues are brought to their door. The relief that

the court can offer is viewed as being final and immediate. This view conflicts with the reality; the courts capacity to bring about social change is limited in several ways, such as:

- Court policy is piecemeal because judges can only right the wrong before them in a given case,
- The adversarial process provides judges with skewed facts upon which they base their decisions, and this process is more conducive to finding historical facts rather than social fact,
- Courts and judges are generalists, yet they are required to process large amounts of specialized information and make devise specialized solutions,
- The adjudication process lacks the ability to monitor implementation and the consequences of a court order.

Traditionally speaking, court policy does tend to be piecemeal, as Horowitz described. However, the cases that came to Judge Johnson were different. The complaints in the *Newman*, *Pugh* and *James* each outlined several issues with the prison system. At the conclusion of the *Pugh* and *James* case, Judge Johnson declared the entire Alabama prison system unconstitutional. Judge Johnson did not feel that the facts of the cases before him limited his ability to reform the entire system and his orders for reform came in relatively few orders rather than in a piecemeal fashion as Horowitz suggests.

During trials, Johnson was not faced with making decisions of historical fact or social fact, largely because both sides seemed to be in agreement about what had already happened and that there were problems in the prison system. Thus, Judge Johnson was not faced with the task of determining historical facts or social facts based on the two extreme sides of the story that he heard because the story from the two sides was very similar.

Where the two sides differed was the reasons for these problems. The plaintiffs claimed that the defendants were unconcerned with fixing the problems in the prison system while the defendants claimed that they would gladly fix the problems if given the money to fix the problem.

It was up to Judge Johnson to solve the problems that they both agreed existed. Horowitz claims that this part of the adjudication process can present problems for judges. Because judges are forced to provide a remedy, judges are often forced to offer up a remedy without considering the larger social consequences of their decisions. The "remedy" that the court offers is in a fact a form of social policy, and like the social policy that comes out of the legislative branch, is often highly specialized. Unlike the legislative branch, judges do not have tools at their disposal to develop specialized policy such as committees, lobbyists, and colleagues who may have experience in a particular policy area. Also like the policies that come out of the legislative branch, the policies that come out of the judicial branch are bound to have unintended consequences, but the judicial branch lacks the ability to monitor and correct for these unintended consequences. Judge Johnson understood these limitations on his power and he dealt with these limitations in two ways: the creation of the Human Rights Commission and flexibility.

The HRC was a group of appointed prison policy experts who were assigned to work with the defendant to devise a plan for bringing the prison system into compliance with the Constitution. Horowitz points out that judges often enter into making social policy without any type of expertise in the area of policy that they are making. The HRC allowed Judge Johnson to overcome the fact that he was not a prison policy expert by assigning the task of developing specialized policy to prison policy experts. Horowitz also explains that the

judicial branch does not have a body to monitor the implementation of their decision or to monitor the effects of a decision that has been implemented but HRC was a monitoring body so through the creation of the Human Rights Committee Judge Johnson was able to indirectly monitor how his decisions were being carried out and how the changes were affecting the prison system, thus overcoming this incapacity.

Judge Johnson's flexibility also helped him overcome some of the incapacities described by Horowitz. Judge Johnson valued the opinion of the defendants in these cases and was flexible with how the standards laid out in his opinions were achieved. He stated the necessary ends but left it to the defendant and the Human Rights Commission to determine the best means to reach those ends. For example, Judge Johnson ordered the defendant to reduce overcrowding and it was the responsibility of the defendant to put a plan into action under the guidance of the Human Rights Commission. This flexibility also allowed room to correct the unintended consequences of newly implemented policies and allowed Judge Johnson to avoid making specific, specialized public policy.

Overcoming the constraints of the adjudication process proved to be far easier for Judge Johnson to overcome than overcoming the constraints of the political process. The important of political support is emphasized by Gerald Rosenberg in *The Hollow Hope*. Rosenberg outlines three constraints on the judiciary:

- There are limited number of rights in the Constitution and the Supreme Court can only provide a remedy of one of the rights in the Constitution have been violated,
- The judicial branch depends on other branches of government,
- The judicial branch does not have the tools to implement their orders.

Judge Johnson's orders primarily collided with Rosenberg's second constraint, which relates to political support for reform. Judge Johnson stated that he only became involved with prison reform after the issue was forced upon him by the other branches' failure to respond to the pressing problems in prison (Yackle 16). After he assumed responsibility for reforming the prison system, Judge Johnson quickly realized that moving the other branches to fund or otherwise support reform would not be as simple and expedient as issuing a court order (Yackle 110). The court order to improve prisons was worth nothing if there was no money available to prison administrators to make the improvements and the funds needed to come from the legislature, which was no more inclined to jump to the aid of prisoners after Judge Johnson became involved than it was before he became involved. After Judge Johnson made a court order, prison reform was turned over to the political process where the issue was dragged out for decades.

The various other branches of government reacted to the court orders in different ways. Wallace framed the issue as an example of the federal government getting involved with state issues and taking the side of criminals (Yackle 109). He accused Judge Johnson of "acting outside his expertise" and in campaign speeches Wallace hinted that perhaps he would choose to not comply with the orders (Yackle 104-105). His actions demonstrated more than disdain for the court orders; they also demonstrate that he viewed compliance with the orders as being a choice. Wallace was criticized in the media for both being weak and finger pointing. Later, when change was inevitable, Wallace suggested that income taxes should be raised to pay for the reforms, knowing that that the taxes could only be raised by amending the state constitution, something that was unlikely to happen (Yackle 125)

The state legislative branch, lead by Lieutenant Governor Beasley, took a two-fold approach to the issue. On one hand they spoke of the importance of reforming prisons. On the other hand, they blamed the problems on Commissioner Locke and impeded his efforts to reform the prisons at every turn. Beasley acknowledged that the prison system had problems but he was intent on blaming those problems on inefficiency and mismanagement (Yackle 118). Consequently, though he felt that the system needed reform, he was unwilling to fund the reform with appropriations from the legislature and the majority of the legislature was behind him in his refusal to fund the prison system. The legislature's solution was to appoint a legislative task force to find problems in the prison system and recommend reforms. The legislative task force continued with the legislature's criticism of Commissioner Locke (Yackle 119).

Commissioner Locke came forward with plans to plans to reform the prison system but he was greeted by a legislature that was refusing to fund reforms until the problems inside the prison system were fixed. Even when Locke came up with plans to comply with the court orders, he was assaulted from all sides (Yackle 109-122). Without political support, he was largely powerless to make the changes necessary to bring the system into compliance.

The case studies point out two areas in which political resistance or inaction to court orders translated into delayed and or partial compliance: overcrowding and the provision of mental health services. One can see how political forces impeded and delayed implementation by examining the issue of prison over crowding. Though prison officials were eager to alleviate over-crowding, but situation was largely out of their control (Yackle 101). They could not simply build new prisons without funding not were they able to

release prisoners. The bureaucracy relied on laws from the legislature to allow them to do these things.

For a prime example of how the political process slowed reform in this area look at the "good time" law. A law designed to reduce overcrowding in the prison system by releasing prisoners with good time credits early was passed by the legislature, vetoed by the governor and the veto was overridden by the legislature and Lieutenant Governor Beasely. The Human Rights Commission convinced Commissioner Locke that the new law not only gave him the power, but required him to award good time credits retroactively and begin releasing prisoners immediately. Based on this advice, Commissioner Locke awarded good time credit retroactively and processed 200 prisoners for release. The plan to release prisoners early angered many people. Prosecutors claimed that the new law took gave too much power to Commissioner Locke and Lieutenant Governor Beasely claimed that the law was not intended to award good time credit retroactively. The legislative task force denounced Commissioner Locke's decision to release prisoners early. Commissioner Locke blamed the event on the HRC but the HRC denied involvement and the Attorney General's office revised an earlier opinion on the law that supported the retroactive award of good time credits. Reacting to political pressure, Commissioner Locke ordered prisoners who were already processed to be sent back to their cells (Yackle 122-129).

Overcrowding eventually was reduced in the prison system after certain political actors moved on to other positions in government and other political actors abandoned their opposition to the early release of prisoners. However, overcrowding continued to be a problem in local a jails, a problem that was created by Judge Johnson's orders that the prisons stop taking in new prisoners until overcrowding was reduced. The result of the

order was criminals who were supposed to be sent to state prisons were being held in local jails instead (Yackle 122-123). Even today, overcrowding continues to be a problem in the women's prison, Tutweiler. I suspect that the lack of improvement at Tutweiler is due in part to the fact that as a women's prison Tutweiler was not placed in the same political spotlight as the men's prisons. In the end, one can say that overcrowding is better than it used to be, but it is not eliminated, this makes overcrowding an area in which compliance with Judge Johnson's order to eliminate overcrowding was both partial and delayed.

In addition to overcrowding, the problem of inadequate mental health care has also gone unsolved despite Judge Johnson's orders to provide prisoners with mental health care. Yackle characterized the provision of mental health care as being greatly improved (258) since Judge Johnson ordered that mental health care must be available for all who need it. However, as was pointed out in the Alabama case study, a 2003 Human Rights Watch report reveals that all who need mental health care are not getting it. Inmates in Alabama prisons who need mental health services will find that mental health care is difficult to obtain. Mentally ill inmates who act out may be punished for their actions rather than receiving treatment. The treatment that is available is provided by a handful of staff members, some of whom are not licensed to practice, and care is limited to medications (Human Rights Watch 136-139). I would classify compliance in this area as being partial. While the availability of some staff to treat mental illness and drugs to help control mental illness are improvements, the improvements fall short of Judge Johnson's order to provide mental health care all who need it. The precise reason for why the prison system has failed to comply with Judge Johnson's orders is difficult to say. It could be that the political process provided only limited finding for compliance and this was the best that the state could do, in

which case the failure to provide mental health care would reveal that Rosenberg's constraints are at work. It could also be that state and prison officials view their current program as sufficient and in line with Judge Johnson's orders, which would indicate that the implementing population as defined by Canon and Johnson is interpreting Judge Johnson's orders as being no longer applicable to them.

The Texas Case Study

Much like the Judge Johnson in Alabama, Judge Justice was able to overcome some of the traditional incapacities discussed by Horowitz. Justice had one major case (*Ruiz*) that included several problematic aspects of the TDC and thus issued one order that was aimed at reforming the entire system, thereby avoiding the pitfalls of making piecemeal social policy as Horowitz suggests. The TDC did not dispute what was occurring in the prisons, they simply maintained that the policies were the best way to maintain control in the prison and were constitutional so Justice did not have to figure out what had happened, he just needed to determine if there needed to be a solution and if so what that solution should be. Judge Justice appointed a special master to monitor the implementation of his order thus overcoming the lack of monitoring capabilities.

Unlike Johnson however, Justice was not as flexible and he did not leave the policy making to the defendants or any other prison experts. His orders included not only end but also specific means for reaching those ends. For example, Judge Justice ordered the TDC to decrease overcrowding and then listed several ways that this goal was to be accomplished. Consequently, the Fifth Circuit Court overturned this portion of Justice's ruling stating that he could no specify how the goals were met.

Like Judge Johnson, Judge Justice had considerably more difficulty overcoming the constraints outlined by Rosenberg. Prison reform in Alabama suffered from a lack of political support for reform. In Texas, initially political forces sided with the TDC but as the TDC's sympathizers left state government and the scale of the problems was revealed to the people and the government, reform garnered political support. The strongest resistance to reform came from the implementing population. The primary constraint on the courts ability to affect social policy in Texas was Rosenberg's third constraint- the lack of implementation power.

The lack of implementation power did not stop reform altogether, but it did slow reform and stunt the effectiveness of the court order. In the case study of the TDC, there are several examples of how resistance to court orders in the implementing population slowed progress.

The TDC was ordered to dismantle the building tender system. Building tenders were approved by the board of commissioners to perform a variety of tasks in the prison including bookkeepers and gatekeepers. In exchange for their service, building tenders received payments and privileges that other inmates did not receive. They were also allowed to have a significant amount of power over other prisoners and with the approval of prison officials, the building tenders used their power to maintain order. Building tenders were part of a vast network of prison snitches in the TDC and their words seemed to go unquestioned and inmates were physically and sometime sexually punished solely on a report from a building tender (Crouch and Marquardt 86-87). Needless to say, such a system was ripe for abuse, leading Judge Justice to the conclusion that the system had to be eliminated. Because TDC officials had come to rely on the services (including the snitch network) to keep the prison running smoothly and they resisted Justice's order to dismantle

the system first by appealing to the courts. When the Fifth Circuit Court upheld Justice's order to dismantle the system, prison officials made the decision to call inmate holding building tender positions "support service inmates" instead of "building tenders" (Crouch and Marquardt 131). Though the support service inmates' duties and privileges remained the same, this was the TDC's way of "complying" with court orders to get rid of the building tender system without actually changing how the prisons were run. It was more than three years after the end of the trial before administrators agreed to eliminate the job that went with the building tender title.

Another area where there was considerable resistant to reform was the reduction of the use of physical force. The threat of force was an important way for prison guards to exert control over the inmates. If prisoners were caught bending the rules faced severe physical punishment, and this looming threat was often enough to keep the prisoners in line. Physical abuse of inmates was never an official punishment, but little was done to stop the practice. Prison guards were understandably reluctant to relinquish this power and consequently they resisted attempts to take this power away from them. If there was a use of force incident that sent an inmate to the infirmary, prison guard encouraged medical staff to manipulate the medical reports to make injuries seems minimal. If an incident was reported to the special master and there was an investigation, prison staff often refused to cooperate with the investigation. The unchecked use of force continued until new leadership at the TDC began enforcing the new rules governing the use of force by firing those who used force inappropriately or refused to cooperate with an investigation (Crouch and Marquardt 130-143).

Compliance with the court order was resisted by the implementing population until political pressure and pressure from prison administrators was great enough to force out those in the implementing population who were actively resisting the court order. This delay in compliance was despite the fact that there were monitors and the monitors knew that the orders were not being followed (Crouch and Marquardt 131). Despite this knowledge, Judge Justice was powerless to force compliance alone. It took the cooperation of the other branches of government and the virtual replacement of the implementing population (removing those attached to the "old ways") to bring about change. However, even with the removal of corrections officers who refused to comply with new regulations, there are still reports of corrections officers not intervening to protect victims of sexual crimes. If true, these reports would indicate that some aspects of the "old ways" are still present in the organizational culture. This discussion shows how Rosenberg's third constraint worked to limit the immediacy and effectiveness of court decisions.

CONCLUSION

How effective were the courts at reforming the prisons? There are no black and white answers to this question. The courts have not been a silver bullet to all of the problems of the prison systems examined in this paper. Nor do the case studies reveal that the courts are completely incapable of bringing about change. Instead, these case studies show that court decisions are subject to certain limitations. In Alabama, the primary constraint was the lack of sufficient political support for any one plan of reform. In Texas, the district court's lack of implementation power meant that the courts' orders were resisted until the reforms were forced on the implementing population by political forces. In both cases there were limitations at work besides the constraints outlined by Gerald Rosenberg. In both cases, the

court orders had unintended consequences (overcrowding in jails in Alabama and proliferation of gangs in Texas), which is one of the incapacities of the courts outlined by Donald Horowitz.

These constraints collide with the intent of a court order and by doing so they limit the effects of the court order, but they do not eliminate the effects of the court order. This can help explain why court ordered prison reform has resulted in mere improvements rather than comprehensive reform; "uneven" results to use the words of Rosenberg or "extraordinary" and "inadequate" as stated by Feeley and Rubin.

Though the success of the courts' attempts to reform the country's prisons was only partial, it did make a profound impact on the conditions in prisons. If only for that impact, the courts involvement was important and worth it. As this paper has pointed out repeatedly, problems still remain. It is important for reformers to take in the central lesson of this paper- that the courts' capacity to bring about social change is not unlimited- and apply that lesson to future attempts to bring about prison reform.

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