The Governance of Corrections: Implications of the Changing Interface of Courts and Corrections

by Christopher E. Smith

ABSTRACT

Judicial decisions established legal standards for prison conditions and the treatment of prisoners. Prisoners used the litigation process to seek judicial enforcement of these rights-based standards that restricted the autonomy previously enjoyed by correctional officials. Judicial intervention into corrections transformed corrections by pushing all correctional institutions to become professionalized, bureaucratic organizations with formal procedures and legal norms. During the 1980s and 1990s, however, the U.S. Supreme Court and Congress used their authority to force a deceleration of Federal judges' involvement in correctional management. Court decisions and legislation narrowed the definitions of prisoners' rights, required greater judicial deference to correctional administrators, and limited both prisoners' effective utilization of civil rights litigation and Federal judges' remedial authority. Despite these developments, the routinization of institutional procedures under the supervision of trained correctional administrators should preserve the changes initiated by court decisions. Moreover, the threat of future litigation continues to protect against the abandonment of correctional standards. The future interface of courts and corrections depends largely on developments

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affecting correctional law and shaping the environment of corrections. The growth in prison populations and correctional personnel, the introduction of new technologies, and the privatization of corrections are likely to produce new issues that will attract judicial attention throughout the litigation process.

Beginning in the 1960s, a new connection between courts and corrections reshaped aspects of both institutional segments despite being unrelated to their sequential proximity. Throughout the United States, judges in both Federal and State courts asserted the authority to examine whether the conditions and practices in correctional institutions comport with constitutional standards for the protection of offenders' rights. The use of litigation as a tool for seeking civil rights for African-Americans, especially in areas such as school desegregation, voting rights, and housing discrimination, provided a model for policy activists pursuing the expansion and protection of constitutional rights for others in society who lacked the political power to effect change through traditional legislative lobbying and voter mobilization. Because convicted offenders constitute a politically powerless minority spurned by American society, individual prisoners and advocates for prisoners' rights looked to the courts as the law- and policy-producing forum most accessible and receptive to claims of right. Over a relatively brief timespan, from the mid-1960s to the mid-1980s, court decisions played a catalytic role in altering correctional policies and practices. Judicial intervention in prison administration was often controversial and spawned reactions by legislatures and the U.S. Supreme Court. These reactions limited the prospects for further judicial intervention, but they did not undo the significant alterations in policies and procedures that were set into motion by prior court decisions affecting corrections.

With the new century, correctional administration is in many respects markedly different than it was just a few decades ago. Judicial decisions imposed specific requirements for policy and practices within correctional institutions. Moreover, administrators' heightened sensitivity to inmates' constitutional rights and the threat of litigation affects decisionmaking concerning the training and supervision of correctional personnel.

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Prisoner litigation has affected courts as well as corrections. The receptivity of courts to legal actions filed by or on behalf of convicted offenders permits prisoners to pursue claims, legal and otherwise, through judicial processes. The influx of prisoners' cases in recent decades has added to the caseload burdens of judicial institutions that also have experienced increased workload demands concerning a variety of issues unrelated to criminal justice. Because corrections is affected by factors independent of judicial action, such as the exponential growth in prison populations since 1980 due to changes in sentencing policies, uncertainty exists concerning the future impact of courts on corrections (and vice versa). If growing prison populations produce deleterious

effects on conditions of confinement, avenues remain open for litigation that could reinitiate judicial intervention into and supervision of correctional administration. At the same time, the rapidly growing population of potential prisoner-litigants creates the possibility of increasing caseload burdens that may impede courts' ability to fulfill effectively their responsibilities for processing legal cases.

However, as this paper discusses in detail, developments during the 1990s affecting the constitutional doctrines and statutes governing judges' authority to supervise correctional practices will limit the potential for a return to aggressive and pervasive judicial intervention into prisons. Similarly, legal developments in the 1990s made the courts less accessible to prisoner-litigants. The ultimate impact of these limitations on the potential for future judicial policy-making in corrections will depend on developments affecting the environment of corrections and the effectiveness of existing policies and practices—many of which were judicially influenced—in responding to these developments.

Origins of Federal Judicial Intervention

Prior to the 1960s, 20th-century prisons and jails typically were closed institutions under the control of administrators who had significant discretion for developing and employing various techniques, including violence, for maintaining offenders' obedience and institutional order. Legislative bodies granted significant autonomy to such institutions. Elected officials manifested concerns about minimizing the expense of operating such institutions and ensuring that security and order were maintained. Although pioneering penitentiaries of the 19th century, such as those in Pennsylvania and New York, emphasized idealized visions of programmatic organization and design, most 20th-century prisons emphasized secure custody without emphasizing particular objectives for programs, standards of confinement, or legal protections for offenders. As a result, there was limited supervision and accountability regarding conditions of confinement and correctional practices employed by prison administrators. If correctional institutions absorbed the sentenced offenders sent to them by the courts, kept those offenders under control, and limited expenditures to meet the expectations of elected officials, there was little reason for governors or legislators to devote attention to the operation of such institutions.

Individual and regional variations existed in prison management with, for example, some States emphasizing agricultural productivity and profitability as primary objectives. These States, primarily in the South, minimized public expenditures on corrections by forcing prisoners to work under harsh conditions in agricultural labor, renting prisoners to local businessowners as laborers,

and using prisoner-on-prisoner violence as the mechanism to ensure their obedience and productivity. Such primary objectives raise questions about who was responsible for maintaining security and order as well about the techniques employed to achieve the institutions' goals. Many of these institutions had relatively few paid staff members. Instead, prisoners handled administrative tasks, including guarding cellblocks, supervising inmate labor, and enforcing discipline. Supervisory prisoners often could employ weapons, sometimes including firearms, to enforce order, and they received special privileges in return for their service to the institution. They gained opportunities to exploit other prisoners through shakedowns, bribes, and their control of the prison economy. They were also positioned to use their authority to physically abuse the prisoners under their supervision and control (see, e.g., Crouch and Marquart 1989, 85).

The **Hull** *decision provided the foundational element for prisoners' right of access to the courts. By restraining correctional officials from limiting prisoners' ability to submit pleadings to the Court, the U.S. Supreme Court opened the avenue by which prisoners and their advocates eventually gained judicial assistance in altering correctional policies and practices.*

In an environment of institutional autonomy, minimized expenditures, and limited objectives that were directed at either secure custody or agricultural productivity, correctional personnel typically had minimal qualifications and training. Positions as correctional officers were low-wage jobs for people with limited education and skills. As long as correctional officers were capable of enforcing order, including the use of physical force, they were considered qualified. Within institutions, administrators often either worked their way up through the ranks or received patronage appointments through connections to elected officials and correctional administrators.

Prior to the 1960s, the correctional environment presented a serious risk to offenders that they would be deprived of basic human needs (e.g., health care, food, shelter) and would be the target of violence. Although a few State courts intervened to stop abuses at specific institutions (Wallace 1997), courts are generally regarded as taking a hands-off approach to corrections prior to the 1960s (Branham and Krantz 1997). The existence of State court decisions that sought to prevent inhumane treatment in a few correctional institutions indicates that not all institutions managed to close themselves off from judicial scrutiny. Most institutions, however, remained autonomous and untouched by judicial scrutiny or intervention. Because State judges were usually elected officials or otherwise dependent on local politics for their appointments and reappointments,

they faced significant disincentives and risks if they contemplated decisions that could arouse political controversy or public opposition. Moreover, even if judges were interested in addressing problematic conditions and practices in correctional institutions—and there is little indication that many judges were so inclined—there were few legal bases for deciding in favor of prisoners' claims. Judges generally deferred to the expertise and authority of correctional officials in claims about improper correctional practices.

Unlike State judges, whose close connections to and dependence on State and local politics made their independence suspect, Federal judges enjoy protected tenure in office. Because they are appointed by the President and removable only through cumbersome impeachment processes, Federal judges' protected tenure positions them to make independent and potentially controversial decisions. Prior to the 1960s, however, Federal judges possessed limited authority to examine cases from prisoners in State correctional institutions.

The 14th amendment protects individuals against actions by State and local governments that violate due process and equal protection. The precise contours of the rights embodied in these vague terms developed through U.S. Supreme Court decisions during the 20th century. Beginning in 1925, the Court began to declare that specific rights within the Bill of Rights, such as freedoms of speech, press, and religion, were included in the right to due process in the 14th amendment and therefore protected against adverse actions by State and local government officials. This process of incorporating rights into the 14th amendment's due process clause continued through the 1960s, but it was not until the final years of this process that the protection of constitutional rights by Federal judges began to affect prisons' policies and practices.

Several key U.S. Supreme Court decisions set the stage for the Federal judicial intervention in prisons that began in the mid-1960s. In *Ex parte Hull* (312 U.S. 546 [1941]), the Court forbade prison officials to screen or intercept habeas corpus petitions that prisoners sought to file in Federal courts. The *Hull* decision provided the foundational element for prisoners' right of access to the courts. By restraining correctional officials from limiting prisoners' ability to submit pleadings to the Court, the U.S. Supreme Court opened the avenue by which prisoners and their advocates eventually gained judicial assistance in altering correctional policies and practices.

The eighth amendment's prohibition against cruel and unusual punishment eventually became the basis for the judicial decisions that most significantly altered correctional officials' authority to operate prisons as they saw fit. The words of the amendment make no reference to prisons, and, indeed, the words do not even convey any definition of the policies, practices, and conditions in any con-

text that may constitute rights violations. By defining the term "cruel and unusual punishment" in *Trop* v. *Dulles* (356 U.S. 86 [1958]), the U.S. Supreme Court opened the way for Federal judges to use the eighth amendment to supervise and remedy perceived constitutional violations in correctional institutions. In *Trop*, a case concerning a World War II soldier who lost his American citizenship after being convicted of desertion, the High Court declared that the cruel and unusual punishment clause must be interpreted flexibly in light of changing societal standards. In the words of Chief Justice Earl Warren, "[T]he words of the [eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (p. 100). Because of the eighth amendment's vague language, Malcolm Feeley and Edward Rubin (1998) characterized it as a "grant of jurisdiction" rather than an amendment that gives meaningful guidance to judicial decisionmakers about its proper interpretation. In effect, *Trop*'s endorsement of a broad, flexible constitutional interpretation gave Federal judges significant discretionary authority over how to interpret and apply their grant of power under the eighth amendment.

In 1962, Federal judges gained the possibility of applying interpretations of the eighth amendment to State criminal justice institutions and processes when the Court decided in *Robinson* v. *California* (370 U.S. 660 [1962]) that the constitutional protection against cruel and unusual punishment applied to State and local actions through the due process clause of the 14th amendment. The case concerned the constitutionality of a narcotics law, but it served to enable Federal judges to apply the eighth amendment to States in various contexts, which eventually came to include prisons.

A fourth key Supreme Court decision came in *Cooper* v. *Pate* (378 U.S. 546 [1964]), in which the Justices decided that prisoners could file civil rights actions under title 42, section 1983, of the United States Code. Section 1983 enables individuals to file lawsuits against State and local government officials for violating their Federal constitutional rights. Such lawsuits may produce judicial orders commanding government officials to change their policies and practices. These lawsuits also can provide the basis for monetary awards to litigants who demonstrate that their rights were violated. By declaring that State prisoners and local jail detainees could use the Federal civil rights statute as the basis for filing lawsuits, the Court provided a vehicle through which incarcerated individuals could challenge correctional practices and the conditions of confinement within institutions.

The Court's opinions provided the necessary elements for judicial decisions affecting corrections: a vehicle for litigation challenging correctional administration (section 1983), access to the courts (*Ex parte Hull* and later decisions),

and a legal basis for judges' intervention in corrections (the eighth amendment and other elements of the Bill of Rights incorporated into the due process clause of the 14th amendment). In the 1960s, individual judges in the lower Federal courts began to consider claims from prisoners and use those claims as a basis for scrutinizing corrections. Most notably, a Federal district court in Arkansas considered prisoners' challenges to conditions and practices within State prisons. State officials initially cooperated in changing some aspects of prison conditions, but the litigation eventually led to judicial decisions barring the use of corporal punishment (*Talley* v. *Stephens* (247 F. Supp. 683 [E.D. Ark. 1965]) and *Jackson* v. *Bishop* (404 F. 2d 371 [8th Cir. 1968])) and generating the Court's endorsement of the authority of lower Federal courts to remedy unconstitutional conditions of confinement within correctional institutions (*Hutto* v. *Finney* (437 U.S. 678 [1978])). Emulating the litigation strategy employed to advance racial equality through judicial enforcement of constitutional rights, prisoners and prisoner advocates throughout the country recognized and pursued the opportunity to seek Federal judicial assistance in altering the practices and conditions in correctional institutions. In the late 1960s, these efforts produced further gains for prisoners' legal protections by, for example, gaining a Supreme Court decision that barred racial segregation and discrimination within prisons on the grounds that they violated the right to equal protection (*Lee* v. *Washington* (390 U.S. 333 [1968])). The Court also declared that prison officials could not bar prisoners from helping each other prepare legal filings unless the prison provided an alternative means of legal assistance (*Johnson* v. *Avery* (393 U.S. 482 [1969])).

Prison Reform Litigation in the 1970s and 1980s

During the 1970s, prison reform lawsuits drew the attention of Federal judges across the Nation. These lawsuits challenged a variety of practices and conditions. Prisoners sought vindication of various constitutional rights, including those concerning religious practices, access to legal materials, disciplinary proceedings, and living conditions. As lower court judges issued rulings addressing these matters, appeals by disappointed parties pushed prison reform litigation to higher courts so that the U.S. Supreme Court and Federal appellate courts eventually clarified many issues and provided guidance to Federal district judges about the contours of constitutional protections possessed by incarcerated individuals. In *Wolff* v. *McDonnell* (418 U.S. 539 [1974]), for example, the U.S. Supreme Court provided guidance about the due process rights possessed by prisoners facing prison disciplinary proceedings. Minimum standards for medical care emerged from *Estelle* v. *Gamble* (429 U.S. 97 [1976]), when the Court announced that prison officials vio-

late the eighth amendment prohibition on cruel and unusual punishments if they are deliberately indifferent to the serious medical needs of prisoners. In *Procunier* v. *Martinez* (416 U.S. 396 [1974]), the Court found that excessive censorship of prisoners' outgoing mail violated the first amendment rights of people outside the prison to whom letters were addressed. The results of such decisions forced concrete, albeit comparatively inexpensive, changes in practices within institutions that did not already have proper disciplinary hearing procedures, medical staff and procedures, and procedures for appropriately handling prisoners' incoming and outgoing correspondence.

The Court's decisions establishing that the equal protection clause covered sex discrimination as well as racial discrimination provided a basis for litigation asserting that correctional institutions for women improperly lacked facilities and programs equivalent to those provided for male prisoners (see, e.g., *Craig* v. *Boren* (429 U.S. 190 [1976])). These lawsuits provided a basis for judicial interventions that led to the establishment of broader educational, vocational, and other programs at women's prisons.

Although the Court decided only a small number of cases concerning prisoners' rights and correctional management, its endorsement of constitutional protections for incarcerated individuals permitted lower court judges to consider a wide array of issues while feeling confident that the general enterprise of judicial supervision and intervention in corrections enjoyed support from Federal appellate courts. The appellate courts did not endorse every district court decision, but it was quite clear that the judiciary's perspective on the scope and legitimacy of prisoners' rights had changed drastically since the hands-off era of the early 1960s.

The Court and lower courts rapidly identified constitutional protections possessed by incarcerated individuals, but it should be noted that these protections are limited in number and scope. A consistent theme in judicial decisions affecting corrections is the paramount need for institutions to maintain order, security, and safety. Many correctional officials may argue that specific judicial decisions placed inadequate emphasis on order and security. This assessment is a matter of personal judgment about which reasonable people may differ. It seems quite clear, however, that whether judges accurately anticipated the consequences of their decisions for order and security, they did not dismiss these considerations as central priorities for correctional institutions. Judges consistently balanced the scope of prisoners' rights against the institutions' interests. Thus, prisoners gained recognition of their particular religious practices and access to legal materials—rights that generally can be exercised without disrupting order and security. By contrast, prisoners' fourth amendment protections against unreasonable searches and seizures are necessarily almost nonexistent

(except with respect to some aspects of intrusive and humiliating body cavity searches) because of the judicially recognized need to permit correctional officials to search for weapons and other contraband.

The most dramatic and expensive judicial interventions into corrections came through decisions applying the eighth amendment. Two Court decisions in the 1970s confirmed for lower court judges that the eighth amendment provides a permissible basis for judicial decisions commanding correctional officials to change policies and conditions within their institutions. When the Court interpreted the eighth amendment in such a way as to establish prisoners' limited right to medical care in *Estelle* v. *Gamble* (429 U.S. 97 [1976]), the Court made it clear that the cruel and unusual punishment clause was applicable to conditions of habitability within correctional institutions and not just to measures formally inflicted as specific punishments for criminal behavior or institutional rule violations (e.g., isolation, corporal punishment, denial of privileges). Moreover, the Court's decision in *Hutto* v. *Finney* (437 U.S. 678 [1978]) concerning the Arkansas prison system clearly endorsed district judges' authority to issue remedial orders directed at conditions of confinement within correctional institutions.

With the apparent support of the Nation's highest court, Federal judges throughout the country continued to examine conditions in correctional institutions. Although litigation that spurred judicial intervention was typically initiated by individual prisoners or prisoner advocates within the legal profession, some judges, as documented by Feeley and Rubin (1998, 81), actively shaped the litigation process by recruiting lawyers with special expertise to present the prisoners' claims in the most effective manner. Lawsuits challenging conditions of confinement resulted in litigation that frequently dragged on for years and involved judges in the day-to-day details of correctional management. In one of the most famous cases, for example, Judge Frank Johnson assumed significant control over Alabama's prisons and issued detailed remedial orders requiring, among other things, a specific minimum living space for each prisoner, a certain number of bathing opportunities per week, and a certain number of toilets per cellblock (*Pugh* v. *Locke* (406 F. Supp. 318 [M.D. Ala. 1976]); see also Yackle 1989). Critics pointed to Johnson and others as examples of judges who had exceeded their legitimate authority by interfering with the operations of government agencies under the supervision of elected officials (see, e.g., Cripe 1990). However, Johnson and other judges were confronted with prisons in which legislators, governors, and correctional officials failed to provide working toilets, heat, nutritious food free of insects and rodents, toothpaste and other items necessary for personal hygiene, and, most strikingly, protection against rape, robbery, and other violent predatory activities by fellow inmates,

including those entrusted with maintaining order and security at some institutions (*Pugh* v. *Locke* (406 F. Supp. 318 [M.D. Ala. 1976])). Judge Johnson acted to reform Alabama's prisons after cataloging the details of "the rampant violence and jungle atmosphere existing throughout Alabama's penal institutions" and noting that "[o]ne expert witness, a United States public health officer . . . testified at trial that he found these facilities wholly unfit for human habitation according to virtually every criterion used by public health inspectors" (*Pugh* v. *Locke* (406 F. Supp. 323, 325 [M.D. Ala. 1976])).

Although judges found prisons in numerous States had specific problems requiring remedial orders, many of the most extensive and intrusive judicial orders were directed at States such as Alabama, Arkansas, and Texas that had fostered myriad multidimensional problems because of their reliance on agricultural prison labor, prisoner "trusties" as guards, and minimal expenditures of public funds. According to Feeley and Rubin (1998), the core development generated by judicial policymaking in prisons was the transformation of these Southern prisons, with their plantation-style structure, into modern penal institutions with professional management, paid custodial staff, and adherence to national standards for policies and practices.

When Federal judges intervened in public schools to end racial segregation, they confronted a significant resource allocation issue. Often, schools to which African-American children had been assigned did not receive an equitable share of resources until judicially ordered school desegregation plans sent white students to those schools. Conversely, many African-American students did not enjoy the benefits of equitable resources until they were sent to previously all-white schools.

By contrast, judicial reform of correctional institutions faced a different resource problem. Rather than an inequitable distribution of resources among institutions, there was simply a lack of the resources necessary to implement and maintain the policies and conditions that judges viewed as required by the eighth amendment. The lack of public expenditures on corrections was most stark in the Southern States that sought to make prisons nearly self-supporting through prison labor and the employment of relatively few paid staff. The minimal funding for corrections in other States also produced constitutional deficiencies in conditions and programs. It was not easy for judges to issue orders requiring specific changes and automatically expect that those changes would take place in compliance with the judicial order. The forced alteration of conditions within correctional institutions can require significant expenditures while simultaneously generating vocal political opposition from elected officials and members of the public who perceive upgrading prison conditions as coddling

criminals. Thus, the actual role of judges in prison reform litigation was often quite different from the traditional conception of judges as detached officers presiding over formal adversarial proceedings in a courtroom. In Colin Diver's (1979) well-known characterization of judges involved in institutional reform litigation as following either an adjudicative model or a political bargaining model, the course of prison reform litigation necessarily assumed attributes of the political bargaining model. To effectuate reform, judges were forced to be creative in pressuring and negotiating with State officials over lengthy periods. Depending on the case, the process of pushing, accommodating, and pushing officials again might have consumed more than a decade before fundamental changes were implemented and institutionalized. Several States, including Alabama, acknowledged that conditions within their prisons fell short of constitutional standards. Even in the aftermath of such admissions, which sometimes produced consent decrees rather than a complete adjudication of issues, deficiencies were not automatically and instantaneously remedied because of the need to agree on appropriate corrective measures and the difficulties involved in gaining necessary resource allocations from State legislatures.

Contrary to the image of judicial processes involving formal legal combat between adversarial parties, there is often significant cooperation between judges and correctional officials. Many correctional administrators recognized deficiencies in their own institutions. However, they had no mechanism to obtain needed funding from legislatures composed of representatives responding to perceptions about the public's desire for low taxes and harsh prisons rather than to entreaties from correctional professionals wanting to attain appropriate standards for conditions and programs within their institutions. These correctional officials often welcomed and assisted with prison reform litigation because they saw judicial intervention as the means by which they would finally be able gain the resources necessary for fulfilling their own vision of a proper, effective correctional institution.

In addition to behind-the-scenes assistance from correctional administrators, judges also relied on other available mechanisms for creatively remedying deficiencies and monitoring the process of implementing mandated reforms. In Alabama, Judge Johnson appointed the Human Rights Committee for the Alabama Prison System, a citizens' committee charged with overseeing the implementation of reforms (*Pugh* v. *Locke* (406 F. Supp. 318 [M.D. Ala. 1976])). In other States, judges appointed "special masters" or "compliance coordinators" to monitor institutional responses to judicial orders and ensure that States properly implemented reforms (see, e.g., Chilton and Talarico 1990). Other judges mandated that the State's attorneys and the prisoners' attorneys meet with the judge in a series of regular conferences that continued from the

initiation of litigation all the way through the lengthy implementation process. At such conferences, the judge could facilitate negotiations between the parties and hear feedback from each side about the feasibility, desirability, and consequences of various remedial measures. It was even possible for judicial officers to preempt litigation by sponsoring and facilitating discussions between prisoner advocates and those correctional administrators who agreed on the existence of specific problems but who wanted to work informally toward a remedy without arousing the opposition of elected officials who might use public statements against correctional reform as a means to seek electoral support (Smith 1990).

Consequences of Reform Litigation

Judicial reform of corrections produced a variety of consequences for correctional institutions as well as for the people who work and are confined in those institutions (see Jacobs 1997). Some of those consequences were intended by the judges whose orders or oversight of negotiations shaped the reforms. Other consequences were unanticipated, and their emergence produced new issues for correctional officials.

Prison litigation affected the allocation of government expenditures in many States. These expenditures fell into two categories. First, litigation is an expensive process, especially when it is complex and requires numerous pretrial proceedings and motions, expert witnesses, and several years of attorneys' time and effort. Although State governments can, relative to other litigants, economize by using salaried attorneys already on the payroll, the use of these attorneys on prison reform cases takes some (or all) of their time away from States' other needs for legal counsel. Moreover, under the Civil Rights Attorneys' Fees Awards Act of 1976 (U.S. Public Law 94–559, 90 Stat. 2641, 42 U.S.C. § 1988), judges could order States to pay the fees for the prisoners' attorneys when the prisoners prevailed in establishing that their constitutional rights had been violated. These fees could amount to hundreds of thousands of dollars for litigation stretching over several years. In addition, when States indemnify their officials who have been named as defendants in section 1983 lawsuits, the States will pay any monetary judgments against those officials when the court finds that monetary damages are an appropriate remedy for constitutional violations.

Although litigation expenses can be significant, they may pale in comparison to the second category of expenses—the millions of dollars that many States may spend in order to bring their correctional institutions into compliance with

judges' interpretations of the eighth amendment (Feeley 1989). States built new prisons or substantially renovated old prisons in order to upgrade plumbing and heating systems, improve housing areas, and provide adequate space for prisoners. In addition, many States hired and trained hundreds of new staff members to take over security and maintenance functions previously handled by prisoner "trusties."

Prison reform litigation established specific rights for incarcerated individuals and thereby diminished the ability of government officials to operate prisons and jails in any manner they wished. Prisoners gained limited rights related to religion, due process, access to the courts, conditions of confinement, and other matters. The establishment of these rights effectively imposed national standards on prisons throughout the country. Correctional institutions could no longer operate quietly, according to the whims and predilections of individual wardens. States could no longer run prisons and jails according to their own values and for their own convenience. Instead, judicial decisions provided minimum standards for living conditions and disciplinary processes—standards that could be monitored and enforced through the litigation process.

Judicial action contributed to making prisons both more professional and more bureaucratic. Because courts ordered prisons to stop relying on prisoners to maintain order and supervise prison work details, correctional institutions were forced to hire additional staff. These staff members entered a new world of corrections in which they needed to learn about rules and regulations instead of relying solely on their own discretionary applications of brute force and coercion to maintain order. To comply with judicially imposed standards, State departments of corrections and individual prisons and jails created policies and procedures to cover every anticipated situation in which institutional practices might collide with a prisoner's constitutional rights. Institutions created detailed regulations to give prisoners notice of rules and procedures governing discipline, visitors, correspondence, and other matters. These regulations also provided guidelines to instruct correctional staff about proper procedures to follow in each situation. The development of policy- and rule-based governance moved correctional institutions away from the old management style that was often based on ad hoc rules developed at the warden's discretion and enforced through coercive measures, including violence.

Under the new regime, judicial decisions limited officials' use of force to specific situations involving self-defense, defense of third parties, last-resort measures to enforce rules, and the prevention of crimes and escapes (Palmer 1997). The removal of the traditional means of prisoner control, namely discretionary employment of force, meant that correctional officers needed to be

trained to utilize planning, communication skills, psychology, and other tools of modern management in order to control difficult populations. The staff members' development of such skills required the introduction of training programs that contributed to the professionalization of prison management. Departments of corrections turned increasingly to college-educated administrators rather than managers who had worked their way up from the custodial staff or gained political appointments to correctional posts. Educated professionals were viewed as better equipped to fulfill judicially imposed standards, develop proper policies and regulations, design training programs, and supervise expanding staff within prisons. Correctional administration became a profession that used theories of management and social science research to develop effective policies and programs. This professionalization of corrections developed partly in response to higher education's increased emphasis on criminal justice and public administration, but it was further enhanced by the requirements for institutional performance dictated by judges through prison reform litigation.

The threat of litigation and judicial intervention pushed institutions to develop grievance procedures. If prisons could implement their own mechanisms for investigating and addressing prisoners' complaints concerning rights and other matters, they create the possibility that some legal actions could be prevented. Although many prisoners view institutional grievance procedures with great suspicion, it is possible for such procedures to gain a measure of legitimacy and acceptance if the individuals in charge—whether ombudsmen, hearing officers, or assistant wardens—earned credibility in the eyes of the complainants. Congress sought to encourage the development of institutional grievance procedures through the Civil Rights of Institutionalized Persons Act (CRIPA) of 1980 and apparently hoped that prisoner litigation would decrease as more institutions made effective procedures available to prisoners.

Judicial intervention in prisons and the development of defined rights for prisoners raised incarcerated individuals' expectations about their legal entitlements and the willingness of the courts to protect their rights. Prisoners no longer passively endured the policies and practices governing their lives in correctional institutions. Instead, they had the possibility of challenging policies and practices through the judicial process. As indicated by the 95-percent rate of case dismissals prior to pretrial hearings for prisoners' civil rights lawsuits (Hanson and Daley 1995), many prisoners apparently have little ability to accurately identify and effectively present claims that judges can recognize and vindicate through the judicial process. However, even if prisoners do not understand the definitions of their rights and the difficulties involved in successfully pursuing claims in the Federal courts, their belief in the existence of their rights and the

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accessibility of the courts to them can encourage greater assertiveness and challenges to authority. Moreover, prisoners are well aware that correctional officials cannot freely use force against them or deprive them of privileges without valid justifications and adherence to proper procedures. Thus, prisoners' heightened expectations and increased willingness to question the actions of staff members can make it more difficult to control the attitudes, statements, and behavior of incarcerated individuals. In fact, some researchers have reported increases in prison violence as an immediate consequence of judicial intervention because prisoners become less fearful of and deferential to correctional officers and because officers have less discretionary authority to choose the means to enforce rules and maintain discipline (Crouch and Marquart 1989).

Because of officers' loss of discretionary authority, the increased assertiveness of prisoners in demanding legal protections, and the pressures of administering increasingly detailed rules and regulations, there are risks that the new order established within prisons as a result of judicial intervention may adversely affect staff morale. Certainly, a well-run institution need not necessarily experience morale problems among staff. However, in specific institutional contexts, correctional officers may suffer significant stress because of their limited options for dealing with uncooperative prisoners and the prospect of being sued by prisoners if they take actions that violate prisoners' expectations about protected rights. Prior to judicial intervention, many correctional officers could use physical force with impunity whenever they believed that a prisoner should be disciplined or intimidated. After prison reform, officers faced the prospect of criminal charges and civil lawsuits for improperly employing force to control prisoners. Even if correctional officers receive legal representation and indemnification from the State, they run the risk of significant inconveniences if they must sit for depositions, attend pretrial hearings, and face the prospect of cross-examination on the witness stand in the event that a case makes it to trial. Officers also can worry about unlikely worst-case scenarios that may weigh heavily on some officers' minds. In the back of their minds, officers in many States must realize that the government will not indemnify them in all circumstances. Thus, if an assistant attorney general determines that an officer violated a prisoner's rights intentionally or maliciously, the officer faces the possibility of assuming personal responsibility for litigation costs

and the risk of losing his or her home, life savings, or even more if the court case produces a judgment against him or her. Such concerns cannot be taken lightly by correctional officers, whose compensation is typically relatively modest.

An additional consequence of judicial action affecting prisoners' rights has been the influx of prisoners' cases in the Federal courts. Although prisoners' filings have not increased at the same dramatic rate as increases in prison populations since 1980, they have steadily increased. There were 12,395 civil rights cases filed in Federal courts by State prisoners in 1980. By 1996, that number had climbed to 39,996 (Scalia 1997, 4). As a result, the Federal judiciary points to the steady flow of prisoners' cases as a justification for seeking increased resources from Congress. In addition, there are risks that prisoners' cases do not receive sufficiently careful consideration in some courts. Because such cases are seldom successful and are filed by individuals who have been spurned by society, prisoners' cases may be presumed to be frivolous by the law clerks, U.S. magistrates, and district judges responsible for reading and evaluating petitions filed by prisoners. Unless a district judge conscientiously emphasizes the importance of prisoner cases and provides adequate supervision of subordinates, personnel who assist judges may reflexively recommend dismissal of such cases in assembly-line fashion (Smith 1988). There is a risk that dismissal recommendations can be produced without judicial subordinates adequately examining whether the petitions, which often are poorly prepared by uneducated prisoners, actually contain the elements of a potentially valid claim.

Deceleration of Judicial Policymaking in Prisons

Prison reform litigation and the implementation of judicially initiated reforms continued in the 1980s and 1990s. Prisoners continued to file legal actions under section 1983 asserting that correctional policies and practices had violated their constitutional rights. Some of these lawsuits concerned specific rights violations affecting a single prisoner. Other cases concerned widespread policies and practices in a correctional institution or a State's entire correctional system. Although judges continued to review prisoners' petitions and provide remedies when prisoners established the existence of unconstitutional actions or conditions, the pace and scope of judicial reforms began to diminish. Several factors contributed to the deceleration of judicial policymaking, including external influences stemming from political and institutional reactions to developments in prison reform litigation during the 1970s and 1980s.

In the judicial hierarchy, appellate courts determine the range of freedom of lower court judges in making decisions and implementing remedies. If Federal district judges' decisions are out of line with higher courts' conceptions of legal definitions and judicial propriety, the lower court decisions can be overturned on appeal. Appellate courts also shape the legal doctrines that establish precedents for lower courts to follow. District judges cannot freely base their decisions on interpretations of constitutional provisions and statutes that are contrary to the interpretations pronounced by the U.S. Supreme Court and circuit courts of appeals. District judges are aware of the risk that their decisions may be overturned. If their decisions concern areas of law in which higher courts have not yet developed doctrine and precedents, such as prisoners' rights, they may move forward in shaping the law themselves with the hope that appellate judges will support their efforts. However, if precedents and controlling doctrines have been established, then district judges are forced to follow even those precedents with which they disagree unless they are willing to use their own judicial resources by openly inviting a higher court to overturn their decisions. The U.S. district judge's opinion in *Falzerano* v. *Collier* (535 F. Supp. 800 [D.N.J. 1982]) provides a good example within prison litigation of the effects of limitations imposed on lower court judges by appellate decisions. In *Falzerano*, the district judge criticized legal doctrines developed by the U.S. Supreme Court that granted prisoners access to law libraries but did not guarantee them assistance from legal professionals when they sought to fulfill their right of access to the courts. According to the judge,

> In this court's view, access to the fullest law library anywhere is a useless and meaningless gesture in terms of the great mass of prisoners. . . . To expect untrained laymen to work with entirely unfamiliar books, whose content they cannot understand, may be worthy of Lewis Carroll, but hardly satisfies the substance of constitutional duty. Access to full law libraries makes about as much sense as furnishing medical services through books like "Brain Surgery Self-Taught," or "How to Remove Your Own Appendix," along with scalpels, drills, hemostats, sponges, and sutures. (p. 803)

Although the judge castigated the existing doctrine, he ultimately followed the Court's precedents. Appellate courts cannot control lower courts in an absolute sense because they do not have the resources to review all trial court decisions and because not all lower court decisions are appealed. Appellate courts can, however, assert significant influence over decisions by trial court judges by threatening to overturn decisions on appeal. Moreover, appellate courts' influence is enhanced through the acceptance by many lower court judges of a perceived judicial obligation to respect and obey precedents established by higher courts—even when they disagree with those precedents.

U.S. district judges in the 1960s and 1970s who looked to the U.S. Supreme Court for cues about how to handle prison litigation could readily perceive that they enjoyed significant freedom to intervene and remedy problematic conditions of confinement and other constitutional rights violations in correctional institutions. Warren Court Justices had defined "cruel and unusual punishment" broadly and flexibly (*Trop* v. *Dulles* (356 U.S. 86 [1958])). They had incorporated the 8th amendment into the due process clause of the 14th amendment so that Federal courts could stop State and local government officials from taking any actions that would violate the constitutional prohibition against cruel and unusual punishments (*Robinson* v. *California* (370 U.S. 660 [1962])). They had permitted prisoners to file civil rights lawsuits under section 1983 (*Cooper* v. *Pate* (378 U.S. 546 [1964])). During the initial years of the Burger Court, the Justices—several of whom were holdovers from the Warren Court—supported the authority of lower court judges to examine conditions of confinement in prisons and use the eighth amendment as a means to create and enforce minimum standards for living conditions and medical care (*Estelle* v. *Gamble* (429 U.S. 97 [1976]); *Hutto* v. *Finney* (437 U.S. 678 [1978])). The Warren Court's decisions affecting criminal justice generally tended to broadly define and protect the rights of individuals and create clear rules to limit the authority of criminal justice officials to use discretion in developing policies and practices. The Burger Court appeared to continue this trend with respect to prison litigation during most of the 1970s, so district judges intervened extensively in corrections with little fear that the Supreme Court would overturn their decisions.

The Supreme Court's decision in* Bell *v.* Wolfish *is often regarded as an important signal to the lower courts that there would be no further expansion of constitutional rights for incarcerated individuals.

Beginning in the late 1970s and continuing through the 1990s, the Court's orientation toward prison litigation changed. Instead of continually endorsing the identification of broad new rights for incarcerated individuals, the Justices began to place limits on the district judges' efforts to intervene in correctional institutions. The Court's new orientation was partly attributable to changes in its composition. By 1981, six Warren Court Justices had retired and been replaced by appointees of Presidents Nixon, Ford, and Reagan—Republicans who were critical of Federal judicial decisions in the 1960s and 1970s that expanded rights for criminal suspects and offenders. In general, the new Justices were less inclined than their predecessors to support broad constitutional rights in criminal justice. Instead, they manifested greater concern for

providing criminal justice officials with flexibility, discretionary authority, and autonomy in developing policies and practices. These new Justices also came to the Court at a time when significant public commentary and academic criticism focused on the Federal judiciary's allegedly excessive judicial activism in shaping various areas of public policy, including broadening criminal justice rights and ordering the desegregation of school systems in the North (see, e.g., Graglia 1976; Horowitz 1977; Morgan 1984). These criticisms stemmed from and contributed to a political backlash against the courts by elected officials who opposed the Federal judiciary's active role in public policy.

By the 1980s, many of the worst conditions in State prison systems had begun to be corrected. Some States increased expenditures on corrections and made improvements because they were ordered to do so by judges. In other States, governors and State legislators could observe the course of litigation elsewhere and reacted by negotiating consent decrees or taking action on their own to remedy perceived deficiencies in prison conditions. In addition, correctional officials were positioned to persuade elected officials of the need to improve prisons and jails to avoid the risk of expensive litigation. In effect, judicial intervention provided leverage for correctional administrators to seek the resources they needed to upgrade and professionalize their institutions.

The Court's contribution to the reduction of the judiciary's role in shaping correctional policies and practices appeared in two forms. In the first form, the Justices issued decisions indicating that they were unwilling to expand further the definitions of constitutional rights possessed by incarcerated individuals. From the 1960s through the 1970s, Federal courts steadily expanded the definitions of prisoners' rights with respect to issues such as religion and access to the courts as well as to eighth amendment conditions of confinement. The expansion of recognized rights for prisoners provided both obligations and opportunities for Federal judges to scrutinize policies and practices in corrections. By limiting the expansion of prisoners' rights, the Court defined the minimum standards that prisons and jails must fulfill and simultaneously limited the bases for judicial intervention. In the second form, the Justices imposed more direct limitations on the authority of Federal judges to intervene in and maintain control over corrections. These limitations developed from decisions defining the standards to be applied by judges before ordering remedies. The Justices also permitted greater flexibility in the reconsideration of consent decrees.

The Supreme Court's decision in *Bell* v. *Wolfish* (441 U.S. 520 [1979]) is often regarded as an important signal to the lower courts that there would be no further expansion of constitutional rights for incarcerated individuals. At the time of the decision, the title of a scholarly article—"The Cry of *Wolfish* in the Federal

Courts: The Future of Federal Judicial Intervention in Prison Administration"—captured the notion that the Supreme Court had begun to send a new message to Federal judges about the permissibility and extent of their continued involvement in prison reform litigation (Robbins 1980). *Bell* v. *Wolfish* concerned conditions and practices at the Federal Metropolitan Correctional Center in New York. The facility housed pretrial detainees, who alleged the existence of unconstitutional overcrowding and who challenged practices concerning searches and access to books and packages. Justice William Rehnquist's majority opinion for the divided Court rejected the court of appeals' application of a "compelling necessity" test that would have required the government to provide significant justifications for policies and practices that limited the liberty of detainees. Instead, Rehnquist announced that judges should apply a "rational basis" test that gave correctional officials substantial flexibility and discretionary authority in determining policies and practices. According to Rehnquist, "If a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment'" (p. 539) and thereby violate the due process rights of pretrial detainees.

After announcing the test, Rehnquist was deferential to the government's claimed concerns about institutional security. Among the practices approved by the Court (over the vociferous objections of Justice Thurgood Marshall) was body cavity inspections of detainees who had contact visits, performed without suspicion of wrongdoing—even when those detainees wore difficult-to-remove, one-piece jumpsuits, were under constant observation by staff, and thus were extremely unlikely to be smuggling contraband in body cavities. Because the Court's apparent deference to correctional officials in *Bell* v. *Wolfish* limited the defined rights of *presumptively innocent pretrial detainees*, it was not surprising that observers, including lower court judges, might infer the expectation of parallel limitations for the rights of demonstrably guilty convicted offenders in prisons.

The Supreme Court addressed the rights of convicted offenders in *Rhodes* v. *Chapman* (452 U.S. 337 [1981]). The *Rhodes* case involved a claim that placing two prisoners in cells designed to house one prisoner amounted to overcrowding in violation of the eighth amendment prohibition on cruel and unusual punishment. The Court rejected this claim, noting that to avoid eighth amendment violations, prison "[c]onditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment" (p. 346). The Court did not regard two prisoners to a cell as a violation of either aspect of eighth amendment standards. After analyzing and rejecting the prisoners' claim, Justice Lewis Powell's opinion included an additional comment that was regarded as a message warning lower

court judges to be less assertive in intervening in correctional institutions. Powell wrote in *Rhodes* v. *Chapman* (452 U.S. 352 [1981]):

> In discharging this oversight responsibility, however, courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system.

In light of the Court's prior adoption in *Bell* v. *Wolfish* of a legal standard deferential to the decisions of correctional officials, Powell's comment appeared to reiterate the Court's desire for a new, less intrusive approach to prison litigation. The potential implications of Powell's warning were so obvious that Justice William Brennan attempted to counteract the Court's apparent message by writing a concurring opinion in which he said, "I write separately, however, to emphasize that today's decision should in no way be construed as a retreat from careful judicial scrutiny of prison conditions. . . . " (*Rhodes* v. *Chapman* (452 U.S. 353 [1981])). Whether the Court's decision in *Rhodes* constituted a "retreat from careful judicial scrutiny of prison conditions," as feared by Brennan, it certainly seemed to tell lower court judges to "go no farther than you have already gone" in identifying and protecting prisoners' rights.

During the 1980s, the Court's inclination to encourage increased judicial deference to correctional officials appeared in decisions addressing the definitions of and legal standards for protecting various specific rights for prisoners. In *Whitley* v. *Albers* (475 U.S. 312 [1986]), the Court examined an alleged eighth amendment violation for excessive use of force in which a prisoner was shot by correctional officers who were quelling a disturbance and attempting to free a hostage. The wounded prisoner was not involved in the disturbance and was attempting to run to his cell to stay out of the way of correctional officers entering the cellblock when a shotgun blast hit him in the legs and caused serious injuries. In determining the legal standard to apply when prisoners assert a constitutional claim of excessive use of force, the deeply divided Court concluded that prisoners must show that the force was used "maliciously and sadistically for the very purpose of causing harm" (pp. 320–321). This difficult-to-prove standard required prisoners to establish that the officers had a specific, unlawful intent in using force that caused injury. Such a standard gives correctional officials much more flexibility in the use of force than the four dissenters' preferred approach of looking for "unnecessary and wanton infliction of pain" without regard to the existence of a specific intent to cause harm.

In *O'Lone* v. *Estate of Shabazz* (482 U.S. 342 [1987]), the Court applied a deferential approach to the issue of prisoners' first amendment right to the free

exercise of religion. In *O'Lone*, Muslim prisoners on a work detail outside the prison wanted to return to the prison at midday on Friday for a weekly prayer service. They asserted that they possessed a constitutional right to participate in the religious service. A sharply divided Court rejected their claim and adopted a legal standard deferential to correctional officials' asserted interests in institutional security and efficient management. According to Chief Justice Rehnquist's majority opinion, "We have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that applied to alleged infringements of fundamental constitutional rights [for people outside of prisons]" (p. 349). Again, the Court's approach gave correctional officials greater administrative flexibility and discretionary authority in the development of institutional policies and practices.

The trend in Supreme Court decisions limiting lower court judges' authority to intervene in prisons significantly affected eighth amendment conditions-of-confinement claims after *Wilson* v. *Seiter* (501 U.S. 294 [1991]). *Wilson* involved myriad claims about alleged unconstitutional conditions in an Ohio prison. The lawsuit alleged overcrowding, excessive noise, inadequate heating, unsanitary dining facilities, and other improper conditions. In rejecting these claims, a five-member majority opinion enunciated a new legal standard for judges to follow in evaluating eighth amendment claims. Justice Antonin Scalia's opinion for the Court concluded that determinations of unconstitutional conditions of confinement must rest on a finding that correctional officials were "deliberately indifferent" to the development and existence of inadequate conditions. In asserting the primacy of this subjective test, Scalia relied on precedents concerning medical care (*Estelle* v. *Gamble*) and excessive use of force (*Whitley* v. *Albers*). Strangely, Scalia did not emphasize the Court's precedents addressing conditions of confinement (*Hutto* v. *Finney*; *Rhodes* v. *Chapman*)—precedents that appeared to emphasize an objective evaluation of whether prison conditions constitute "wanton and unnecessary infliction of pain." After *Wilson*, prisoners were required to prove the intent of correctional officials in permitting poor prison conditions to develop. It was no longer adequate to merely establish the existence of conditions falling below standards for human habitation. Because it is difficult to prove intent, especially when correctional officials might assert that inadequate resources or factors other than their own "deliberate indifference" produced the challenged conditions, it became much more difficult for prisoners to provide sufficient evidence to justify remedial intervention by Federal judges.

The Court reinforced and clarified its subjective test for eighth amendment violations in *Farmer* v. *Brennan* (114 S. Ct. 1970 [1994]). Farmer was a transsexual male prisoner who "project[ed] feminine characteristics" and had attempted

to use hormone treatment and (unsuccessful) surgery to undertake an anatomical transformation from male to female to match his psychological gender identification. He was serving time in Federal prison for credit card fraud. Because of his prison disciplinary record, he was transferred to a high-security men's prison where he was allegedly beaten and raped. He sued under the eighth amendment, claiming that prison officials were deliberately indifferent to the physical threats he faced in a high-security prison population because they should have known that a transsexual prisoner who "project[s] feminine characteristics" was a likely target of sexual assaults when placed among violent offenders. In effect, Farmer's attorney argued for an objective test of "deliberate indifference" by urging the Court to hold prison officials liable for what a reasonable correctional administrator should have known about the risks in light of the available facts. The Court, however, rejected this argument and adopted a more difficult-to-prove, subjective test of "deliberate indifference." According to Justice David Souter's majority opinion (*Farmer* v. *Brennan* (114 S. Ct. 1979 [1994])):

> [A] prison official cannot be found liable for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

In other words, prisoners bear a significant and specific burden of proof concerning prison officials' knowledge and intent in order to successfully assert eighth amendment claims.

In *Rufo* v. *Inmates of Suffolk County Jail* (502 U.S. 367 [1992]), the Court granted more flexibility to correctional officials wanting to challenge consent decrees. Massachusetts officials had entered into a consent decree intended to remedy constitutional deficiencies at the Suffolk County Jail in Boston. The consent decree included a provision for single-occupancy cells. However, the jail population's growth outstripped projections so that officials sought to have the consent decree modified to permit double occupancy. The Court rejected the lower court's requirement that officials demonstrate a "grievous wrong" to modify consent decrees. Instead, the Court said that consent decrees can be modified in institutional reform litigation when there is a significant change in the facts or law affecting the case.

Many correctional officials had long argued that consent decrees imposed unreasonable burdens because they could not be readily adjusted to account for changing circumstances or because they were the product of agreements made by departing correctional officials and governors who did not bear the burden

of fulfilling the continuing and arguably excessive requirements for compliance (Cripe 1990, 275). In *Rufo*, the Supreme Court took a step toward alleviating correctional officials' concerns, but, in the eyes of critics, this step came at the expense of judges' authority to maintain oversight of the implementation of reforms. Moreover, critics feared that the decision would encourage correctional officials to stall during the implementation phase of consent decrees with the knowledge that the changing environment of corrections would likely provide an eventual justification for seeking alteration of the decree.

The Court's decision in *Lewis* v. *Casey* (116 S. Ct. 2174 [1996]) limited the likelihood that Federal judges could order prisons to provide legal assistance and specific legal resources for prisoners seeking to prepare civil rights lawsuits and habeas corpus petitions. Under the doctrine established in *Bounds* v. *Smith* (430 U.S. 817 [1977]), prisons bore the obligation of providing prisoners with access to a law library or assistance from people trained in law to fulfill the prisoners' right of access to the courts. Because the sixth amendment right to counsel does not apply to prisoners' civil rights lawsuits (or to habeas corpus petitions), prisoners must generally prepare and present their own lawsuits alleging that correctional policies and practices violate their constitutional rights. Some prisoners may receive representation from civil rights organizations or prisoner advocacy groups, and a few prisoners may possess the resources to retain counsel. Most prisoners, however, are on their own and must proceed as *pro se* litigators. Although effective *pro se* litigation is extremely difficult for anyone (including a highly educated person) who lacks professional training in legal research and trial advocacy, it is virtually impossible for prisoners who are illiterate, mentally disabled, mentally ill, not fluent in English, or otherwise hindered by limitations that impede their ability to read, comprehend, and present legal arguments.

To address the difficulties faced by prisoners with special, identifiable limitations on their ability to utilize a law library, some Federal judges ordered State prisons to provide extra legal assistance (e.g., trained paralegals) for the benefit of these prisoners. Other judges closely scrutinized the policies and procedures of prison law libraries and issued orders designed to ensure that prisoners in administrative segregation, on death row, and in other special confinement settings had adequate access to materials from the prison law library. In *Lewis* v. *Casey*, the State of Arizona challenged a U.S. district judge's order specifying in minute detail the times that prison libraries were to be kept open, the number of hours each prisoner was entitled to use the library, the direct assistance by lawyers and paralegals to be provided to illiterate prisoners, and other aspects of the prison system's policies affecting prisoners' right of access to the courts. The U.S. Supreme Court rejected the district court order and criticized the district judge on several grounds: "fail[ing] to accord adequate deference to the

judgment of prison authorities," issuing an order that was "inordinately—indeed, wildly—intrusive," and developing an order through a process that "failed to give adequate consideration to the views of state prison authorities" (*Lewis* v. *Casey* (116 S. Ct. 2185 [1996])).

In addition, Justice Scalia's majority opinion emphasized the need for prisoners to demonstrate an "actual injury" to have legal standing to challenge a prison's policies concerning access to law libraries and legal assistance. Thus, district judges are not permitted to issue remedial orders concerning prisoners' right of access to the courts unless prisoners can prove that prison policies have harmed their right in some concrete fashion. Although the concepts of "actual injury" and standing as the proper person to initiate a lawsuit are important in many areas of law, they potentially pose special problems when applied to prisoners' right of access to the courts. For example, is an illiterate prisoner required to draft and successfully file in court a complaint alleging that he or she possesses literacy skills that are too inadequate to permit him or her to draft and file a complaint successfully? In the "catch-22" situation that appears to emerge from *Lewis* v. *Casey*, it would seem that only prisoners who are incapable of using law libraries have suffered an actual injury, yet their inability to use the law library would presumably prevent them from being able to demonstrate that injury to a court to seek a judicial remedy for the violation of their right of access to the courts. Although the ultimate consequences of *Lewis* v. *Casey* remain to be seen, the decision seems to provide an additional impediment for some prisoners who may want to file lawsuits alleging violations of constitutional rights within correctional institutions.

The Court's opinion in *Lewis* v. *Casey* provides a strong, clear message that lower court judges should show deference to the judgment of prison authorities and that they should avoid imposing intrusive remedial orders. This message is far different from the messages conveyed by the Court's decisions prior to 1979, in which the Justices endorsed and encouraged active judicial scrutiny of alleged rights violations in correctional institutions. By the late 1990s, the Court had clearly limited Federal judges' authority to impose remedial orders and maintain consent decrees affecting the policies and practices at prisons and jails. Moreover, the Court had arguably reduced the scope of prisoners' rights affecting religion, access to the courts, and conditions of confinement and thereby relaxed the requirements imposed on correctional administrators for maintaining compliance with constitutional standards.

The Court was not alone in decelerating judicial intervention in prisons. Congress also acted to limit the authority of Federal judges. Congress sought to limit the ability of Federal judges to intervene in prison operations as well as

the number of prisoner cases filed in the Federal courts. Federal judges had complained since the 1960s about the burdensome nature of the caseload of prisoners' filings. In fact, the growth of prisoners' cases was used as a justification for the creation of the office of the U.S. Magistrate Judge, a judicial officer who assists Federal district judges and, in many districts, specializes in evaluating prisoners' claims (Smith 1990; Seron 1985). Many legislative proposals to limit Federal judges' authority over prisoners' cases initially focused on habeas corpus petitions (Yackle 1993) but eventually also addressed prisoners' civil rights lawsuits. Although there was widespread criticism of Federal judges' involvement in prisons, Congress did not act until the 1990s. In 1994, a provision of the Violent Crime Control and Law Enforcement Act required individual prisoners to prove that crowded conditions violated their eighth amendment rights before Federal judges could order remedies for prison overcrowding (Call and Cole 1996). In other words, judges were not to reach a general conclusion that prison overcrowding was in violation of the eighth amendment. First, a prisoner needed to prove that the conditions produced by population pressures on the prison's capacity caused specific violations of that prisoner's eighth amendment rights.

The Prison Litigation Reform Act (PLRA) of 1996 took broader aim at judges' authority and prisoners' access to the courts. PLRA attempted to limit the remedial authority of Federal judges by requiring that prospective relief granted in prison cases "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right" (18 U.S.C. § 3626(a)(1)). The law required preliminary injunctive relief to be similarly narrow and, moreover, mandated that such injunctive relief would automatically expire after 90 days unless the court made findings that satisfied the requirements for prospective relief under PLRA. PLRA limited judges' ability to issue prisoner release orders as a means to combat prison overcrowding. Prisoner release orders can only be issued after "clear and convincing" evidence is presented to a special three-judge district court that crowding is the primary source of a Federal rights violation and that nothing other than the release of prisoners can remedy the violation. Congress also mandated that judicial orders in prisoner cases terminate after 2 years unless the court makes additional findings to justify the continuing necessity of the court-ordered relief. In addition, PLRA sought to limit and control Federal judges' use of special masters in prison reform cases by mandating both parties' involvement in the selection—and veto—of potential special masters and by requiring such special masters to receive compensation from the court's budget rather than from the State's department of corrections (Solano 1997).

With respect to prisoners' access to the courts, PLRA made it more difficult for prisoners to have filing fees waived by requiring partial payments and extended-time payments from their prison account. Moreover, prisoners who have had three civil rights lawsuits previously dismissed as "frivolous, malicious, or fail[ing] to state a claim" are barred from filing any more civil rights actions unless they are under "imminent danger of serious physical injury" (28 U.S.C. § 1915(g)). Frivolous lawsuits typically are defined as those dismissed for deficiencies in the definition of the legal claim or for allegations based on an inappropriate factual situation rather than for asserting a contrived or imaginary grievance (Fradella 1998). For example, a prisoner may complain of genuine discomfort when a prison doctor prescribes only aspirin for a painful skin rash, yet such incomplete medical treatment would not violate the limited constitutional right against correctional officials' deliberate indifference to medical needs. In effect, Congress increased the cost to prisoners of filing lawsuits over alleged rights violations in prisons. Prisoners must use their own financial resources, no matter how modest, to initiate the case, and each case filed poses a risk that it will effectively "use up" one of the finite opportunities available for individual prisoners to raise rights claims not based on a risk of serious physical injury. Although the initial litigation concerning PLRA caused confusion as courts struggled to interpret the statute (Bennett and del Carmen 1997), presumably the new rules imposed by PLRA will ultimately deter some prisoners from filing cases that they would have previously submitted for consideration by a Federal court. Indeed, in the year following implementation of PLRA's new requirements, the Federal district courts experienced a drop in prisoners' civil rights lawsuits despite the continued growth in the number of potential claimants committed to incarceration (Administrative Offices of the U.S. Courts 1998, 1999).

Except for the decline in prisoner civil rights lawsuits, the specific consequences of PLRA are still developing and have not been studied systematically. Comments from States' assistant attorneys general responsible for defending against prisoners' lawsuits provide early anecdotal evidence that PLRA is substantially fulfilling congressional intentions.[1] State's attorneys note significant declines in prisoner civil rights lawsuits but observe that those cases that survive initial dismissal often involve complex issues that require significant defense efforts on their part. States have succeeded in employing PLRA to terminate consent decrees. Such terminations can be easier when new judges have no vested interest in protecting the judicial interventions in corrections undertaken by their predecessors. Some attorneys perceive that judges are reluctant to intervene with formal judicial orders in corrections because PLRA's sunset provisions limit the duration of orders and require new presentations of proof

to maintain judicial supervision. Thus, some judges increasingly push for and facilitate private settlements between prisoner-claimants and the State instead of imposing judicial orders and consent decrees of the sort limited by PLRA.

As PLRA pushes prisoners to seek alternative means to raise claims that previously would have been filed in Federal courts, there can be increases in complaints filed under institutional grievance procedures. Some prisoners try to develop creative ways to present their constitutional claims through habeas corpus petitions. Others attempt to file their claims in State courts. However, the State court alternative is increasingly less available, as State legislatures have emulated Congress in enacting statutes to limit prisoners' opportunities to file civil rights lawsuits. For example, under Georgia's Prisoner Litigation Reform Act of 1996, prisoners who cannot pay filing fees have their inmate accounts frozen, and all moneys deposited in those accounts must be forwarded to the clerk of courts until the filing fees are fully paid. Moreover, the Georgia statute imposes a fine amounting to 50 percent of the prisoner's inmate account for filing a false or malicious claim, delaying judicial proceedings, providing false evidence, or abusing the discovery process. The payment of past due court costs and fees can become a condition for parole eligibility, thus making Georgia prisoners think long and hard before filing civil rights cases in State court (Georgia Code, §§ 42–12–4 and 42–12–7). Similarly, other States, such as Michigan and Florida, have statutes that emulate PLRA by imposing greater burdens on prisoner-claimants for filing fees and court costs. Initial experience with PLRA and State laws indicates that trial courts may vary in their diligence in ensuring that inmate account records are carefully checked before indigency status is granted and filing fees are waived.

Feeley and Rubin (1998, 383) argue that Congress' actions merely validated rather than counteracted the impact of Federal courts on correctional institutions' policies and practices. In their study of prison litigation, they conclude that Federal legislation went no further than the Court had already gone in limiting Federal judges' authority over prison litigation. Moreover, they note that Congress did not act until after courts no longer needed to be controlled because the most significant constitutional problems in prisons had already been remedied and judges less frequently found themselves issuing orders affecting the daily operations of correctional institutions. Although Feeley and Rubin's retrospective assessment of Federal legislation may accurately describe the established impact and systemic acceptance of the consequences of judicial intervention, it should be noted that PLRA remains an impediment to judicial intervention if developments in the environment of corrections produce circumstances in which claimants seek to raise new constitutional issues.

The actual level of judicial activity affecting corrections will depend heavily on two important factors: the state of the laws governing corrections and developments affecting the environment of corrections.

The overall deceleration of judicial intervention in prisons stemmed from Supreme Court decisions limiting judges' authority and opportunities to identify rights violations and impose remedies. Congress reinforced the Court's actions by formalizing limitations on Federal judges through statutes enacted in the 1990s. Whereas these institutional responses to two decades of prisoner litigation were important as limiting factors, judicial intervention also slowed because much had already been accomplished through the litigation processes initiated in the 1960s, 1970s, and 1980s. Judges and correctional administrators used their influence to push legislators to provide sufficient resources to permit prisons and jails to achieve minimum constitutional standards for conditions and practices. In addition, because of the difficult and protracted nature of prison litigation, many judges sought ways to limit their own involvement in developing and implementing remedies. Instead of issuing detailed orders about myriad aspects of correctional conditions and practices, these judges came to prefer a more restrained role in which they merely identified unconstitutional conditions that must be remedied. The judges then required correctional officials to develop their own remedies under the court's supervision. In effect, the judge could employ an interactive process involving pressure and negotiations to push officials to develop and implement feasible solutions to the problems identified through the litigation process. As the constitutional problems presented to judges became less frequently egregious and systemic, there was less need for judges to scrutinize, monitor, and control various aspects of prison operations. Thus, prisoner litigation continued through the 1990s, but it often was focused on narrower issues and involved less intrusive judicial action than the systemwide institutional reform cases undertaken in the 1970s and 1980s.

The Posttransformation Era in Correctional Reform

Prisoner litigation from the 1960s through the 1980s contributed to significant changes in the policies and practices of correctional institutions. Not all of these changes are attributable to judicial decisions because the professionalization of correctional administration produced a new breed of prison manager who sought to introduce American Correctional Association (ACA)-based and other national standards for governing prisons and jails. Although judges cannot claim credit (or garner blame) for all reforms that occurred, reforms not

attributable to judicial action occurred in the shadow of litigation. The threat of judicial action prodded legislators to act when pushed by correctional officials. In addition, correctional officials could use litigation processes to introduce their own ideas about reform, either by informally advising and supplying information to judges or by formally submitting proposals for consent decrees and suggestions for feasible judicial orders. The actions undertaken by judges and correctional officials transformed American corrections. In some States, correctional institutions were literally remade into new entities by shifting from plantation-style organizations that relied on minimal public expenditures and significant prisoner labor to secure and professionally staffed facilities that emphasize custody and prisoner programs (Feeley and Rubin 1998, 367). In other instances, the transformation was less apparent because institutional organization did not seem to change. However, transformation did occur in these institutions because of the intrusion of legal norms and court-mandated minimum standards for conditions and procedures. Instead of vesting nearly unlimited power in the discretionary commands of wardens and correctional officers, judicial intervention pushed institutions to develop policies, procedures, and training that cover nearly every aspect of prison management—from food quality and preparation to disciplinary procedures and use of force. From the 1960s onward, prisons were transformed into bureaucratic institutions governed by formal rules and professional management principles.

The establishment of minimum standards, professional policies and practices, and significant changes in organization and authority has not eliminated the possibility of further judicial impacts on correctional management. The courts remain available as a forum for the pursuit of grievances. The nature and likelihood of judicial intervention have changed as a result of the transformative developments in corrections, the Court's new orientation toward judicial intervention in corrections, and the political reactions resulting in legislative limitations on Federal judges and prisoner-litigants. However, the litigation process remains available as a familiar avenue for seeking reform, and section 1983 still provides a vehicle for asserting constitutional violations claims through that process. The actual level of judicial activity affecting corrections will depend heavily on two important factors: the state of the laws governing corrections and developments affecting the environment of corrections.

State of the laws

As detailed in prior sections of this paper, the Court's decisions have halted further movement toward broadening the definitions of prisoners' constitutional rights. The Court has not eliminated the rights developed during the 1960s and 1970s. Instead, it has narrowed the contours of those rights and made it more

difficult for prisoners to prove that their rights have been violated. The Court's decisions have, in effect, stabilized the legal expectations and diminished the judicial pressures imposed on correctional administrators. Barring significant changes in the Supreme Court's composition, correctional administrators have no reason to fear that the Federal judiciary will impose unexpected new rules for them to follow. With respect to constitutional law, corrections has reached a point of relatively stable standards and expectations. Correctional officials can rely on the current stability in legal standards to develop policies, practices, and staff training that fulfill institutional obligations for achieving the goals of corrections while respecting the recognized constitutional protections possessed by prisoners.

The fact that correctional officials have little reason to fear the imposition of new constitutional standards does not mean that they can ignore the threat of judicial action that will hold them accountable for standards and practices within their institutions. In other words, the relaxation of Federal judicial standards and scrutiny over corrections should not be misperceived as a complete withdrawal of judicial authority or abdication of judicial responsibility. The Court has clarified constitutional rights in a fashion favorable to correctional officials, thereby making it more difficult for prisoners to allege and prove the existence of constitutional rights violations. However, section 1983 remains viable and available as a mechanism for judicial intervention that will hold correctional officials accountable for constitutional rights violations, especially if those violations result in injuries, health damage, or death.

Research indicates that police executives are more concerned about the risk of expensive jury verdicts in civil rights lawsuits impacting their departments than about the possibility that the Court's decisions will impose new constitutional requirements on their policies and practices (Smith and Hurst 1997). Although correctional officials' perceptions about legal threats have not been studied in a comparable fashion, sheriffs and local jail administrators have every reason to share the same fears as police executives. If they use excessive force or otherwise violate the rights of detainees, they face the prospect of significant jury verdicts, including millions of dollars in awards, through section 1983 litigation. For example, a Federal court jury in Michigan awarded $13 million to the family of a man who died in custody at the Lansing City Jail (Martin 1998). Such awards can impose significant costs on local taxpayers when juries impose liability at levels that exceed a municipality's insurance coverage. The imposition of such costs can lead to significant political backlash against responsible officials, especially when budget cuts or tax increases are required to pay the judgment. Moreover, such cases can also expose correctional officials to the risk of personal liability if they are not indemnified by their employer.

State correctional officials may have less reason to fear the threat of successful lawsuits. When such officials are indemnified, they are represented by the State's attorneys and the State pays any judgment. Individual adverse judgments have less impact on State governments because they can be paid from a larger budget and, in effect, the financial burden can be spread among taxpayers across the State.

The fact that administrators in State prisons may have less reason to fear litigation does not mean that they are free to ignore the threat of legal action. If prisoners' allegations are supported by sufficient evidence to avoid dismissal in the early stages of litigation, the litigation process itself begins to impose costs on the correctional institution. Administrators and staff members will be called to sit for depositions and answer interrogatories as part of the pretrial discovery process. If the case proceeds to trial, institutional staffing will be affected by the need for personnel to appear in court as witnesses. Moreover, correctional administrators are accountable to officials in centralized State correctional departments. The State officials' assessments of the causes of the litigation may adversely affect institutional managers' prospects for promotions and favorable performance reviews.

Thus, the threat of judicial intervention continues to exist and place limits on the range of decisions and actions correctional officials are permitted to undertake. Because of the relative stability and clarity in constitutional standards, the most significant threat that deters abusive behavior and standards violations by correctional officials may have shifted from judges, who previously intervened in prison management, to the sometimes unpredictable jurors in civil rights lawsuits. This threat is most significant in cases concerning physical injuries or damage to prisoners' health.

The threat of adverse jury verdicts depends on the continued existence of constitutional standards defining rights for incarcerated individuals. Shifts in the Supreme Court's composition could disrupt the recent doctrinal trends toward stable standards favoring judicial deference to correctional administrators' decisions about policies and practices. Because several of the Court's cases narrowing the scope of prisoners' rights and placing greater burdens on prisoner-litigants involved divisions among the Justices concerning the appropriate reasoning and constitutional standards (e.g., *Wilson* v. *Seiter*; *O'Lone* v. *Estate of Shabazz*), it is possible that changes in the Court's composition will lead to broadened rights and increased expectations and standards for correctional institutions. Advocates for prisoners will continue to develop constitutional arguments for new bases of judicial protection for incarcerated individuals, such as the recent argument that institutional toleration of sexual harassment

by male prisoners against other male prisoners should constitute a violation of the eighth amendment (Robertson 1999). Alternatively, it is also possible that changes in the Court's composition could lead to a further diminution of the rights of incarcerated individuals. This alternative is particularly intriguing because two of the Court's youngest Justices, Clarence Thomas and Antonin Scalia, who presumably may remain on the Court for several decades, strongly advocate significant reductions in constitutional protections for prisoners. If they should be joined by at least three like-minded newcomers on the Court, the possibility exists that bases for judicial supervision and lawsuits, especially with respect to the eighth amendment, may be eliminated entirely.

By relying on an original intent approach to constitutional interpretation, Justice Thomas, joined by Justice Scalia, has indicated that the eighth amendment does not apply to conditions and practices in prisons. They argue, in effect, that the eighth amendment prohibition on cruel and unusual punishment applies to the sentence announced by the judge in court but not to the conditions under which the sentence is carried out. According to Thomas, "The text and history of the Eighth Amendment, together with *pre-Estelle* [v. *Gamble*] precedent, raise substantial doubt in my mind that the Eighth Amendment proscribes a prison deprivation that is not inflicted as part of the sentence" (*Helling* v. *McKinney* (133 S. Ct. 2475, 2485 [1993] [Thomas, J., dissenting])). If the Thomas-Scalia interpretation of the eighth amendment had prevailed throughout the 20th century, lower Federal judges would have had no basis for intervening to change conditions in correctional institutions even when those conditions fell below established public health standards for human habitability.

Thomas also advocates the narrowest possible definition of prisoners' right of access to the courts. Thomas believes that correctional officials cannot prevent prisoners from mailing letters to the court. He does not believe, however, that correctional officials must provide law libraries or even pencils and paper as part of a broader right of access to the courts. In Thomas' words, "That right . . . is a right not to be arbitrarily prevented from lodging a claimed violation of a federal right in a federal court. . . . There is no basis in history or tradition for the proposition that the State's constitutional obligation is any broader" (*Lewis* v. *Casey* (116 S. Ct. 2174, 2195 [1996] [Thomas, J., concurring])). If Thomas were to gain additional votes to support his positions, there might be significant reductions in the level of constitutional protections for incarcerated individuals, both because of the withdrawal of eighth amendment rights and because of the risk that prisoners would no longer have access to the legal resources necessary for the preparation of legal claims. A shift in favor of Thomas' perspective would not necessarily reduce legal protections in all prisons, because current practices and standards may have become so thoroughly institutionalized that

administrators would continue to employ them even if they were not constitutionally obligated to do so. However, if administrators were to face choices about resource allocations, even institutionalized practices may subside when, for example, money currently spent on the maintenance of an up-to-date law library is shifted to another purpose because the courts cease to insist that the law library be maintained to meet specific standards. Such developments depend on either a change in the Court's composition or changes in the decisionmaking patterns of Justices who currently do not agree with Thomas. Thus, it is uncertain whether law and policy will ever move in this direction.

As indicated by the foregoing discussion, the Court currently treats constitutional law concerning corrections as relatively settled, stable, and oriented toward correctional managers' interest in emphasizing order, security, and administrative efficiency. Although the Court's actions effectively limit the potential for Federal judges to intervene in prisons in the name of constitutional rights, there are several other bases for judicial intervention that may have continuing impacts on correctional institutions: (1) legal actions for application to the correctional context of statutes enacted to address issues outside of corrections, (2) legal actions to force correctional officials to obey their States' laws and their own policies and procedures, and (3) legal actions based on State constitutions and statutes.

Prisoners will continue to initiate legal actions to ask judges to apply statutory rights and privileges for the benefit of incarcerated individuals, even if the statutes in question were not enacted with prisoners specifically in mind. For example, in 1998, the Court decided in *Pennsylvania Department of Corrections* v. *Yeskey* (118 S. Ct. 1708 [1998]) that the Federal Americans With Disabilities Act (ADA) included coverage for prisoners who, like other people with disabilities, cannot be excluded from governmental programs because of their disabilities. In the case in question, because of his high blood pressure, Yeskey was denied entry into a prison boot camp that might have facilitated an accelerated release from custody. The Court said that ADA's requirements applied to prisoners because the statute clearly covered State governments without providing any exclusion for State departments of corrections. The Court's decision was unanimous and, moreover, was written by Justice Scalia, one of the Justices most active in seeking to limit the scope of recognized legal protections for incarcerated individuals. However, because of the clarity of the statutory language, Scalia and Thomas joined the other Justices in applying the legislation to prisoners.

Other kinds of statutes may also provide opportunities for similar judicial impacts on correctional policies and practices. In the wake of the Court's invalidation in 1997 of the Federal Religious Freedom Restoration Act (*City of*

Boerne v. *Flores* (117 S. Ct. 2157 [1997])), a statute intended to limit the ability of governments to implement laws and policies that interfere with the free exercise of religion, many State legislatures have considered enacting their own statutes to protect free exercise of religion (Guest 1997). The Federal statute included protections for prisoners, so it is likely that courts will be called upon to examine State religious freedom statutes unless those statutes explicitly exclude correctional contexts from their coverage. With respect to the free exercise of religion, States are likely to self-consciously consider whether to provide statutory protections to prisoners because of their own experiences in dealing with the now-defunct Federal statute. However, the example helps to illustrate that there may be other kinds of statutory enactments at the Federal and State levels to provide unanticipated opportunities for prisoners to seek judicial assistance in applying the statutes to correctional institutions.

Opportunities always exist for prisoners to seek judicial orders to force correctional officials to obey State statutes and department regulations. If, for example, regulations promulgated by a department of corrections require that certain procedural steps occur in prison disciplinary processes and officials in one institution omit a step, the prisoner may seek to have the institutional officials comply with the regulations. Prisoners may be forced to exhaust administrative appeals processes before they can seek judicial action, but the threat of judicial intervention hangs over each situation and provides a source of pressure to encourage correctional officials to obey relevant laws and regulations. Because prisons were transformed into bureaucratic institutions as a result of judicial intervention and professionalization trends during the 1960s, 1970s, and 1980s, staff members in prisons and jails are responsible for knowing and adhering to many rules and regulations. Policies and procedures manuals in prisons often are so thick and detailed that it would be nearly impossible for most personnel to memorize and comprehend the nuances of every rule. Thus, it is inevitable that situations arise in which prisoners seek to force correctional personnel to comply with departmental regulations and institutional rules. Challenges to compliance by prisoners may be based on either intentional omissions or inadvertent oversights on the part of personnel. Prisoner challenges may also arise when there are disputes about how to interpret and apply statutes and rules in corrections.

Litigation based on State constitutions and statutes may provide an avenue for judicial intervention even as Federal judges appear less likely to utilize constitutional claims as the basis for issuing orders affecting prisons and jails. As the Court in the 1970s and 1980s became less receptive to all kinds of constitutional rights claims, not just those concerning prisoners, civil rights lawyers increasingly explored possibilities for using State court litigation as a means

to vindicate individuals' rights. State constitutions often contain different provisions than those in the U.S. Constitution. Moreover, State supreme courts frequently interpret their constitutions' provisions differently than the U.S. Supreme Court's interpretations of parallel provisions in the U.S. Constitution. Thus, the potential for interventions in corrections by State judges depends on the particular legal language and case precedents applicable within each State. Hypothetically, the potential for State court litigation concerning correctional issues may also be affected by the structure of State court systems, particularly the electoral accountability applied to elected State judges, who may be less willing than life-tenured Federal judges to apply judicial power in controversial circumstances on behalf of unpopular litigants. Moreover, because State governments feel burdened by prisoner litigation, there is a significant likelihood that State legislatures will act to limit opportunities for such litigation in State courts, especially if legislators perceive State judges as being increasingly receptive to prisoners' lawsuits. For example, the Michigan legislature in 1999 considered several bills modeled on the Federal PLRA that were proposed with the intention of limiting the number and nature of legal actions that could be filed in State courts by prisoners (Johnson 1999).

Developments affecting the environment of corrections

The most notable development affecting the environment of corrections is the continuing increase in prison populations. In 1979, at the moment when the Court began to decelerate Federal judicial intervention in corrections with its decision in *Bell* v. *Wolfish*, there were 301,470 convicted offenders incarcerated in Federal and State prisons (Maguire and Pastore 1998, table 6.35). By June 30, 1998, that number had grown exponentially to 1,210,034 (Gilliard 1999, 1). The 1998 figure represented a 4.8-percent increase over the total from 12 months earlier, and only the District of Columbia and three States (Idaho, Massachusetts, and Wyoming) failed to increase their prison populations between midyear 1997 and midyear 1998. Moreover, jails showed a 4.5-percent annual increase in their populations, for a total of 592,462 inmates. Thus, 1.8 million people were in custody in prisons and jails when the midyear census was conducted in 1998 (Gilliard 1999). These increases are generally attributed to increased severity in sentencing beginning in the 1980s, especially because prison populations continued to increase even as crime rates for many serious offenses decreased during the 1990s.

Rising prison and jail populations automatically increase the prospects for litigation because there are more potential litigants interacting daily with correctional personnel and more potential moments in which disputes can develop

about whether constitutional and statutory protections are being maintained. The potential for litigation is even greater because governments' efforts to build and expand correctional facilities have not kept pace with the growth in inmate populations. The Bureau of Justice Statistics reported that, as of December 31, 1997, "State prisons were operating at between 15 [percent] and 24 [percent] above capacity, while Federal prisons were operating at 19 [percent] above capacity" (U.S. Department of Justice 1999). Overcrowding increases the potential for conflicts between prisoners and for greater difficulties in maintaining order and security. As a result, there is a risk of lawsuits against correctional institutions for injuries suffered by prisoners at the hands of other prisoners because the law imposes obligations on correctional officials to maintain order and keep prisoners safe and healthy. There is also a risk that a tense environment and overtaxed resources will lead correctional personnel to "cut corners" on policies and procedures and otherwise overreact (or underreact) under pressure in their efforts to maintain order and ensure the safety of themselves and others.

The environment of correctional institutions imposes inherent difficulties and pressures upon staff. There is an ever-present (albeit not necessarily highly probable) threat of attack. There is the constant challenge of maintaining cooperation from and control over a difficult "clientele," among whom are people who lack self-control, suffer from mental illnesses that affect their behavior, or perceive few incentives to cooperate with the institutional goal of establishing order and security. These pressures may mount significantly when institutions operate above capacity. The risk of conflict is well illustrated by the testimony of Georgia correctional officer Ray McWhorter in a lawsuit alleging that correctional officials attacked and brutally beat prisoners at the behest of top officials from the State department of corrections:

> We have put up with a lot. In the years I have been working, I have been spit at. I have had urine thrown on me. I have been kicked. I have been punched. When you are dealing with that over and over and over and you are trying to restrain yourself year after year, and all of a sudden they are saying "Get them, boys," well, hell, you go in there and you get them. (Bragg 1997)

Because overcrowding can increase conflicts among prisoners and between prisoners and staff, the continuing expansion of prison and jail populations beyond institutional capacity creates an environment with the potential for litigation that will lead judges and juries to make judgments about the fulfillment of legal standards in the management of correctional institutions. In addition, scholars who studied the initial impacts of Supreme Court decisions and congressional legislation designed to limit Federal judicial authority concluded that

changes in the law had not stopped Federal district judges from looking closely at prison overcrowding (Call and Cole 1996; Call 1995).

Two elements that may have countervailing impacts on the prospects for litigation and judicial intervention are the institutionalization of standard policies and procedures and the systematic training of correctional personnel.

Changes in the composition of prison populations may also provide a basis for litigation and judicial intervention. For example, rising numbers of women sentenced to incarceration increase the risks of claims alleging sexual abuse and assault, denial of proper medical care, and other issues that arise in women's prisons, especially when a majority of correctional officers are men (Collins 1997; Amnesty International 1999).

In another example, the deinstitutionalization movement in mental health led to the closing of many facilities that traditionally housed people with mental illnesses. Coinciding with cutbacks in mental health facilities and services in some jurisdictions has been an increase in the number of mentally ill people held in jails and prisons. In some States, county jails detain mentally ill people who have committed no crimes but are merely behaving strangely or waiting for a bed to become available at a mental hospital (Saul 1997). After Michigan shut down six hospitals serving the mentally ill in the early 1990s, the State prison system experienced a 23-percent increase between 1993 and 1997 in inmates who were formerly mental patients, a growth rate more than double the 11-percent rate for the prison population generally (Hornbeck 1997). An increase in inmates with special needs, especially in small county jails that are particularly ill-equipped to provide special resources or programs, increases the risk that these inmates will cause conflicts or be harmed in circumstances that could generate litigation.

Similarly, institutional responses to other demographic developments in prison populations, such as changing racial and ethnic compositions that have exacerbated racial tensions and problems with ethnicity-based gangs, may produce litigation on equal protection grounds or raise due process concerns when policies call for swift institutional intervention to preempt threats and conflicts within a prison's population. There are many projections being discussed about how the country's ethnic and racial composition will evolve to produce a white minority by the mid-21st century. Changes in the general population are likely to produce changes in the demographic composition of prison populations. New circumstances and conflicts produced by them and the institutional responses to them may create opportunities for litigation and judicial intervention.

Two elements that may have countervailing impacts on the prospects for litigation and judicial intervention are the institutionalization of standard policies and procedures and the systematic training of correctional personnel. Judicial intervention and trends in professionalization since the 1960s have turned correctional institutions into bureaucracies permeated by the influence of legal norms (Jacobs 1977). Institutions need well-developed and clear policies to diminish the risk that staff will violate prisoners' rights or otherwise fail to comply with legal requirements imposed on correctional management. The existence of up-to-date written policies helps to protect State correctional officials' qualified immunity from civil rights lawsuits in cases alleging that correctional officers violated constitutional rights about which the officials should have known. Without the existence of written policies, correctional officials are at greater risk of violating and being found liable for the violation of prisoners' constitutional rights. Thus, State departments of corrections, county jails, and individual State prisons typically have thick policy manuals detailing the proper procedures for a wide range of predictable circumstances that may arise. The development of standards and policies has been guided and assisted by ACA, the American Jail Association, the U.S. Department of Justice, and other organizational entities that disseminate publications concerning research, standards, and model policies (see, e.g., Lauen 1997; American Correctional Association 1993, 1991).

Policy manuals provide guidance to correctional staff and help establish the expectations of both staff and prisoners about the rights of the incarcerated population and the obligations of institutional personnel. These policies are shaped by legal requirements drawn from court decisions and relevant statutes and regulations. As a result, policies about body cavity searches, the use of force, and other issues can direct correctional personnel to conform to the requirements of the law. The policies help establish routines of behavior that enhance order and security while reducing the risk that prisoners will be subjected to excessively arbitrary treatment. The policy-mandated routinization of body frisks and cell searches, for example, can diminish the potential perception that officers wield their search authority arbitrarily or for the purpose of harassing inmates. Well-developed policies also help diminish the risk that staff members will make inappropriate or uninformed discretionary judgments about how to deal with specific situations that may arise. Moreover, the establishment and routinization of policies based on existing legal standards may serve to keep those standards in place even if subsequent judicial decisions and statutory enactments reduce the scope of legal protections for prisoners and thereby permit a wider range of restrictive, discretionary practices by correctional officials. Unless there are specific resource utilization gains or other foreseeable benefits from changing policies, institutions may simply keep in place practices

that are familiar and effective even when those precise practices are no longer legally required. Depending on the nature of the policies and practices at issue, the risk of upheaval and uncertainty from changing established routines may be more undesirable than the thought that prisoners are receiving more extensive protections than those required by law.

The existence of written policies does not immunize correctional officials against civil rights litigation. Policy manuals are often so extensive and detailed that it is difficult to know, let alone understand, their entire contents. Thus, correctional administrators have a great incentive to train and retrain staff members about existing policies and procedures. Moreover, the failure to train staff properly is a recognized basis for finding a local government agency, such as a county jail, liable for constitutional rights violations by its officers (*City of Canton* v. *Harris* (489 U.S. 378 [1989])). The institutionalization of systematic training helps to alleviate the risk that actions taken by correctional staff will violate legal standards and produce litigation.

There are questions, however, about the extent to which various jurisdictions have developed and fully implemented training programs. It was not until 1999, for example, that the Mississippi legislature sought to require extensive training for all correctional personnel to reduce correctional agencies' exposure to the risk of lawsuits (*Corrections Digest* 1999c). Training for jail personnel may be especially problematic because its existence and content are often under the control of county sheriffs who emphasize law enforcement rather than correctional responsibilities. Some sheriffs may place newly hired people on jail duty for on-the-job training while they await the opportunity to become deputies with road patrol responsibilities (Kerle 1998). Inadequate training can create situations that could subsequently invite litigation.

Obviously, the existence of policies and training does not guarantee that correctional officials will properly respect legal protections for prisoners. Personnel training must be reinforced by effective supervision and accountability mechanisms. If there are inadequate supervision procedures or deficiencies in the recruitment and selection of correctional personnel, then high-quality training will have limited effectiveness in preventing situations that produce litigation and the prospect of judicial intervention.

An additional element of concern is the extent to which the penal harm philosophy may become incorporated into the daily decisions and actions of correctional personnel. As Clear (1994) discussed, many aspects of criminal punishment since the 1970s have moved beyond such limited goals as incapacitative custody and retributive loss of liberty to compound punishments of offenders by inflicting additional pain and discomfort. In corrections, the penal

harm philosophy may affect not only the length of sentences and conditions of confinement, but also the attitudes and actions of correctional personnel in their daily interactions with prisoners. Recent research documenting the extent to which medical personnel in corrections manifest the penal harm philosophy, which diminishes their concern for the quality of medical care provided to and the amount of pain experienced by prisoners, illuminates the risk that staff members' attitudes may counteract the intentions of policies and training and thereby produce situations that generate litigation (Vaughn and Smith 1999).

Increasing prison populations have led Federal and State governments to build new correctional institutions. From 1990 to 1995, for example, States opened 168 new correctional facilities and the Federal Government added 45 facilities (Stephan 1997, 1). The creation of new facilities to hold steadily increasing inmate populations necessarily requires the addition of new personnel. By 1995, there were 347,320 staff members employed at Federal and State correctional facilities, including 220,892 custody/security personnel whose jobs are devoted solely to maintaining order within institutions (Maguire and Pastore 1998, table 1.74). Because the healthy economy and employment rates of the 1990s created a relative abundance of job opportunities in some regions, there are risks that correctional departments may not have been positioned to be as thorough and selective as they wanted to be in screening and hiring personnel to staff new facilities. In addition, quick infusions of new personnel, especially in custody/security positions, can dilute the average levels of experience possessed by the officers in direct daily contact with prisoners. Because correctional officers, like other "street-level bureaucrats" carrying out rules and policies in difficult environments, must learn to be effective through on-the-job experience, an increase in newcomers may increase the risk of errors in judgment and inadvertent (or intentional) rule violations that produce conflict and the potential for litigation. If any departments of corrections are forced to lower their hiring standards or are unable to screen applicants thoroughly amid the pressure to find and train new staff quickly, these risks may be exacerbated.

Although judicial intervention in corrections is usually discussed in terms of prisoner litigation, future judicial decisions affecting correctional management may increasingly concern legal issues initiated by institutional personnel.

The problems of hiring new personnel are illustrated by the situation in Texas in 1999. The rapid expansion in the number of Texas prisons, along with the favorable economy, made it difficult for the State to recruit and retain person-

nel. In fact, the State reportedly lowered its hiring qualifications and shortened training to combat staff shortages. As a result, more than 40 percent of Texas correctional personnel had less than 3 years of experience (*Corrections Digest* 1999f). The difficulties involved in properly hiring and training staff may produce problems that spawn litigation and judicial scrutiny. This problem is especially troubling in light of the increasing range and sophistication of responsibilities of correctional officers. Effective officers need comprehensive knowledge of law, policies, procedures, and new technologies in addition to skills in interpersonal communication and psychology (Josi and Sechrest 1998).

The growing numbers of correctional personnel also increase the likelihood of judicial interventions initiated by staff members seeking to challenge the nature or application of rules and regulations affecting employees. In the difficult and pressure-filled workplace environment within correctional institutions, staff members may want to challenge regulations affecting their working conditions, such as institutional rules concerning searches and disciplinary procedures aimed at employees (see, e.g., Associated Press Wire Service 1998) or the inadequacy of safety equipment and procedures (*Corrections Digest* 1999d).

The special requirements of correctional occupations also may produce conflicts that could lead to litigation. For example, male correctional officers who belong to religions that expect men to grow beards may find their religious practices in conflict with institutional rules requiring officers to be clean shaven so that gas masks fit properly (Schneider 1995). In addition, the influx of female correctional personnel—who numbered 100,659 in 1995, including 41,857 custody/security officers—increases the likelihood of legal actions concerning employment discrimination and workplace sexual harassment. For example, if correctional institutions impose limitations on female officers' authority to search male prisoners or supervise their living quarters and shower areas, there are risks that those limitations will be challenged in court as impediments to equal employment opportunity (Bennett 1995). Although judicial intervention in corrections is usually discussed in terms of prisoner litigation, future judicial decisions affecting correctional management may increasingly concern legal issues initiated by institutional personnel.

New strategic or technological innovations can provide a source of litigation that invites judicial scrutiny of correctional practices and procedures. The remote-controlled REACT (Remote Electronically Activated Control Technology) stun belt, for example, which delivers 50,000 volts of electricity at the push of a button to prisoners being transported to court and elsewhere, is reportedly used by 25 State departments of corrections and 100 counties across the country. As a result of its use on a jail inmate who interrupted a judge during a sentencing hearing, it became the subject of a lawsuit (Canto 1998). Some future

innovations may merely be efforts to return to past practices that appeal to the public's perceived desire to punish in harsh or specialized ways. Thus, there has been talk in recent years of a return to corporal punishment as a criminal sanction. In another example, Alabama's rediscovery in the 1990s of the practice of shackling prisoners outdoors to an iron bar was barred after a legal challenge because of testimony indicating that the prisoners suffered pain and were not given proper access to drinking water and sanitation facilities (Southern Poverty Law Center 1997). As innovations in devices and techniques to control prisoners are developed, it seems likely that they will face eighth amendment challenges in court if they inflict physical pain or excessive psychological harm.

Technological innovations may also face challenges from correctional personnel. The development of new search technology, such as electronic drug detectors that identify particle traces of narcotics on clothing, will undoubtedly produce litigation when applied against correctional officers who may claim that the devices made erroneous readings or that the particles came from inadvertent contact with other people's clothing (Penn 1997). Similarly, opportunities for judicial intervention will emerge from the application of new technologies to prison visitors. There are already controversies about prison systems that require certain visitors to submit to x-ray-based devices to detect the presence of weapons and other contraband. Because exposure to x-ray radiation may be harmful to people's health, especially if the machine malfunctions or if the visitors are especially vulnerable because of pregnancy or other medical conditions, there is a basis for initiating legal challenges. It is difficult to predict what new technologies will emerge and how they will used, but it is relatively easy to anticipate that some applications of new technologies will be challenged in court by prisoners, correctional personnel, and prison visitors.

Another development affecting the potential for litigation and judicial intervention in corrections is the operation of private prisons. By the end of 1997, private correctional facilities existed in 30 States and held more than 60,000 prisoners (Maguire and Pastore 1998, tables 1.77, 1.78). Additional facilities continue to be built as various State and local jurisdictions utilize this private-sector option for handling burgeoning prison and jail populations. These facilities are obligated to fulfill legal standards concerning the treatment of and living standards for prisoners. Because they are privately managed and necessarily emphasize cost-effective policies and practices to enhance profitability, there are risks that their policies and practices based on these priorities may be a source of new litigation and judicial scrutiny. In addition, opening new facilities and hiring new staff without the professional experience and supportive infrastructure of a State department of corrections may pose additional risks of problems that will produce litigation.

Some private facilities have experienced problems, such as escapes from private facilities in Texas by convicted murderers and sex offenders sent to serve sentences from other States (Thompson 1996). The first private prison in Ohio agreed to a $1.6 million settlement in 1999 because, within 2 years after opening, 6 prisoners reportedly died while under prison medical care, 20 prisoners were stabbed, 2 prisoners were murdered, and the Federal Government criticized the institution for its harsh and humiliating search procedures (*Corrections Digest* 1999c). Also during 1999, correctional officers in a private facility in New Mexico reportedly covered up their involvement in an assault on a prisoner, and an employee of a private prison in Tennessee helped a confessed murderer to escape (*Corrections Digest* 1999a, 1999b). When correctional facilities fail so dramatically in fulfilling their custody and security obligations, they invite lawsuits by members of the public as well as by prisoners.

Private correctional facilities and their staff members are especially vulnerable to civil rights lawsuits because the Court determined that employees of private prisons do not benefit from the qualified immunity bestowed by the law upon governmental correctional personnel through section 1983 litigation (*Richardson* v. *McKnight* (117 S. Ct. 2100 [1997])). As cost-conscious institutions whose continued existence may depend on demonstrating satisfactory performance in the eyes of State and local officials, private correctional institutions have especially strong incentives to avoid problems that will produce litigation and judicial scrutiny. Thus, the threat of lawsuits and possible judicial intervention may have an especially powerful impact on private correctional managers' efforts and effectiveness in complying with legal standards.

The expense of providing facilities for mushrooming prison populations has encouraged consideration of alternative punishments. Thousands of offenders have been placed in alternative settings of confinement and supervision, including boot camps, electronic monitoring, home detention, day reporting centers, and community-based programs. In addition, 3.9 million offenders were on probation and parole at the end of 1997 (U.S. Department of Justice 1998). This figure represents an increase of 110,000 offenders over the prior year. The growing number of convicted offenders under confinement and supervision in contexts other than traditional custodial incarceration provides an additional population that can initiate litigation. Moreover, because many of these offenders have contact with or opportunities for contact with the public, any problems caused by interactions between offenders and citizens, including criminal acts committed by sentenced offenders while under correctional supervision, may provide a source for additional lawsuits and judicial scrutiny of correctional policies and practices. Inevitably, courts will be called on to clarify

how established legal standards and constitutional rights apply to new or different correctional contexts. For example, in 1998, the Court addressed the applicability of the exclusionary rule when government officials seek to use improperly obtained evidence at parole revocation hearings (*Pennsylvania Board of Probation and Parole* v. *Scott* (118 S. Ct. 2014 [1998])).

Some State responses to the expense of expanded prisons will simply amount to burden shifting from States to counties and cities. For example, States may reduce mandated sentence lengths and thereby increase the number of offenders serving sentences in county jails rather than State prisons. The jails may not have adequate funds, equipment, and staff training for handling larger numbers of offenders, and conditions and practices in increasingly overburdened jails may produce new litigation. Although litigation will lead judges to scrutinize specific aspects of nonincarcerative and other alternative sentences, their decisions in these cases seem much less likely to impose major changes on correctional policies and practices than did court decisions in the institutional reform cases of the 1960s, 1970s, and 1980s.

Conclusion

The courts have played an integral role in shaping modern correctional institutions and correctional practices. Judicial decisions established legal standards for prison conditions and the treatment of prisoners. Moreover, judicial processes provided an avenue by which prisoners could employ litigation to force correctional officials to comply with developing legal standards. These developments coincided with judicial decisions affecting policies and practices throughout the criminal justice system as judges followed the patterns established by the Warren Court and defined individuals' constitutional rights more clearly and broadly. The veritable explosion of prisoner litigation and judicial intervention into corrections during the 1960s, 1970s, and 1980s transformed corrections by forcing an end to regional differences in the organization of institutions and by pushing all correctional institutions to become professionalized, bureaucratic organizations with formal procedures and legal norms. These changes were largely beneficial. Although they did not extinguish opportunities for abusive behavior by correctional officials, the changes in law labeled such behavior—which was previously overt and officially encouraged in many institutions—as unacceptable and remediable under the law. The development of standards and procedures created greater predictability in the expectations for and behavior of staff and prisoners, thereby reducing opportunities for unbridled discretion and unremediable inflictions of pain or deprivations of basic human needs.

During the 1980s and 1990s, the U.S. Supreme Court and Congress used their authority to force a deceleration of Federal judges' involvement in correctional management. Supreme Court decisions and Federal legislation narrowed the definitions of prisoners' rights, required greater judicial deference to correctional administrators, and limited both prisoners' effective utilization of civil rights litigation and Federal judges' remedial authority. These new directions did not negate all of the rules and practices developed during the Court's interventionist years; however, they clearly signaled that judicial and legislative decisionmakers believed that the formalization of correctional procedures and the professionalization of correctional officials had progressed sufficiently to permit a relaxation of judicial scrutiny. Moreover, political and governmental trends advancing the enhancement of federalism and the diminution of judicial control over various public policy issues during the 1980s and 1990s reinforced the changing boundaries of courts and corrections. Because of widespread dissatisfaction at the State and local levels with many policy declarations from the Federal Government, the political values advancing the decentralization of policymaking and public administration are likely to perpetuate these boundary changes unless new problems emerge that are perceived as requiring nationwide remedial initiatives. As a result, the interventionist years in which courts played a significant hand in producing major changes in correctional systems throughout the Nation can probably be regarded as a unique era that is unlikely to be reproduced in the foreseeable future.

A simple causal model that characterized judicial intervention and supervision as the sole forces for transforming corrections and maintaining desirable changes in institutions' policies and practices would necessarily raise fears that the deceleration in Federal judicial intervention might mean a return to the abusive practices and inhumane conditions of the past. However, the transformation of corrections did not rest solely on judicial action. The rise of professional public administrators and the application of management theories and social sciences research in corrections also shaped the transformation of policies and practices. The continued presence of professionally trained administrators and their utilization of modern management principles provide sources for the maintenance of policies and procedures developed during the transformative period beginning in the 1960s and lasting through the 1980s. In addition, standardization and routinization of policies and systematic staff training may operate to preserve and reinforce practices that comply with established legal norms. Moreover, the deceleration of judicial intervention led by the Court and Congress cannot be accurately characterized as an end to judicial authority over corrections. Legal standards have been established, and courts retain the authority to examine and enforce those standards. Thus, it is neither inevitable nor even probable that correctional institutions will return to the problematic practices and conditions of their pretransformative decades.

From the prisoners' perspective, does the current state of affairs ensure that rights will be protected and proper procedures will be followed within the professionalized, bureaucratic environment of contemporary corrections? Of course not. There are opportunities for legal standards to be violated in circumstances in which prisoners are unable to provide sufficient evidence to prove what transpired. Litigation is an awkward, expensive, time-consuming, and unwieldy process that cannot be utilized quickly, easily, or flawlessly as a means to vindicate rights and uphold legal standards. In many respects, prisoners' interests in appropriate daily treatment may be better served by the standardization and routinization of policies and practices compliant with laws and regulations rather than by reliance on the prospect of litigation to remedy individual rights violations. If the potential threat of litigation motivates correctional administrators to develop proper policies and provide effective training, supervision, and accountability mechanisms for employees, then the most significant role for courts may be in casting a shadow over corrections as a perceived source of possible authoritative intervention—even if actual successful litigation by prisoners is infrequent or unlikely.

The future interface between courts and corrections depends largely on developments affecting the laws governing correctional institutions and shaping the environment of corrections. There are prisoner advocates and academics who call for expanded definitions of prisoners' rights and increased bases for judicial supervision of and intervention in correctional management. Conversely, there are others, including Supreme Court Justices Thomas and Scalia, who call for further diminution of prisoners' rights and increased limitations on the ability of Federal judges to hear prisoners' civil rights cases and impose judicial orders upon prisons and jails. Although it is difficult to predict how future political and social developments in American society will affect the composition and viewpoints of the Court and Congress, for the foreseeable future, it appears that the laws affecting corrections have reached a point of relative stability. It is acknowledged that prisoners possess specific rights concerning religion, access to the courts, conditions of confinement, and a limited list of other rights. The definitions of these rights are relatively narrow, and the balances struck between prisoners' rights and institutional interests in security and order tend to favor the preservation of policies and practices developed by correctional administrators. Prisoners are less able to demand legal resources and freely file legal actions, but the courthouse door has not been closed to prisoners' filings, and judges retain authority to examine whether institutions are upholding constitutional and statutory standards.

A continuing role for courts, either directly through litigation and court orders or indirectly through the threat of possible judicial intervention, is assured by

visible, predictable developments affecting the environment of corrections. The growth in prison populations, prison personnel, innovative strategies and technologies, private prisons, and alternative sanctioning methods will produce litigation that draws judicial attention to correctional policies and practices. This litigation may increasingly concern either employee issues or narrow prisoners' rights questions rather than efforts to significantly alter conditions of confinement. The deceleration in judicial intervention does not necessarily translate into a reduction in the judicial system's prisoner litigation cases. Continued increases in prison populations are projected to produce increases in prisoners' cases filed in Federal courts (Cheesman, Hanson, and Ostrom 1998). One unknown factor that will affect the nature and extent of judicial involvement in correctional cases is the uncertain capacity of heavily burdened courts to carefully review and consider increasing numbers of cases from prisoners without an infusion of new resources.

The most difficult questions concerning the future interface of courts and corrections concern unpredictable developments that could affect the environment of corrections. In light of the contemporary penchant for significant incarcerative sanctions during an era of declining crime rates, what would happen if the United States experienced a dramatic increase in crime rates? Moreover, what if this increase in crime rates coincided with a significant downturn in the national economy so that government budgets had fewer resources to spend on corrections? Would incarceration rates increase in a manner that would significantly outstrip prison capacity at a moment when governments could not afford to maintain minimum conditions and amenities within correctional institutions? Such a hypothetically plausible scenario could sorely test both correctional administrators' commitment to professional standards and the power of standardization and routinization as means to maintain standards. Courts would inevitably be called on to examine alleged problematic conditions and practices in prisons. There may be questions about whether the Court and Congress went too far during the 1990s in limiting the remedial authority of Federal judges in prison cases. Law is adaptable and malleable, however, especially in the hands of judges, so the opportunity could undoubtedly be created to permit judges to issue orders addressing problems in corrections.

The real uncertainty about judicial action would probably concern social and political values possessed and applied by the judiciary. Are the judicially developed standards for correctional institutions so thoroughly established from litigation during the latter decades of the 20th century that judges would intervene and push Federal, State, and local governments to uphold standards for conditions and practices? Alternatively, could a sense of crisis concerning the crime problem permeate the thinking of judges and thereby attract judicial

decisionmakers to the arguments of Justices Thomas and Scalia about the inapplicability of the eighth amendment to questions about the conditions of confinement in correctional institutions? This approach would constitute a withdrawal of judicial scrutiny and involvement from many areas of prison operations. Such speculative questions cannot readily be answered, but they help to illustrate the uncertainties involved in predicting the future impact of courts on corrections.

Courts and corrections seem inextricably linked together because of the established avenues for prisoners (e.g., section 1983 litigation) and prison employees to seek judicial consideration of challenged conditions and policies in correctional institutions. Despite the deceleration of judicial intervention in the posttransformative era of corrections, current developments affecting the environment of corrections ensure that courts will continue to be called on to examine specific aspects of correctional management. The actual nature and extent of future judicial impact on corrections necessarily depends on the course of developments shaping correctional law and the environment of corrections from which legal issues spring.

Note

1. Based on author's conversations with assistant attorneys general from several States.

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