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Leveraging Maximum Reform While Enforcing Minimum Standards

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LEVERAGING MAXIMUM REFORM WHILE ENFORCING MINIMUM STANDARDS

*Alphonse Gerhardstein**

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INTRODUCTION

People want to be safe from crime. Politicians must therefore deliver policies that promote public safety. For several decades that duty has translated into more prisons, but we know better. Research shows that prisons are effective at promoting safety (reducing recidivism) for only a small percentage of the offending population. Litigation that focuses only on conditions of confinement, therefore, misses an opportunity to promote public safety by requiring programming and supervision options that will truly help reduce recidivism. Policy makers need and often want the push that litigation addressing evidence-based programming can provide. Aligned on the other side is policy promoted by fear. Arguing that a state can be simultaneously smart and tough on crime can help change the debate. Success will result in expanded effective programming to those who are incarcerated or under supervision.

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This Article is not about litigating in environments where the defendant corrections officials have dug in and are committed to saving the status quo. Remedies in such cases will necessarily be limited to the proven violation. Rather, this Article focuses on those occasional opportunities when defendants can be persuaded to view litigation as an opportunity to support progressive policies that will reduce dependence on secure custodial options. This Article offers suggestions on how advocates for criminal justice reform can use litigation to promote effective crime reduction policies that also serve to maximize services to, and opportunities for, the offender.¹

Part I reviews some of the problems facing efforts to improve rates of recidivism. A goal of simply achieving compliance with the Constitution will not serve to make the public safer or the offender less likely to commit an offense in the future. Part II will review examples of criminal justice reform litigation in which the remedy has moved past constitutional compliance to promote effective, evidence-based solutions to public safety problems. Part III will suggest strategies to achieve these broader remedial terms.

I. CONSTITUTIONAL STANDARDS SET A LOW BAR; ENFORCEMENT DOES NOT PROMOTE PUBLIC SAFETY

The clients in correctional litigation are the individuals in custody. Traditionally, such litigation is focused on securing constitutional compliance regarding the conditions of confinement. However, individuals in custody need more. They need an advocate for their success upon re-entry into society. To delay that advocacy until an offender is released misses an important opportunity to utilize the period of supervision in confinement or post-release to promote pro-social behavior. Confined clients deserve these opportunities and conditions litigation can be a vehicle for this advocacy.

A. Who is Incarcerated?

While the American violent crime rate has been falling in the past thirty years, the incarceration rate has increased. In fact, during this period, the prison population of the United States has qua-

1. This Article does not focus directly on sentencing reform. It should, however, be a part of any comprehensive strategy to target correctional resources in a manner that will promote public safety. This includes a critical look at drug sentences, three strikes laws, and gun specifications.

drupled.² This relationship, however, is not causal. Prison beds are filled with more offenders serving mandatory terms, some triggered by “three-strikes” legislation which creates lengthy stays in prison for non-violent offenders. Because so many non-violent offenders have been incarcerated, the rising prison population from 1993 to 2001 accounted for only 2%-5% of the decline in serious crime in large cities like New York and Los Angeles.³

The United States now leads the world with 2.4 million people in jail, prison, and detention facilities. This equates to approximately 738 prisoners for every 100,000 Americans.⁴ Whether measuring per capita or raw numbers, no other country compares.⁵ American incarceration rates are higher than any other Western nation.⁶ The “Carceral State,” as labeled by Marie Gottschalk, is now the status quo and mass incarceration is the norm.⁷

The American corrections system, alone among civilized nations, considers punishment and confinement the correct response for even non-violent and low-risk offenders.⁸ Other strategies, however, have proven to be both less expensive and more effective.⁹

The racial disparity in prison population captures the difference in the social experience of black men in America better than any other socio-economic barometer.¹⁰ Today’s average young black male is more likely to go to prison than serve in the military or obtain a bachelor’s degree.¹¹ One in every nine black males be-

2. See Bruce Western, *Re-entry: Reversing Mass Imprisonment*, B. REV., July-Aug. 2008, <http://bostonreview.net/BR33.4/western.php>.

3. See THE SENTENCING PROJECT, DO MORE PRISONERS EQUAL LESS CRIME? A RESPONSE TO GEORGE WILL 3 (2008) [hereinafter MORE PRISONERS, LESS CRIME?], available at http://sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cwill_overall%20response.pdf.

4. See David Crary, *Record-High Ratio of Americans in Prison*, FOX NEWS, Feb. 29, 2008, <http://www.foxnews.com/wires/2008Feb29/0,4670,PrisonPopulation,00.html>.

5. See *id.*

6. See *id.* (stating that Russia incarcerates 628 in 100,000 citizens and China, a far more populous nation than the United States, has 1.5 million people behind bars); see also JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 3-4 (2003).

7. MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 18-20 (2006).

8. See *No. 1 at Imprisoning, but Not at Reforming*, DES MOINES REGISTER, Dec. 19, 2007, at 16A.

9. *Id.*

10. See Western, *supra* note 2, at 1 (“Racial disparities in unemployment (two to one), nonmarital childbearing (three to one), infant mortality (two to one), and wealth (one to five) are all significantly lower than the seven to one black-white ratio in incarceration rates.”).

11. See *id.*

tween the ages of twenty and thirty-four is in either prison or jail on any given day and that rate is rising rapidly.¹² If current trends continue, one third of black males born today will spend time in prison.¹³

Racial disparity in the prison population exists in all age groups and levels of education, which has broad implications for black communities. One in fourteen black children has a parent who is incarcerated and unable to contribute to the household.¹⁴ Because of laws that prohibit felons from participating in the democratic process, 13% of blacks are unable to vote.¹⁵ This represents a significant portion of the community that has become disenfranchised.¹⁶

Incarceration disrupts communities. While the offender is locked up, his family and community lose his services. Following release, the offender needs help establishing pro-social patterns. The current system of long sentences and little programming has caused recidivism to remain unacceptably high, now level at approximately 67%.¹⁷ The weight of more than 700,000 persons who re-enter society each year is disproportionately placed upon the shoulders of the poorest neighborhoods.¹⁸ While states spend millions on incarceration, little attention has been paid to re-entry strategies, creating a merciless and expensive revolving prison door. There are some bright spots, however, where policies promote effective institutional programming and help with re-entry for adults and teens alike, resulting in lower rates of incarceration.¹⁹

12. See MORE PRISONERS, LESS CRIME?, *supra* note 3, at 1.

13. See *id.*

14. See *id.* at 4.

15. See *id.*

16. See *id.*

17. See ROBYN L. COHEN, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE VIOLATORS IN STATE PRISON 1 (1991), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppvsp91.pdf> ("Between 1975 and 1991, the number of parole and other conditional release violators entering State prisoners increased from 18,000 to 142,000—twice the rate of growth of offenders newly committed from courts."); see also JOHN GIBBONS & NICHOLAS DE B. KATZENBACH, COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 106 (2006), available at http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf.

18. See Solomon Moore, *Trying to Break Cycle of Prison at Street Level*, N.Y. TIMES, Nov. 23, 2007, at A28. For example, in 2005 the Houston, Texas Sunnyside neighborhood was one of ten in the city that together accounted for 15% of the city's population, yet received half of the 6,283 Houston prisoners released that year. *Id.*

19. Todd Lewan, *Missouri Tries New Approach on Teen Offenders*, USA TODAY, Dec. 29, 2007, http://www.usatoday.com/news/nation/2007-12-29-2062815235_x.htm.

B. What Helps Reduce Recidivism?

Incapacitation through confinement does not lower recidivism. Researchers and public policy advocates have identified numerous strategies that do effectively lower recidivism.²⁰ These “evidence-based” programs and strategies are based on principles of effective intervention frequently summarized as “risk, need, treatment and fidelity.”²¹ “Risk” refers to the risk of re-offending.²² Incarcerating low risk offenders has been shown to increase the risk of recidivism for that group.²³ “Need” refers to what an intervention should target, that is, crime-producing or criminogenic needs.²⁴ “Treatment” refers to how to address the offenders’ needs.²⁵ For example, a behavioral program is a type of treatment. “Fidelity” refers to adhering to the principles of a strategy to ensure consistent results.²⁶

To determine which programming works, recidivism rates and the cost to taxpayers must be considered. The result is a cost-benefit analysis, framing prison reform (not construction) as an economic boon, which provides a political shield to government officials who want to appear “tough on crime” while evidence-based practices are implemented.²⁷ Evidence-based practices like vocational education programs, cognitive-behavioral therapy, and supervised treatment programs have been proven to be inexpensive and effective in reducing crime. For juveniles, the best practices are Functional Family Therapy, Multi-systemic Therapy, and Multidimensional Treatment Foster Care.²⁸ Other effective juvenile treatments create a connection between the offense and the damage it caused to the community through victim apologies, monetary restitution, and service projects.²⁹ Evidence-based practices can have an effect not only on life on the outside, but on the inside

20. *See id.*

21. Edward J. Latessa & Christopher T. Lowenkamp, *What Works in Reducing Recidivism?*, U. ST. THOMAS L.J. 521, 521-22 (2006).

22. *See id.* at 522.

23. *Id.*

24. *See id.* at 523.

25. *See id.* at 523-24.

26. *See id.* at 524-25.

27. Jeninne Lee St. John, *A Road Map to Prevention*, TIME, Mar. 26, 2007, at 56.

28. Steve Aos et al., *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, 19 WASH. STATE INST. FOR PUB. POL’Y 275, 281-85 (2006).

29. *See Lee St. John, supra* note 27.

as well, lowering rates of inmate-on-inmate and inmate-on-staff assault, drug use, rape, and suicide.³⁰

C. What Does Conditions Litigation Traditionally Accomplish?

Conditions litigation has long been focused on securing maximum rights for citizens who are incarcerated. Unfortunately, as the prison population in America has swelled the rights of the incarcerated population has been steadily diminished. For example, after incarceration, prisoners are only protected from excessive force that constitutes “unnecessary and wanton infliction of pain.”³¹ Inadequate medical care cannot be remedied unless it displays “deliberate indifference.”³² Arbitrary imposition of segregation can only be addressed if the deprivation “imposes atypical and significant hardship.”³³ Denial of legal materials can only be remedied if the plaintiff shows “actual injury.”³⁴ Prison regulations—even those that impact sensitive First Amendment matters—are all measured by “reasonableness.”³⁵ Even safety from other violent inmates is only remedied if the failure of the staff is due to “deliberate indifference.”³⁶

The substantive law challenges are just the beginning. A prisoner plaintiff cannot sue the state because of Eleventh Amendment immunity.³⁷ The individual defendants that can be sued are all cloaked with qualified immunity.³⁸ The Prison Litigation Reform Act³⁹ (“PLRA”) further limits recovery to claims of physical injury, limits attorney fees,⁴⁰ and imposes administrative exhaustion requirements without mandating what administrative grievance procedures a state should provide.⁴¹ The PLRA also limits injunctive relief.⁴² Courts may only issue prospective injunctive relief if the relief is narrowly drawn and is the least intrusive means

30. Sarah More McCann, *Program Helps Arizona Prisoners Get Ready for Real Life*, CHRISTIAN SCI. MONITOR, Aug. 1, 2008, at 25.

31. *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

32. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

33. *Sandin v. Conner*, 515 U.S. 472, 472 (1995).

34. *Lewis v. Casey*, 518 U.S. 343, 349 (1996).

35. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

36. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

37. *See* U.S. CONST. amend. XI.

38. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

39. 42 U.S.C. § 1997e(e) (1996).

40. *Id.* § 1997e(d).

41. *Id.* § 1997e(a)-(b).

42. 18 U.S.C. § 3626(a)(1)-(2) (1996).

necessary to correct the constitutional violation.⁴³ Population caps are prohibited unless authorized by a three-judge panel that finds crowding is the primary cause of the violation of federal constitutional rights, and no other relief will remedy the constitutional violation.⁴⁴

The substantive and procedural hurdles in conditions litigation are quite significant. But conditions litigation is nonetheless ongoing and is presently tackling severe problems.⁴⁵

The results are important for establishing some minimum level of humane treatment for the prisoner plaintiffs. But a “win” that secures only compliance with the constitutional minima will generally do very little to help confined plaintiffs accomplish the ultimate goal of living safely in a free society upon release without re-offending. If a state department of corrections is fighting to avoid providing services and simply wants to incapacitate the inmates through the period of incarceration, then plaintiffs’ counsel are stuck, limited to only securing compliance with the low Eighth Amendment standards.⁴⁶ But defendants can occasionally be prodded to do more.

43. *Id.* § 3626(a)(1)(A).

44. *Id.* § 3626(a)(3)(E); see also generally Alphonse A. Gerhardstein, *PLRA Can Affect Private Practitioner’s Ability to Represent Inmates*, 13 CORRECTIONAL L. REP. 66 (2002).

45. For examples of such problems and how they have been addressed, see *Inmates of Northumberland County Prison v. Reish*, No 08-C-345, 2008 WL 2412977 (M.D. Pa. June 11, 2008) (noting systemic defects in the prison’s delivery of medical, mental health, and dental care, life-threatening fire hazards in the institution’s housing units, chronic environmental problems in the living and kitchen areas, and the hostile effects of profound overcrowding in the women’s dormitory); see also *Osterback v. McDonough*, 549 F. Supp. 2d 1337 (M.D. Fla. 2008) (terminating injunctive relief granted under the PLRA, the court found there were no longer any ongoing constitutional violations at the prison and injunctive relief was provided for inmates who were under strict supervision in Florida prison); *Gammatt v. Idaho State Bd. of Corr.*, No. CV05-257-S-MHW, 2007 WL 2684750 (D. Idaho Sept. 7, 2007) (ordering a prison official to treat the plaintiff’s gender identity disorder); *Flynn v. Doyle*, No. 06-C-537, 2007 WL 805788 (E.D. Wis. Mar. 14, 2007) (certifying a class action in a case alleging deliberate indifference to the medical needs of women in Wisconsin prison); *Roe v. Crawford*, 439 F. Supp. 2d 942 (W.D. Mo. 2006) (finding that a policy prohibiting transportation of pregnant inmates off-site to provide abortion care for non-therapeutic abortions violated the Fourteenth Amendment).

46. Another barrier that will be raised by a department in defense mode is found in *DeShaney v. Winnebago Department of Social Services*, 489 U.S. 189, 201 (1989) (explaining that the duty to protect the safety and general well-being of a person arises only from taking such person into custody, and thus there is no duty to persons not in custody).

II. CONDITIONS LITIGATION CAN HELP REDUCE RECIDIVISM

Secure confinement is only one point on the criminal justice continuum. Inmate advocates should seize every opportunity to push toward reduced reliance on prisons, and increased reliance on programs that work to reduce recidivism. This will promote public safety and increase opportunities for successful re-entry among offenders. As I address in Parts II.B and II.C below, juvenile prisoners and seriously mentally ill⁴⁷ or otherwise disabled prisoners present excellent opportunities for this type of advocacy.

The key to securing relief that extends beyond the prison walls is to anchor any settlement or relief in the criminal justice continuum. Nearly every inmate will be released from prison to serve some form of parole or post-release control. Advocates should approach that fact with the attitude that the resolution of the litigation should assist “ongoing efforts” to make sure that the inmate is successful upon re-entry.⁴⁸ This can be politically appealing to the defendant policymakers, because it bolsters potential claims regarding their commitment to improved public safety. Most settlements require an application for funds to the state controlling board or similar legislative funding group in order to secure approval. Including measures in a settlement that will specifically make re-offending less likely is often an attractive component to a settlement that would otherwise look only like a concession to greater inmate “rights.” The key, in addition to having cooperative defense counsel, is to tie the settlement measures to the claims in the case.

A. Seriously Mentally Ill Offenders

One example of this advocacy is *Messiah S. v. Alexander*, a case currently pending in the U.S. District Court for the Southern District of New York.⁴⁹ The plaintiffs consist of two groups: (1) New York City residents with psychiatric disabilities who are on parole supervision and (2) those who are soon to be released to parole supervision.⁵⁰ Persons with psychiatric disabilities are over-

47. See generally FRED COHEN, CIVIC RES. INST., *THE MENTALLY DISORDERED INMATE AND THE LAW* ¶ 1.2 (2008).

48. This formulation of building on “ongoing efforts” should be used in order to acknowledge any efforts that are underway and thereby help invest the department in the remedy by letting them claim “they were doing it anyway.”

49. Complaint at 1, *Messiah S. v. Alexander*, No. 1:07-cv-01327 (S.D.N.Y. Feb. 22, 2007).

50. *Id.*

represented in the prison and jail population.⁵¹ They also have a higher recidivism rate.⁵² In *Messiah S.*, the plaintiffs are seeking re-entry planning and services by enforcing rights secured by the Americans with Disabilities Act, the Rehabilitation Act, and New York State law. As disabled persons under the law, plaintiffs “require disability accommodations in the form of pre-release planning and appropriate transitional services in order to be successful in the Parole Program and have access to the services it offers.”⁵³

Among other relief, the plaintiffs are requesting that New York assist the class members by providing access to medical care and medical health services prior to the class members’ release from state custody.⁵⁴ The rationale behind this request is to increase class members’ ability to function in society and, as a result, increase the likelihood that they will be able to successfully comply with the Parole Program.⁵⁵ Additionally, the plaintiffs want New York to facilitate class members’ access to federally provided benefits, such as food stamps, Medicaid, and Social Security.⁵⁶

B. Juveniles

Another opportunity to promote relief that reduces recidivism is provided by incarcerated juveniles. This special population has a somewhat uncertain legal status,⁵⁷ but whether approached from the perspective of the Eighth Amendment or Fourteenth Amendment, there does not seem to be a general “right to treatment.”⁵⁸ Juveniles in custody do, however, have a clear right to education, including special education.⁵⁹ For those who are not serving a determinate sentence, the juvenile must appear before a board that determines when the youth will be released. Education and release

51. See COHEN, *supra* note 47, ¶ 1.6.

52. See *id.* ¶ 99.

53. *Id.* ¶ 1.

54. See *id.* ¶ 102.

55. *Id.* ¶ 113.

56. *Id.* ¶ 215-17.

57. See *id.* ¶ 20.3.

58. *Id.*; see also *Santana v. Collazo*, 714 F.2d 1172, 1177 (1st Cir. 1983) (finding that while desirable, juveniles have no right to rehabilitative treatment under the Constitution); *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974) (finding that juveniles have a right to rehabilitative treatment under the Fourteenth Amendment); *Stevens v. Harper*, 213 F.R.D. 358, 375-76 (E.D. Cal. 2002) (acknowledging the conflicting case law regarding the existence of juveniles’ constitutional right to treatment); *Alexander S. ex rel. Bowers v. Boyd*, 876 F. Supp. 773, 790 (D.S.C. 1995) (finding that juveniles have a right to rehabilitative treatment under the Fourteenth Amendment).

59. See *Tommy P. v. Bd. of County Comm’rs*, 645 P.2d 697, 697 (Wash. Super. Ct. 1982).

decisions require an ongoing assessment of the juvenile in a number of areas. The need to assess progress on several measures is typically satisfied by using a unified case plan. Such a plan is drafted at intake and guides the interventions to be utilized with that youth. All of this work is ultimately focused on the release of the youth to the community, ensuring that success on re-entry becomes a compliance term in a remedial plan.⁶⁰

Deficiencies in education and rehabilitation were addressed in California in *Farrell v. Harper*.⁶¹ In that case, the plaintiffs alleged that the state juvenile facilities were deficient in several areas, including education, rehabilitation, medical care, and mental health care.⁶² The parties entered into a consent decree⁶³ that led to California's development of an "educational remedial plan."⁶⁴ This plan concentrates on California's efforts to rehabilitate the juveniles and prepare them to become reintegrated into society. The goal is that increased education will reduce recidivism and increase the likelihood that the juveniles in the facilities will become productive members of society.

The most recent special master report that addressed the educational improvement required under *Farrell* shows that education within California's juvenile justice system is improving.⁶⁵ All of the schools are now accredited by the Western Association of Schools and Colleges. California has also significantly increased the number of students who take classes to prepare students for reintegration with society.⁶⁶ The education provided in California's juvenile justice system still needs improvement, as many students are not making sufficient progress towards graduation,⁶⁷ and absenteeism remains a cause for concern.⁶⁸ This is an ongoing process, however, and improvements are still being made.

60. Douglas Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001, 1081-82 (2006).

61. Complaint for Injunctive and Declaratory Relief at 2-3, *Farrell v. Harper*, No. RG03079344 (Cal. Super. Ct. Jan. 16, 2003).

62. *Id.* at 10, 14, 18, 24.

63. Consent Decree, *Farrell v. Allen*, No. RG03079344 (Cal. Super. Ct. Nov. 16, 2004).

64. Defendant's Notice of Filing of California Youth Authority's Education Remedial Plan at 2, *Farrell*, No. RG03079344 (Cal. Super. Ct. Mar. 1, 2005).

65. Fourth Report of Special Master at 22, *Farrell v. Tilton*, No. RG03079344 (Cal. Super. Ct. July 30, 2007).

66. *Id.* at 23.

67. *Id.* at 24.

68. *Id.* at 25.

An effort to use conditions litigation to promote broader criminal justice reform, including reduced recidivism is presently underway in Ohio. In *S.H. v. Stickrath*, Ohio has agreed to do much more than protect juveniles in custody and provide them with medical and mental health care.⁶⁹ The class action stipulation for injunctive relief spans approximately ninety pages and includes very detailed terms on every topic affecting youth committed to the Ohio Department of Youth Services (“DYS”). The agreement, approved by Federal Judge Algenon Marbley on May 21, 2008, is currently being implemented in light of the guiding principles set out at the beginning of the stipulation. These include the following:

COMPREHENSIVE CONTINUUM OF CARE IN A REGIONALIZED SERVICES DELIVERY SYSTEM. *DYS shall develop a continuum-of-care system that emphasizes prevention, intervention and treatment in local communities using evidence-based or promising practices. . . . The goal regarding the existing facilities shall be that no living unit in any *DYS* facility shall house a population that exceeds that unit’s rated capacity. The goal of the regional plan is to expand regional beds while downsizing or closing existing facilities*

LEAST RESTRICTIVE ALTERNATIVES. *The *DYS* continuum of care for youth should provide rehabilitation while protecting the community. *DYS* secure facilities should normally be utilized to incarcerate and treat high-risk, serious and chronic juvenile offenders. The least restrictive appropriate alternative should always be preferred in order to decrease the number of youth in secure care, including community correctional facilities or other residential programs. This principle shall be communicated to Ohio’s juvenile judges, who shall be encouraged to exercise their discretion consistent with this principle.*

COST EFFECTIVE MEASURES. *The system developed should maximize cost effectiveness and the use of taxpayer’s money.*

EQUITABLE TREATMENT FOR ALL YOUTH. . . . *DYS must focus on the disproportionate commitment of youth of color and work to identify and reduce disparities. *DYS* must also develop programming that is culturally sensitive, gender sensitive and disability-responsive.*

EFFECTIVE AND CONSISTENT ADMISSION ASSESSMENT AND ONGOING ASSESSMENTS. *Placement and treatment decisions must be formed by validated risk and need assessment instru-*

69. See Stipulation for Injunctive Relief at 9-15, *S.H. v. Stickrath*, No. 2:04-CV-1206 (S.D. Ohio May 21, 2008).

ments that are multi-pronged and ongoing to respond to the changing needs of youth; to ensure that youth are placed in the least restrictive environment possible; and *to ensure that youth are not incarcerated longer than necessary for successful re-entry.*

YOUTH-FOCUSED CARE. The DYS system of care must reflect the individual, familial, social, educational, developmental and psychological needs of youth served. DYS shall implement individualized, dynamic treatment planning and programming informed by principles of adolescent development and facilitated through active youth involvement.

QUALITY TREATMENT INTERVENTIONS. DYS shall employ interventions that incorporate appropriate professional standards of care to include outcome measures to support effectiveness.

ENGAGEMENT OF FAMILIES. DYS shall strive to involve family, family surrogate, or other significant adult relationships at all levels in the youth's care, and maintain ongoing, family-friendly, open communications regarding youth throughout their stay. DYS' family-centered philosophy shall include youth offenders who are themselves parents and seek to be a caregiver in their children's lives

STRONG RE-ENTRY PROGRAMS. *Re-entry efforts should begin at the time of admission and utilize a wrap-around case management function which includes residential options for youth who cannot return home to their families.*

FAIR AND EFFECTIVE RELEASE PROCESS. A system for decision making regarding release must be based upon accurate and current information regarding a youth's risk and needs, the due process rights of the youth, timely and ongoing communication with treatment staff, parents or other responsible adults, and must comply with notifications as required by law. Release decisions should be fair, consistent, and *result in youth that are held no longer than necessary for successful re-entry.* There should be accountability and oversight of decision making regarding release.

ACCOUNTABILITY AND MONITORING. A strong system of accountability must be put in place through systematic monitoring and evaluation of programs and treatment of juveniles.⁷⁰

The guiding principles and subsequent text repeatedly state that a youth should be held "no longer than necessary for successful re-entry."⁷¹ To meet such a goal, the State must provide program-

70. *Id.* at 10-15 (emphases added).

71. *Id.* at 15.

ming designed to minimize the risk of re-offending. Moreover, the requirement that the defendant develop a “*continuum-of-care system that emphasizes prevention, intervention and treatment in local communities using evidence-based or promising practices*” requires that DYS and other government and private agencies serving Ohio youth coordinate their efforts to create this system of graduated options for youthful offenders in Ohio.⁷²

Ohio has announced that it will add up to \$35 million per year to the DYS budget to meet the terms of this agreement. Discussions have commenced with the juvenile judges across the State to advise them of the impact of the agreement on their local courts and enlist their partnership in meeting the terms of this agreement. Outreach to other stakeholders including the legislature, private service vendors, public defenders, and advocacy groups has been ongoing and has been very helpful in reinforcing the reforms goals in this stipulation.

III. STRATEGIES FOR ACHIEVING RELIEF BEYOND CONSTITUTIONAL MINIMA

Most corrections professionals want to deliver services above the constitutional standard, but oftentimes they lack sufficient funding. Further, they do not want to be viewed as “running country clubs.” I have been involved in four class action lawsuits that address systemic problems efficiently and comprehensively. Each of these cases is grounded in conditions or problems that violate the Constitution. In each case, however, the defendants have agreed to use the lawsuit as a vehicle for systemic change. Including such broad reforms in the remedial plan has been helpful in re-designing programs to better serve overarching state issues even if the remedy stretches beyond constitutional minima. The key has been collaboration on defining the relevant problems and acknowledging every effort the state was already pursuing to solve the problem so that the remedy was seen as an extension of ongoing efforts. It is also important to position the case as one part of an answer to a persistent social problem that traditional political strategies are failing to solve.⁷³

72. *Id.* at 10.

73. There is no political lobby for prisoners. Securing more funds for their humane treatment does not garner more votes for a politician. But demonstrating that a credible lawsuit asserting serious constitutional violations was solved quickly, efficiently, and improved the delivery of services, helps enlist politicians to these remedies. See GOTTSCHALK, *supra* note 7, at 41-76 (chronicling the challenges of seeking

For example, in *Dunn v. Voinovich*,⁷⁴ Ohio agreed to provide a continuum of care to the seriously mentally ill inmates in the adult system. A regional system of graduated services was established including an inpatient hospital, residential treatment units, and outpatient services.⁷⁵ Clinical and related staffing were ensured pursuant to a formula set out in the agreement.⁷⁶ A process for setting the formula was determined. Treatment providers were consulted when inmates on the mental health caseload were brought before the rules infraction board.⁷⁷ The mentally ill inmates became more stable. Rule violations dropped as did their segregation time (in segregation, the condition of mentally ill inmates had deteriorated further).⁷⁸ Extensive policy revision and staff training was required to change the culture within the system. The agreement required quality assurance and was designed to ensure continuation of the reforms after the agreement monitoring ended.⁷⁹ This agreement set Ohio as a leader in prison mental health care, exceeding the constitutional minimum. It was established during a conservative Republican state administration, adopted because it was viewed as a pragmatic and efficient way to solve the problem of managing the needs of the seriously mentally ill inmates by improving institutional safety for all staff and inmates.⁸⁰

A similar broad result was achieved with respect to physical health care in the Ohio prisons in *Fussell v. Wilkinson*.⁸¹ One of the features that made the agreement more attractive was a provision entitled “cost saving projects,” which included a study of admissions to outside hospitals, to determine where expenses could be reduced.⁸² *Fussell* is still in the monitoring phase.

criminal justice reform outside of litigation efforts); see also DAVID GARLAND, *THE CULTURE OF CONTROL* 111-13 (2001).

74. See Consent Decree, *Dunn v. Voinovich*, No. C1-93-0166 (S.D. Ohio July 11, 1995).

75. *Id.* §§ VII(c)-(e), XIV.

76. *Id.* § XV.

77. *Id.* § XXI(d).

78. See COHEN, *supra* note 47, ¶ 7.3[5].

79. Consent Decree, *supra* note 74, § XXVIII.

80. The agreement unfortunately did not require any aftercare and therefore did not have the impact on recidivism it could have achieved. See Fred Cohen & Sharon Aungst, *Prison Mental Health Care: Dispute Resolution and Monitoring in Ohio*, 33 No. 4 CRIM. L. BULL. 299 (1997) (examining *Dunn v. Voinovich*).

81. Stipulation for Injunctive Relief, *Fussell v. Wilkinson*, No. C-1-03-704 (S.D. Ohio, Nov. 22, 2005).

82. *Id.* at 6.

In both *Dunn* and *Fussell*, class counsel and defense counsel agreed to suspend normal discovery and appoint an independent expert team to find facts that would be the basis for negotiation.⁸³ The parties reserved the right to reject the independent reports resulting from this process, but did not exercise that right. In both cases, the fact-finding process led to the conclusion that the system failed to meet constitutional standards.⁸⁴ These findings were very detailed and organized in a way that pointed the parties to solutions. The fact-finding teams in each case were headed by Professor Fred Cohen, who also assisted the parties in negotiations and decree drafting and also monitored each agreement. His intimate familiarity with the underlying problem made his monitoring very efficient. Starting each case with an agreed fact finding process set a tone of cooperation and transparency in both cases that carried into the monitoring effort. In both cases state legislators were satisfied that the huge resources that would normally go to lawyers and expert witnesses were not being expended. Instead, a much smaller sum was spent efficiently, defining and solving a serious problem. This was billed as good government.

Dunn and *Fussell* both were limited to relief within the prison walls. Other cases reveal that the litigation model pursued in those cases can deliver even broader relief. For example, in *In re Cincinnati Policing*, a class of African-American citizens alleged that the City of Cincinnati engaged in a pattern of racial profiling and excessive force.⁸⁵ Class counsel and the city attorneys in that case acknowledged early in the litigation that a solution to the serious issues addressed by the case required involvement of many additional stakeholders. Judge Susan J. Dlott appointed conflict resolution specialist Jay Rothman of the ARIA Group, Inc. to assemble the stakeholders and lead them in dialogue. He brought to the table eight stakeholder groups that each had a unique perspective on relations with the police. These groups included youth, police officers and their spouses, business representatives, city administrators, social service agencies, religious organizations, members of

83. See Parties Revised Proposed Case Management Plan, *Fussell*, No. C-1-03-704 (S.D. Ohio Jan. 23, 2004).

84. See Ohio Department of Rehabilitation & Correction Medical Services Final Report of Findings, *Fussell*, No. C-1-03-704 (S.D. Ohio Mar. 12, 2005).

85. Collaborative Agreement at 2, *In re Cincinnati Policing*, No. C-1-99-317 (S.D. Ohio Aug. 5, 2002).

the majority white community, members of the African-American Community, and members of other minority communities.⁸⁶

Over 3,500 individuals participated. The resulting discussions were substantive and emotive—consistent with the depth of the problem on the table. Consensus goals for police community relations were set and then delivered to the parties to the lawsuit to guide them in drafting a settlement that would serve the entire community impacted by this problem. The parties entered into a consent decree monitored by an expert team to be implemented over a five-year period. The terms of the decree included measures to achieve use of force reform,⁸⁷ increased police accountability, careful tracking of police stops to address any racial bias in policing, and the adoption of community-problem-oriented policing (“CPOP”).

CPOP is the most far-reaching aspect of the agreement. The City agreed to adopt problem solving as the “principal strategy for addressing crime and disorder problems.”⁸⁸ This plan has two aspects: community engagement and police department adoption of problem solving. In a nutshell, CPOP is evidence-based policing.⁸⁹ It requires that crime and disorder be approached as problems defined through careful data analysis. Participants learn that much disorder is traceable to repeat offenders, repeat victims, and repeat locations. Strategies are then tailored to solve those problems by enlisting the resources and stakeholders appropriate to the problem. Sometimes these are police resources only, sometimes other government agencies are needed, and sometimes the community is needed. Citizens, particularly in the African-American community, will be more receptive to policing that is based on defined problems in contrast to sweeps, zero tolerance strategies, and similar measures that are frequently associated with resentment of and frustration with policing in the community. CPOP is not required by the Equal Protection Clause, but given the cooperative and transparent process that was used to arrive at the terms of the agreement, the parties were able to commit to CPOP because it

86. See Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489 (forthcoming 2008).

87. The decree incorporated the terms of a Memorandum of Agreement with the United States Department of Justice addressing use of force and accountability.

88. Collaborative Agreement, *supra* note 85, at 4.

89. The parties were greatly aided by having policing expert Professor John Eck of the University of Cincinnati at the table during negotiations to advise them regarding best practices.

solved the problem of policing fairly—even if that went beyond the narrow requirements of the Constitution.⁹⁰

The agreement in *In re Cincinnati Policing* was not based on joint fact-finding, but it was carefully based on a joint process that involved many more people than the formal parties to the lawsuit, which was appropriate to the problem addressed in that case. The terms of the agreement also directly acknowledge all of the initiatives already in place at the police department that form the basis and foundation for the reforms in the agreement. This served to honor what was being done right by the policymakers leading up to the agreement.

The agreement in *S.H. v. Stickrath*, described above in Part II.B, also expands relief beyond the constitutional minima. In *Stickrath*, as in *In re Cincinnati Policing*, the parties were able to directly address the issues at stake for the plaintiff class and for the other stakeholders involved in juvenile justice in Ohio. In this case, the parties once again returned to Fred Cohen to assemble an expert team for joint fact finding. The expert report concluded that the conditions of confinement fell below the constitutional minima. During negotiations, DYS shared all of the initiatives that at various stages of discussion impacted the problems at the core of the lawsuit. DYS was studying its release authority to make it less arbitrary, and DYS had a statewide task force in place to develop smaller, regional correction centers. Other initiatives and studies were also reviewed. The efforts were honored in the agreement, but formalized and expanded so that now the agreement, when implemented, will change the entire footprint of juvenile corrections in Ohio. For example, the Constitution does not require regional centers, but Ohio saw the wisdom of creating such centers rather than increasing investments in the existing large facilities which have been proven inappropriate for this population. This decree now serves to ensure humane conditions of confinement but also helps government make communities more safe when youthful offenders are released. Aligning the conditions litigation with the core purpose of juvenile corrections has allowed relief far beyond a traditional agreement.

90. See Jay Rothman, *Identity and Conflict: Collaboratively Addressing Police-Community Conflict in Cincinnati, Ohio*, 22 OHIO ST. L.J. 105, 105 (2006) (examining the *In re Cincinnati Policing* collaborative agreement).

A. Public Acceptance of Broad Remedies

The fear of “activist judges” has created a perception that reform cannot happen through the courts.⁹¹ But willing parties can make any agreement. Sometimes government defendants will agree that a court-supervised remedy is the only way to secure the multi-year effort and sufficient funding that are necessary to fundamentally change some institutions and systems.

Settlements like those described herein are likely to win bi-partisan political support, public approval, and cooperation from community organizations. Without the impetus of a lawsuit, some politicians will not tackle prison reform for fear of appearing “soft-on-crime.” Conventional wisdom holds that prisons enhance public safety and reforming prison abuses is a slap in the face to victims and their families. But these ideas are changing. As the federal cost of incarceration soars to \$5 billion, the public is taking notice and demanding reform.⁹² Court orders keep everyone on task.⁹³

CONCLUSION

If the state will not give an inch in its defense of the status quo, the examples in this Article cannot help plaintiffs’ counsel. But most state defendants acknowledge the problems and simply face political barriers that cause the problems to fester. These situations may be ripe for joint problem definition or fact finding. If so, it is important to find ways to achieve cost efficiencies and to acknowledge those reform efforts that the state already has underway to solve the problem. If at all possible, collaboration should start early in the case. This helps set the tone necessary for real systemic institutional reform. These steps have real potential to extend relief beyond prison walls and to help reduce recidivism.

91. See generally, Fred Cohen, *The Limits of the Judicial Reform of Prisons: What Works; What Does Not*, 40 CRIM. L. BULL. 5 (2004).

92. See Posting of Lilitiana Segura to Altnet, http://www.altnet.org/rights/78648/america_behind_bars%3A_why_attempts_at_prison_reform_keep_failing/ (March 5, 2008).

93. See Editorial, *Collaborative Was Beginning, Not End*, CINCINNATI ENQUIRER, Aug. 29, 2008, <http://news.cincinnati.com/apps/pbcs.dll/article?AID=/20080829/EDIT01/808290383/1019/edit>.