

Legislating from the Bench: Judicial Activism in California and its Increasing Impact on Adult Prison Reform

By Chantale Fiebig

I. Introduction

The prison system in California has reached a well-documented state of crisis, with nearly 163,000 state inmates housed in 33 prisons operating at 194% capacity.¹ Until recently, California's executive and legislative branches have done little towards regaining control of the system, which has been spiraling out of control for the last two decades. Rather, developments such as the abolition of indeterminate sentencing and the passage of the nation's first and most severe Three Strikes law have resulted in ever expanding criminal populations, increasingly composed of non-violent and first-time drug offenders. Recently, there have been nominal attempts to reform the criminal justice system coming from California's legislative and executive branches.² Given California's complicated political dynamics and the restraints they impose on the policy decisions of both the executive and legislative branches, however, the judicial branch has remarkably emerged as the single most influential branch of government impacting California's prison reform in the last decade.

The judicial influence upon prison reform intensified in the early 1990's when a group of attorneys from the Prison Law Office initiated a case alleging brutality and sub-human conditions at Pelican Bay State Prison.³ Federal District Judge Thelton E. Henderson ruled that the "wretched misery" that inmates had to endure violated their

¹ See Sterngold, J. and Martin, M. *Hard Time: California's Prisons in Crisis*. San Francisco Chronicle, A-1. July 3, 2005. See also http://www.insightprisonproject.org/resources/?category_id=1 (last visited Jan. 25, 2006). Statistics as of 2004, when the state inmate population was recorded at 162,456.

² See Daniel B. Wood, *California Tackles Its Prison Problem*, Christian Sci. Monitor, July 20, 2004.

³ *Prison Receivership Could Nix Guard Contract If Federal Judge Installs a Hand-Picked Administrator, The Lucrative Deal Could Be Changed or Even Abrogated*, Contra Costa Times, July 22, 2004, at A07.

civil rights and ordered sweeping reforms.⁴ He has overseen the reforms at Pelican Bay ever since and his oversight has even extended to Sacramento in the last two years as he probes the internal-affairs procedures for the entire California prison system.⁵ In July of 2004, he dramatically threatened to take the entire California Prison system under federal receivership.⁶

This threat was delivered after Governor Arnold Schwarzenegger entered into a renegotiated guard contract with the California Correctional Peace Officer's Association (CCPOA), the prison guard union. While the contract was intended to save the state up to \$108 million, Judge Henderson was concerned that it may "undermine the ability of the court to enforce orders" because it granted the union more control than management had within the prison walls.⁷ According to the special master that Judge Henderson appointed to serve as his eyes and ears inside the Pelican Bay Facility, the new contract would make "conducting thorough internal-affairs probes of guards 'almost impossible'."⁸

The drastic measure of taking the prison under federal receivership would be rare, but not unprecedented. Similar arrangements have been pursued in Atlanta and in Washington D.C.⁹ The most striking feature of the threat of receivership is that it represents an additional step in what has already been identified as a unique trend of judicial activism: Judges in California are no longer willing to rely on the executive or legislative branches of government to enact the necessary prison reforms. Rather, judges

⁴ Mark Martin, *Judge Condemns Deal with Prison Guards He Threatens to Take Over State System*, S.F. Chron., July 21, 2004, at A1.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Prison Receivership*, *supra* note 2.

are actively impacting the 33-prison system in California through wide-reaching judicial decisions mandating sweeping reforms.

In the past, federal judges have certainly intervened to improve prison conditions in Texas and elsewhere. This trend even prompted Congress to enact a bill in the mid-1990's which made it easier for local governments to overturn some court controls.¹⁰ This development, however, has not deterred the activism of California's federal judges who continue to call for drastic, across-the-board prison reforms. This paper seeks to explore *why* California's judges continue to do so. First, I will review the major cases that have impacted the adult prison system from 1995-2005. Next, I will explore national trends to determine whether or not California is an anomaly. By reviewing the Prison Litigation Reform Act of 1996's impact on prisoner litigation and the judicial trends in New York, Florida, and Texas, I conclude that it is. Accordingly, I will then offer the three factors that I have identified as the most significant drivers of California's judicial activism: 1) the existence of the Prison Law Office; 2) the personal influence of Judge Thelton E. Henderson; and 3) California's unique political climate. Finally, I will conclude by identifying the policy implications of a judiciary-dependant path towards prison reform.

II. California's Prison Reform Cases: 1995-2005

The remarkable judicial involvement in reforming California's prison system in the last decade began with the landmark decision delivered by Judge Thelton E. Henderson in *Madrid v. Gomez*.¹¹ In *Madrid v. Gomez*, the plaintiffs represented a class of prisoners incarcerated at Pelican Bay State Prison alleging a variety of violations to

¹⁰ Gladstone, M. *Judge Warns of Prison Takeover; He Says Reform Blocked by Guard Concessions*, San Jose Mercury News, July 21, 2004, at 1A.

¹¹ 889 F. Supp. 1146 (N.D. Cal. 1995)

their First, Eighth, and Fourteenth Amendment rights.¹² Judge Henderson’s detailed and thoughtful opinion recognized that “[f]ederal courts are not instruments for prison reform and federal judges are not prison administrators.”¹³ Nonetheless, the court’s extensive findings of rampant abuse and constitutional violations compelled Judge Henderson to resort to drastic measures in an attempt to remedy the “senseless suffering and sometimes wretched misery” imposed upon prisoners. In assessing plaintiffs’ claims, the court considered testimony from the plaintiffs themselves, defendants, and correctional employees at all levels, as well as over 6000 exhibits. Included among the exhibits were documents, tape recordings, photographs, and thousands of pages of deposition excerpts, many of which were from experts offered by both parties.¹⁴ The evidence provided led the court to sustain many of the most troubling allegations.

First, the court held that there was a conspicuous pattern of excessive force used in violation of the Eighth Amendment, including such incidents as an inmate receiving burns over a third of his body due to scorching water in an infirmary bath and the frequent use of gas guns, tasers, fetal restraints, and cagings.¹⁵ Second, Judge Henderson found that prison officials failed to provide inmates with constitutionally adequate medical and mental health care; evidenced by extremely insufficient staffing; inadequate training and supervision of medical staff; inaccurate and incomplete medical and psychiatric records and the absence of an effective medical record maintenance system; lack of initial physical and mental health screenings of incoming prisoners; significant and unnecessary delays in gaining access to medical providers; an utter lack of quality

¹² *Id.* at 1156.

¹³ *Id.* at 1279.

¹⁴ *Id.*

¹⁵ *Id.* at 1159 – 1200.

control or systematic review of the physicians and/or the treatment being provided to inmates; the absence of any comprehensive suicide prevention programs; and a “rampant pattern of improper or inadequate care that nearly defies belief” and that clearly demonstrated callous indifference and deliberate disregard for the physical and mental health of inmates at Pelican Bay.¹⁶ Finally, the court found that where serious mental injury can be shown to have been sustained as a result of extended placement in a security housing unit, the conditions imposed upon the affected prisoners may violate the Eighth Amendment.¹⁷

In light of the endless violations revealed in the record, Judge Henderson stated, “We are firmly convinced that the constitutional violations identified above will not be fully redressed *absent intervention by this Court.*”¹⁸ Accordingly, he appointed a Special Master to fashion an appropriate remedy to the constitutional violations and to monitor the progress of the defendants in implementing the remedy as necessary. While Judge Henderson’s scathing admonishments and appointment of a Special Master effectively underscored the grave violations being committed in the California correctional system, his ruling would be first in a long line of far-reaching cases that would attempt to mandate prison reforms.

Chief Judge Emeritus Karlton delivered the second seminal opinion of the last decade later that same year in *Coleman v. Wilson*.¹⁹ In *Coleman*, the court echoed many of the findings in *Madrid* in holding that the California Department of Corrections was failing to provide inmates with the minimum constitutionally adequate level of mental

¹⁶ *Id.* at 1200 – 1214.

¹⁷ *Id.* at 1236. The court dismissed the plaintiffs’ claims challenging the “procedures governing the assignment of prison gang members to the security housing unit for indeterminate periods.” *Id.* at 1280.

¹⁸ *Id.* at 1280 (emphasis added).

¹⁹ 912 F. supp. 1282 (E.D. Cal. 1995)

health care. More specifically, the court found that there were inadequate screening procedures for identifying inmates who suffered from “serious mental disorders” both at the time of intake and while incarcerated; the CDC was chronically understaffed in the area of mental health care and there was no effective method for insuring the competence of the mental health staff; there were significant delays in access to the necessary medical attention, inappropriate use of punitive measures, and an extremely deficient medical records system.²⁰ Additionally, the court found that while defendants had designed an adequate suicide prevention program, the program had not yet been implemented, largely due to the staffing shortages in mental health care.²¹ Like Judge Henderson, Judge Karlton elected to appoint a Special Master to monitor compliance with the court-ordered injunctive relief, once again demonstrating that the court had little confidence in the prison administrators to adequately reform the mental health care system in California’s prisons without active intervention.

In 1997, Judge Wilken’s opinion in *Armstrong v. Wilson*²² provided further constitutional protections to inmates in California’s prison system. In *Armstrong*, plaintiffs were disabled state prison inmates who alleged violations of the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA). Specifically, plaintiffs charged that prison facilities lacked adequate emergency evacuation plans for prisoners with disabilities, there was a more limited range of vocational programs available to disabled inmates, and that some disabled inmates had been improperly classified which denied them the opportunity to gain sentence reduction credits available to non-disabled

²⁰ *Id.* at 1296-97.

²¹ *Id.* at 1297.

²² 124 F.3d 1019 (9th Cir. 1997)

inmates through certain work and educational programs.²³ Rather than simply denying that the allegations violated the statutes in question, defendants elected to argue that the ADA and RA did not apply to state prisons at all.²⁴ Taking the opportunity to expand on previous Ninth Circuit precedent and joining two other circuits in reaching her conclusion, Judge Wilken unequivocally ruled that, based on the plain meaning of the statutes, the ADA and RA did in fact apply to state prison facilities.²⁵ This far-reaching ruling would ensure that vocational and educational programs throughout the California correctional system would have to be re-evaluated in order to prevent further violations of the rights of disabled inmates.

In a related case, *Clark v. State of California*,²⁶ Judge Smith allowed a class of developmentally disabled prisoners to proceed in a case alleging violations of due process by denying defendants' motion for summary judgment. Plaintiffs in this case were alleging that the CDC system did not have a systematic way of identifying developmentally disabled inmates in order to ensure that they were provided necessary assistance and protection.²⁷ This failure had resulted in, *inter alia*, inmates receiving disciplinary violations without staff assistance in defending themselves, prisoners being denied medical care because of their disabilities, and inmates being denied participation in educational programs because they were developmentally disabled.²⁸ Emphasizing an inmate's need for access to information and assistance necessary to meaningfully respond

²³ *Id.* at 1021.

²⁴ *Id.* Defendants also argued that the suit was barred in federal court by the 11th Amendment.

²⁵ *Id.* at 1023. Building on 9th Circuit precedent of *Duffy v. Riveland*, 98 F.3d 447, 453-56 (9th Cir. 1996) (holding that a prison inmate may state a claim under the RA and the ADA that we was denied prison services based on his physical handicap). Joining the Third and Seventh Circuits in holding that the RA and ADA apply to state correctional facilities.

²⁶ 1998 WL 242688. The plaintiffs' Equal Protection claims were dismissed with prejudice.

²⁷ *Id.* at *1.

²⁸ *Id.*

to charges against them, Judge Clark found that the CDC's inadequate treatment of developmentally disabled plaintiffs could constitute a violation of their due process rights. While this case was ultimately settled, Judge Clark's decision further protected the rights of disabled prisoners in the wake of *Armstrong*.

Judge Henderson next addressed the question of competent counsel in *Ashmus v. Calderon*.²⁹ In this case, an inmate sentenced to death in California filed a habeas petition to prevent the state from applying Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). As explained by the court, "Chapter 154 provides expedited habeas review procedures and other substantive benefits to states that qualify to 'opt in.' In order to qualify, states must establish a system to assure that capital defendants receive competent legal representation for their state habeas claims."³⁰ It was in precisely this area that Judge Henderson deemed California's system inadequate. The court found that California did not have policies focusing on and articulating standards of competence for unitary review counsel and, further, there was no mechanism to ensure competency.³¹ Given these deficiencies in the state's system for appointment of counsel, Judge Henderson rightly ruled that the state's habeas proceedings were not entitled to more deference in the face of an inadequate method of ensuring the competence of state-appointed counsel.

In 2001, another landmark ruling was issued in *Armstrong v. Davis*,³² providing a helpful illustration of just how specific judges were willing to be in requiring reform. In this case, named plaintiffs were disabled prisoners who had been sentenced to life in

²⁹ 31 F.Supp.2d 1175 (N.D. Cal. 1998)

³⁰ *Id.* at 1177.

³¹ *Id.* at 1190.

³² 275 F.3d 849 (9th Cir. 2001)

prison with the possibility of parole. On behalf of the plaintiff class, they alleged that the Board of Prison Terms (BPT) had violated their due process rights by failing to provide adequate accommodations during parole hearings and throughout the parole revocation process.³³ Not only did Judge Wilken find that defendants had engaged in discrimination, she also entered a system-wide injunction to modify the policies and practices of the BPT to bring them into compliance with the ADA and the RA.³⁴ According to the terms of the injunction, BPT was to hire a full-time ADA coordinator, re-do its Self-Evaluation and Transition Plan, and implement all of the following changes:³⁵

[R]evis[e] all BPT forms used by prisoners and parolees to make them more comprehensible; provide alternative formats for all BPT forms used by prisoners and parolees to make them more comprehensible; provide alternative formats for all BPT forms used by prisoners and parolees; desist from shackling, during parole and parole revocation proceedings, the hands of hearing impaired prisoners or parolees who use sign-language to communicate, unless prior approval is obtained; provide accommodations for prisoners or parolees who need to review their files in preparation for parole or revocation proceedings; provide accommodations for prisoners or parolees filing appeals from such proceedings; and establish grievance procedures by which prisoners may complain about ADA violations.³⁶

In addition to this extensive list of remedial requirements, the court also stipulated that all officials who interacted with parolees were required to undergo training in the general requirement of the ADA and disability awareness.³⁷ While remarkably specific in its requirements, the court's injunction was affirmed by the Ninth Circuit, ensuring that regardless of what the prisoner administrators deemed to be most appropriate, compliance with the ADA would be achieved according to the court's decree.

³³ *Id.* at 855.

³⁴ *Id.* at 858.

³⁵ *Id.*

³⁶ *Id.* at 859.

³⁷ *Id.*

One year later, Judge Karlton found that California's parole revocation procedures violated non-disabled prisoners' due process rights as well in *Valdivia v. Davis*.³⁸ In *Valdivia*, the plaintiff class of parolees challenged the unitary parole revocation hearing system because it allowed for parolees to be detained once the parole officer issued a parole hold. Parolees claimed that their procedural due process rights were violated because they could be detained without a preliminary hearing to determine whether or not there was probable cause to believe that they had committed the acts that constituted a violation of their parole. Although the state granted parolees a comprehensive hearing prior to reaching their final revocation decision, the average delay in holding final revocation hearings ranged from thirty-one to forty-five days.³⁹ Given this unreasonable and unnecessary delay, Judge Karlton held that the California revocation system did indeed violate the procedural due process rights of inmates.⁴⁰

As may be expected, given this trend of judicial activism, courts soon ventured into other areas of prisoners' rights. In *Clement v. California Department of Corrections*,⁴¹ Judge Wilken issued a summary judgment opinion protecting prisoners' First Amendment rights. In this case, a prisoner at Pelican Bay State Prison brought a case on his own behalf challenging a prison policy that banned regular mail containing Internet-generated materials.⁴² The policy was based on the premise that Internet-generated information "provides a particular danger to prison security because of the high volume of e-mail, the relative anonymity of the sender, and the ability of senders easily to attach lengthy articles and other publications would greatly increase the risk that

³⁸ 206 F.Supp.2d 1068 (E.D. Cal. 2002)

³⁹ *Id.* at 1077.

⁴⁰ *Id.* at 1078.

⁴¹ 220 F.Supp.2d 1098 (N.D. Cal. 2002).

⁴² *Id.* at 1110.

prohibited criminal communications would enter the prison undetected and would make tracing their source more difficult.”⁴³ Judge Wilken remained unconvinced, however, and found that the ban was unreasonable insofar as it did not serve a valid penological purpose.⁴⁴ Although the plaintiff brought the case on his own behalf, and in fact did not even move for summary judgment, Judge Wilken recognized that the rights of all similarly situated prisoners were being violated as well and, accordingly, issued an injunction to enjoin the unconstitutional policy.⁴⁵

In a concurrent case which Judge Wilken also decided on summary judgment, *Ashker v. California Department of Corrections*, state prisoners brought a §1983 action challenging the requirement that books received from vendors had to have special shipping labels attached to them.⁴⁶ Defendants claimed that the rule was implemented to prevent the many gang members housed in the security housing unit at Pelican Bay State Prison from receiving contraband, “including drugs or encrypted messages in publications.”⁴⁷ Judge Wilken found that there was not a rational relationship to a legitimate penological objective and, therefore, the rule was unduly burdensome on prisoners’ First Amendment rights.⁴⁸ The court entered a permanent injunction to enjoin this prison policy as well.⁴⁹

⁴³ *Id.*

⁴⁴ *Id.* at 1113.

⁴⁵ *Id.* at 1115.

⁴⁶ 224 F.Supp.2d 1253 (N.D. Cal. 2002).

⁴⁷ *Id.* at 1254.

⁴⁸ *Id.* at 1262.

⁴⁹ *Id.* at 1264. Two years later, Judge Damrell in the E.D. of Cal. held that it was a violation of the Establishment Clause of the First Amendment to require an inmate to complete a drug treatment program (Narcotics Anonymous) in order to be considered for parole because the program’s literature unequivocally asserted that belief in God was a fundamental requirement of participation. *Turner v. Hickman*, 342 F.Supp.2d 887 (E.D. Cal. 2004).

In spite of these significant judicial decisions calling for reform of prison policies and practices, California's prison system remains in a state of crisis. With the executive and legislative branches seemingly unwilling to take the necessary steps towards reform, and given prison administrators' seeming inability to implement the proscribed remedies, judicial activism appears to be the most promising path towards prison reform presently available. Accordingly, judges are continuing to come forward to mandate the reforms identified as most dire.

In May of 2005, Judge Henderson delivered on his threat and once again issued a sweeping decision heralding a remarkable level of judicial involvement in California's prison administration. In *Plata v. Schwarzenegger*,⁵⁰ a class of prison inmates at San Quentin sued the Governor of California, alleging that California was still not providing a constitutionally adequate level of health care in the prison system. After a thorough review of the evidence and having presided over the case during the four years since it was originally filed, Judge Henderson issued an opinion laced with clear frustration. He introduced his holding with the following preface:

The prison medical delivery system is in such a blatant state of crisis that in recent days defendants have publicly conceded their inability to find and implement on their own solutions that will meet constitutional standards...In light of this crisis and defendants' concession that the constitutional violations will not be corrected for a long time to come, the Court is compelled to take it upon itself to construct a remedy that will cure the violations as soon as possible.⁵¹

Accordingly, Judge Henderson took the dramatic step of appointing an interim receiver to manage the CDC's delivery of health care services. Further, Judge Henderson notified defendants that if finding them in civil contempt is necessary in order to appoint a receiver, they are to be prepared to address the issue. The contempt claim stems from the

⁵⁰ 2005 WL 2932243 (N.D. Cal. 2005).

⁵¹ *Id.* at *1.

enactment of a Stipulated Injunction in 2002 which called for the defendants to achieve substantial progress in bringing the medical care system closer to constitutional standards.⁵² The court then issued a separate, and highly alarming, opinion providing the findings of fact and conclusions of law supporting the appointment of the receiver.⁵³ Whether or not the appointment of the receiver is enough to radically reform California's prison system is yet to be seen. But whether or not judges will continue to mandate such reforms given California's prison crisis, on the other hand, appears to be a virtual certainty.

Given the extensive discussion of the cases described above, several patterns emerge. First, I do not believe that it is the case that the judges are departing from precedent. The rulings issued in favor of plaintiffs, generally, do not challenge findings of lower courts, nor do they espouse new standards of review, evidentiary burdens, or duties of care. Rather, they tend to emphasize the facts in each specific case and evaluate them based on established case law. In many instances, the conditions described are egregious and unlike any to have come before. In those instances, such as in *Madrid*, the court's insistence that the prison system be reformed to restore the prisoners' most fundamental rights, such as that to basic healthcare, does not reflect a departure from established doctrine. In fact, the court's insistence is more reflective of a proper understanding of the Constitution's most sound guarantees.

It is clear that federal judges have been busy reviewing the many prisoner cases which have alleged constitutional violations in California's adult prison system in the last decade. It is also clear that there have been substantial victories for plaintiffs which have

⁵² *Id.* at *2.

⁵³ 2005 WL 2932253 (N.D. Cal. 2005)

resulted in wide-reaching systematic changes, many of which have been overseen by the state. What is less clear is whether California is uniquely situated, or whether other states are experiencing similar levels of judicial involvement given the increases in prison populations nationwide. In order to determine whether California is emerging as an outlier, it may be helpful to take a step back and examine national trends in prisoner litigation.

Accordingly, the next part of this paper will briefly review the changes in the legal landscape that were heralded in with the passage of the Prison Litigation Reform Act of 1996 (PLRA), as well as other relevant developments that same year. Needless to say, the PLRA has drastically changed prison litigation in the last decade. I will then explore recent developments in New York, Florida and Texas (given that each state, like California, has very high prison populations and has struggled with institutional reform) to assess whether or not they are experiencing similar levels of judicial involvement. I conclude that they are not and thus, I follow that section with a discussion of the various factors that have come together to give rise to the unique developments in California. While charges of judicial activism certainly warrant some consideration, there are several other noteworthy aspects of California's prison reform movement that must be recognized as well.

III. Prison Litigation Reform Act of 1996

The prison reform movement in America really began to manifest itself in the years immediately following the civil rights movement. Along with civil rights for minority groups and women, activists began demanding rights for prisoners as well, reminding lawmakers that convicted felons were still Americans and even while

incarcerated, protected by the Constitution. Since the 1960's, litigation has served a central role in reforming correctional facilities and with hundreds of cases filed each year, plaintiffs were winning some substantial victories. In fact, just a few years before the passage of the PLRA, Susan Sturm notes, "As of January 1993, forty states plus the District of Columbia, Puerto Rico, and the Virgin Islands were under court order to reduce overcrowding and/or eliminate unconstitutional conditions of confinement."⁵⁴ This statistic clearly indicates that meritorious claims were being filed by prisoners all over the country seeking remedy to the constitutional violations inflicted upon them. Congress, however, recognized that these cases were the very rare minority of cases and the courts were being bogged down by what was characterized as "frivolous" litigation.

In her comprehensive review of the PLRA's impact on inmate litigation, Professor Margo Schlanger explains that while the prison reform movement had virtually died out since the early 1980s, inmate lawsuits had steadily risen with the nation's quadrupled prison population.⁵⁵ According to her research, "In 1995, inmates filed nearly 40,000 new federal civil lawsuits – nineteen percent of the federal civil docket. About fifteen percent of the federal civil trials held that year were in inmate civil rights cases."⁵⁶ More and more of these lawsuits were aimed at state officials who did not take long to introduce a bill which would attempt to reduce the money and effort being expended defending the state against such suits. In 1996, Congress enacted the Prison Litigation Reform Act as a rider to an appropriations bill. The PLRA's effects have been staggering. Schlanger explains, "The PLRA has had an impact on inmate litigation that is hard to

⁵⁴ Sturm, S. *The Legacy and Future of Corrections Litigation*. 142 U. PA. L. REV. 639, 641 (1993).

⁵⁵ Since 1980.

⁵⁶ Schlanger, M. *Inmate Litigation*. 116 HARV. L. REV. 1555 (2003).

exaggerate; to set out just the most obvious effect, 2001 filings by inmates were down forty-three percent since their peak in 1995, notwithstanding a simultaneous twenty-three percent increase in the number of people incarcerated nationwide.”⁵⁷

The PLRA included several noteworthy provisions: 1) Plaintiffs must exhaust all available administrative remedies, with no consideration for whether they are deemed “adequate or not;” 2) plaintiffs are required to pay a \$150 filing fee, even when proceeding *in forma pauperis*; 3) plaintiffs are required to pay defendants’ costs (particularly for transcriptions) if plaintiffs lose and these costs can no longer be waived by the judge; 4) judges are permitted to consider and dismiss cases prior to service of process, without notice to plaintiff and without an opportunity to respond; 5) unless a judge deems a case to have a reasonable chance of prevailing on the merits, named defendants have no obligation to respond to the complaint; 6) if an inmate is needed in a hearing or motion in court, technology is to be used to allow them to participate from jail; 7) inmates are unable to collect damages for mental or emotional harm if there has not been a showing of actual physical injury; 8) if a plaintiff is awarded damages, the full amount is payable towards court-ordered restitution and the plaintiff receives only the remainder; 9) attorney’s fees have been limited to 150% of the total award or 150% of rates authorized for court appointed counsel; and 10) the legislation applies to all non-habeas current prisoners.⁵⁸

This long list of provisions is obviously significant. The exhaustion requirement has emerged as the greatest obstacle to successful inmate suits, and inmate suits nationwide have declined significantly as a result. Two other legislative developments

⁵⁷ *Id.* at 1559.

⁵⁸ *Id.* at 1627-1632.

have also likely contributed to the decline in federal inmate litigation. First, the same appropriations bill that contained the PLRA also prohibited all legal services organizations that receive federal funding from representing inmates.⁵⁹ Second, only two months before the passage of the PLRA, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA) which held that inmates could only have one round of habeas review and had to file any appeals within one year. The Supreme Court was not far behind Congress in contributing to a decrease in inmate litigation. That same year, the Court held in *Lewis v. Casey*⁶⁰ that the lack of a law library was not a constitutional violation unless it could be shown that it had actually hindered the inmate from pursuing a legal claim. Each of these developments in 1996 has contributed to the steep decline that has been witnessed nationwide in inmate litigation. Given these national trends, the question remains as to why prison reform litigation has remained at the forefront of the judicial and political landscape in California.

IV. Judicial Prison Reform in New York, Florida, and Texas

California's recent trend in judicial involvement in prison reform appears to be unique when compared to the experiences of the nations other three largest prison systems: New York, Florida and Texas. As of 2004, the federal and state prison populations in these states were recorded as follows: New York, 63, 751; Florida, 85,533; California, 166,556; and Texas, 168, 205.⁶¹ We'll consider each in turn.

New York's prison population is the fourth largest in the nation and yet the federal judges in New York have refrained from assuming an overly participatory role in New York's prisons. There are two issues which plague New York's correctional system.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Information available at www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf.

The first is that New York's prisons are being largely populated by non-violent, often times first-time drug offenders as a result of the controversial Rockefeller Drug Laws enacted in 1973. These laws require judges to give mandatory minimum sentences to drug offenders without regard to "their background, character, role in the offense, or threat to society."⁶² Further, judges are no longer able to direct offenders to treatment centers rather than into the prisons; discretion has been shifted almost entirely out of the hands of the judges and into the hands of the prosecutors.

The second predominant issue in the area of corrections is the fact that so many of the prisons are located in rural upstate New York, effectively skewing census results.⁶³ Prisoners held in facilities in remote locations are counted as residents of those counties, resulting in redirected state and federal funding, as well as potentially affected the number of Congressional seats allocated to those districts. While the majority of actual residents (and accordingly correctional officers and prison staff members) are white, the majority of prison inmates are black or Hispanic.⁶⁴ As a result, resources are being diverted away from many of the impoverished, minority neighborhoods where the offenders actually reside and where the resources may be most desperately needed. Alternatively, building the prisons in rural upstate New York creates jobs for communities there that would otherwise suffer from higher unemployment rates. Since this is a significant economic benefit to their districts, the representatives from those regions are unlikely to contest the benefits of the Rockefeller Drug Laws because to do so would be directly against the interests of their constituents. Accordingly, the Rockefeller Drug Laws and the displacement of residents are issues which will likely continue to

⁶² See <http://www.drugpolicy.org/statebystate/newyork/rockefellerd/index.cfm>.

⁶³ See <http://www.prisonersofthecensus.org/newyork.shtml>.

⁶⁴ *Id.*

trouble New York's prison system. New York's judges, however, have yet to issue rulings that would significantly alter the effects of either issue.

Florida, a state with a population of approximately 18 million people, has fifty-nine major correctional facilities.⁶⁵ Before the expansion of the prison system throughout the 1980's, prison inmates rioted in the early 1970's to protest crowded conditions.⁶⁶ In response, the head of Florida's prison system stopped accepting prisoners altogether. In that same year, inmates sued to obtain better health care, food, and less crowded conditions for the 10,000 inmates that were incarcerated at that time. A federal judge agreed with inmates that prisons were unconstitutionally crowded and gave the state six years to build sufficient facilities. While Florida immediately began expanding the prison system and adjusted the formulas used for capacity limits, the state also began implementing programs like "gain time," which allowed prisoners to reduce the length of their sentences through good behavior and administrative discretion. Unfortunately, the reforms mandated by the lawsuit failed to fully reform the system. Also in the 1980s, there was a population boom in Florida and an increase in drug-related crimes. The introduction of sentencing guidelines and the elimination of parole, along with the later revocation of gain time has left the prison system in Florida once again badly in need of reform.

⁶⁵ For population information, please see <http://www.stateofflorida.com/Portal/DesktopDefault.aspx?tabid=95>. It is the fourth largest state in terms of population, following only California, Texas, and New York. For information on Florida's correctional facilities, please see <http://www.dc.state.fl.us/oth/faq.html> ("As of June 30, 2005, Florida had 128 prison facilities, including 59 major institutions, 37 work/forestry camps, one treatment center, 26 work release centers and five road prisons).

⁶⁶ See Hatcher, C. *How Florida Became a Prisoner of its Own Mistakes*. Palm Beach Post, March 23, 1997 at Opinion.

Like California, Florida's prison healthcare system has been attacked for insufficiently meeting inmates' needs, particularly in the area of mental health.⁶⁷ Unlike the judicially mandated remedies which are taking hold in California, however, the prison system in Florida is pursuing a different path: that of privatization. Just this month,⁶⁸ the state announced that it was turning over the health care of 14,000 inmates in thirteen prisons in the southern part of the state to Prison Health Services (PHS).⁶⁹ PHS was awarded the ten-year contract after underbidding the current health care provider by millions of dollars. While new management may be a welcome change, there is a great deal of skepticism that PHS was the right choice. A *New York Times* investigation exposed that the sub-standard care that was previously provided by PHS has resulted in fifteen inmate deaths in eleven Florida prisons in the past 13 years.⁷⁰ By submitting a bid that is so far below what the current healthcare costs are certainly does not encourage faith that the quality of services delivered are likely to improve anytime soon. Lawsuits, on the other hand, are surely soon to follow if the system isn't strengthened. Whether or not these lawsuits will lead to substantial judicial intervention in Florida as we have seen in California remains to be seen. California currently appears to stand alone.

As indicated by the 1970's reforms in Florida, Judge Henderson's rulings are not completely unprecedented. The clearest example of far-reaching judicial activism in prison reforms is that of Judge William Wayne Justice who took control of the Texas prison system in the landmark case of *Ruiz v. Estelle* in 1972. His ruling that conditions in the prison system violated constitutional rights of inmates left Texas's prison system

⁶⁷ See Hammett, Y.C. *Prisons Fail to Help Mentally Ill*, Fort Pierce Tribune. Apr. 29, 1998, Sec. A.

⁶⁸ January 2006. See Hollis, M. *Private Firm Promises to Save Millions by Taking Over Health Care at Prisons*, Sun-Sentinel. Jan. 10, 2006.

⁶⁹ *Id.*

⁷⁰ *Id.*

under federal oversight for over 28 years.⁷¹ When the PLRA was passed in 1996, however, one of its other many provisions required a showing of “specific evidence to maintain authority over a state prison system.”⁷² In another extreme measure, in March of 1999, Judge Justice held that the entire PRLA was unconstitutional and upheld his earlier rulings in the never-ending *Ruiz* case. While he had single-handedly played a major role in reforming Texas’s prisons over nearly thirty years, in March of 2001, the appellate court upheld the PRLA and gave Judge Justice ninety days to “justify to the satisfaction of the Fifth Circuit why he – and not Texas – should operate the state’s prison system.” With this ruling, the Fifth Circuit effectively ended Judge Justice’s crusade to personally supervise Texas’s prisons. Of course, one judge’s mission in Texas does not explain why judges in California have within the last decade really seemed to take notice of the need for prison reform. There are clearly particular dynamics at play in California’s recent experience, but Judge Justice of Texas certainly provides us with some valuable insight into the role that individual judges can play in large-scale institutional reform.

Having considered the prison systems of New York, Florida, and Texas, it appears that since the prison reform movement of the 1970’s, judges elsewhere have not assumed as active a role in prison reform as we are currently witnessing in California. It is true that “[w]ith some of the highest costs per inmate, the most violence, the highest rate of parolees going back to prison and the most crowding, California’s corrections system is unlike any other system in the United States.”⁷³ Michael Jacobson, director of the Vera Institute of Justice in New York and the former head of New York City’s jail

⁷¹ *Coryn Announces Major Ruling in 1972 Ruiz Prison Case*. Office of the Attorney General News Release Archive, Tuesday, March 20, 2001 (available at <http://www.oag.state.tx.us/newspubs/newsarchive/2001/20010320ruiz.htm>).

⁷² *Id.*

⁷³ *Id.*

system, even remarks, “There’s California, and then there’s the rest of the country.”⁷⁴

With such a unique predicament, it is little wonder that California has generated a unique response. The pertinent query then becomes: what is responsible for that response being an increase in judicial activism in reforming California’s prison system?

Perhaps the most ironic aspect of the extended judicial battles is the fact that for many prison administrators, the courts’ intervention is a welcome occurrence.⁷⁵

V. What Accounts for California’s Judicial Activism?

There are two clear influences that seem to have contributed to the recent rise in judicial activism in California. First of all, California’s Prison Law Office is a unique and formidable presence on the legal landscape. Second, California has homegrown a Judge Justice of the West. Sitting as a federal district court judge in San Francisco, Judge Thelton E. Henderson seems to have a mission of his own. Beyond these two obvious factors, I believe that there is an underlying sense of fiscal frustration in California that has manifest itself in prison reform. I believe that constituents, as well as the judicial branch itself, has lost faith in the ability of the executive and legislative branches in California to reform prisons as necessary. I will consider each factor in turn.

A. The Prison Law Office

The Prison Law Office (PLO), located in Oakland, is a powerhouse force to be reckoned with. The small staff of ten attorneys has been bringing prisoner lawsuits for the last 25 years.⁷⁶ They have experienced great success rates; federal and state court currently monitor progress on seven cases initiated by the PLO, including the landmark case from Pelican Bay. Their cases have ranged from asserting the rights of prisoners

⁷⁴ *Id.*

⁷⁵ Reflects statements made by Jeanne S. Woodford, Undersecretary of the CDC, to Stanford Law students.

⁷⁶ See <http://www.prisonlaw.com/about.html>.

with disabilities and psychiatric problems to an overhaul of California's correctional youth facilities as of one year ago.⁷⁷

The PLO generally limits its assistance to cases challenging conditions of confinement.⁷⁸ In other words, the PLO rarely accepts cases challenging individual criminal convictions. In order to assist those that they are not able to directly represent, the PLO publishes an annual handbook explaining rights and responsibilities of inmates in California, as well as strategic advice for prisoner litigation. I suspect that this is quite helpful to inmates and their families, especially given the Supreme Court's ruling in *Lewis v. Casey* that significantly limited the claims that prisoners can assert regarding the availability of law libraries within prisons. The presence of a third party monitoring rights of inmates certainly encourages interested parties. Much like the oft-made suggestion to have police officers investigate allegations of prison guard brutality to maintain the integrity of the process, having the PLO as a watchdog strengthens the judicial process in California.

The services that the PLO provides are unique nationally, and even those offices elsewhere that provided comparable services been severely scaled back since the PLRA required legal services offices to cease representing prisoners in order to receive federal funding. The PLO is sustained purely on percentages of damages awarded to their clients. This allows them to continue to represent California's prisoners without consideration for the financial consequences. The existence of a well-qualified organization dedicated to ensuring prisoner rights is unique to California and the well-chosen and expertly

⁷⁷ *Id.*

⁷⁸ *Id.*

developed cases have presented prime opportunities for the reviewing judges to find and rectify the undeniable constitutional violations which characterize the current system.

B. Judge Henderson's Personal Agenda

Judge Henderson has often been the reviewing judge in question and he has indeed seized the opportunities to mandate much-needed reforms. Judge Henderson was born in Shreveport, Louisiana, but moved to California with his family at a young age.⁷⁹ He graduated from high school in Los Angeles and went on to receive his undergraduate and law degrees from the University of California at Berkeley. Upon his graduation in 1962, he was the first African American hired into the Civil Rights division of the United States Department of Justice. He went on to lead a distinguished legal career in Northern California, including serving as an Assistant Dean of Stanford Law School.⁸⁰ When he was appointed to the Federal Court in 1980, he became only the second African American ever appointed to the bench for the District in Northern California. He later became Chief Judge of the United States District of Northern California, the first African American to ever reach that position.⁸¹

Judge Henderson is the son of a domestic worker and janitor and has spent much of his career being the “‘first or only’ African American in his field.”⁸² His career has spawned the course of the Civil Rights Movement and his decisions often reflect the lessons that he’s learned as a legal activist throughout his life and career. While “few judges provoke the ire of conservatives more than [Judge] Henderson,” commentators also recognize that “[o]ur country is divided over the role that judges should play in

⁷⁹ See <http://www.thehistorymakers.com/biography/biography.asp?bioindex=735&category=lawMakers>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See <http://www.newsreel.org/nav/title.asp?tc=CN0182&s=>.

enforcing the law. Henderson's rulings, often protecting the constitutional rights of the dispossessed, demand each of us to scrutinize the complex interplay between the law, political power and social justice."⁸³

While he has received a great deal of praise for his protection of civil rights, he has also infuriated many who perceive judicial activism to be an undeniable threat to the rule of law. The proclaimed necessity of an independent judiciary has led conservatives to go so far as to call for Judge Henderson's impeachment following his decision overturning Proposition 209, "a voter-approved measure that barred state and local governments from using race- and gender-based preferences in education, contracting and hiring."⁸⁴ His decision was overturned by the Ninth Circuit, but not before drawing a great deal of criticism regarding Judge Henderson's judicial activism.

A helpful definition of judicial activism is offered by Dr. Paul M. Johnson. He explains that "judicial activism" refers to:

[t]he view that the Supreme Court justices (and even other lower-ranking judges as well) can and should creatively (re)interpret the texts of the Constitution and the laws in order to serve the judges' own considered estimates of the vital needs of contemporary society when the elected "political" branches of the Federal government and/or the various state governments seem to them to be failing to meet these needs. On such a view, judges should not hesitate to go beyond their traditional role as interpreters of the Constitution and laws given to them by others in order to assume a role as independent policy makers or independent "trustees" on behalf of society.⁸⁵

Under this definition of judicial activism, it is hard to deny that that is precisely what Judge Henderson has taken it upon himself to do. But for many prisoners, his willingness

⁸³ *Id.*

⁸⁴ See <http://www.acsblog.org/assault-on-the-judiciary-1278-who-are-these-judges-under-attack.html>.

⁸⁵ See http://www.auburn.edu/~johnspm/gloss/judicial_activism.

to do so may prove to be their only real option for reform given that the other branches of government are indeed failing to meet their needs.

C. California's Unique Political Climate

California has floundered, as the rest of the nation has looked on, to find stable and credible political footing. Beginning with the impeachment of Gray Davis and, in many circles, exacerbated by the election of Governor Schwarzenegger,⁸⁶ the executive branch in California has come under considerable scrutiny in the last few years. The executive branch's inability to establish and maintain a fiscally sound budget, the financial scandals surrounding pension funds in Southern California and individual politicians from across the state, and the energy crises have left Californians, judges and otherwise, wary of the competence and reliability of the executive branch. In the area of corrections specifically, Governor Davis's inability to resist the demands of the union and Governor Schwarzenegger's apparent willingness to generously negotiate the union's terms have cast further doubt on the reliability of the executive branch to spur reform.

Recent attempts to salvage the role of the executive branch in prison reform have proved disappointing.⁸⁷ For example, during the 2004 State of the State address, Governor Schwarzenegger added the word "Rehabilitation" to the name of the California Department of Corrections (CDC), signaling that he recognized the system was in need of significant revamping.⁸⁸ Ironically enough, however, his next steps seemed to move away from this commitment. He shunned the advice of his own blue-ribbon committee which insisted that outside civilian control would be necessary to assure change and instead

⁸⁶ See http://realcostofprisons.org/blog/archives/challenges_to_civil_liberties/ ("Governor Arnold Schwarzenegger has a commitment to prison reform that no other governor has had but still has failed to make any significant reforms.")

⁸⁷ See Daniel B. Wood, *California Tackles Its Prison Problem*, Christian Sci. Monitor, July 20, 2004.

⁸⁸ See *In the Name of Prison Reform*, San Francisco Chronicle, Jan. 19, 2005 at B8.

vested more authority in his corrections secretary; he announced his intention to cut \$95 million worth of inmate rehabilitation programs; and he proposed adding 1500 new employees and \$250 million in spending to the system.⁸⁹ By doing so, the California prison budget would expand to \$7 billion – more than twice the amount that the state spends on higher education.⁹⁰

The legislature has similarly failed to advance significant prison reform. Many critics point to a single obstacle to meaningful legislative action: the California Correctional Peace Officer's Association (CCPOA).⁹¹ The CCPOA has developed into one of the most influential political interest groups in California.⁹² While many labor unions engage in political activities, the CCPOA has exceeded those of all others in California. In fact, political contributions made by the CCPOA in the 1998 and 2000 election cycles exceeded those made by the California's Teacher Association (CTA), although the CCPOA is only one-tenth their size.⁹³ The varied lobbying activities that the CCPOA engages in, such as spending through political action committees, hiring public relations firms and retaining polling groups, are legal, but their combined effect has had significant ramifications on the state's correctional system and seriously influence the legislature. The politicians dependent on campaign contributions from the CCPOA are unwilling to champion the much needed prison reforms. It is unsurprising that "[w]hen the CTA exerts political influence, class sizes get smaller. When the CCPOA exerts power, more people are incarcerated."⁹⁴ This reality makes it difficult to rely on the legislature to rectify a

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See http://www.cjcg.org/cpp/political_power.php (last visited Jan. 25, 2006).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

quickly deteriorating situation. Given the lack of faith of so many Californians, it is of little surprise that native judges, like Judge Henderson and his colleagues, would recognize, along with many others, that the judicial branch may be the last hope for prison reform.

VI. Policy Implications of California's Judicial Activism

It is now clear that California is in the midst of a historic prison reform effort, spear-headed by Judge Henderson, but made necessary by the failures of the executive and legislative branches to require the California Department of Corrections and the prison guard union to act in conformity with the constitutional rights of prisoners. The unique climate surrounding the wide-reaching judicial decisions of the last decade is due to the courage of the individual judges, the tenacity of the Prison Law Office, and the public skepticism of the competence of California's government. It would be unfair to say that the judges who have decided the major cases highlighted above are actively seeking opportunities for reform. Rather, the cases that are brought to them (particularly when brought by the PLO) are rarely cases to be decided on the margins – they are cases of outright physical abuse, medical malpractice, and denial of fundamental rights. To not find in favor of the plaintiffs seeking protection would in many instances constitute complicity by the courts in allowing heinously morbid acts to be perpetuated upon some of society's most forgotten members.

If Judge Henderson were to retire in the near future, one wonders whether or not there would be another judge similarly inclined who could continue the movement that he has sparked towards prison reform. I believe that that is not an issue to be troubled by. Rather, I predict that as long as the PLO is actively pursuing the rights of prisoners and

the CDC is severely violating them, the judiciary will be left with no option but to intervene in prison reform. Other areas such as education and environmental protection have received a great deal of attention in the past given their controversial nature and the involvement of interested third parties. Federal agencies which regulate them, non-profit organizations which advocate for them, and empowered citizens who fight the daily battles ensure that if the judicial branch is not as actively involved in their management as it has been in days past, these areas of public concern will continue to experience lively debate and responsible management. The prison system in America, and in California in particular, presents a different beast.

Without continued judicial intervention, the CDC will continue to fail, inmates will continue to die, and the union is likely to continue to yield a costly influence over California's prison system. In order to avoid this fate, judges like Judge Henderson should be applauded and his requests to meet with and work with the other branches of government must be obliged. Without the strength and perseverance of California's federal judges and the PLO's tireless attorneys, the rights the Constitution grants to incarcerated populations would become little more than afterthoughts remembered only in the wake of more dead inmates. While the need for continued involvement of the judiciary seems necessary, it is not without consequences.

The most troubling consequence of a system that is largely dependant on litigation for meaningful reform is that millions of dollars are spent annually in defense as well as settlement fees. The resources that are dedicated to challenging prisoner lawsuits, financial as well as in terms of labor, may be misplaced given the critical need for staffing and funding to improve prison conditions and programs. Perhaps the most ironic

aspect of the extended (and expensive) judicial battles is the fact that for many prison administrators, the courts' intervention is a welcome occurrence.⁹⁵ Once an opinion has been handed down mandating reform, the administrators find themselves in better negotiating position for requesting additional funding for programming, staffing, and facilities. Many administrators recognize that they are overwhelmed and in need of direction in addressing the mammoth problems facing the correctional system. For them, the bitter pill to swallow is that the court not only instructs them on what to change, but also instruct them on precisely how.

There are several policy changes that may alleviate a bit of the tension between the judges and the prison administrators when it comes to a discussion of how to run a prison. First of all, judges should be sure to fully utilize prison experts who have spent their entire careers inside prison walls and who have far more credibility with prison administrators.⁹⁶ Second, prison administrators should be willing to work towards pursuing a less adversarial relationship with the Prison Law Office. Moving in a promising direction, "Bruce Slavin, lead attorney for the California Youth and Adult Correctional Agency, said the relationship between state officials and the Prison Law Office has become less confrontational and more constructive in recent years."⁹⁷ It is imperative that the relationship continue to progress towards partnership, or the costs of antagonistic litigation will continue to skyrocket. Finally, lawmakers must implement an incentive structure for prison administrators that counters the influence of the prison guard union. The strength of the union has resulted in a "code of silence" that has

⁹⁵ Reflects statements made by Jeanne S. Woodford, Undersecretary of the CDC, to Stanford Law students.

⁹⁶ See footnote 53 and accompanying text referring to Judge Henderson's opinion offering findings of fact supporting his opinion in *Plata v. Schwarzenegger*. These findings were largely based on expert reports.

⁹⁷ *Guardians of the Guarded*, Schmidt, S. San Diego Union-Tribune. July 5, 2005.

severely hindered transparency in the system.⁹⁸ One possible way to do this is to ensure that the media's access to prisoners is unhindered, a critical component of successful, and publicly accountable, prison reform and an area in which California has fallen short in the past. If correctional officers are immune from exposure, prisoners will need to fight ever harder to bring ongoing abuses to the forefront of California's public policy debates. Litigation certainly remains the most available, and arguably the most effective, means of doing so.

VII. Conclusion

Unrestrained judicial activism can certainly undermine the efficacy of prison reform efforts initiated by both the executive and legislative branches. Given the absence of any significant achievements by either branch in California, however, it is unsurprising that federal judges have taken it upon themselves to guide the system's overhaul. The rights that prisoners in California have secured in the last decade, such as the right to basic medical and mental health care, have not magically materialized. The necessary changes in nearly every category in need of reform will be achieved slowly, and at great expense. Nonetheless, a judicial opinion assuring prisoners that they are in fact entitled to those rights may give them the hope to survive within the system until a new day dawns on California's adult correctional system.

⁹⁸ *Acquittal of prison guards: Time to End the Code of Silence*, available at <http://web.amnesty.org/library/Index/ENGAMR510982000?open&of=ENG-380>, June 15, 2000 (last visited January 26, 2006).