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Defendant Compliance In Public Law Litigation

A Case Study of *Bullington v. Moreland*

St. Louis County Jail

I. The Framework: Public Law Litigation

In his seminal article, *The Role of the Judge in Public Law Litigation*, Professor Abram Chayes coined the phrase "public law litigation" (also labeled structural or institutional reform litigation) to refer the development of a new brand of civil rights case.[1] Unlike the "traditional model" of adjudication, public law litigation did not seek redress of private wrongs through payment of money damages. Rather, it sought to reform the law and effect change in public policy through implementation of court-ordered decrees.[2]

According to Chayes, the traditional model of litigation has several distinct characteristics. It is bipolar, party controlled, retrospective, and self-contained. The case is defined by exchanges between the parties and the trial judge is a neutral intermediary who decides questions of law only if they are put

[1] *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harvard Law Review 1281, 1284 (1976).
[2] Chayes states, "the centerpiece of the emerging public law model is the decree." *Id.* at 1298. *But see* Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 Harvard Law Review 58 (1982) (noting that it is the nature of the controversy, the sources of the governing law, and the consequent impact of the decision–rather than the form of relief–that differentiate public law from traditional model of adjudication).

in issue by the parties. In the traditional model, right and remedy are interdependent: the scope of the plaintiff's relief is derived from the defendant's substantive legal violation under the theory that the plaintiff's compensation should be measured by the harm that was directly caused by the defendant.[3]

In contrast, public law litigation results in long-term restructuring and monitoring of government institutions such as public schools, mental hospitals, welfare agencies and prisons.[4] While public law litigation remedies are also based on a finding of liability, they are directed towards prospective governance of institutions rather than compensation for past injury.[5] Unlike the "passive arbiter of the traditional model," judges take an "active role in shaping, organizing and facilitating the [public law] litigation."[6]

Professor Chayes reasoned that the courts' independence, flexibility, and accessibility made them well suited for the task of holding institutions accountable, and believed that "public law courts were less subject to capture by selfish interests and better able to instigate fruitful dialogue among the relevant parties than the administrative agencies that might otherwise have oversight responsibility."[7] In spite of Chayes' belief that public law litigation would legitimate itself by "solving public problems that other institutions of the administrative state could not," however, the model has drawn substantial

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[3] *See* Chayes, *supra* note 1, at 1281.
[4] *Id* at 1284.
[5] *Id.*
[6] Id. at 1298.
[7] *Id.* at 1017.

criticism.[8] The principal argument against public law litigation is that courts cannot "undertake the restructuring of administrative agencies without trenching on the authority of the executive and legislative branches, and that federal courts could not undertake the restructuring of state and local agencies without compromising principles of federalism and local autonomy."[9] As Paul Mishkin notes, institutional reform consent decrees "involve the taking over of institutions of state or local government by federally-appointed lawyers neither chosen by nor responsive to an electorate, neither charged with nor even assuming responsibility for the ultimate directional thrust or effectiveness of the institutions of state or local government."[10]

The debate surrounding the legitimacy of public law litigation has not been confined to the academy. Courts and Congress have also disputed the constitutional appropriateness of reform litigation as well. Justice Powell, for example, stated that "it merits noting how often and how unequivocally the Court has expressed its antipathy to efforts to convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government."[11] Similarly, Congress restricted federal courts' jurisdiction to hear

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[8] *Id.*
[9] Sabel and Simon, *supra* note 8, at 1017-1018; *see also* Donald Horowitz, *Decreeing Institutional Change: Judicial Supervision of Public Institutions*, 1983 Duke Law Journal 1265 (1983).
[10] Paul J. Mishkin, *Federal Courts as State Reformers*, 35 Washington and Lee Law Review 949 (1978).
[11] *United States v. Richardson*, 418 U.S. 166, 192 (1974) (concurrence).

and remedy institutional reform cases through enactment of legislation limiting prison litigation.[12]

Critics also argue that courts are not well-equipped to develop solutions to social problems and that they have accordingly been ineffective in implementing their structural remedies. They disapprove of the fact that courts must often rely upon the personnel of the institutional defendant to disseminate and to implement court orders. As one theorist argued, "courts have few resources for guaranteeing compliance on the part of the defendants or for creating positive incentives to encourage adherence to judicial orders. Aside from the threat of a contempt order, courts must rely upon the moral persuasiveness of their judgments to acquire legitimacy. This highlights another deficiency in a court's ability to implement a remedy: its lack of resources for marshaling political and public support for its decrees, without which the court's efforts likely will fail."[13]

Despite criticism, the court's role in regulating institutions such as schools, prisons and housing through decree is well settled.[14] Scholars have

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[12] Prison Litigation Reform Act, 42 U.S.C. §1997e (2004).

[13] John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 California Law Review 1121, 1168 (1996).

[14] In National Rulemaking Through Trial Courts: The Big Case and Institutional Reform, 51 UCLA Law Review 1015, 1020 -1021 (2004), David Zaring states,

> "A wave of consent decrees in the mid-1990s has placed some of the largest public housing authorities in the country under judicial supervision. Moreover, the Department of Housing and Urban Development (HUD) has been authorized to pursue similar relief in the case of "troubled" housing authorities. Forty-five states are either facing lawsuits designed to reform public school funding or have changed their funding practices in

differed in their analysis of this litigation. Some view public law litigation as "judicial policy making" involving "translation of policy goals into legal doctrine."[15] Others see public law litigation as a "negotiating process between plaintiffs' attorneys, various court-appointed functionaries, and lower-echelon officials."[16] David Zaring labels these theoretical perspectives "unilateralism" and "multilateralism".[17]

Unilateralists focus extensively on the judge as the central actor in resolving disputes. This "conception of adjudication starts from the top—the office of the judge—and works down . . . at the core of structural reform is the judge, and his effort to give meaning to our public values."[18] Multilateralists, on the other hand, maintain that the judge in institutional reform litigation is merely one player in an extensive cast of characters. Their focus is on plaintiff's counsel, whose resources, strategies and priorities shape consent decrees, even on policy

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> response to such suits. One out of every ten school districts is under a consent decree. Meanwhile, over four hundred correctional institutions operate under court orders. As a consequence, vast numbers of government institutions throughout the country continue to be subject to the supervision of district courts. In fact, this year the Court once again reaffirmed the constitutionality of this supervision, noting that once entered, a consent decree may be enforced by the trial court overseeing it."

[15] Daniel Farber, *Stretching the Adjudicative Paradigm: Another Look at Judicial Policy Making and the Modern State* 24 Law & Society Inquiry 751, 753-54 (1999) (book review).
[16] Ross Sandler & David Schoenbrod, Democracy by Decree: What Happens When Courts Run Government 10 (2003).
[17] Zaring, *supra* note 16, at 1021.
[18] Owen Fiss, *The Supreme Court, 1978 Term--Foreword: The Forms of Justice*, 93 Harvard Law Review 1, 17, 41 (1979).

issues not originally involved in the lawsuit and about which there may be no evidence of a legal violation.[19]

It is important to note that defendants and their attorneys also play a substantial role in the negotiation of consent decrees and their subsequent implementation. Colin Diver questions why a defendant, who has systematically violated plaintiffs' rights, would take a leading role in designing and implementing the remedy for its own improper actions.[20] There are several reasons: defendant's participation plays a crucial part in promoting cooperation with the remedy, produces better substantive outcomes by producing a dialogue among actors with different perspectives on the causes of the underlying problem and the impact and feasibility of proposed solutions, and serves an educational function by informing those responsible for implementation about obstacles and potential solutions to problems.[21]

Multiple factors motivate defendants to comply with consent decrees. The first is the threat of court action: without compliance, a judge could enforce its

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[19] *See, e.g.,* Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 Michigan Law Review 1994, 1997 (1999); Sandler and Schoenbrod, *supra* note 18, at 62; Susan Poser, *What's a Judge to Do? Remedying the Institutional Reform Litigation*, 102 Michigan Law Review 1307 (2004) (book review).

[20] Colin Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Litigation*, 65 Virginia Law Review 43, 82 (1979).

[21] *See* Susan Sturm, *The Legacy and Future of Corrections Litigation*, 142 University of Pennsylvania Law Review 639, 655 (1993); Susan Sturm, *The Promise of Participation*, 78 Iowa Law Journal 93 (1993).

order by holding defendant in civil contempt or imposing similar sanctions.[22] If defendants take the court's power seriously and view contempt as a realistic threat, they "[react] by improving their efforts, changing policies, or agreeing to changes in the decree."[23] A second motivation for compliance is that defendant administrators operating under fiscal and political constraints frequently "win by losing," that is, a consent decree provides access to resources and provides for operational changes that improve the institution.[24] Finally, jail administrators may maintain compliance because they believe that doing so will satisfy their legal obligations under the Constitution, even at facilities to which the decree does not apply. The following case study of Bullington v. Moreland[25] analyzes the role of these factors in defendant administrator compliance with a correctional court order.[26]

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[22] The court's powers to enforce a consent decree include interpreting the decree, issuing injunctions to implement the decree, granting supplemental relief, delegating authority to a special master, and holding a party in contempt of court. Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 University of Illinois Law Review 729, 737 (1986).

[23] *Id.*

[24] Schlanger, *supra* note 21, at 2012. Sandler and Schoenbrod similarly note, "Officials can expand and protect budgets and programs, trump political bodies, gain protection against even more stringent laws and rules, and avoid the risk that a judge might impose a worse remedy." Sandler and Schoenbrod, *supra* note 22, at 171.

[25] *Bullington v. Moreland*, No. 79-650-C(3), (E.D. Mo. Filed May 23, 1989, consent decree entered August 30, 1983).

[26] Colin Diver articulates two categories of defendants in public law litigation: executive officials and operating managers. Operating managers have direct responsibility over jail facilities, while executive officials are mayors or governors and are sued in their official capacity. This analysis is limited to a discussion of the motivations of defendant operating managers, the administrators responsible for the implementation of the consent decree. See Diver, *supra* note

II. Bullington v. Moreland: A Case Study

Background

St. Louis County opened its first jail in 1878.[27] Two renovations of the original building were completed before County voters approved a bond issue in 1945 that allowed construction of a new courthouse building housing the County Jail on its 4th floor.[28] This facility, which faced Forsyth Boulevard in Clayton, was completed in 1949.[29] The County began detaining inmates at a new minimum security facility, the Adult Correctional Institute at Gumbo in 1969, after a change in state law allowed detention facilities to be built outside of the county seat.[30] Both facilities were operated by the St. Louis Department of Justice Services until the Buzz Westfall Justice Center opened in 1998.[31]

Conditions at the St. Louis County Jail in Clayton were called into question in 1979 when Robert Ernest Bullington, an inmate pending trial on a charge of first degree murder, filed suit pro se. Named defendants were Warden Edward Moreland, Associate Warden Joseph Breeding, and Correctional Officer Aaron Mensey.[32] The complaint alleged that defendants had violated

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22, at 70. While Gene McNary, (an executive official under Diver's formulation) was also named in the suit, he declined to be interviewed about his role.

[27] http://www.co.stlouis.mo.us/plan/factbook2002/History.pdf

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Warden Moreland was the Director of the Department of Justice Services, and Associate Warden Breeding was second-in-command at the Department of Justice Services. Correctional Officer Aaron Mensey was responsible for seizing

Bullington's First and Fourteenth Amendment rights by seizing copies of magazines that had been mailed to him without allowing him the opportunity to read them.[33] Plaintiff sought a temporary injunction forbidding such seizure. The case was assigned to Judge Edward Filippine,[34] who appointed James Leslie Thomas to represent the plaintiff.[35]

When Thomas met with Bullington to discuss the lawsuit, he discovered that plaintiff's grievances extended beyond magazine seizure to include cell overcrowding, lack of medical attention, lack of clean bedding and clothing, lack of recreation time, inadequate visiting facilities, and poor food.[36] Thomas subsequently interviewed inmates Steven Toney, Glen Reynolds and Michael Clark, who substantiated these complaints.[37] On September 4, 1979, Thomas

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plaintiff's magazines. *Plaintiff's Motion for Temporary Injunction*, filed May 23, 1979.

[33] *Plaintiff's Brief in Support of Temporary Injunction*, filed May 23, 1979.

[34] Judge Filippine was appointed to the Federal District Court for the Eastern District of Missouri Court in 1977 and served as Chief Judge from 1990-1995. http://www.aaslh.org/frid.htm

[35] Thomas was admitted to the Missouri bar in 1975. He was a solo practitioner in St. Louis until 2000, when the Supreme Court of Missouri suspended him with no right to petition for reinstatement for six months for bringing a frivolous proceeding based on false allegations, failing to properly supervise his trust account and failing to act with reasonable diligence in representing a client. *See* http://www.illinoisbar.org/Association/024-15e.htm. Following his suspension, Thomas opened a general private practice in Waynesville, Missouri, where he is still an attorney. Telephone Interview with James Leslie Thomas, Esq. (10/07/04).

[36] Thomas interview, *supra* note 37.

[37] The record notes that these inmates were all charged with felonies and were unable to post bond, but does not indicate the length of time that they were ultimately detained at the St. Louis County Jail. *Plaintiffs' Amended Complaint for Declaratory Judgment, Injunctive Relief, and Other Appropriate Relief*, filed October 5, 1979.

filed a motion for intervention on behalf of Toney, Reynolds and Clark, a proposed amended complaint and a motion to join Gene McNary, County Supervisor, as a defendant. The motions for intervention and joinder were granted on September 5, 1979. At that time, Judge Fillipine dismissed the case as to defendants Breeding and Messing. Attorneys Thomas W. Wehrle, St. Louis County Counselor, and Donald J. Weyerich, Special Assistant County Counselor, represented the defendants in the litigation. [38] Defendants' principal counsel was Weyerich, while Wehrle's involvement in the case was superficial.[39]

Plaintiffs filed an amended complaint seeking declaratory and injunctive relief on October 5, 1979, alleging "shocking, dehumanizing, illegal and unconstitutional conditions."[40] These included: overcrowding by excess population; cold food and inadequate portions thereof; substandard medical dental facilities; lack of a serviceable library; failure to provide prisoners with jail rules; inadequate ventilation and sanitation; censorship of mail coming from attorneys and courts; random strip searches; inadequate visitation facilities; internal

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[38] Wehrle worked in the County Counselor's office from 1963 – 1990, and held the position of County Counselor from 1975-1990. He was appointed to the office by Gene McNary, County Supervisor, a Republican. Prior to his tenure with the County Counselor's office, Mr. Wehrle was in general practice as a partner in the law office of Wehrle & Wehrle. He is now a partner at the St. Louis law firm of Gallop, Johnson and Neuman. Telephone interview with Thomas Wehrle, Esq. (10/26/04). Weyerich practiced at the County Counselor's office for over 20 years and is now deceased. Telephone interview with Chris McCarthy, Esq., Head of Litigation Department, St. Louis County Counselor's Office (10/18/04).

[39] McCarthy interview, *supra* note 40.

[40] *Complaint*, *supra* note 39.

assaults; lack of recreation; and length of pretrial detention.[41] They claimed that the conditions brought about by the "willful and intentional acts, policies and omissions" of defendants constituted a violation of jail inmates' First, Fifth, Eighth and Fourteenth Amendments.[42]

On November 21, 1979, Thomas filed a motion requesting that the case be certified as a class action, to which he attached 35 letters from inmates articulating complaints about jail conditions.[43] Before Judge Fillipine had an opportunity to rule on the motion, the case was transferred to Judge John F. Nangle.[44] The reason for the transfer is not clear from the record. On February 20, 1980, Judge Nangle ordered that the action be maintained as a class action on behalf of "all persons who are detained or will be detained at the St. Louis County Jail awaiting trial on alleged offenses against the State of Missouri."[45]

On September 18, 1980, Judge Nangle appointed John Emde as plaintiffs' co-counsel after receiving letters from plaintiffs complaining that their appointed counsel was not acting in their best interest.[46]. The inmates alleged, *inter alia*, that "Mr. Thomas stated at the outset that he could not make any money on this

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[41] *Magistrate's Review and Recommendation*, filed June 22, 1983.
[42] *Complaint*, *supra* note 39.
[43] *Plaintiffs' Motion to Certify as Class Action*, filed November 21, 1979.
[44] John F. Nangle was appointed to the District Court for the Eastern District of Missouri in 1973. Before taking the bench, he was an outspoken Republican. Nangle later gained some notoriety when he was named by Chief U.S. Circuit Judge Roger Wollman to investigate misconduct complaints against Kenneth Starr in 2000. He now serves as a Senior Judge on the District Court for the Southern District of Georgia. http://www.uscourts.gov/ttb/dec00ttb/interview.html
[45] *Order to Maintain Action as a Class Action*, entered February 21, 1980.
[46] *Inmate Letter*, filed April 03, 1980.

case, [he] has refused to investigate the numerous attempted suicides, [he] is indifferent to the possibility of psychological damage to plaintiffs; and [he] has not notified the jail population that they are a part of the class."[47] Bullington v. Moreland was then referred to Magistrate Judge William S. Bahn[48] to conduct whatever proceedings deemed necessary to resolve conflicts as to the facts in the case. The Magistrate reviewed reports submitted by the parties, conducted an unannounced inspection of the jail, and held hearings during which counsel's arguments were considered and stipulations were made upon the record. Magistrate Bahn directed plaintiffs to submit a list of jail conditions to the court and directed defendants to draft and submit a plan to remedy those conditions agreed upon. Ultimately the parties reached a voluntary settlement, which was reviewed and recommended by the Magistrate.[49] The Magistrate's review and recommendation was filed and submitted to Judge Nangle, who ordered that the stipulation of the parties be accepted and that the new procedures set forth in the consent decree adopted.[50] The order went into effect on August 30, 1983. Although the first page of case's the docket sheet bears the stamp "CLOSED", the record does not indicate when or upon whose motion the case was formally closed.

The Specifics of the Consent Decree

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[47] *Id.*

[48] Magistrate William Bahn's law clerk from 1983 -1986, now a partner at the law firm of Armstrong Teasdale in St. Louis, declined to be interviewed (10/12/04).

[49] *Review and Recommendation*, *supra* note 43.

[50] *Order and Memorandum*, filed August 30, 1983.

The consent decree adopted by the parties made widespread changes to virtually every operational aspect of the St. Louis County Jail. It mandated a population cap that limited the jail's maximum capacity to 162 inmates, including those housed in the infirmary.[51] In addition, the order required construction of a library containing basic legal materials; establishment and distribution of printed rules and procedures for both jail staff and inmates; increased services from doctors and licensed practical nurses; a policy forbidding censorship of mail coming from attorneys and courts; limitations on strip searches; installation of a telephonic communication system; recreation opportunities and facilities; and procedures for housing juvenile offenders.[52]

Compliance and Effect

There was limited compliance monitoring following the conclusion of the case. The record does not indicate any court-established deadlines or motions compelling compliance. Thomas stated that plaintiffs' counsel never visited the jail after the order was issued.[53] This statement is likely inaccurate: the record indicates that Thomas' co-counsel assumed responsibility for monitoring compliance and jail records from 1992 list him as "Special Master" responsible for monitoring the case.[54] Indeed, one jail administrator recalled Emde having

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[51] *Stipulation of Parties*, filed June 22, 1983.
[52] *Id*.
[53] Thomas interview, *supra* note 37. Thomas' justification for not visiting the jail was that his appointment ended after his attorney's fees were paid.
[54] Bernsen interview, *supra* note 53.

made periodic inspections in the early implementation stages of the decree, but these inspections most certainly ceased after his death in 1995.

Despite lack of monitoring, defendants came into compliance with all provisions of the consent decree within a year of its issuance and remained in compliance until the jail closed in 1998.[55] The decree prompted changes that were both structural and operational: a new library and visitation area were installed; inmates were granted recreation time; the majority of the responsibility for cleaning and sanitation was shifted from inmate trustees to hired staff; and rules and disciplinary procedures for both inmates and staff were drafted and promulgated.[56]

Implementation of the consent decree resulted in substantial cost to the County. In 1980, the total budget for the Department of Justice Services was $3,763,911.[57] In the year preceding the consent decree, budget expenditures had risen to $4,787,703.[58] In 1984, the Department required $7,130,874 in operating costs, which continued to increase incrementally in 1985 and 1986.[59] While it is unclear exactly how the budget changes relate to the court order, the impact is best illustrated by the difference between the 1982 and 1984 appropriations for

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[55] *Id*.
[56] *Id*.
[57] At this time, the Department of Justice Services encompassed the St. Louis County Jail, the Intake Service Center, the Adult Correctional Institute at Gumbo, Adult Probation and Parole Services, and the inmate work program. *St. Louis County Budget*, Program and Personnel Detail, Department of Justice Services, 1980-1986.
[58] *Id.*
[59] *Id.*

the County Jail itself (as opposed to Justice Services as a whole.) In 1982, operational costs for the jail totaled $1,847,223. In 1984, they had risen to $2,676,443, a difference of almost $900,000.[60] In 1986, the County Jail's final appropriation exceeded $3 million.[61]

Budget increases were not confined to the County Jail. Changes to the Intake Service Center are reflected in the additional $252,421 that was allotted to that facility in the year following the decree. While the consent decree did not extend to the Adult Correctional Institute in Gumbo, jail administrators implemented many of the provisions at that facility as well. The budget for the ACI increased from $1,160,851 in 1982 to $2,112,169 in 1984. In this time, the County accommodated a Department of Justice Services request for $431,908 to construct and manage an addition to the facility, called the ACI Annex, to alleviate overcrowding. Furthermore, 18 additional correctional officers were hired; visitation, recreation and medical facilities were renovated to meet the standards set forth in the decree; a law library was constructed; and rules were promulgated for inmates and staff.[62]

Such rapid changes were not without consequence. Administrators found implementation of some portions of the decree unduly burdensome.[63] One example of this relates to inmate recreation: compliance with this provision

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[60] *Id.* Although the budget does not give an exact breakdown of expenditures, it does indicate that 30 personnel were hired at the St. Louis County Jail between 1983 and 1984. *Id.*
[61] *Id.*
[62] Bernsen interview, *supra* note 53.
[63] *Id.*

required transport from the fourth floor of the courthouse, where the jail was housed, to the newly constructed recreation facilities on the second floor.[64] The facility's security was called into question when three inmates, two convicted murderers and one convicted serial rapist, escaped during this process. Several days passed before these inmates were re-captured.[65] Similarly, inmates were able to stage a riot when a handgun attached to a pole was passed from the street through a window covering in the recreation area.[66]

Motivations For Defendant Compliance

Avoiding Court Action

Given lack of monitoring controls and the burden and cost imposed by the decree's implementation, it seems surprising that St. Louis County Jail administrators remained in substantial compliance for almost 18 years. One reason for adherence to the consent decree was the possibility of court action, such as civil contempt, if compliance was not achieved.[67] Herb Bernsen, Deputy Director of the St. Louis Justice Center and Former Director of ACI Gumbo, acknowledged that court action was a concern while the facility was being

[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *See, e.g., United States v. City of Yonkers*, 856 F.2d 444 (2d Cir. 1988) (affirming coercive contempt sanctions against municipality for violation of consent decree obligating city to remedy its highly segregated housing), cert. denied, 489 U.S. 1065 (1989); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 839 F.2d 1296 (8th Cir. 1988) (affirming civil contempt sanctions against school district for failure to comply fully with desegregation order), cert. denied, 488 U.S. 869 (1988); *Ruiz v. McCotter*, 661 F. Supp. 112 (S.D. Tex. 1986) (finding Texas Department of Corrections in civil contempt for its failure to comply with single-celling order in timely manner).

monitored. He noted, "we recognized that the possibility of court intervention existed, and we did all we could to avoid [it]."[68] These concerns ceased after compliance inspections were discontinued, however, a period that spanned at least three years.[69]

Financial and Operational Benefits

While the threat of court action may have encouraged defendant compliance initially, the benefits the decree provided motivated compliance for its duration. Bernsen noted, "Completely aside from the improvements for the inmates, the benefits of the consent decree to staff and administrators outweighed implementation problems without question."[70] Budget increases certainly evidence one benefit - the following example illustrates another.

The Bullington v. Moreland consent decree stipulated that the jail would be subject to a population cap of 162, divided into several different areas which inmates would be placed based upon classification and length of detention. While the population cap did not result in significant changes in total population (the average daily population of the jail in 1981 was 147 inmates), it did change the way in which inmates were housed. At the time the lawsuit was filed, a high

[68] There is nothing in the record to suggest that court action in would have actually been taken against defendants if they had not complied with the consent decree. Courts rarely use contempt of court to enforce consent decrees. The reasons for this phenomenon, one commentator notes, are that, "findings of contempt are blunt instruments, poorly adapted to solving subtle problems of implementation . . . [and] a finding of contempt implicitly recognizes that the spirit of consent and cooperation has died." Anderson, *supra* note 24, at 749.
[69] Bernsen interview, *supra* note 53.
[70] *Id.*

percentage of the inmates were housed in common rooms with dormitory-style bunks, and cells were generally reserved for those held in close confinement or isolation.[71] This layout was not a result of overcrowding but rather an attempt to maximize resources and staff. As a result, the facility was exceedingly difficult for correctional officers to supervise. Supervision problems were exacerbated by the maximum security nature of the inmates and the fact that the facility was windowless and poorly lit. Bernsen stated, "It was no secret that this jail was a nightmare to supervise. It was dark, the rooms were crowded, hallways were long, and the building was not really intended to be used [in this way]." The consent decree modified jail operations by mandating very specific limits on the number of inmates that could be housed in particular cell blocks or modules, including the infirmary. In effect, the order forced the jail to utilize all of its available space to minimize overcrowding. This also resulted in a safer facility for staff.[72]

St. Louis County Jail administrators were certainly not unique in their use of a consent decree as leverage to obtain resources. Charles Sabel and William Simon note that defendants subject to such decrees often "welcome the new resources that the decree induces . . . the remedy makes these resources available."[73] Colin Diver similarly argues that public law litigation defendants benefit from consent decrees because "translating a grievance into a demand for

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[71] *Id. See also Review and Recommendation, supra* note 43.
[72] Bernsen interview, *supra* note 53.
[73] Sabel and Simon, *supra* note 8 at 1017-1018.

resources, even when alternative remedial approaches exist, not only deflects responsibility from the operating manager but also gives him a powerful ally in the unending quest for additional funds."[74] Some theorists have criticized this phenomenon, suggesting that defendants actively collude with plaintiffs to obtain resources and to bind successors in interest.[75] One school desegregation consent decree was labeled "an excellent example of collusion between litigants in institutional reform litigation" in part because "the School Board quietly welcomed the lawsuit. It . . . favored desegregation yet lacked the political will to implement it. In that context, the lawsuit was a lifesaver."[76]

Collusion, however, was not probable in Bullington v. Moreland. While the decree afforded defendant operating managers new resources, joinder with Gene McNary, an executive official, likely offset their power to consent to particular provisions that would prejudice the County. As Colin Diver notes, "The Chief Executive's broad political accountability inevitably forces him to balance the plaintiff's demands against other competing demands for resources."[77] Defendants were represented jointly, and were therefore forced to "reach agreement on litigation strategy, performance standards, and other levels at very

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[74] Diver, *supra* note 22, at 71.
[75] See Jeffrey Standen, *The Fallacy of Full Compensation*, 73 Washington University Law Quarterly 145, 150 (1995).
[76] Carolyn Hoeker Luedtke, *On The Frontier Of Change: A Legal History Of The San Francisco Civil Rights Movement, 1944-1970*, 10 Temple Political & Civil Rights Law Review 1 (2000).
[77] Diver, *supra* note 22, at 81.

high levels of specificity" before the settlement was finalized.[78] The "thoroughgoing and detailed examination of an institution's workings"[79] required for joint defendants to reach such consensus effectively eliminated the possibility of collusion between defendant operating managers and plaintiffs in this case.

It is not entirely clear why St. Louis County Jail administrators did not attempt to make these changes absent a consent decree. There are a range of possibilities - "it is possible they were not inclined to do so, but it's also possible that they faced major coordination obstacles, or transaction costs, to doing so."[80] While many of the structural changes to the facility were likely to have been previously constrained by budget, the consent decree also mandated operational changes that had great impact but required little or no expenditure. One such example deals with the promulgation of jail rules.

When the lawsuit was initiated, the St. Louis County Jail did not have a policy of distributing rules to inmates. Instead, correctional officers used their discretion to determine whether an inmate had acted improperly and imposed an appropriate punishment. The consent decree required that that jail rules be submitted to plaintiffs' counsel for approval and then promulgated, printed and distributed to inmates upon entry into the institution. While a seemingly straightforward requirement, this provision was described "one of the most influential" in the decree because it provided a measure by which both inmates

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[78] *Id*. at 82.
[79] *Id.*
[80] Sabel and Simon, *supra* note 8, at 1066.

and staff could determine the outcome of particular actions.[81] The improvement in disciplinary practices, Bernsen noted, could not be overstated – "the rules really made a difference."[82]

This provision illuminates a pervasive legal debate arising from the opposition of rules and standards.[83] A rule is a norm that limits the range of factors that a decision maker can consider and typically dictates a particular decision upon a finding of facts. A standard allows the decision maker to justify a more general value by considering the full range of relevant facts in the context in which the dispute arises. "Inmates may receive one visit per week" is a rule, while "Inmates must conduct themselves properly during visits" is a standard. While rules sometimes require a decision maker to decide in a way that is inconsistent with the ultimate purposes of the rule, standards create controversy about how they should be applied, even to undisputed facts.[84]

In *The Rule of Law as a Law of Rules*, Supreme Court Justice Antonin Scalia notes several reasons for favoring rules over standards in adjudication.[85] These arguments prove helpful in understanding why distribution of printed rules

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[81] Bernsen interview, *supra* note 53.
[82] Bernsen interview, *supra* note 53.
[83] *See, e.g.,* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards,* 106 Harvard Law Review 22, 58 -59 *(1992)*; *see also* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harvard Law Review 1685, 1687-1713 (1976) (discussing the relationship of rules to form and substance); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 University of Chicago Law Review 1175, 1182- 88 (1989) (noting the difficulty of framing general rules); Pierre Schlag, *Rules and Standards*, 33 UCLA Law Review 379 (1985) (differentiating between rules and standards).
[84] *See* Sullivan, *supra* note 90, at 58-59.
[85] *See generally* Scalia, *supra* note 82.

to inmates would have a profound impact in this case. First, Scalia argues that rules offer consistency, uniformity, and predictability, and that they appear fairer than standards on the surface. When correctional officers must determine whether behavior is improper on a case by case basis, inconsistency will result for a variety of reasons, including the particular inmates and circumstances involved. Even when inconsistencies are unintentional, they are likely to be perceived as bias. A lack of uniformity was apparent in the application of the jail's previously utilized "propriety" standard: some correctional officers were viewed as more lenient than others. Understandably, inmates were "were constantly trying to see what they could get away with."[86] Printed rules afforded predictability, and thereby enabled inmates to regulate their behavior within the parameters of established guidelines or face certain consequences. The rules also limited overreaching by correctional officers because they required that the officers "respond in a determinate way to the presence of delimited triggering facts."[87]

Rules are not ideal in every situation. They focus only on certain facts, and may ignore other relevant facts and thereby produce results that are at odds with the basic policies or principles underlying the rule. As Justice Scalia observed, "[a]ll generalizations ... are to some degree invalid and hence every rule of law has a few corners that do not quite fit."[88] Rules can produce error in either of two directions. On the one hand, a rule can be over-inclusive, by ignoring facts

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[86] Bernsen interview, *supra* note 53.
[87] Sullivan, *supra* note 82, at 64.
[88] Scalia, *supra* note 82, at 1177.

that should make it inapplicable. On the other hand, a rule can be under-inclusive, by failing to anticipate factual situations to which it should apply. The open-ended quality of standards not only these problems, it allows the law to adapt more easily to changing circumstances.[89]

While a considerable literature has developed over why decision-makers choose one form over the other, the rules/standards debate is not entirely applicable to this context. It is hard to imagine a scenario where a systemic policy of correctional officer discretion would be favored over established behavioral guidelines. Effective correctional management, theorists recognize, is inherently rule-based. John DiIulio has argued that the "control model" of corrections, which emphasizes "inmate obedience, work, and education, roughly in that order,"[90] enabled Texas prisons to remain free of gangs at a time when state prison systems based on other models, such as California's, were experiencing substantial gang-related problems.[91]

Satisfaction of Legal Obligations

Unlike correctional management, public law litigation is intrinsically standard-based. It is policy oriented rather than formalist. In public law litigation, justice is thought to be best served by well-informed analyses of particular institutions, and rights and values are treated not as hard rules distinguished by bright lines, but as general standards that can be differentially

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[89] *See generally* Sullivan, *supra* note 82.
[90] John J. DiIulio, Jr., Governing Prisons: A Comparative Study of Correctional Management 105 (1987).
[91] *Id*. at 108.

implemented. Owen Fiss describes the institutional reform lawsuit as "one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements."[92] This approach has not gone without criticism: opponents argue that institutional reform judges not only eliminate the threat to constitutional values or rights, but go farther in an attempt to improve institutions. Sandler and Schoenbrod describe this as the "judicial slide from enforcing rights to making policy in pursuit of aspirational goals."[93]

In Bullington v. Moreland, it is unclear whether the settlement extended beyond constitutional rights into the realm of aspiration. Plaintiffs alleged violations of their First, Fifth, Eighth and Fourteenth Amendment rights in the complaint, but the decree's very specific directives do not address which of these rights were actually violated by defendants or how the remedy vindicates those rights. Susan Poser describes a similar phenomenon in desegregation cases, noting that "the extent of equitable power at the remedy stage is not firmly rooted in the nature of the right that has been violated."[94] The decree offered virtually no insight into how defendants, who operated more than one correctional facility, could satisfy their Constitutional obligations to all inmates, not simply those at the County Jail. Defendants assumed that implementing the consent decree at ACI

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[92] Owen Fiss, *The Supreme Court, 1978 Term--Foreword: The Forms of Justice*, 93 Harvard Law Review 1 (1979).
[93] Sandler and Schoenbrod, *supra* note 8, at 102.
[94] Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status,* 81 Nebraska Law Review 283, 292 (2002).

Gumbo would provide them with a safe harbor in the event of similar litigation. They therefore instituted and complied with nearly every provision until the facility closed in 1998.

One area in which defendants were unable to comply at Gumbo, however, was the population cap. Compliance with the decree ultimately required that only the 162 most dangerous offenders be housed at the Clayton facility, while the other inmates were transferred out.[95] This practice resulted in severe overcrowding at the second facility, which housed two to three times its maximum capacity in the later years of the decree.[96] Between 1985 and 1997, administrators and county executives proposed three bond issues to allow construction of a larger correctional facility, but voters defeated every initiative.[97]

In fact, consent decrees have no precedential value because they are entered without final adjudication of issues of fact or law in dispute.[98] While they may establish a "benchmark against which similar disputes [can be] measured,"[99] remedies in institutional reform cases are very context specific and therefore not binding across institutions. This is true even when both facilities are operated by the same defendant. For these reasons, no action could have been taken against jail administrators when they were unsuccessful at preventing overcrowding at

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[95] Bernsen interview, *supra* note 53.
[96] *Id.* Bernsen noted, "We utilized Gumbo as a safety valve because there was no consent decree in place mandating a certain population cap at that facility. It could be as crowded as it needed to be." *Id.*
[97] *Id.*
[98] See Burt Neuborne & Frederick A.O. Schwarz, Jr., *A Prelude to Settlement of Wilder*, 1987 University of Chicago Legal Forum 177, 194.
[99] *Id.*

Gumbo. Despite the sheer number of inmates confined at Gumbo, though, no one sued to improve jail conditions. Bernsen believes this outcome can be directly linked to other changes prompted by the consent decree. Whether or not implementation actually provided defendants with a safe harbor is inconsequential, he argues, because it helped them to operate a constitutional facility and thereby avoid a lawsuit altogether.

It is impossible to determine whether the consent decree actually prevented constitutional violations at ACI Gumbo, because constitutional rights such as cruel and unusual punishment are in themselves standards requiring fact-specific inquiry. Consent decrees do not provide jail administrators with bright-line rules for satisfying legal obligations in all the facilities they operate, as defendants in this case believed, but they do provide something more specific than standards. Scholars have questioned the rule/standard distinction, noting that over time, rules tend to become more standard-like, as exceptions are carved out that require judgment to apply and reduce the determinacy of legal outcomes. Meanwhile, standards become more rule-like, as case-by-case adjudication fills in the zone of discretion, thereby producing more determinate results. A more workable model, they argue, is one in which rules and standards lie along a continuum.[100]

While the Bullington consent decree's requirements for things like cell size and number of inmate recreation hours per week make it rule-like, it is also

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[100] *See* Sullivan, *supra* note 82.

standard-like in the sense that it could be adapted to accommodate characteristics of the County's different facilities while still providing the same benefits to inmates. The fact that ACI Gumbo housed mostly non-violent offenders made it better equipped it to handle overcrowding than the jail – there were far fewer incidences of fights or assaults, and there was never a riot. In public law litigation, it is not only the judge who must fill out the details of broad constitutional commands, but it is also the defendant, who is required to both remedy current violations as well as avoid them in the future. Bullington v. Moreland demonstrates how consent decrees offer defendants a model for accomplishing this task.

III. Conclusion

One distinctive feature of public law cases is their longevity: decrees of twenty and thirty years duration are not uncommon.[101] In some instances, a decree may even outlast the attorney responsible for its enforcement. As Bullington v. Moreland illustrates, motivations behind defendant compliance, such as leverage in obtaining resources, ensure that the policy goals articulated in the decree do not die with their monitors.

[101] Sandler and Schoenbrod, *supra* note 8, at 130.