Real and Lasting Reform: Small County Jail Reform Litigation and Post-Order Stakeholders

Chad Ben

Scholars have taken different approaches in their analyses of institutional reform litigation and have offered various descriptions of how the litigation works. In this study, I evaluate the various descriptions theorists and commentators have offered about how institutional reform litigation operates in light of the Scott County Jail case of Gray v. Ferrell (hereinafter, Gray). What makes Gray a useful case for such evaluation is that, while in many ways the case is quite typical of prison litigation, in other ways it is quite different from the prison litigation scholars have written about.

As is typical of much of the institutional reform litigation that theorists and commentators have studied, Gray appeared at the height of the litigation movement, in the early 1980s.[1] Further, a civil rights lawyer litigated the case without much prisoner involvement,[2] the case ultimately settled,[3] and a prison conditions expert was crucial to the case's litigation and resolution.[4] At the same time, Gray is quite different from the prison litigation written about by scholars. The obvious distinction is that the litigation involved a very small jail. While institutional reform litigation cases were brought against small jails, these cases do not appear in scholars' analyses and descriptions of how the litigation operates. More subtle, but more

[1] *See* Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 Mich. L. Rev. 1994, 2003-2004, 2020 (1999) (*reviewing* Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (1998)).
[2] *See* id. at 2017 ("Civil rights lawyers got involved in the prison cases in a number of ways").
[3] *See* M. Kay Harris and Dudley P. Spiller, Jr., *After Decision: Implementation of Judicial Decrees in Correctional Settings*, 11-13 (1977) ("The manner in which the relief for unconstitutional conditions and practices was formulated varied among the cases . . . In all of the cases, the method by which relief was formulated assured that the content comported with correctional realities. Furthermore, participation by defendants in framing the orders minimized hostility and resentment. By giving an opportunity for input by the defendants and utilizing someone who either had or obtained correctional expertise, acceptability of the orders was increased"); *see also* Schlanger, *supra* note 1, at 2012.
[4] *See* Susan Sturm, *The Legacy and Future of Prison Litigation*, 142 Penn. L. Rev. 639, 721 (1993).

importantly, I found in the course of my study that the operation of the Gray litigation contradicts a theory to which many institutional reform litigation scholars subscribe. Contrary to the majority of prison cases resulting in significant social reform, Gray appears to have led to real and lasting reform notwithstanding the complete disappearance of plaintiffs' counsel after he won what could very well have turned out to be merely a paper victory.

In order to develop my study of the Gray litigation, it is first necessary to explore the existing theories of institutional reform litigation. While relative agreement has been reached that litigation is the primary vehicle to social change in prisons, there is still active debate about how institutional reform litigation operates.[5] The debate is best understood as one between two schools of thought, and turns on whether institutional reform litigation is the product of particularly empowered judges, or whether it is a party-driven phenomenon.[6] Following a recent article by David Zaring, I refer to these two camps as unilateralist and mulitlateralist; each attempts to explain the operation of institutional reform litigation from its inception through the post-decree, implementation process. [7]

Generally, the unilateralists, a camp led by scholars like Abram Chayes and whose views have more recently been espoused through the writings of Malcom Feeley and Edward Rubin, recognize institutional reform litigation as a reinvention of the roles of the judge.[8] On the opposite side of the debate, the multilateralists, led by scholars like Margo Schlanger and Susan

[5] *See* David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. Rev. 1015, 1017 (2004).
[6] *See* Schlanger, *supra* note 1, at 1999.
[7] *See* Zaring, *supra* note 5, at 1021.
[8] *See* id. at 1021-1023; *see also* id. at 1022 (Chayes thought that these institutional reform cases shifted power from the parties who invited the lawsuit to the judge who supervised the remedy).

Sturm, view institutional reform litigation as empowering the parties more than the judge.[9] Consistent with the broader views of the multilateralist camp, in his recent article, Zaring recognizes institutional reform litigation as "a negotiating process between plaintiffs' attorneys, various court-appointed functionaries, and lower-echelon officials."[10]

Rather than focus upon the broader unilateralist and multilateralist models and the two schools' approaches to the operation of institutional reform litigation, I am more interested in their explanations of the operations of the remedy and post-decree phases of the litigation and the conditions they believe must exist for successful post-decree implementation of a court order and significant social change to be achieved.[11] In this case study, I set out the two camps' views on the remedy and post-decree phases of institutional reform litigation and argue that both camps have failed to recognize that successful post-decree implementation leading to significant social change in correctional institutions can, and does, take place not only in the absence of judicial oversight and monitoring, but without active involvement or participation by the plaintiffs, plaintiffs' counsel, or prison conditions experts. My case study suggests that, while the shape of several phases of institutional reform litigation (more specifically, the remedy phase) may be the product of the identity, goals, resources, and strategies of both judicial and nonjudicial participants, successful post-decree implementation and institutional reform in small county jails may more logically be characterized as the result of the localized participation of the litigation's biggest post-order stakeholder(s). [12] In Gray, this stakeholder was defendant Sheriff Ferrell.

---

[9] *See* Schlanger, *supra* note 1, at 1999; *see also* Sturm, *supra* note 4, at 705; *see also* Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, 35-36 (1991) (Rosenberg is skeptical about the ability of courts to transform or even lead the way in transforming American institutions).
[10] Zaring, *supra* note 5, at 1028.
[11] *See* Phillip J. Cooper, *Hard Judicial Choices*, 16 (1988) ("The remedial decree litigation model is an open system model consisting of trigger, liability, remedy and post decree phases").
[12] *See* Schlanger, *supra* note 1, at 2009-2010.

Phillip Cooper describes remedial decree litigation through an open system model consisting of trigger, liability, remedy and post decree phases.[13] For the purposes of my case study, I use Cooper's four-phase model because it is a particularly useful schematic for understanding how institutional reform litigation operates in practice. According to the unilateralist camp, all four phases of institutional reform litigation are under the strict control of the trial judges, and whether reform is ultimately successful is dependent upon their actions.[14] Chayes and others who subscribe to the unilateralist model view institutional reform litigation as shifting power from the parties involved in the lawsuits to the trial judges who supervise the remedies and as privileging the judges to act in particularly empowered ways.[15]

According to the unilateralist camp, trial judges become policy planners and managers by actively shaping and monitoring the decrees, mediating between the parties, and developing their own sources of expertise and information.[16] Chayes argues that in institutional reform litigation, "the scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties."[17] "The judge," he stresses, "is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation, but for organizing and shaping the litigation to ensure a just and viable outcome."[18] In effect, under the unilateralist model, trial judges become the "dominant figure[s] in organizing and guiding the case[s]," as well as "continuing involvement in administration and implementation" of relief.[19]

---

[13] *See* Cooper, *supra* note 11, at 16.
[14] *See* Zaring, *supra* note 5, at 1022-1023.
[15] *See* id. at 1022.
[16] *See* id.
[17] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1302 (1976).
[18] Id. at 1302.
[19] Zaring, *supra* note 5, at 1023 (This privileging of the judge encapsulates the unilateralist model of institutional reform litigation).

Feeley and Rubin have written the most comprehensive recent analysis of institutional reform litigation that falls within the tradition of the unilateralist model of thinking.[20] Their analysis defines the trial judges' behavior in institutional reform cases as "judicial policy making."[21] This concept accepts Chayes' premise that institutional reform litigation has brought about the demise of the "bipolar structure" and that it is the judge who is the principal actor in such litigation.[22] Feeley and Rubin's most basic point is that "judicial policy making [is] a separate judicial function with its own rules, its own methods, and its own criteria for measuring success or failure."[23] In accordance with the unilateralist belief that there is strict judicial control throughout the entire course of institutional reform litigation, Feeley and Rubin believe that once a trial judge announces her new rule, it is she who faces the task of its implementation.[24]

But other scholars present institutional reform litigation quite differently, suggesting that judges play a much more limited role in producing social change than unilateralists attribute to them.[25] Court decisions themselves, these multilateralists suggest, are neither necessary nor sufficient for producing significant social reform.[26] Contrary to the unilateralist camp's focus on privileged and empowered judges, "the history of litigated prison reform reveals it to be an intricate set of interactions framed by the rules of litigation and involving many groups, with varying roles, interests, and constraints."[27] That is, whether social change is brought about

---

[20] *See* Zaring, *supra* note 5, at 1023.
[21] Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*, 337 (1998).
[22] *See* Zaring, *supra* note 5, at 1023.
[23] Schlanger, *supra* note 1, at 1997.
[24] *See* Feeley and Rubin, *supra* note 21, at 337.
[25] *See* Sturm, *supra* note 4, at 639; *see also* Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institution*, 65 Va. L. Rev. 43, 45-46 (1979).
[26] *See* Rosenberg, *supra* note 9, at 35-36.
[27] Schlanger, *supra* note 1, at 1999; *see also* id. at 2009 ("Feeley and Rubin's theoretical vision is so tightly focused on judges and doctrinal creation that they seem nearly blind to most of the other relevant players and the rules and contours of other types of court action").

depends as least as much upon these other factors, as it does upon the actions of trial judges.[28] As Margo Schlanger argues, "prison cases simply do not support Feeley and Rubin's single-minded consideration of how judges act when they decide cases and originate remedies; understanding the cases calls for analysis of the other ways court judgments and outcomes are derived, along with an assessment of the differing contours and relative importance of contested judgments and settlements."[29] In *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, Schlanger takes issue with Feeley and Rubin's "microanalysis" of prison cases and their theory that almost exclusively concerns the sole institution of the judiciary and the judicial activity of doctrine creation:[30]

> Institutional reform litigation is not a judicial movement but a political practice. How courts began, and whether they continue, to be an arena for such litigation; how the litigation looks; and whether it succeeds or fails are functions not simply of judicial will and roll, but of the goals, resources, and actions of many groups and actors, filtered through the rules of litigation.[31]

The multilateral model recognizes that the court, judge, plaintiffs, plaintiffs' counsel, expert witnesses, defendants, and defendants' counsel are all players who shape prison reform cases.[32] Not solely the result of trial judges' actions, the resources, skills, and commitment of the prisoners' lawyers, the determination of the judge, the types of prison problems targeted by the reform, the attitude of the prison's and prison department's officials toward reform, the attitude

---

[28] *See* Schlanger, *supra* note 1, at 1999; *see also* Harris and Spiller, Jr., *supra* note 3, at 5 (Analysis of the variances in the extent of compliance with the judicial decrees was not only made difficult by the large number of factors potentially capable of influencing the degree of compliance, but was further complicated by the fact that many of the factors interacted with one another).
[29] Schlanger, *supra* note 1, at 2014.
[30] Id. at 1999.
[31] Id. at 2036.
[32] *See* id. at 1999-2000; *see also* Zaring, *supra* note 5, at 1030-1031 (Multilateralists have emphasized, to varying degrees, the importance of the plaintiff, defendant, and other local actors in the lawsuit).

of the department's legal counsel toward reform, and the attitude of the rank and file corrections officers toward legal reform, all affect the shape of institutional reform litigation.[33]

Courts alone will generally not be effective producers of significant social reform, due in part to a lack of judicial independence and the judiciary's inability to develop appropriate policies and its lack of powers of implementation.[34] District court judges themselves do not invent the legal theories underlying their decisions.[35] Rather, they generally act by following a path proposed by plaintiffs' counsel and by building on the foundation laid at trial.[36] In institutional reform litigation, "[t]he judge tends to rely, for his influence, far more on exchange than on coercion, and, for his mode of operation, far more on bargaining than on adjudication."[37] Judges may, and often do, appoint appropriate lawyers, handpicking them for their expertise, and then resume the traditional stance of arbiter rather than originator.[38] Sturm notes that "[c]orrections litigation challenging conditions of confinement in prisons often leads to the appointment of extremely competent counsel."[39] By choosing a skilled plaintiffs' lawyer for the inmates, the judge, in effect, limits her own role in shaping the litigation by putting the job of developing the inmates' case back in counsel's hands.[40]

---

[33] *See* James B. Jacobs, *Judicial Impact on Prison Reform*, *in Punishment and Social Control*, 63, 71 (1995).
[34] *See* id. at 64.
[35] *See* Schlanger, *supra* note 1, at 2015.
[36] *See* id. at 2015-2016.
[37] Diver, *supra* note 25, at 45-46.
[38] *See* Schlanger, *supra* note 1, at 2016; *see also* id. at 2019 ("[O]ther 'public interest' lawyers handled prison cases as well – especially lawyers from the large array of new legal services offices that received federal funding starting in 1965").
[39] Sturm, *supra* note 4, at 683.
[40] *See* Schlanger, *supra* note 1 at 2016; *see also* Telephone Interview with Michael Hoare (Oct. 14, 2004) [hereinafter Hoare interview] (After graduating from law school, Goldstein moved to Scott County, Missouri and began taking cases as a sole practitioner. Goldstein mostly did plaintiffs work in employment discrimination suits and soon became the county's prominent public interest attorney. Although the bulk of his work consisted of employment discrimination cases, Goldstein, the known resident liberal, public interest lawyer, was appointed by U.S. Magistrate Bahn to represent Gray).

What has yet to be discussed, and what this case study hopes to expose, are the stakes players have at different stages of institutional reform litigation and how a single player's high, post-decree stake can lead to an order's successful implementation and significant social reform in the absence of once high stake-holding parties.[41] In order to ultimately show that the success of post decree implementation may well be a function of the continued presence and active involvement the decree's single *biggest* after-Order stakeholder, I begin by looking at the remedial stage; how it operates, its players and their stakes. Given that the unilateralist model maintains that institutional reform litigation is under the strict control of trial judges throughout the entire course of litigation, and that the success of reform is dependent upon their actions, it is only necessary that my preliminary discussion look at the remedy and post decree phases of institutional reform litigation from the mulilateralist perspective. It is from this perspective that one may come to understand and explain the operations of institutional reform litigation as the phases play out in actual cases.

According to the multilateralists, successful advocacy depends on recognition of the importance of the remedial stage.[42] In their opinion, the remedial stage is not only the most important stage of institutional reform litigation, but is, in many respects, the most difficult aspect of correctional litigation as well.[43] Its difficulty is likely due to the fact that institutional reform cases are "multi-directed controversies involving a variety of players and that parties often change and play different roles at different times during the litigation."[44] During the

[41] *See* Cooper, *supra* note 11, at 337 ("[T]he players involved as a case moves from remedy crafting to implementation may change").
[42] *See* Sturm, *supra* note 4, at 726; *see also* Cooper, *supra* note 11, at 335 (The product of the remedy phase is "a *core* remedy in the form of a decree or detailed remedy guideline").
[43] *See* Sturm, *supra* note 4, at 724 ("The remedial stage will consume the bulk of advocates' time and resources").
[44] Cooper, *supra* note 11, at 17.

remedy phase of institutional reform litigation, both parties to the litigation arguably have high stakes in the core remedy produced.

In their explanation of the operation of the remedial stage, multilateralists focus closely on the roles played, and the stakes held by the judge and parties to the litigation because settlements seem to be the primary source of judgments in prison and jail cases.[45] During the remedy crafting stage of institutional reform litigation, the judge often plays a facilitator role, calling upon the parties to negotiate some sort of agreement on how to resolve the problems identified during the liability phase.[46] Parties often agree on the means to remedy the offending conditions and submit that agreement to the court for legal ratification.[47] The incentives to settle are strong for the parties and judge because settlements save time, often enormous expense, and the uncertainty (or in some cases, the certainty) associated with trial and appeal.[48] Settlement also provides the parties with greater control over the specifics of the remedy by preempting the need for the judge to make liability findings and issue remedial orders.[49] In addition, when the parties settle on a remedy, once adopted by the Court, the consent judgment often incorporates

---

[45] *See* Schlanger, *supra* note 1, at 2012; *see also* id. at 2015 ("[T]he litigants necessarily have an overwhelming effect on the shape of settled outcomes").

[46] *See* id. at 2011; *see also* Cooper, *supra* note 11, at 335 ("Judges are often described as adopting either the role of a counterproductive interloper who intervenes rather arbitrarily in the operation of agencies or local units of government, on the one hand, or a mere negotiator who facilitates a cooperative solution between the parties, on the other. The latter picture is nearer the mark").

[47] *See* Schlanger, *supra* note 1, at 2011.

[48] *See* id. at 2011-2012 ("No consent judgment is the pure result of judicial decisionmaking, they often result from the negotiations and consent of democratically accountable officials"); *see also* Zaring, *supra* note 5, at 1029 (Multilateralists begin with the doctrinal insight that "institutional reform remedies are usually implemented through consent decrees designed by the parties, over which judges has limited power and, often, less inclination to reject"); see also Sturm, supra note 4, at 719 ("Cases that target conditions and practices in bureaucracies, rather than rules and regulations, tend to be more fact intensive and expensive to litigate").

[49] *See* Schlanger, *supra* note 1, at 2011-2012 ("[P]re-1996 rules governing acceptance of a prison or jail conditions consent decree by a trial judge were far from strict. A decree needed only spring from and serve to resolve a dispute within the court's subject-matter jurisdiction[,] . . . com[e] within the general scope of the case made by the pleadings, and . . . further the objectives of the law upon which the complaint was based").

terms the judge could not have lawfully, and would not have, included following contested litigation.[50] Finally, once entered by the judge, a consent judgment is not appealable and therefore more permanent than an order issued as a result of litigation that is subject to appeal.[51]

Scholarly studies suggest that "many prison officials have seen the velvet glove in the iron fist."[52] In the late 1970's and early 1980's prison officials came to recognize that they could leverage litigation or the threat of litigation to obtain resources (especially more staff) and improvements.[53] In many instances, the initiation of litigation or even the threat of litigation produced significant reform.[54] Government-official defendants, operating under fiscal and political constraints, frequently won by losing.[55] A consent decree often afforded the jails more resources and freedom from restrictions in their changes to policy and practice.[56] "'The court is making me do it' trumps many ordinary political considerations."[57] Further, in the context of prison litigation, defendants were often themselves interested in the "professionalization" of the prisons under their supervision.[58]

Because the rules of litigation largely confine judicial response to the record developed and the arguments presented by the parties, litigation gives those seeking change a formal and unique ability to shape the contest.[59] While the "identity, priorities, litigating strategies, and resources of plaintiffs' counsel are of great importance to the [general] shape and success of

[50] *See* Schlanger, *supra* note 1, at 2014 ("The pre-judgment settlement of one of Feely and Rubin's five case studies noted that the sheriff of the jail helped write specifications into the consent decree that went well beyond anything the court would have ordered"); *see also* Cooper, *supra* note 11, at 337 ("From an administrator's standpoint, the consent decree may have been more intrusive than what a court would have ordered in the same case").
[51] *See* Schlanger, *supra* note 1, at 2011.
[52] Jacobs, *supra* note 33, at 72.
[53] *See* id. at 69.
[54] *See* id.
[55] *See* Schlanger, *supra* note 1, at 2012.
[56] *See* id.
[57] Id.
[58] *See* id.
[59] *See* id. at 2015.

litigated prison reform, it is during the remedy phase, in particular, that the abilities and tactics of plaintiffs' counsel are extremely important."[60] Effective advocacy during the remedy phase requires different skills and processes than those necessary for effective participation in formal adjudication.[61] According to Sturm, "[m]uch of the remedial process takes place outside the courtroom and the adversary model of dispute resolution. Because cooperation by crucial insiders is critical to implementation, effective remedial advocacy requires creative uses of negotiation, mediation, and experts."[62] Successful advocacy requires that plaintiffs' lawyers be skilled in "understanding what appellate courts look for in reviewing lower court records; knowledgeable in the law in their field; effective in locating and working with expert witnesses; and competent in the management ability needed to guide the case and relieve the judge of onerous case management details."[63]

Effective lawyering during the remedy phase often requires expert involvement in fact-finding and negotiating remedies.[64] Sturm suggests that the role of experts in institutional reform litigation has, in many respects, become indispensable.[65]

> The use of expert witnesses has become essential to investigation, the framing of the issues, and to analysis of the likelihood of success before a complaint is filed. Experts also are now involved in all phases of pretrial preparation. Their presence is invaluable when depositions are taken or when interrogatories are drafted. They assist in review and analysis of documents, selection of exhibits, and preparation of cross-examination.[66]

---

[60] Cooper, *supra* note 11, at 19; *see also* Schlanger, *supra* note 1, at 2015 (Schlanger recognizes plaintiffs' lawyers as a particularly crucial set of players).
[61] *See* Sturm, *supra* note 4, at 714.
[62] *See* id. at 714.
[63] Cooper, *supra* note 11, at 18.
[64] *See* Sturm, *supra* note 4, at 727; *see also* Cooper, *supra* note 11, at 19 (Especially critical is the role of expert testimony).
[65] *See* Sturm, *supra* note 4, at 721.
[66] Claudia Wright, *Expert Witnesses: Expanding Their Role in Prison Cases*, Nat'l Prison Project J., Fall 1987, 12, 12.

The use of experts differs in institutional reform litigation in that experts interact with the administration, staff, and inmates to develop a plan of action.[67] They not only assess the causes and likely impact of particular conditions, but further help develop a plan of action.[68] According to Sturm, "if experts can work effectively with management and staff, judicial intervention can develop into . . . cooperative endeavor[s] that can enhance the quality of service delivery in the institution and avoid protracted litigation."[69] In institutional reform litigation cases, trial judges are not well enough informed to craft "appropriate and adequate" opinions of their own, and thus often will rely heavily upon the recommendations made by prison conditions experts.[70] Two types of experts have been identified as playing significant roles in institutional reform litigation; local resident experts and national methodological and policy experts.[71] Local experts may provide their opinions without being accused of being outsiders only in town to criticize the community, while outside experts are able to assess evidence from the local picture in light of their national expertise.[72]

Advocates learned through experience that formal legal victories did not mean actual success in achieving correctional reform; that is, that the decrees themselves were not self-executing.[73] The continued presence of trial judges, plaintiffs' counsel, and/or special masters was crucial to successful implementation of remedial decrees.[74] M. Kay Harris and Dudley P. Spiller, Jr. suggest that "[b]oth extra-judicial and judicial factors are capable of significantly

---

[67] *See* Sturm, *supra* note 4, at 721.
[68] *See* id. at 721; *see also* Telephone Interview with Bob Buchanan (Nov. 7, 2004) [hereinafter Buchanan interview].
[69] Sturm, *supra* note 4, at 721.
[70] *See* Cooper, *supra* note 11, at 339.
[71] *See* id. at 333.
[72] *See* id. at 339.
[73] *See* Sturm, *supra* note 4, at 712-713.
[74] *See* Harris and Spiller, Jr., *supra* note 3, at 5.

influencing the decree implementation phase."[75] Further, Harris and Spiller note that in cases where "judicial determination is less firm, or at least less evident, even apparently willing parties may fail to fully comply."[76]

Just as parties to the cases can shape the remedy crafting role of the judge by affording or denying her role options, so the role played by the judge in the post decree phase is shaped by the core remedy.[77] In fact, some multilateralists believe that discussions of remedial implementation often ignore the fact that district judges are in no position to focus all of their time and energies on post decree matters.[78] According to Sturm, the process of monitoring and enforcing a remedy requires the continued presence and involvement of plaintiffs' counsel.[79] Their knowledge of the local political scene, the day-to-day problems of the institutions, and the key players within a particular system can be invaluable to the implementation process.[80] Furthermore, experts, assigned as special masters may play key roles not only in decree formulation, but also in implementation monitoring.[81]

According to the multilateralist camp, successful decree implementation also depends upon enlisting the support of crucial insiders within the targeted system to achieve lasting reform.[82] In fact, some scholars suggest that that court-ordered prison reform cannot be achieved without cooperation from prison officials.[83] Sheryl Dicker stresses, "advocates must find a

---

[75] *See* Harris and Spiller, Jr., *supra* note 3, at 5.
[76] Id.
[77] *See* Cooper, *supra* note 11, at 23.
[78] *See* Harris and Spiller, Jr., *supra* note 3, at 20.
[79] *See* Sturm, *supra* note 4, at 734 (Compliance is unlikely to be achieved without the active involvement of plaintiffs' counsel); *see also* Harris and Spiller, Jr., *supra* note 3, at 5 (Accounting for differences in the extent to which compliance with judicial decrees was attained was difficult because a large number of factors are potentially capable of influencing the degree of compliance).
[80] *See* Sturm, *supra* note 4, at 734.
[81] *See* id. at 721.
[82] *See* id. at 683-684.
[83] *See* Jacobs, *supra* note 33, at 72.

'partner' inside government to achieve successful implementation of reforms."[84] Similarly, Rosenberg believes courts can be effective producers of significant social reform when "administrators and officials crucial for implementation are willing to act and see court orders as a tool for leveraging additional resources or for hiding behind."[85] Accordingly, "constraints on a court's ability to achieve social change can be overcome by an alliance with prison officials who see an opportunity to leverage the court's decision to obtain more resources and other reforms that they themselves want."[86]

In the Gray litigation, when inmate Larry Gray filed a pro se civil suit for damages against the Scott County Jail, he could have had no idea that his court-appointed attorney would have very different plans for the direction of the litigation. Despite Gray's initial intentions, his "run-of-the-mill" damages suit was transformed by Richard Goldstein into an action for declaratory judgment and injunctive relief arising under the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and the Civil Rights Act, 42 U.S.C. §1983.[87] Described by Michael Hoare as a young, eager public interest attorney in the "Boot-heel" of Missouri, Goldstein was on a mission to bring constitutionally-mandated improvements to the conditions of a small, local county jail.[88]

Just one of many lawsuits filed by Scott County Jail inmates against Sheriff Ferrell, the county, or the jail in the late 1970s and early 1980s, Gray's damages suit itself was not a

[84] Sturm, *supra* note 4, at 684.
[85] Rosenberg, *supra* note 9, at 36.
[86] Jacobs, *supra* note 33, at 72; *see also* Hoare interview, supra note 40 (As far as the jail conditions were concerned, the settlement reached between the plaintiffs and Scott County granted the plaintiffs much more relief than the judge would have awarded had the case proceeded through trial).
[87] *See* Plaintiffs' Second Amended Complaint (*filed* Dec. 29, 1981); *see also* Telephone Interview with Richard Goldstein (Sept. 29, 2004) [hereinafter Goldstein interview].
[88] *See* Goldstein interview, *supra* note 87; *see also* Hoare interview, *supra* note 40.

surprising one.[89] As the Sheriff recalls, inmates were constantly filing damages suits against the jail.[90] Also unsurprising was the fact that Goldstein chose litigation as the vehicle by which to improve the jail's conditions. Scholars agree that in attempting to account for the occurrence of significant social change in prison, no causal variables appear to rival litigation.[91] According to Rosenberg, "There is little evidence that prison reform litigators have put as much time, energy and resources into political and social change as into litigation."[92]

Often times, the public lacks knowledge of, and concern about prison and jail conditions.[93] As James Jacobs suggests, "[i]t is hard, if not impossible, to convince the citizenry that money should be invested to upgrade prison conditions rather than to upgrade schools, roads, health care, the state university, police, job, training, and practically anything else."[94] Sturm also recognizes the public's general lack of concern, noting that, "[o]n a policy level, corrections reform takes place at the expense of education, social services, and rebuilding the infrastructure of our cities.[95] This lack of knowledge and concern is usually further reflected in the actions of public officials.[96] Whether they personally share the generally antipathy of their constituents, public officials generally oppose correctional reform.[97] In the absence of strong

---

[89] *See* Telephone Interviews with Sheriff Ferrell (Oct. 28, 2004, Nov. 5, 2004, Nov. 11, 2004) [hereinafter Ferrell interviews]; *see also* Telephone Interviews with Captain Chambers (Sept. 16, Nov. 5, 2004, Nov 11, 2004) [hereinafter Chambers interviews].
[90] *See* Ferrell interviews, *supra* note 89.
[91] *See* Jacobs, *supra* note 33, at 68; *see also* Harris and Spiller, Jr., *supra* note 23, at 3 ("[However,] at the heart of the debate about corrections litigation are opinions concerning litigation's effectiveness as a vehicle for social change. Evaluation of the propriety and value of litigation in solving the problems of correctional institutions depends upon perspective").
[92] Jacobs, *supra* note 33, at 68.
[93] *See* Harris and Spiller, Jr., *supra* note 3, at 8; *see also* Jacobs, *supra* note 33, at 69.
[94] Jacobs, *supra* note 33 at 69.
[95] Sturm, *supra* note 4, at 645.
[96] *See* Harris and Spiller, Jr., *supra* note 28, at 8.
[97] *See* id. at 8-9; *see also* Jacobs, *supra* note 33, at 69 ("Even if politicians and [the citizenry] are not opposed in principle to prison reform, and they often are, it is highly unlikely that they would serve as catalysts for change. Furthermore, no broad-based citizens' movement in the 1960's and 1970s (or since) pushed for widespread prison reform").

interest groups, supportive public opinion, or legislative or executive branch politics that press for expanding prisoners' rights or improving prison conditions, political reality does, and will likely continue to assign prison reform the lowest political priority.[98]

Although there was jail litigation in Missouri in the late 1970s and early 1980s, there was virtually no interest among attorneys in becoming involved in institutional reform litigation.[99] The only lawyers, let alone people, who cared about Scott County Jail inmates, were criminal defense lawyers.[100] Even they, however, were not willing to get involved in civil litigation.[101] Inmates' damages suits, though often legitimate and actionable, were not worth the costs of litigation.[102] Civil rights advocates like the American Civil Liberties Union (hereinafter, ACLU), were often reluctant to bring actions for institutional reform against small county jails due to the high costs associated with such litigation and the limited reach of any favorable resulting court orders.[103] At the same time, private practitioners had neither the time nor the resources necessary to get involved in often lengthy, and always expensive institutional reform litigation.[104]

Among attorneys practicing in Scott County, Missouri at the time, Hoare described Goldstein as a "real aberration."[105] Goldstein was the only public interest attorney in the county

---

[98] *See* Jacobs, *supra* note 33, at 69.
[99] *See* Hoare interview, supra note 40.
[100] *See* id.; *see also* Harris and Spiller, Jr., *supra* note 3, at 8 (Prior to the litigation, "the general public had been largely apathetic and unconcerned about jail and prison matters. Much of the public's lack of concern may be accounted for by the paucity of information concerning the conditions of life inside the walls").
[101] *See* Hoare interview, *supra* note 40.
[102] *See* id.
[103] *See* Joyce Armstrong Interview (Nov. 3, 2004) [hereinafter Armstrong interview] (Often, despite clear civil rights violations, the ACLU was reluctant to get involved in institutional reform litigation after conducting a "cost-benefit" analysis.)
[104] Hoare interview, *supra* note 40.
[105] *See* id.

who would have been willing to bring a civil rights claim against the county jail.[106] Goldstein recognized that an award of funds would not have helped Gray a great deal even if he could collect a financial judgment.[107] Even a favorable damages award for Gray would have left the unconstitutional conditions of the jail unchanged.[108] Interested in social change, and not dollars and cents, Goldstein made a deal with Gray.[109] He explained that under the circumstances, Gray's exorbitant claim was worthless for monetary damages.[110] Goldstein offered to represent Gray only on the condition that Gray agreed to be a named plaintiff in a class action for declaratory and injunctive relief.[111] It was Goldstein's goal to undo the damage done to Gray, his co-plaintiffs, and others similarly situated.[112] With no real alternative, Gray agreed.[113]

The Gray litigation supports the claims made by what Zaring labels the "multilateralists." The first three phases of the litigation played out much as the multilateralist camp would have predicted, offering nothing new to the camp's prior studies of institutional reform litigation and its description of how the litigation operates. That is, the real work was done by the parties. The judge was just barely involved; his major contribution being the appointment of plaintiffs' counsel. My findings through much of the Gray litigation confirmed that even in the small jail setting, the multilateralists' theories hold true.

---

[106] *See* Hoare interview, *supra* note 40.
[107] *See* Goldstein interview, *supra* note 87; *see also* Cooper, *supra* note 11, at 13.
[108] *See* Goldstein interview, *supra* note 87.
[109] *See* id.
[110] *See* id.
[111] *See* id.
[112] *See* id.; *see also* Cooper, *supra* note 11, at 17 ("[T]he equitable remedy cases are instituted as a reaction to a combination of historic policies or practices plus some triggering event. The cases tend to arise in situations in where a number of controversial actions have been taken by one or more government units over time until a trigger level is reached. At that point, one critical action will engender a challenge not only to the most recent event, but too many of the past actions as well").
[113] *See* Goldstein interview, *supra* note 87.

After dozens of lawsuits had been brought on behalf of Scott County Jail inmates against Sheriff Ferrell, corrections officers, and the county, this institutional reform litigation was finally triggered by Gray's filing a damages claim against Sheriff Ferrell. The damages claim was then molded into action for declaratory judgment and injunctive relief arising under the U.S. Constitution and the Civil Rights Act, 42 U.S.C. §1983, and subsequently driven by plaintiffs' counsel through the liability and remedy phases of the litigation. During the liability and remedy phases, the litigation was shaped through the interaction between a variety of players, including plaintiff's counsel, the defendant, defense counsel, the trial judge; and most significantly by plaintiffs' counsel's prison conditions expert. The expert alone facilitated settlement of liability and later, almost single-handedly shaped the remedy phase; the most controversial and important phase of institutional reform litigation.

Richard Goldstein was knowledgeable on the law.[114] He knew, as did defendant Sheriff Ferrell, that the Scott County Jail was not meeting the minimum, constitutionally-mandated prison conditions standards as set by the federal district courts.[115] Holding up to four inmates at a time in each of its 90 square foot cells, Sheriff Ferrell admitted that the Scott County Jail was a concrete and metal dungeon.[116] Run as a "mom and pop operation," an old couple living next

---

[114] *See* Goldstein interview, *supra* note 87.

[115] *See* id.; *see also* John W. Palmer, Constitutional Rights of Prisoners (3rd ed. 1985), at 240 ("Courts have a duty to protect inmates from unlawful and onerous treatment of a nature that, of itself, adds punitive measures to those legally meted out by a court." *Stickney v. List*, 519 F.Supp. 617 (D. Nev. 1981)); ("While the federal courts continue to recognize the broad discretion which state prison officials require in order to maintain orderly and secure institutions, constitutional deprivations of such a magnitude as to allow the maintenance of facilities which are wholly unfit for human habitation cannot be countenanced. The courts are under a duty to, and will, intervene to protect incarcerated persons from such infringements of their constitutional rights." *Jordan v. Arnold*, 472 F.Supp. 265 (M.D. Pa 1979); *Taylor v. Sterrett*, 600 F.2d 1135 (5th Cir. 1979); *Robson v. Biester*, 420 A.2d 9 (Pa. Cmwlth. 1980); *James v. Wallace*, 406 F.Supp. 318 (M.D. Ala. 1976)).

[116] *See* Goldstein interview, *supra* note 87; see also Ferrell and Chambers interviews, *supra* note 89 (After the Order was entered in 1982, modifications were made to the jail to bring conditions into compliance with the Order. The old jail was demolished and construction of the new jail was completed in April, 2004).

door to the jail was cooking (with the help of inmate trustees) for the inmates, cleaning the jail, and washing the inmates' laundry.[117] When the couple locked up at night, the jail was closed and its inmates were left unsupervised.[118] There were no smoke detectors or sprinklers in the jail, an insufficient number of fire extinguishers, and there were no fire drills and no fire evacuation plan.[119] Without any supervision, a fire during the night would have killed the prisoners.[120]

Among the Scott County Jail's many violations of minimum prison conditions standards, under this regime, inmates were eating spoiled food, had insufficient opportunity for exercise, and were living in vermin-infested unsanitary conditions.[121] Meals served to the inmates were inadequate in quality and quantity, and were far below the minimum daily nutritional requirements for adult inmates.[122] The menu contained no milk, eggs, fresh fruit or vegetables.[123] Furthermore, the inmate trustees who helped prepare the meals were not checked for contagious diseases, thus creating a serious health risk to the entire jail population.[124]

Inmates were under a regime of enforced idleness, locked in their cells from about 4:00 p.m. each afternoon until the following morning.[125] At other times, they were only allowed to pace in a common "bull pen" area.[126] Although there was an outside, secured yard available, inmates were given virtually no opportunity for outdoor recreation or exercise.[127] Most

---

[117] *See* Chambers interviews, *supra* note 89.
[118] *See* id.
[119] *See* Motion for Order that Facts be Taken as Established (*filed* Feb. 10, 1982)
[120] *See* Chambers interviews, *supra* note 89
[121] *See* id.; *see also* Motion for Order that Facts be Taken as Established, *supra* note 119 (The meat served was often spoiled, the rolls stale, and the food was generally repetitious and unsavory).
[122] *See* Motion for Order that Facts be Taken as Established, *supra* note 119.
[123] *See* id.
[124] *See* id.
[125] *See* id.
[126] *See* id.
[127] *See* id.

disturbingly, each of the jail's ninety square foot cells was holding up to four inmates at a time in horrendously unsanitary conditions.[128] Inmates who were being punished were frequently not allowed to shower, or to only shower once a week.[129] Mattresses were filthy and crawling with lice and other vermin.[130] Inmates, responsible for cleaning their own cells, were not provided with adequate cleaning supplies and often had to clean their toilets with their bare hands.[131]

After a couple of quick phone calls to Joyce Armstrong, then the head of the ACLU for Missouri, and Michael Hoare, an ardent civil rights advocate with whom Goldstein had worked on a number of cases, Goldstein uncovered the name of nationally renowned prison conditions expert, Bob Buchanan.[132] Buchanan met with Goldstein, toured the Scott County Jail, and agreed to testify at trial as to the minimum national standards imposed upon jails and prisons and that the jail was in egregious violation of due process standards for the conditions.[133] Given Buchanan's expertise in prison condition standards, the minimum conditions constitutionally mandated by the then existing caselaw and the minimum jail conditions required by the National Institute of Corrections, Sheriff Ferrell and defense counsel would have to admit liability and subsequently try to limit the resulting remedy to one that was reasonable; that is, one with which Sheriff Ferrell would feasibly be able to comply.[134]

After stipulating to the facts established by plaintiffs' counsel and its expert, Sheriff Ferrell recognized that he could best limit his and the county's costs by working with plaintiffs'

---

[128] *See* Sheriff Ferrell's Answer to Interrogatories (*filed* July 17, 1981) (The average number of prisoners detained in the Scott County Jail from January 1, 1981, to April 1, 1981: January, 1981: 40.5 daily; February, 1981: 44.6 daily; and March 1981: 39.9 daily).
[129] *See* Motion for Order that Facts be Taken as Established, *supra* note 119.
[130] *See* id.
[131] *See* id.
[132] *See* Goldstein interview, *supra* note 87; *see also* Armstrong interview, *supra* note 103; *see also* Hoare interview, *supra* note 40.
[133] *See* Goldstein interview, *supra* note 87.
[134] *See* Ferrell interviews, *supra* note 89.

counsel and its expert to negotiate the terms of a settlement agreement.[135] Sheriff Ferrell realized that at trial he would be facing not only his own costs to litigate the case but, in the very likely event that the plaintiffs won the case, he would have to pay their costs as well (i.e., attorneys fees, the expert's fees, etc.).[136] In the event that he lost the case at trial, Sheriff Ferrell knew he would also have to bear the enormous costs of tearing down the Scott County Jail, sending inmates to other facilities, and building a new jail that met the requirements of the judge's Order.[137] Sheriff Ferrell was clearly in an inferior bargaining position in the remedy phase of the litigation.[138] To save himself the costs associated with an almost certain loss at trial, it made financial sense for the Sheriff to settle on an agreement that provided the plaintiffs more than the Scott County Commission would have offered, and likely more than the judge himself would have ordered.[139] Having made few, if any, changes to the consent agreement drafted by the prison expert and agreed to by the parties, the judge signed the Order.[140]

Where prior theorists have gone wrong is by considering the plaintiffs' counsel essential to successful implementation of court orders and significant social reform. It turns out that is not so. For reasons that have yet to be recognized and explained by institutional reform litigation scholars, the substantial Order against the Scott County Jail was successfully implemented and has led to significant social reform. Among the data suggesting that many of the institutions sued in the 1970s and 1980s have yet to achieve and maintain compliance with court orders, why is it that the Scott County Jail is among the minority?[141] Why, in the absence of post-decree involvement by plaintiffs, plaintiffs' counsel, plaintiffs' expert, or judicial oversight, would the

[135] *See* Ferrell interviews, *supra* note 87.
[136] *See* id.
[137] *See* id.
[138] *See* id.
[139] *See* id.
[140] *See* Consent Judgment (*filed* Oct. 25, 1982).
[141] *See* Sturm, *supra* note 4, at 724.

litigation's defendant, Sheriff Ferrell, want to comply with the Order? It is my contention that, just as the remedy phase of institutional reform litigation is shaped by the interaction of the individual phase's interested parties, a single post-decree stakeholder's interests in successful implementation can lead to its realization. In this case, plaintiffs' counsel disappeared, but the case nonetheless had a real and lasting impact on both budgetary and non-budgetary practices in the Scott County Jail.

After the Order was signed by the judge, the plaintiffs, plaintiffs' counsel, and the prison expert abandoned the case; that is, none of these earlier-interested parties actively participated in, or monitored the implementation process to see whether the Order was actually being complied with by Sheriff Ferrell and the Scott County Jail. Despite post-decree abandonment by players that once held stakes in the outcomes of earlier phases of the litigation, significant social reform was realized in the Scott County Jail because defendant Sheriff Ferrell, the biggest post-Order stakeholder, had everything to gain from the Order's successful implementation.

Unlike inmate plaintiffs in institutional reform litigation cases involving state and federal prison conditions, where the defendant's compliance (and noncompliance, for that matter) is likely to affect them due to lengthier sentences, transient county jail inmates could care less whether jail conditions are improved once they are released. In this case, plaintiff Gray's interests were abandoned by his own counsel long before the implementation phase of the litigation, when Goldstein dropped Gray's damages claim and offered to represent him only upon the condition that Gray agreed to be a named plaintiff in a class action for declaratory and injunctive relief.

More strikingly, after the Order was signed by the judge, plaintiffs' counsel abandoned the case. It seems somewhat strange that after bringing, developing and litigating the case,

plaintiffs' counsel would fail to actively monitor the defendant's compliance with an order that he had fought so hard to obtain. While the plaintiff inmates arguably never had a *real* interest in the litigation, plaintiffs' counsel arguably had the biggest stakes of any of the interested parties through the trigger, liability, and remedy phases of the litigation. However, although he may have had a moral obligation to follow-up to see how his client and the other Scott County Jail inmates had fared as a result of the litigation, plaintiffs' counsel's interest ended upon completion of the remedy phase. Goldstein's post-decree abandonment may well be described by the idea that, "success at trial orients lawyers' goals and strategies, rather than actually alleviating unconstitutional conditions and practices."[142] The favorable Order was itself a victory for Goldstein. It was upon the judge's entering the consent judgment that Goldstein was paid for his services. With other work and clients to tend to, and in the absence of any further financial interest, Goldstein ceased to involve himself in the post decree implementation phase of the litigation.

As plaintiffs' counsel's interests and involvement ceased upon the conclusion of the remedy phase, so too did the interests and involvement of the plaintiffs' expert.[143] At the time of his involvement in the case, Buchanan was part owner of a prison corrections company located in Kansas City, Kansas.[144] The consulting company was involved in dozens of corrections matters around the country and often had neither the time, nor was it in a position, to actively participate in the post-decree implementation processes of the institutional reform litigation cases in which it was involved.[145]

[142] *See* Sturm, *supra* note 4, at 713.
[143] *See* Buchanan interview, *supra* note 68.
[144] *See* id.
[145] *See* id.

Buchanan's prison correction company's involvement in any institutional reform litigation case is one he described as a three-phase process.[146] First, after being contacted by an interested party, the company would assess the conditions of the correctional facility and determine the extent of the deficiencies, if there were any, in the facility's conditions.[147] During this first phase, after determining whether and where a facility needed to make improvements, the company prepared a report of its findings and subsequently made the recommendations it felt needed to be made in order to bring the facility into compliance with national prison condition standards.[148] The second phase of its involvement consisted of either (1) the company working with the parties to reach a settlement agreement; or (2) one of the company's experts testifying at trial, both as to his findings in the particular facility as well as his expert knowledge of existing prison conditions standards.[149] During the third and final phase of its involvement, if appointed by the judge, the company would act as a special master and oversee the implementation of the order.[150]

The company was rarely retained to oversee the implementation process, hence its involvement with any institutional reform litigation typically ended after a consent agreement was entered or one of its experts testified at trial.[151] As was usually the case, Buchanan's involvement with the Gray litigation ended upon the completion of the second phase.[152] After the court entered the consent agreement, and declined to appoint him special master to oversee the Order's implementation, Buchanan was compensated by the defendant for the services he had

[146] *See* Buchanan interview, *supra* note 68.
[147] *See* id.
[148] *See* id.
[149] *See* id.
[150] *See* id.
[151] *See* id.
[152] *See* id.

performed through the remedy phase of the litigation.[153] At this point in the litigation, Buchanan and his private corrections company had no financial interest in monitoring the defendant's compliance with the Order.[154]

Along with the post-order abandonment by the plaintiffs, plaintiffs' counsel, and the plaintiffs' prison conditions expert, the judge did not actively oversee or monitor the defendant's compliance with the Order. Among its several reasons for lack of active, post-decree involvement, the court's role was effectively limited by plaintiffs' counsel's post-decree abandonment of the case. The judicial system is an adversarial one, and without a motion brought before it by plaintiffs' counsel for injunctive relief, the judge was severely limited in the actions he could take to enforce possible non-compliance by the defendant.

Unique to institutional reform litigation, the lack of active, post-decree judicial involvement may also have been due in part to the Order not having been the product of the judge.[155] The court made no findings of fact in view of the settlement entered into by the parties.[156] Rather than the judge crafting an opinion, through the use of the prison conditions expert and their decision to settle, plaintiffs' and defense counsels limited the judge's role in the liability, remedy, and post decree phases of the litigation. While the Court recognized that the Consent Judgment "completes the intention to provide a jail facility such that the inmates of the Scott County Jail will not be deprived of rights, privileges and immunities secured to them by the Constitution of the United States," it was essentially prepared by the expert and later signed by the judge as a matter of procedure.[157] Who knows whether a violation of the Order would likely not have been taken personally by the judge as a violation of his Order? Furthermore, the court

[153] *See* Buchanan interview, *supra* note 68.
[154] *See* id.
[155] *See* id.
[156] *See* Consent Judgment, *supra* note 140.
[157] *See* id.

was, and is, busy. It handles a large caseload, and while the defendant would have been in violation of the Order if he failed to comply with its terms, the court simply did not have the time to "police" the Order through the implementation process.

As is also likely unique to the implementation phases of small-county jail institutional reform litigation, the judge had faith that the jail, in the absence of judicial oversight or monitoring, would comply with the Order.[158] According to Sheriff Ferrell, the judge recognized that in the past, the jail had not willfully violated the minimum prison conditions standards, but rather had done the best that it could with the limited resources it had.[159] In fact, upon request of Sheriff Ferrell and the Scott County Commission, the judge chose not to appoint a special master to oversee the implementation process.[160]

Subsequent to the Order being entered on October 25, 1982, Sheriff Ferrell immediately began implementing the court-ordered improvements.[161] In order to maintain an adequate jail staff to provide for inmate supervision and to properly respond to inmate requirements, the Sheriff quickly hired two additional full-time jailers, one within 90 days from the date of the Order, and the second by January 1, 1983.[162] Within 30 days from the date of the Order, Sheriff Ferrell converted the jail's storage room into a day room, adding 216 square feet to the existing day room.[163] Without delay, inmates were given more time in the outside, secured exercise yard.[164] The Sheriff developed a manual of policies and procedures for the operation of the jail which included rules governing the supervision and care of inmates by jail staff, staff training, emergency situation procedures, a daily jail routine, uniform commissary policy, visitation, mail,

[158] *See* Ferrell interviews, *supra* note 89.
[159] *See* id.
[160] *See* id.
[161] *See* id.
[162] *See* id.
[163] *See* id.
[164] *See* id.

and disciplinary and grievance procedures.[165] Within 90 days from the date of the Order, the Sheriff retained the services of a visiting nurse to conduct a twice weekly sick call at the jail.[166] Furthermore, upon being admitted to the jail, each inmate was provided one clean, fire retardant mattress, one sheet or washable mattress cover, one clean blanket, a clean towel and a basic toiletries kit which included at least a toothbrush, toothpaste, soap and safety razor.[167]

Within 90 days of the Order, the Sheriff arranged for an inspection by the State Fire Marshal.[168] Upon recommendation by the Fire Marshal following his inspection, fire procedures were drafted, fire blankets, fire extinguishers and smoke detectors were added to the jail, an emergency evacuation plan was devised, and a $10,000 exhaust system was built in the kitchen.[169] In addition, the Sheriff hired a nutritionist to upgrade the jail menu to be in compliance with generally accepted minimum nutritional requirements.[170] The lighting in each of the jail's cells was measured and, where necessary, was enhanced to meet the court-ordered requirement that there be at least twenty foot candles of lighting per cell, measured at the point of usage.[171]

With all of the litigation's earlier stakeholders out of the picture (most significantly, in the absence of plaintiffs' counsel), successful implementation of the Order and significant social reform were realized because Sheriff Ferrell recognized that compliance would have lasting, positive effects on the jail; its inmates, correctional officers and jail officials. In the absence of plaintiffs' counsel, the case nonetheless had a real and lasting impact on both budgetary and non-budgetary practices due to Sheriff Ferrell's (1) learning through the institutional reform litigation

[165] *See* Ferrell interviews, *supra* note 89.
[166] *See* id.
[167] *See* id.
[168] *See* id.
[169] *See* id.; *see also* Chambers interviews, *supra* note 89.
[170] *See* Ferrell interviews, *supra* note 89.
[171] *See* id.

process what national prison conditions standards required and a personal desire to "be better" (i.e., "litigation as education"); (2) recognition that compliance would decrease his exposure to liability in future lawsuits; (3) commitment to having a professionally run jail; and most significantly (4) recognition that compliance with the Order allowed him to gain additional resources for the jail; that is, Sheriff Ferrell saw the litigation as a method of improving his bargaining power when making budgetary requests to the Scott County Commission.[172]

I am not wholly persuaded that Gray constituted what Margo Schlanger refers to as "litigation as education,"[173] and further that such education was the driving force in the Order's successful implementation. It appears that the prison conditions expert's involvement in the litigation enlightened both Sheriff Ferrell and the Scott County Commission more than they would like to admit. Through the liability and remedy phases of the litigation, the Sheriff and the County Commission were, to some extent, educated as to both minimum nationally-recognized prison condition standards and the means by which the jail might feasibly be able to comply with such standards. I would not attribute the significant social reform in the jail to "litigation as education" because the litigation did not educate the Sheriff as to legal means he could pursue in order to bring about improvements in the jail's conditions. However, the litigation had at least an "educating effect" on the Sheriff and the County Commission. In the face of budgetary constraints and the community's general dislike of prisoners, the litigation allowed Sheriff Ferrell and, more importantly and most significantly, the County Commission to see prison reform as something more than a community burden and a waste of taxpayer money that takes place at the expense of upgrading schools, roads and health care.

---

[172] *See* Ferrell interviews, *supra* note 89; *see also* Chambers interviews, *supra* note 89; *see also* Buchanan interview, *supra* note 68.
[173] *See* Paper Conference with Professor Schlanger (Nov. 16, 2004)

It is similarly implausible that Sheriff Ferrell's voluntary compliance with the Order, and the resulting social reform, was largely the result of his viewing the litigation as a threat. Again, the judicial system is an adversarial one, and without a motion brought before it by plaintiffs' counsel for injunctive relief, the judge was severely limited in the actions he could take to enforce any non-compliance by the defendant. Therefore, in the absence of plaintiffs' counsel to activate the threat, it is doubtful that the threat of litigation compelled the Sheriff's compliance. However, while Sheriff Ferrell was not compelled to comply with the Order for fear that Goldstein would return to enforce its provisions, the Sheriff recognized that compliance with the Order would decrease his exposure to liability in future actions brought by inmates against him or other jail officials.[174] Through compliance with the Order, the Sheriff was able to both decrease the likelihood of future lawsuits brought against the jail by improving the safety, health, and well-being of the inmates and corrections officers, while at the same time hide behind the Order in the event of subsequent lawsuits.[175]

I am convinced that successful implementation and significant social reform were the result of the Sheriff's commitment to having a professionally run jail and his utilizing the litigation as a method of improving his bargaining power in his request for more resources. While initially wary of Sheriff Ferrell's claim to be committed to having a professionally run jail, Buchanan suggested that, from his own experiences as a prison conditions expert, if a Sheriff was committed to running his jail professionally he would see to it that it was run that way.[176] According to Sheriff Ferrell, prior to Gray, he continuously sought additional funding from the Scott County Commission to hire more staff and equip the jail with the equipment necessary to

[174] *See* Ferrell interviews, *supra* note 89.
[175] *See* id.
[176] *See* id; *see also* Buchanan interview, *supra* note 68.

provide the inmates and staff with safer and healthier working and living conditions.[177] However, the Order's successful implementation was not solely the result of Sheriff Ferrell's commitment to having a professionally run jail. Although the Order called for changes in the jail which would require the Scott County Commission to appropriate it more funds, several of the Order's provisions called for changes the Sheriff could well have made without additional funding.[178]

Successful voluntary implementation of the Consent Judgment and resulting social reform within the Scott County Jail were the result of Sheriff Ferrell's using the Gray litigation as a method of improving his bargaining power in his request for more resources. The Sheriff had a strong budgetary interest in the Order and seeing that it was successfully implemented. Among its many provisions, the Order required Sheriff Ferrell to hire full-time jailers, a visiting nurse and a nutritionist.[179] Other provisions required present and future jail officers take a training course and also receive CPR and first aid training.[180] In addition, the Order mandated the Sheriff to provide proper lighting, plumbing, heating and ventilation; health, sanitation and fire inspections; fire retardant mattresses, basic toiletries kits, a library of basic legal materials, etc.[181]

Again, prior to Gray, Sheriff Ferrell continually sought, and was denied, additional funding from the County Commission to hire additional staff and furnish the jail with equipment

---

[177] *See* Ferrell interviews, *supra* note 89.
[178] *See* Consent Judgment, *supra* note 140 (The Order called for inmates to be given more time in the outside, secured exercise yard, for the Sheriff to develop a manual of policies and procedures for the operation of the jail which included rules governing the supervision and care of inmates by jail staff, staff training, emergency situation procedures, a daily jail routine, uniform commissary policy, visitation, mail, and disciplinary and grievance procedures).
[179] *See* id.
[180] *See* id.
[181] *See* id.

necessary to provide inmates and staff with safer and healthier living and working conditions.[182] Without sufficient funding, the Sheriff was not only unable to comply with the majority of provisions subsequently ordered in Gray, but was at the same time defending against inmate suits involving jail conditions that he lacked the resources to improve.[183] In the absence of the Order, the Sheriff's and County Commission's opposing budgetary interests left the Sheriff powerless to obtain the resources necessary to bring the jail into compliance with constitutionally-mandated standards.[184] While the Sheriff sought to maximize his budget to obtain as many resources as he could for operation of the jail, the County Commission sought to minimize the jail's budget when appropriating taxpayer money to the County's competing agencies and organizations. The Gray Order backed the Sheriff's request for more resources with the force of a court order and justification for the Scott County Commission to appropriate additional resources to the jail in the face of community opposition.[185]

The Scott County Jail has continued to report to the Bureau of Justice Statistics that it is operating in compliance with the Gray Order, when the court only reserved jurisdiction over the action for a period of *one year* from October 25, 1983.[186] The jail reported the Order on the BJS Census in 1983, 1988, 1993, and 1999 to insure compliance with its provisions.

The usual paradigm for successful institutional reform litigation is the initiation of litigation, the resolution of the litigation, followed by post-decree enforcement. As the Gray litigation suggests, in institutional reform litigation in small county jails, this paradigm does not necessarily hold true. Small county jails have extremely transient inmate populations, public interest plaintiffs' counsel move on to other public interest cases, and trial judges, who have

[182] *See* Ferrell interviews, *supra* note 89.
[183] *See* id.
[184] *See* id.
[185] *See* id.
[186] *See* id.

concluded a case by signing an order, move on to other cases on their dockets. Nonetheless, successful post-order implementation and real and lasting prison reform was realized.

Neither of the two descriptive camps has recognized that the dynamics of institutional reform litigation are different in small county jails. As Gray suggests, once litigation concludes and a settlement is reached, enforcement is not necessarily driven by the adversarial process; rather, it is effectuated by a single post-order stakeholder when the benefits of successful implementation inure to the defendants themselves, the jailers. The unilateralist and multilateralist camps must acknowledge that real and lasting institutional reform may be realized in small county jails where the implementation phase of litigation appears not to be dependent upon the adversarial process. Future study of the operation of small county jail institutional reform litigation may further demonstrate that significant reform can be achieved in the absence of players many theorists and commentators suggest are crucial to its success. If reform can be realized in such circumstances, that is, without post-order involvement of plaintiffs' counsel and other once high stake-holding parties, more plaintiffs counsel might well decide that the potential benefits of litigation outweigh its costs.