Judicial Policy-Making in Institutional Reform Litigation: Analysis of an Activist Bench in The St. Louis City Jail Case

Introduction

The purpose of this paper is to examine the nature and criticisms of judicial policy-making in the context of institutional reform litigation generally and prison reform litigation specifically. After a discussion of the various perceived dangers of judicial policy-making in institutional reform litigation, and the counter-discussion of why judges assume the role of policy-maker despite these perceived dangers, the paper will undertake a case study of a major prison reform litigation, The St. Louis City Jail case[1], to examine the criticism the three district judges responsible for that litigation could have been susceptible to on policy-making grounds and the balance each struck between the desire to institute policy reform in the name of justice on the one hand and the desire to remain a neutral arbiter who merely manages litigation without apparent bias or implicit favoritism on the other. The evidence leads me to the conclusion that even the most "hands-off" federal judge must engage in policy-making when there has been a violation of constitutional rights by a governmental institution, and that even the most "hands-on" federal judge, and one whose desire is solely to see his preferred policies enacted, is limited by the nature of institutional reform litigation and cannot effectuate his preferences without the support of public opinion and at least some of the government actors who must comply with his remedial decrees.

Scholars of institutional reform litigation have delineated two alternative roles for the judge: the neutral arbiter or the policy-maker. As in most cases of black-and-white contrast,

[1] Although this case went through a variety of captions, the primary case styling is *Tyler v. U.S., et al.*, the docket number is 74-40-CV, and the reported opinions for the case can be found at: 602 F. Supp. 476 (E.D.Mo. 1984); 737 F.Supp. 531 (E.D.Mo. 1990); 135 F.3d 594 (8th Cir.1998);

there is a substantial gray area neglected by these delineations. Some decry the classification system outright as an oversimplification; others use the terms exclusively and ignore the area of overlap entirely. However, to the extent that they do assist one's comprehension of what is meant and connoted by the term "activist judge," discussion of the two popular characterizations of the judge in institutional reform litigation is useful. For the purposes of this paper, a "policy-making" judge is one who eagerly takes on institutional reform litigation, plays an active role in shaping the parties' negotiations, and monitors the resulting consent decree or court order proactively to ensure institutional compliance. In contrast, a judge acting as "neutral arbiter" generally has a "hands-off" policy when a court is asked to intervene in institutional reform litigation; if forced to engage in institutional reform litigation, the "neutral arbiter" assumes a managerial role, advising the parties but not directly contributing to their negotiations, and monitoring the resulting consent decree or court order only to the extent that plaintiffs' counsel keeps up with institutional developments and reports the unsatisfactory changes to the court.

- Judge can remain neutral arbiter

The "neutral arbiter" role is characterized by a judge's refusal to intrude upon the domain of the political branches by forcing upon them specific operating requirements in the form of judicial mandates or decrees. Judicial discretion is limited in this role, and impartiality among the groups and possible outcomes is the chief objective. For instance, Abraham Davis describes the "neutral arbiter" in Blacks in the Federal Judiciary as follows:

> Their fundamental concern seems to be to scrutinize the relevant facts painstakingly and then to carefully apply either statutory law and/or precedents. There is no evidence whatsoever that these black male and female judges are advocates for members of their own race in cases involving allegations of racial discrimination.

> Instead, they are neutral arbiters that place a premium on being impartial.[2]

In using African-American judges called upon to decide a racial discrimination matter as his example, Davis keys in on the case of a judge who would, presumably, have strong feelings about the outcome of a case and insists that the neutral arbiter looks to the record, the parties' argument, and nothing more as a basis for his decision. The "neutral arbiter" role thus represents a narrower view of the judicial function. That function, as stated by Ross Sandler and David Schoenbrod, is "to enforce the laws, including the constitutional law, that elected officials adopt. Judges who go beyond what is necessary to enforce the law usurp the policy-making function of elected officials…."[3] In the "neutral arbiter" role, the judge determines liability and awards relief without regard to the policy consequences of his actions or of policy-based precedents set by other courts under similar circumstances.

- Judge can become policy-maker

In the role of "policy-maker," a judge manages litigation, rules on liability, and crafts remedies based on the outcomes he believes will most benefit society.[4] The district judge is most often driven to this position when he recognizes that existing laws or policies "are not consistent with justice or the good of the community."[5] Continues Hennessey, "It is then, when legal reasoning will not suffice, that judges make value judgments. It is in this discretionary exercise in making policy that judges most often are said to be legislating."[6] Coupled with the

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[2] Abraham L. Davis, *Blacks in the Federal Judiciary: Neutral Arbiters or Judicial Activists?*, Bristol, Ind.: Wyndham Hall Press (1989): 76.
[3] Ross Sandler an David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government*, New Haven: Yale Univ. Press (2002): 9.
[4] Margo Schlanger, "Beyond the Hero Judge: Institutional Reform Litigation as Litigation," 97 Mich. L. Rev. 1994 (May 1999): 1997 (*quoting* Feeley and Rubin at 5).
[5] Edward F. Hennessey, Judges Making Law, Boston: Flaschner Judicial Institute (1994): 1.
[6] Id.

"broad power the nonmajoritarian branch is given…especially in constitutional law,"[7] district judges have considerable latitude to implement their own visions of appropriate social policy by assuming the "policy-making" posture. In the "policy-making" role, a "liberal jurist" has the power to "expand the list of fundamental rights" in favor of underrepresented classes or interests.[8] While that does not necessarily mean that he will employ that power, there is evidence to suggest that judges, like those in the federal district courts, who are appointed for life terms are more likely to apply the law liberally than judges who periodically run for election or retention.[9]

The difficulty of these roles, of course, is that judges, like most people, do not choose a role before acting and follow that role through to its logical conclusion. At some points in an institutional reform litigation, a judge may act exclusively as "neutral arbiter;" at others, he may appear to be fulfilling the expectations of the "policy maker" role. Most judges work hard to balance their personal inclinations and value judgments with sound judicial practice. This balancing act is the central feature of Cooper's *Hard Judicial Choices*. According to Cooper,

> The hard choices involved in the [representative institutional reform cases studied in the book] were not whether to take a case or whether there was a violation of law requiring a remedy. In most instances, the cases were clear and the violations patent. Rather, the truly hard choices come from the effort to meet the elements of remedial adequacy while balancing those demands against the need for limits to discretion, both the more formal doctrinal constraints and the less formal judgmental factors associated with a prudent sense of the court's

[7] Id. at 64.
[8] Id. at 52.
[9] Bradley C. Canon & Charles A. Johnson, *Judicial Policies: Implementation and Impact*, 2d. Ed., Washington D.C.: Congressional Quarterly Press (1999): 54. (4a)

> relationship to the community and its administrative and elected officials.[10]

The roles described in the passage more or less reflect the "neutral arbiter" and "policy maker" roles explored above. As suggested by the passage, most district judges in institutional reform litigation seek a balance of the two, not a static adherence to a single role.

Major Criticisms of Judge as Policy-Maker in Institutional Reform Litigation

While balancing the roles of "neutral arbiter" and "policy maker" realistically reflects the district judge's practical role in the governmental hierarchy since *Brown*, significant criticism still abounds, from both scholars and elected officials, against those judges who deviate in any way from the "neutral arbiter" role. That criticism is based on the following arguments.

Judges are ineffective at instigating social change (normative argument)

Some commentators insist that judges should refrain from policy-making on the grounds that their policy decisions do not, in the end, drive institutional reform. Rather, the argument goes, the environment in which the judge operates determines if and when social policy reform will take place; if the members of the society whose policies would be altered by a judge's ruling are unreceptive to such alteration, the alteration will not occur, regardless of the judge's mandates.[11] If society were significantly influenced by judicial pronouncements, such that a judge could issue an opinion explaining the need for institutional reform and public opinion would respond in a favorable matter to the implementation of such reform, then presumably critics arguing along this line would have less concern with judicial policy-making. However, as

[10] Philip J. Cooper, *Hard Judicial Choices: Federal District Court Judges and State and Local Officials*, New York: Oxford Univ. Press (1988): 350.
[11] This is one of the driving theses behind Gerald N. Rosenberg's The Hollow Hope: Can Courts Bring About Social Change?, Chicago: University of Chicago Press, 1991.

Canon and Johnson point out, society's attitudes toward institutional reform are influenced by an array of inputs:

> …people's responses to a new policy are shaped by their preexisting attitudes toward the policy or toward things symbolized by or associated with the policy or the agency making the policy. Such attitudes may be acquired from a variety of sources, such as parents, peers, churches, community norms, magazines, and television shows. These attitudes may be based upon facts or upon misinformation, they may stem from accurate or from erroneous versions of history. Attitudes may or may not be logically connected with the policy at issue.[12]

Faced with that dizzying array of inputs to contend with, even a most uncharacteristically outspoken district judge, one willing to use every available media outlet to assault the public with his policy views, would have considerable difficulty in changing public opinion on a policy if the majority of other societal inputs were not on his side. Accordingly, and following this criticism of judicial policy-making, a judge never makes policy, he merely enforces the will of the people to undertake reform.

Judges are ill-equipped to adequately reform institutions in disrepair

Several popular arguments abound as to why judges are ill-equipped to undertake policy-making in the context of institutional reform litigation. Two of those come in the form of assumptions about judges' personalities and backgrounds, made in general terms to cover the breadth of the federal judiciary. First, several leading texts[13] criticize federal judges for choosing the path of least resistance in disposing of cases and managing litigation. These authors assume,

[12] Canon, 155.
[13] Sandler & Schoenbrod's *Democracy by Decree* (cited above); David Stein, *Judging the Judges: The Cause, Control and Cure of Judicial Jaundice*, Hicksville, N.Y.: Exposition Press (1974).

and in some cases state outright[14], that judges are inherently comfortable (read: lazy) creatures who are happy to mandate sweeping reform but care little for the massive effort required to tailor that reform to the particular situation and oversee its implementation through various stages and in the hands of various parties. I should think that if this assumption were true, institutional reform litigation would seldom see the quantity of interim orders, the level of engagement, and the span of years that it does in the federal district courts. Second, a more basic assumption that goes to the heart of any policy-making argument criticizes the judges for their lack of expertise in the reform matters they undertake. The argument goes that judges, who are not experts, should leave the policy-making to those who are, such as agency heads and legislators. But where the political branches are unwilling to act to correct rights violations pronounced by the courts, and where judges are willing to call in experts to testify in a matter so as to educate both the judge and the parties as to the consequences of their proposed course of action, this defect is both excusable and correctable by judicial action.

Two broader arguments test the ability of the judge as part of the federal judiciary to effectively resolve institutional reform litigation.

- The adversary system, which constrains judges, is an inadequate forum for resolving institutional reform litigation

Critics who claim that the adversary system in which district judges are trapped is inadequate to resolve institutional reform litigation point to two main justifications for their skepticism. First, the adversary system necessarily limits the number of voices able to engage in debate. A case must, by reason of administrative feasibility, have a finite number of players;

[14] Sandler, 126-127.

those players' voices are sure to be heard, at least to some degree.[15] Institutional reform cases also attract the attention of major public policy groups interested in the type of reform at issue in the case; those groups' voices can be accommodated through amicus filings with the court. The public, however, and the majority of smaller interest groups with various policy orientations know little about the procedure for joining a case as amicus curiae; in many cases, even if the groups did know how to formally serve as amicus, they would be denied the chance to do by judges looking to keep the litigation manageable. No one doubts, however, that these groups might contribute significantly to the policy debate were it staged in a political forum. The adversary system thus limits the scope of the public debate over policy. Moreover, if public debate through popular channels breaks out as the result of reports that a judge is considering undertaking a massive institutional reform in a particular litigation, the court must be deaf to the public concerns not lodged formally with the court to preserve the legitimacy of the court's proceedings.

The second reason centers on the nature of litigation. A judge may not issue a policy-making opinion merely because he feels the time has come for institutional reform, the way, for instance, a city mayor is able to do. Rather, a judge must wait for a case to be filed to act on his desired policy reforms. This may work in certain policy arenas, but in others it can cause a broad disconnect. Consider the case of *Brown* again briefly. When the Supreme Court ordered the desegregation of the nation's public schools, it was limited by the nature of the complaint to ruling on racial discrimination in the context of education. The Supreme Court and the lower courts that inherited the *Brown* legacy then had to wait for subsequent desegregation cases to be

[15] Issues often arise in the class formation stage between plaintiffs whose ultimate interest in the outcome of the case are quite separate from other plaintiffs' and/or the goals pursued by plaintiffs' counsel. See the description of the plaintiff's class in the *Tyler* litigation, page 21, for an example.

raised in order to address those related issues. While in *Brown* that was arguably a benefit, easing the South into full-scale desegregation while forcing through policy reform that no Southern politician would risk his career to support, most institutional reform cases would benefit from a broad base of popular support from the outset and the commitment of politicians who can act relatively quickly to see tangentially-related reforms instituted in the legislature or through executive agencies. In this second way, the adversary process limits the ability of courts to construct successful, broad-based policy schemes.

- Judges are unable to adequately oversee implementation of remedial decrees

The most reasonable criticism of judicial policy-making in institutional reform litigation centers on the argument that the courts are not equipped to implement and oversee the reforms in practice. The most notable problem with judicial oversight of reforms is that the judiciary has no access to state coffers nor police powers: the court cannot implement the reforms personally.[16] Thus, the court must rely on some other party to implement the reforms prescribed.

> A further difficulty that is unique to judicial policies is that the institutional powers of the judiciary usually limit the court's selection of who implements a judicial policy, how it is done, and with what resources. Thus courts must work with existing implementing groups – they cannot fire unenthusiastic implementers and hire new ones. To compound the problem, the groups that immediately implement the policies are frequently parties to the decision. If the implementing group loses its case, then it must immediately execute a decision which it fought against for months or even years.[17]

Even if the implementing parties undertake to carry out the judicial policies with reasonable deference to the court's judgment, the court cannot know this without appointment of special masters or frequent reports to the court by the implementing parties and others invested in the

[16] Canon, 63.
[17] Id., 66.

carrying out of the institutional reform. Canon and Johnson point out that while "[c]ourt orders have improved the worst prison conditions" the courts nonetheless "cannot prevent prison officials from mistreating their charges in less visible ways."[18] Their contention underscores the importance of political investment in reforming the institution independent of a judicial mandate and points out the greatest shortcoming of judicial oversight of remedial decrees: judges cannot know everything that is happening within the institution, and even if they could, they would not be able to act on perceived injustices until a suit was filed and resolved in due course.

Judges undermine American democracy by treading on political ground

In their well-known (if equally widely hated) book Democracy by Decree, Sandler and Schoenbrod issue an alarmist warning that judicial encroachment into the policy-making arena traditionally inhabited by the political branches threatens the very fabric of American democracy. Among the parade of horribles they usher out in support of this thesis, two criticisms of judge as policy-maker stand out. First, the authors claim that judges may fashion policy without regard for the rule of law or the will of the people, and if they do so, they will be insulated from accountability by their life appointments. The authors claim that institutional reform, insofar as it is policy-making, should be undertaken only by those directly accountable to the people.[19] The authors concede that *Brown* and its progeny have cured many societal ills, and that the reform of public schools has been to the advantage of a society in which the political branches were unwilling to undertake reform themselves; however, they argue rather arbitrarily, such judicial policy-making should be off-limits in the future.[20] Beyond the confusion engendered by praising a grand gesture of judicial policy-making while in the same breath

[18] Id., 99.
[19] Sandler, 9.
[20] Id., 14-15.

condemning the practice as anti-democratic, Sandler and Shoenbrod's criticism that the judicial branch will act without reservation because judges are somehow unaccountable to the people falters on two grounds. First, judges are, in fact, concerned with public perception of judicial action insofar as judicial policy-making power is derived, to a great extent, from the public's perception that the courts are impartial bodies seeking justice for the great and the small alike; if judges veer too far from the rule of law and their appointed place within its administration, public perception of judicial propriety is likely to be weakened, and with it judicial power in the field of policy-making. As a result, judges have a genuine incentive to stay within the lines of established judicial practice by engaging in policy-making only where it is clearly within the scope of the applicable law and generally accepted by society at large.

Second, Sandler and Schoenbrod argue that the judiciary is simply not invested with the right to make policy, and in doing so it oversteps its constitutionally-appointed boundaries and undermines the powers bestowed exclusively upon the executive and administrative branches.[21] In this, their Article III argument, the authors seek to limit the judiciary's power to the declaration of rights clearly established and the management of claims alleging violations of those rights. The judiciary, in this strict-construction model, has no power to add to the arsenal of rights, which is strictly the province of the legislative branch, nor full power to enforce existing rights, which is largely the province of the executive branch. In institutional reform litigation, the authors claim, judges add to the existing rights by reading between the lines of the Constitution's text to afford plaintiffs rights not explicitly granted and by fashioning specific requirements, such as minimum cell size or maximum occupancy standards in jail cases, to clarify the meaning of vague rights. These same judges enforce existing rights by issuing

[21] Id., 9.

decrees barring government officials or agencies from acting in a way adjudged to abridge the plaintiffs' newly-discovered rights and by overseeing the implementation of those decrees directly. This is a reasonably sound argument from the strict-constructionist camp if one ignores the practical realities of judiciary interaction with the majoritarian branches of government. Practically speaking, the legislative and executive branches often welcome judicial policy-making as a means of achieving social progress in politically unpopular areas[22]. And where they don't invite the judges in to make the decisions, the political branches often, to quote Schlanger, "win by losing" in institutional reform battles with the judiciary.[23]

Why Judges Nonetheless Assume the Role of Policy-Maker in Institutional Reform Litigation

The above sampling is merely the highlight reel of the criticism that judges who engage in policy-making in institutional reform litigation endure. Writes Cooper, "There is ample evidence that the judges deciding these cases are very much aware of the dangers and difficulties, both legal and political, associated with their rulings. The fact that they choose to act despite the difficulties does not mean that they do not care about or are unaware of the consequences."[24] If Cooper is correct, then judges must have strong motivations to proceed with policy-making in the context of institutional reform litigation. What are those motivations?

Judges are creatures of precedent

Through *Brown v. Board of Education* and its progeny, the Supreme Court has given the federal district courts broad policy-making powers in the context of institutional reform litigation. This gift of policy-making power came in the form of precedent, establishing a legal rule which federal court judges would be bound to follow. A leading case in prison reform

[22] Id., vi. ("Elected officials invited judges to take charge of policy making in order to evade responsibility for politically controversial choices. This is a core argument of this book.") *Id*.
[23] Schlanger, 2012.
[24] Cooper, 20.

litigation offered similar precedent in that field.[25] With the power to make policy has also come Supreme Court mandates as to the nature of the tools that may be employed behind that power: "In addressing the permissible scope of a remedial order, the Supreme Court has recognized the need for breadth, but it has also reminded trial courts that they must give due consideration to the interests of states and localities in controlling…public institutions over which local control has usually been exercised."[26] So, district judges, as per the Supreme Court, may make policy to govern reform of such institutions as the nation's prisons, though they are advised to balance what is needed to correct the injustice against the needs and interests of the local political branches. Some note instances when district courts have carried their precedential mandate to set policy too far,[27] but Canon and Johnson point out that the district courts generally operate within the guidelines set by the Supreme Court.[28]

Judges are in a unique position to stand up for the rights of the disenfranchised

Even those who criticize or condemn judicial policy-making acknowledge that the nonmajoritarian branch has a duty to defend the rights of those not represented in the political branches. Indeed, the judiciary was constructed to protect the disenfranchised; as Judge Hennessey describes the Founders' concern, "a democracy of the strong would devour the weak."[29] Institutional reform litigation generally aims to protect the rights of the weak from the apathy of the strong. Especially in states where convicted felons cannot vote to express their

[25] Schlanger, 2004. ("…Holt v. Sarver…augured a nationwide flood of class-action lawsuits leading to major court orders requiring reform in such areas as housing conditions, security, medical care, mental health care, sanitation, nutrition, and exercise.) *Id.*
[26] Cooper, 21-22.
[27] Hennessey, 48-49. ("[T]he criticism is that precedential reasoning leads to future mischief.") *Id.*
[28] Canon, 203-204. ("The district court have much less impact where the law or Supreme Court policy is reasonably clear and the policy does not need to be tailored to fit local situations.") *Id.*
[29] Hennessey, 65.

displeasure with prison conditions, or in the case of the institutionalized mentally ill, whose numbers are few and whose families voices are drown out by the roar of societal problems that effect greater numbers in more dramatic ways, judges see that those who are not counted are nonetheless not forgotten. That is the nature of justice for all, and it serves as a great motivator for judges to ignore their critics and implement policy to benefit society as a whole in institutional reform litigation.

Judges are bound to ensure appropriate respect for rights once violated

One of the prerequisites for institutional reform litigation to proceed to the point of judgment is the violation of a right. A district court judge, having acknowledged the violation of that right, cannot merely advise the government representatives who oversaw the right-depriving institution that they were wrong and must now act rightly. As *Brown* showed, without compulsion, governmental agencies will not move on unpopular institutional reforms, regardless of the stern words issued by a federal court. The responsibility thus falls on the judge to see that a successful plaintiffs' class' rights are not trampled post-judgment. While judges cannot prod officials on with a stick nor fund implementation of changes with a purse, they can issue specific remedies and follow-up to ensure that they are not ignored. In cases where the losing defendants are strongly opposed to the reforms, this may be difficult; however, in the more common case where violation of the plaintiffs' class' rights was the result of institutional inertia, judges have a strong motivation to strive toward making policy as an ultimate goal but manage the litigation in the role of neutral arbiter. This hybrid role helps to ensure compliance: "The more legitimate the decision and the greater the sense of law-abidingness in the agency, the easier it is to overcome inertia."[30] On a grander scale, this hybrid role bolsters the credibility of the judicial branch and

[30] Canon, 177.

encourages law-abidingness by those outside the litigation: "What we do in the courts, and how we do it, is seen not only by the litigants before us, but by the entire community. The stakes are high. Our performance will help to determine whether constitutional principles are nourished and whether human rights are advanced."[31] So while the district judge is encouraged to act despite the criticism of those who denounce judicial policy-making on all fronts, he is also conscious of Supreme Court limitations and public opinion of the judicial branch, which reduce his policy-maker role to that of neutral-arbiter in the context of managing institutional reform litigation.

Judges, who impose sentences, feel responsible to those who serve those sentences

The trial judge serves a number of functions in the American judicial system. Among those functions, two stand out in the context of a judge's relationship to citizens charged with and convicted of criminal wrongdoing. First, the judge ensures the fair and just administration of the state's prosecution of criminal defendants, presumed innocent until proven guilty and having the right not to be punished until such time as guilt is proven beyond a reasonable doubt. A judge's first encounter with a criminal defendant occurs shortly after arrest at the defendant's preliminary arraignment. It is not lost on judges who have spent years arraigning defendants that those who cannot make bail to secure freedom from jail between their arraignment and their next court date are predominantly minorities. Experienced judges clearly recognize that the effect of drastically limiting issuance of recognizance bonds to criminal defendants is to place behind bars large numbers of minorities who simply do not have the monetary or property resources necessary to secure bond. Thus, when a judge thinks of those in the jail that serves his city or county, he thinks first of a group of criminals convicted of a number of low level crimes, and

[31] Hennessey, 66.

second of those he'll see in court today and tomorrow, the presumably innocent awaiting disposition of their cases. If a judge truly has an interest in the fair and just administration of criminal proceedings, as well as in the integrity of the criminal justice system as a whole, he will have a corresponding interest in ensuring that those who inhabit the jails, many of whom have not been convicted, some of whom will never be convicted, and most of whom are sitting in jail for no other reason than their socioeconomic circumstance, are not effectively punished prior to disposition of their cases by sub-standard conditions and lack of protection within the jail.

Second, the judge imposes a sentence, within certain guidelines and subject, in some cases, to the will of the jury, upon a convicted criminal. As a minister of justice, a judge must realize that some of those convicted in his court will later be proven innocent (the system is not perfect) and that all of those convicted in his court are entitled to at least the constitutionally-minimum standard of treatment (nothing cruel or unusual). Knowing that all of those whom he sentences are entitled to at least the constitutional baseline, and further knowing that some of those whom he sentences will be later proven not guilty, the judge has an interest in seeing that the facility to which he sentences convicts is treating them humanely in keeping with the Eighth Amendment and prevailing administrative and judicial norms. The judge's interest in not feeling responsible for the unconstitutional treatment of prisoners should not, I believe, be underestimated.

Judges are interested in the efficiency of the court system

Judges at all levels are always looking for ways to streamline their dockets, both to reduce their daily caseload and, correspondingly, to allow more attention to be paid to each individual case. Many judges view prisoner litigation as frivolous and primarily a source of docket congestion; this was especially true prior to the enactment of the Prison Litigation Reform

Act ("the PLRA"), which has reduced the overall numbers of prisoner claims, and arguably the bringing of frivolous claims in particular, quite dramatically. Prior to the PLRA, a judge would have had a real incentive in finding a way to prevent prisoner claims from flooding the docket. If prisoner claims alleging deficiencies in a particular facility appeared frequently on a judge's docket, he would have considerable interest in investigating the complaints and rectifying the underlying situation simply from a docket-clearing standpoint. Even though a single prison reform litigation could continue for decades, wiping the regular slew of complaints from the daily docket would cost a judge and the court less time by consolidating the many possible claims into a class action against the institution and then proceeding through the adjudicative process only once (with the regular setbacks and pitfalls, naturally) rather than numerous times. Also, a comprehensive solution to an institutional problem can prevent the filing of complaints not yet seen if the parties to the litigation are properly guided; thus, the judge has an additional interest in seeing that the litigation is broad and effective enough to catch the complaints waiting in the wings.

Prison Reform Litigation as a Special Subcategory of Institutional Reform Litigation

Prison reform litigation is an especially prevalent type of institutional reform litigation.[32] In prison reform litigation, a class of plaintiffs typically seeks relief from corrections officials for alleged violations of Eighth Amendment rights.[33] According to Schlanger, "The prison cases are sensibly thought of as 'policymaking' in part if not in whole."[34] While public opposition to reforms of jail and prison administration has not generally been terribly passionate, "there

[32] Schlanger, 2004. ("In 1983 (the first year these data exist for jails), 15% of the nation's 3338 jails (including at least one in all but two of the forty-five states that had jails, and the District of Columbia) reported court orders.") *Id.* An older, less statistical study claimed, "Decrees have ruled in prisons in forty-one states and local jails in fifty states." Sandler, 4.
[33] Id., 1999.
[34] Id.

certainly was no popular support for change. In effect, the courts have ordered remedies for particular groups which the majority had not been willing or able to provide through the normal legislative process."[35] The need for prison reform entered the popular awareness in the 1960s, but "[t]he public was in no mood to pressure state legislatures for more money to build prisons. Prison populations turned sharply upward, but there was no room for the inmates."[36] Toward the end of the decade, "federal judges began to…entertain seriously the claim that the Eighth Amendment's prescription against 'cruel and unusual punishments' might provide a judicially enforceable right to at least minimally adequate prison conditions."[37] From this background sprung the modern incarnation of prison reform litigation.

Judge's Role as Policy-Maker in Prison Reform Litigation

The traditional role of the judge in prison reform litigation was that of the "neutral arbiter" in that judges adopted a "hands-off" approach, insisting that management of the nation's jails and prisons was not a matter to be handled by the courts. Tracing the history of the litigation, Schlanger notes: "Until the 1960s, federal judges almost invariably refused to intervene in civil cases about prison conditions or the institutional rules to which federal and state inmates were subjected. In taking this 'hands-off' approach, judges explained that the judicial role simply did not encompass prison reform."[38] In the 1970s this "hands-off" approach started to be relaxed, with "some district judges…developing unprecedented and detailed policies affecting state institutions in their districts, most often prisons."[39] As the pendulum was clearly swinging to a new extreme, the Supreme Court eventually took action to restrain judges'

[35] Cooper, 14.
[36] Cooper, 240.
[37] Schlanger, 2003.
[38] Schlanger, 2000.
[39] Canon, 204.

discretion in crafting and carrying out policies, though "the judges retain considerable flexibility in finding violations and fashioning remedies."[40] According to Canon & Johnson, the judicial advance into the territory of policy-making by the few, and the following of that precedent by the many, has had a substantial effect on the way prisons are run: "It is fair to say that much of the responsibility for reforms in the nation's prisons…comes from pioneering policy activism by district judges such as Frank M. Johnson, Jr. of Alabama, William Wayne Justice of Texas, and others who followed their lead."[41] Although political changes have often affected the degree to which judicial policy-making is accepted, Horowitz nonetheless attributes to it a "structural, enduring character"[42] which suggests that its influence in the area of prison reform litigation is questionable only as a matter of degree. As in other types of institutional reform litigation, district judges managing prison reform litigation have learned to use affirmative as well as negative relief to remedy plantiffs' rights violations:

> Another major rationale for mandating affirmative relief is the federal courts' experience of more than a quarter century with litigation in which legal declarations and general injunctive, but negative, relief were largely ignored. The experience of political resistance to federal court rulings declaring racial discrimination illegal and others calling for an end to inhumane prison conditions indicated that more was needed if the remedial orders were to be more than mere empty statements.[43]

The role of the judge in prison reform litigation may be characterized as policy-making to the extent that all institutional reform litigation necessarily is, compounded by the use of affirmative relief in remedial decrees. However, the judge's policy-making persona is not the one that enters the courtroom day-to-day to manage the litigation; the judge-as-policy-maker tends to come

[40] Id.. (4b)
[41] Id.(4c)
[42] Horowitz, 17. (4k)
[43] Cooper, 14.

through in opinions or statements to news outlets about conditions in the corrections facility. In the courtroom everyday managing the litigation, the judge is the neutral arbiter desired by his critics.

Tyler v. U.S., et al.: A Case Study of an "Activist" Bench

Background of St. Louis City and the Jail at the Time the Litigation Began

The St. Louis City Jail was built in 1915. In addition to the primary building in Midtown St. Louis City, the Jail complex included a minimum-security facility near the river known as the Workhouse. There is little recorded about the condition of the City Jail and the Workhouse for the first sixty years of their existence, but as is the nature of buildings, by 1970 both buildings had fallen considerably into disrepair[44]. Although stories of horrible conditions and a deplorable lack of basic services and amenities abounded in the 1960's, no action was taken to correct the perceived defects. By the early 1970s the spirit of institutional reform litigation, charged by the civil rights movement, was making its way through the country's courthouses. In 1974, that spirit landed on the steps of the courthouse of the United States District Court for the Eastern District of Missouri to challenge jail administrators on conditions of the St. Louis City Jail and Workhouse.

Billy Joe Tyler did not set out to be part of a class. He was interested only in getting himself out from behind the rotting walls of the City Jail. In 1974, Tyler filed a habeas corpus claim in District Court alleging that his defense attorney in an action for assault had misled him as to the consequences of accepting the prosecutor's plea deal.[45] The court dismissed Tyler's claim, and so it was back to (cell) block one for him in crafting his court-ordered release from

[44] See Court's Memorandum Opinion of October 15, 1974 at 3-4, *Tyler v. Percich*, (No. 74-40-C).
[45] Tyler v. Swenson, 306 F.Supp. 1200 (E.D.Mo.1969).

jail. Tyler's next attempt had considerably more staying power, though the effects were not exactly as he intended. Tyler filed suit in the District Court alleging cruel and unusual punishment by the Sheriff of the City of St. Louis, the City Commissioner of Adult Correctional Services, and the Warden of the City Jail; filing the complaint *pro se*, as he had done in the first instance, Tyler demanded his release from the City Jail for violations of his Eighth Amendment rights.

The Tyler Class: Rights Violated

District court Judge John K. Regan recognized the merit in Tyler's complaint and appointed counsel to represent him. Plaintiff's counsel were given leave to reformulate Tyler's complaint into a legally-substantial allegation of violations of Tyler's Eighth Amendment rights by the Sheriff, Warden, and Commissioner.[46] Specifically, the complaint alleged that conditions in the City Jail and Workhouse violated the constitutionally-mandated minimum standard for corrections facilities. Plaintiff's counsel, all attorneys with the Legal Aid and Defender Society, following the lead of other cases in the prison reform litigation genre, then sought to have all former, current, and future residents of the City Jail and Workhouse certified as a class under Federal Rule 23. Judge Regan approved the class status on September 19, 1974[47] and the litigation proceeded as an Eighth Amendment class action for injunctive relief.

Response to the Rights Violations by the Political Branches

The political branches of the state and local government were those branches originally entrusted with supervision of prison administration and conditions. They saw as well as the courts did, and with greater responsibility, the crumbling walls and outdated infrastructure of the City Jail and the Workhouse. They chose not to act. Prison reform was not going to win votes

[46] Court's Order of May 10, 1974, *Tyler v. Percich*, et al., (No. 74-40-CV).
[47] Docket, 3.

for politicians, who found they could get terrific political mileage out of "tough on crime" initiatives that put more prisoners behind bars, without having to worry about where or how all of those additional convicts and pre-trial detainees would be housed. And so the issue was ignored or put on the back burner by political officeholders both in St. Louis and in Jefferson City. The only pressure put on the political branches to act came from the individual officials charged with running the City Jail and Workhouse on a daily basis. They felt the impact of the "tough on crime" policies, and they feared the heat of the judicial reform mandates making the rounds in other state corrections administrations. But in tough financial times, there was no money to alleviate the strain felt by the Sheriff and the other City Jail officials for an unpopular program, especially when Jail policies, staffing, facilities, and funding apportionment were all at their discretion.[48]

The Early Days: Judge Regan

District judge John Keating Regan managed the *Tyler* litigation from its filing in 1974 through September 1982. Regan was a white male appointee of President Kennedy in 1962. He was educated locally at St. Louis University and later attended Benton College of Law, after graduation from which he undertook a career in private legal practice. Before taking his seat on the federal bench, Regan served as a prosecutor in the City of St. Louis, Democratic Committeeman for the Seventeenth Ward of the City of St. Louis, and later Presiding Judge of the City Circuit Court in charge of the criminal docket.

. Regan's career was marked by a disinterest in civil rights litigation. According to the Western Historical Manuscript Collection's biographical preface to the materials on Regan, he

[48] Interview with Tim Bryant, reporter for the St. Louis Post-Dispatch, who covered the *Tyler* litigation for that paper. [Interview on file with the author.]

was "considered unsympathetic to civil rights plaintiffs."[49] On one notable occasion, Regan's decision not to affirm the basic equal opportunity housing rights of prospective African-American homebuyers was overturned by the United States Supreme Court.[50] Yet, somehow Regan was the instigator of the *Tyler* litigation. If he wasn't driven to intervene and mold the litigation by an interest in the rights of prisoners at the City Jail, some other motivation must have driven him to do so. Commentary from those who followed the case suggest that Regan was driven to promote the St. Louis City Jail litigation primarily by his desire to see the City's courts run efficiently and the City's coffers not suffer needless depletion by way of damage awards to prisoners[51]; while that may explain Regan's decision to approach the *Tyler* litigation in a "hands-on" fashion, it offers little insight into Regan's management of the litigation once it entered his court.

Under Regan, the *Tyler* litigation was an efficient operation. The bulk of the matter was resolved between January 1974 and August 1975. The docket entries through 1976 are comprised almost exclusively of City Jail Reports.[52] After 1976, no substantive court action, including receipt of monitoring documents, until Judge Cahill's inheritance of the litigation in 1982.[53] The trial lasted only two days, with all but the testimony of the direct parties to the litigation submitted via deposition or affidavit.[54] While this treatment seems to jive with the suggestion that Regan was motivated by a desire to have a class of prospective complaints

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[49] Western Historical Manuscript Collection, University of Missouri-St. Louis, sl 173 Regan, John Keating, accessed online at http://www.umsl.edu/~whmc/guides/whm0173.htm: November 30, 2004.
[50] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186 (1968).
[51] Western Historical Manuscript Collection materials on Regan.
[52] Docket, 21-27.
[53] Docket, 27.
[54] Memorandum Opinion of October 15, 1975, *Tyler v. Perich, et al.*, (E.D.Mo. 1974) (No. 74-40-C).

cleared quickly and preventatively from the court's docket, it does not explain Regan's morally-charged writing in court documents. Addressing the merits of the case, Regan labeled the conditions within the jail "inhumane" [55] and "brutal,"[56] words that carry with them a sense of innate human rights usually reserved to civil rights champions as compared to viable alternative adjectives such as "constitutionally impermissible." If Regan did not have an interest in prisoner's rights before instigating the *Tyler* litigation, his tone suggests that he developed one by the time he ordered the City Jail reformed in October of 1974:

> To further precisely relate each of the failings of the City Jail would serve no useful purpose. The Jail is used primarily to detain those who are accused of crime but who are too poor to afford bail. Each accused is clothed in a presumption of innocence. The interest of the State in depriving an accused of his liberty is to insure his presence at trial and when that detention becomes punitive it is no longer consistent with the State's lawful interests.[57]

Reading through his court documents, I am persuaded that Judge Regan felt for the poor and the wrongly accused who stood before him in court each day faced with the prospect of returning to an infested, decaying building without hope of safety, recreation, visitation, or medical attention. This is no doubt a troubling interpretation for some as Regan first ordered the jail closed in October 1974 and then turned around in August 1975 and accepted the terms of a negotiated settlement between the parties under which the City Jail would remain open with slight alteration and under court supervision. This action, I believe, was born out of necessity, as the City of St.

[55] Id. at 3.
[56] Id. at 6.
[57] Id. at 9.

Louis did not have the funds necessary to begin immediate construction of a new jail facility, which not high on the political or social agenda of the day.[58]

Whatever delicate combination of efficiency and interest in prisoners' rights might have driven Regan to act in *Tyler*, he explicitly offered encroaching precedent as a motivation for the court-mandated institutional reform stemming from the litigation. Regan went through each of the alleged constitutional violations complained of by the *Tyler* class, citing case law from a variety of circuits to the effect that the jail's actions or inaction was unconstitutional.[59] Because the authority cited to was non-binding upon Regan, and because his general persuasion was against the extension of civil rights at least formally, Regan's marshalling of the available case law reflects his reasoning that reform was on the march and the City of St. Louis would do well to follow the trends developing elsewhere rather than run the risk of increased liability and court congestion caused by greater volume of litigation later.

The Formative Period: Judge Cahill

District judge Clyde Cahill managed the *Tyler* litigation from September 1982 through December 1994. The matter came to him after the recusal of district judge Regan in 1982, which followed roughly six years' inactivity in the case. Judge Cahill reviewed the matter and instructed the parties to present the court with an update on the conditions at the jail.[60] Since the last action in the case, the plaintiffs' class attorneys had abandoned monitoring of the jail and no longer intended to represent the class in the continuing litigation. Cahill wasted no time investigating current jail conditions, temporarily assigning the St. Louis City Public Defender to report on the jail while he sought out a permanent attorney. Finding new plaintiffs' counsel

[58] Interview with Tim Bryant of the St. Louis Post-Dispatch, copy on file with the author.
[59] Memorandum Opinion of October 15, 1975 at 6-9.
[60] Docket p. 27.

proved a difficult task, and while Cahill never acknowledged precisely how many attorneys he endeavored to appoint on behalf of the Tyler class, the young Frank Susman, a local attorney later famous for his reproductive rights work, was evidently not near the top of Cahill's list of choices. Susman took over the litigation out of respect for the court and Judge Cahill, and the value of his service was not lost on Cahill.[61]

Judge Cahill's commitment to civil rights litigation is legendary. One of the first African-American students to graduate from St. Louis University Law School, Cahill began his legal career with the City of St. Louis Circuit Attorney. Cahill tested the waters of private practice briefly before returning as a Special Prosecutor with the Circuit Attorney's office. Cahill's appointment to the District Court for the Eastern District of Missouri by President Carter was the first such appointment for an African-American on that bench.[62]

Judge Cahill set the tone of his handling of the *Tyler* litigation in his first Order, in which he held the defendants in contempt of court for violating the court-mandated occupancy limit.[63] While holding defendants in contempt is always an option when a court order is violated, few judges resort to such seemingly drastic measures in prison reform litigation.[64] Over the course of the twelve years Cahill tended to the *Tyler* litigation, he issued two published opinions and issued over a dozen orders, several *sua sponte*, for action or cessation of action by the defendants.

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[61] Court's Memorandum of August 31, 1984 at 8-10, *Tyler v. Schweitzer,* et al., (No. 74-40-CV). For taking on the undesirable case and approaching it with such diligence, Cahill awarded Susman a 25% bonus in attorneys fees.

[62] Information provided by the Just the Beginning Foundation, of which Cahill was an active member.

[63] Court's Order of August 31, 1984, *Tyler v. Schweitzer*, et al., (No. 74-40-CV).

[64] This may be either to keep the proceedings collegial in an effort to avoid impasse or to save face for the judiciary when holding defendants in contempt will not likely ameliorate the offense and will demonstrate that judicial ineffectiveness to the public.

Distinguishing Cahill's motivations in managing the *Tyler* litigation is fairly simple since he stated them outright. First, Cahill believed that the bail system, which as noted previously favors those with greater economic resources, was unjust and that only true flight risks belonged in jail pending trial.[65] Believing that imprisoning those awaiting trial in even the finest of jails amounted to punishment for economic status[66], Cahill was unwilling to accept that pre-trial detainees should be kept in conditions Judge Regan had termed "barbaric."[67]

In addition to pre-trial detainees, Cahill's overarching goal as a judge was to see incarceration rates decrease.[68] He believed that too many lives, in particular those of minorities, were destroyed by long jail sentences for first-time or non-violent offenses.[69] Cahill managed the litigation with this in mind. Unlike the economic and political pressures that prevented Judge Regan from seeing the erection of a new jail facility, Judge Cahill simply had no interest in a facility that would house the number of inmates the City of St. Louis desired to put in jail. As such, Cahill's orders were tailored toward providing adequate services within the existing facilities for the numbers the Jail and the Workhouse were constructed to house.[70] As jail populations rose in the early Nineties, Cahill set limits on the numbers of "technical parole violators" who could be held when the City Jail facilities approached capacity.[71] Cahill knew that if a new jail were built, its capacity would be increased dramatically compared to the Jail facilities he was working with, and that as a result more "technical" violators would be held for

[65] Tyler v. U.S., 737 F.Supp. 531 (E.D.Mo. 1990): 537.
[66] Id. 537-538.
[67] Memorandum Order of October 15, 1974 at 9.
[68] In an interview with Lauri Reed, a former clerk of Cahill's, she describes this goal as "his legacy." (Interview on file with the author.)
[69] Id. at 538.
[70] See terms set out in Court's Interim Order of October 20, 1982, *Tyler v. Percich*, (No. 74-40-C). *See also* Tyler v. U.S., 737 F.Supp. 531, at 539 (stating Cahill's interest in seeing new jail facilities if the City could constrain itself not to build bigger ones).
[71] Court's Order of February 5, 1993, *Tyler v. Murphy*, et al., (No. 74-40-C).

long periods and prosecutors would more freely deny bail to defendants because there was room enough to store them all pending trial. As such, he encouraged the parties to do the best they could by improving existing conditions and abiding by the restrictions imposed upon their actions thereby with regard to prisoner overcrowding and provision of services.

The Resolution: Judge Jackson

District judge Carol E. Jackson managed the *Tyler* litigation from January 1995 through its resolution in 2003 following the opening of the new City Jail in April 2000 and its inspection by plaintiffs' counsel Frank Susman. The matter came to her after the promotion of Judge Cahill. Jackson, an African-American woman, was educated at Wellesley College and attended law school at the University of Michigan. Her legal career began in private firm practice, after which she served as in-house counsel to Mallinkrodt, Inc.. Jackson left private practice to assume a Magistrate Judgeship which term lasted until her appointment to the District Court for the Eastern District of Missouri by President George H.W. Bush in 1992.[72]

Judge Jackson's motivation in resolving the *Tyler* litigation was a matter of efficiency. Handed down to her was this massive and messy litigation spanning nearly twenty years and still in the monitoring phase. It was clear that Jackson wanted to see an end to the litigation. Cahill's passion for fighting for the rights of the disenfranchised was not handed down through the docket, but luckily it fell into the lap of a jurist whose every action concerning a court matter is the height of propriety. Where constitutional rights had been deemed violated, Jackson could not let the matter simply fade away. With the help of the ever-dedicated Frank Susman, Jackson continued to monitor conditions at the City Jail and did not hesitate to take action against the City when the Jail became overcrowded. The meticulous docket records kept under Judge

[72] Biographical information provided by Judge Jackson's office and the Just the Beginning Foundation.

Jackson indicate that while she was maintaining the standards established by the *Tyler* litigation on the one hand, she was at the same time encouraging the final resolution of the litigation by helping to negotiate the requirements of a new jail facility that would prevent another *Tyler* in the future; for instance, under Judge Jackson, there are fewer "Status Reports" than under her predecessors, but more documents of consequence (motions, memoranda, orders, etc.) and a greater indication of communication between the parties, not merely between each separate party and the court.

It is unlikely that Jackson would have been able to bring the *Tyler* litigation to a close without some help from the political environment of the time. Aiding in the realization of a resolution to the litigation, the St. Louis economy of the early 1990's began to pick up steam and as revenue grew, Mayor Freeman Bosley, Jr. championed the concept of a new City Jail and won over political support for the new facility.[73] Politically popular, socially unopposed, and to the satisfaction of the plaintiffs' class,[74] the new jail opened in April 2000.

Conclusions

The three primary judges charged with overseeing the *Tyler* litigation were all considerably different in their political persuasions, each appointed by a different President and each coming from a different cultural and socioeconomic background. Yet they all chose to approach the litigation as if undeniably justified in intervening where agency management of the institution had resulted in breaches of constitutionally-mandated minimum standards. Each of them assumed the role of "policy-maker," engaging in "judicial activism," without political

[73] Tim Bryant interview, on file with the author.
[74] Susman marked the new jail as only a "minor accomplishment," but an accomplishment nonetheless. "Federal court ends supervision of St. Louis city jail facilities," The Morning Sun, April 9, 2000: online at http://www.morningsun.net/stories/040900/usw_0409000019.shtml.

shame. As explained in the context of each judge's profile, the interest of this relatively diverse group in engaging in policy-making was to some extent the result of outside pressures and to some extent the result of personal motivations. The variety of potential interests motivating judges to act in institutional reform litigation proposed above can all be seen, to a greater or lesser extent, in the actions of the three judges in the *Tyler* litigation.

A single judge's interest(s) in a litigation can only last as long as they preside over that litigation. In the case of institutional reform litigation, which can go on for decades, that means a district judge might only be able to shape a single phase of the development of the litigation. In the *Tyler* case, it is interesting to note that despite Judge Cahill's efforts to promote continued use of smaller jail facilities, the litigation was consummated under Judge Jackson, whose interests differ to the extent that a new jail was an excellent resolution given her motivation of efficiently resolving the elderly litigation. Whether Judge Regan would have expected the case to last as long as it did and have such influence over the management of the City Jail, given his interest in clearing the docket of a certain type of case and protecting the bare minimum constitutional guarantees for prisoner treatment, is unlikely given his own apparent lack of interest in the case in the later years of his tenure; one might even wonder whether he was satisfied with reforms having merely been committed to paper, regardless of the reality of the City Jail prisoners' daily lives. Whatever the case, it is clear that no single judge in such a long-lasting litigation can fully enjoy the work he does in his own interests, but that nonetheless he is motivated to approach the litigation "hands-on," in spite of the criticism inevitably foisted upon him by critics of judicial policy-making.