

## The Political Economy of Prison and Jail Litigation

by Margo Schlanger\*

This article explores the practical effects of the prisoner civil rights docket on conditions of incarceration for the 2.2 million people in American jails and prisons on any given day.<sup>1</sup> The analysis takes on a great deal more importance than it ideally would because detention facility litigation is unique in its regulatory importance. Whereas in most other areas of governmental activity, other accountability mechanisms have pride of place, we have as a polity largely failed to implement any other effective regulatory system to govern our burgeoning incarcerative apparatus; at least in many states, litigation is just about the only reform tool available. It is unlikely to live up to the need. But what

is suggested below is that in a variety of ways, detention litigation at least pushes jail and prison administration in the right direction, towards more rationality and more humane conditions. This process has been undermined by the Prison Litigation Reform Act, passed a decade ago. But litigation remains a vital ameliorative force for improvement if not radical reinvention of detention policy.

### I. The Limits of Constitutional Regulation

An investigation of detention facility litigation should start with an acknowledgement of its limits. Jails and prisons are only lightly regulated by the U.S. Constitution. The Eighth Amendment's ban on "cruel and unusual punishments" sets a low bar for the areas of prison life it reaches at all. Medical care, for example, need not be good, or even non-negligent; the Constitution forbids only care so deficient as to constitute "deliberate indifference" to the health of those incarcerated in jails and prisons.<sup>2</sup> Due process requirements, too, currently reach only a limited set of prison and jail actions: As commonly held views of criminal offenders have shifted, so that they are viewed as more and more wild and threatening, the recharacterization of harsh measures as "security" rather than summary punishment has moved much of penal administration beyond the scope of constitutional oversight. *Sandin v. Connor*,<sup>3</sup> in which the Supreme Court undid much of the penal due process revolution of the 1970s, was merely the most dramatic confirmation of this ongoing change.<sup>4</sup> And in other areas of constitutional law, the ordinary rules in effect outside of jail and prison are often

softened by the strong deference the Supreme Court has held is owed to detention facility administrators.<sup>5</sup>

In addition to the topics for which the constitutional constraints are loose, many important fields are left entirely ungoverned by the Constitution. Indeed, because the Supreme Court's case law divide the judicially enforceable "minimal civilized measure of life's necessities"<sup>6</sup> and the unlawful intentional infliction of extrajudicial punishment, on the one hand, from the permissible constraints on prisoners that are motivated by legitimate security or other penological concerns, on the other, *most* of what goes on in prisons and jails—or, more to the point, what does *not* go on—is not something for which anyone answers in court. The presence or absence of education, employment, and rehabilitative programming; general decisions about custody level or security restrictions; the decision about where a prisoner should be housed—all are beyond the narrow concerns of current constitutional law (and, at least mostly, of other law as well).

But notwithstanding the law's narrow scope, since the 1950s people in prison and in jail have frequently brought lawsuits against officers, staff, and administrators. Even if litigation is not a robust form of external oversight of conditions of incarceration, in many states it is just about all there is. Those who care about humane jail and prison conditions need to understand how prisoners' cases work—in particular, the ways in which jails and prisons respond to the litigation.

The leading topics of detention facility conditions litigation in federal court

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## **Litigation (cont.)**

are physical assaults by staff or by other prisoners; medical and mental health care; alleged due process violations relating to disciplinary sanctions; and more general living-conditions claims relating, for example, to nutrition or sanitation. Less frequent but still often seen are complaints about freedom of speech, free exercise of religion, and access to courts or mail.

There are two very different categories of prisoner civil rights lawsuits. The much larger docket consists of suits brought by individuals, usually seeking damages but sometimes seeking an individualized kind of accommodation or change. A plaintiff in jail might, for example, allege a past or ongoing failure to treat his hepatitis, and seek damages for harm suffered or appropriate medical care going forward. Nearly all of the many thousands of cases federal and state prisoners file each year are of this type. A smaller—but equally if not more important—docket consists of cases involving larger groups of plaintiffs, for example the group of all prisoners in a given facility or system with hepatitis. Most such cases seek injunctive remedies, which obligate a facility or system to undertake various reforms going forward. (This is not to say that group damages actions are unheard of—most notably in a recent large crop of jail strip-search cases.)

### **II. Group Litigation**

Group lawsuits involving jails and are prototypically injunctive lawsuits, seeking some kind of prospective reform of conditions. They always involve lawyers—often dedicated prisoners' advocates, other times pro bono or even appointed counsel. They are extremely expensive to litigate, for both sides, and have grown a great deal more so in recent years. For example, a large case in California involving the Pelican Bay prison cost plaintiffs' counsel over \$1 million in actual expenses and took them many thousands of hours of time. The prisoners do not pay, so it is the plaintiffs' lawyers who bear that expense, though if they win or settle, their fees—but not their expenses—are typically paid by the defendants. After plaintiffs won the Pelican Bay lawsuit, the California Department of Corrections was assessed several million in fees.<sup>7</sup> In short, the group detention facility litigation docket looks a great deal like other types of civil rights

injunctive practice.

For a large number of prison and jail systems, group litigation has had its effect in the most direct way possible—by a court order, reached by litigation or negotiation and enforceable by contempt or other judicial action if need be. At last count, in 2000 (for prisons) and 1999 (for jails), Bureau of Justice Statistics data show that such orders governed 23% of the nation's state prisons, housing 39% of state prisoners, and 13% of the nation's local jails, housing 31% of the jail population. These orders have varying profiles. They can apply to a wing of a facility (a death row, for example), to an entire facility,<sup>10</sup> to a group of facilities within a jurisdiction,<sup>11</sup> or to all the jurisdiction's facilities.<sup>12</sup> A single order can govern many areas of prison life and policy,<sup>13</sup> one very crucial area of prison policy (say, medical care<sup>14</sup>), or something more minor<sup>15</sup>). An order regulating the imposition of discipline or jail menus can affect every prisoner in a facility very deeply; an order setting a minimum frequency for the opportunity to shower might similarly affect every prisoner, but more shallowly. An order requiring some exemption from general policy to adherents of a minority religion<sup>16</sup> may be of vital importance to just a few of those incarcerated in a facility. Orders can matter more or less to the authorities in charge of a facility, as well, depending not only on the costs of compliance but also on the effects on discipline, morale, and the like.

Although assessing the impact of the litigation is a complex topic well beyond the scope of this article, it is clear that prisoners have gained much from the orders. For example, a case study of *Guthrie v. Evans*,<sup>17</sup> the Georgia State Prison case that ended in 1985, summarized its positive effects:

“The inhuman practices and conditions at [Georgia State Prison] that the special monitor described in 1979 no longer exist. The reign of terror against inmates has ended. Today, guards do not routinely beat, mace, and shoot inmates. Inmates and guards no longer die from a lack of safety and protection. Guards can walk the cells without having to carry illegal knives and pickax handles to protect themselves. The medical, mental, nutritional, educational, and recreational needs of inmates are now provided for. . . . Those changes were the result, in large part if not solely, of the *Guthrie* litigation.”<sup>18</sup>

## Litigation (cont.)

Prison memoirs and writings confirm the point. For example, a 1979 article by Wilbert Rideau, then the (prisoner) editor of the Louisiana State Penitentiary's *Angolite*, gave credit to court order litigation for reducing sexual violence:

"While [rapes] used to be a regular feature of life here at the Louisiana State Penitentiary, they are now a rare occurrence. Homosexuality still thrives, but the violence and forced slavery that used to accompany it have been removed. In 1976, Federal District Court Judge E. Gordon West ordered a massive crack-down on overall violence at the prison, which paved the way for the allocation of money, manpower, and sophisticated electronic equipment to do the job. Since then, *any* kind of violence at all between inmates elicits swift administrative reprisal and certain prosecution. This, more than anything else, has made Angola safe for the average youngster coming into the prison today."<sup>19</sup>

And many—though by no means all—other sources concur. Moreover, the effects of court orders are by no means limited to the systems in which they are entered. Orders cast a marked general deterrent shadow on systems hoping to avoid them. And they have had a mimetic impact, as other systems imitated them not out of fear but rather out of a more positive interest.

Prison and jail officials have frequently been collaborators in the litigation. If they have not precisely invited it, they often have not contested it. And as earlier work has observed, the remedies in the cases, frequently designed at least in part by the defendants themselves, very much served what at least some of those defendants saw

as their interests: increasing their budgets, controlling their incarcerated populations, and encouraging the professionalization of their workforces and the bureaucratization of their organizations.<sup>20</sup> As one jail administrator put it:

"To be sure, we used 'court orders' and 'consent decrees' for leverage. We ranted and raved for decades about getting federal judges 'out of our business'; but we secretly smiled as we requested greater and greater budgets to build facilities, hire staff, and upgrade equipment. We 'cussed' the federal courts all the way to the bank."<sup>21</sup>

Even when the litigation has not simply justified a larger budget, it has been useful to prison and jail administrators seeking to solidify their control over their organizations. A prison official in Kentucky, describing a major court-order case<sup>22</sup> about conditions at the Kentucky State Reformatory, explained that the consent decree in the case "changed the whole system. It made the system unified. We had a cabinetwide policy and then institution policies clarified those. . . . That's the guideline by which you operate and function. . . . We have all this training. The training uses all the policies and procedures, explains the importance of the policies and procedures."<sup>23</sup>

The decrees have professionalized and bureaucratized by the terms they imposed, but also by their impact on who was interested in becoming or qualified to become an administrator. As a prisoner involved in the same Kentucky litigation observed:

"But you know what? Guys like those old-time wardens can never be warden at LaGrange any more. That's the beautiful thing about that consent decree. It made that system so damn sophisticated that you just can't walk out of the head of a holler in Hazard, out of the logging woods, an' walk right in and be the warden."<sup>24</sup>

In short, court orders have had an enormous impact on the nation's jails and prisons, both by the regulating they have accomplished directly and by their indirect effects.

However, this effect has been substantially undermined by the Prison Litigation Reform Act,<sup>25</sup> which in 1996 made it more difficult for plaintiffs either to win new orders or to defend old ones. Taking advantage of their new opportunities to terminate longstanding orders, many state prison systems now have few facilities operating under any court-ordered regula-

tion. For example, in 1995, only in about a fifth of states did correctional authorities report that between 0 and 10% of state prison population was housed in entities subject to court-order regulation. By 2000, a *majority* of state prison systems indicated this light degree of coverage.<sup>26</sup>

Still, the threat of litigated intervention remains very salient, because important and highly public new orders continue to be entered. In California's prison system, for example, the entire medical care operation came under receivership in 2005<sup>27</sup>—the most intrusive court order regulation possible, in which the state's authority was given to a private party appointed by the court. Court orders may no longer be as prevalent as they were, but they remain extremely important.

### III. Individual lawsuits: Many Lawsuits, Low Plaintiffs' Success Rates.

This section discusses two unusual features of the docket of cases brought by individual prisoners—its combination of a high volume of lawsuits and very low plaintiffs' success rates. The next section continues by explaining why these features matter. (To give away the ending, it is because of plaintiffs' low success rate that detention facility civil rights lawsuits provide so little by way of compensation. And the combination of high volume and low success means that where in most other arenas, potential defendants worry mostly about *winning* litigation, jail and prison officials are equally if not more concerned with avoiding lawsuits altogether and efficient processing of the ones they face.)

*Feature 1: Many Lawsuits.* It is a common theme in law-and-order discourse to decry prisoner hyperlitigiousness; politicians often condemn jailhouse lawyers and frivolous prisoner lawsuits. The charge has its origin in two aspects of the detention facility docket that are both real and important—that (unlike most litigation) it exists largely in federal rather than state court, and that when prisoners bring lawsuits, whether they nominally sue an officer, a warden, a sheriff, or the state director of corrections, the defense is typically handled by the relevant governmental jurisdiction, not by those individuals. In fact the charge of hyperlitigiousness is false; on average, prisoners do not appear to file civil cases at a higher rate than non-prisoners, once one considers state as well as federal filings.<sup>28</sup> But what *is* true is that because jails and

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prisons are the true defendants in nearly all correctional civil rights litigation, they, along with the federal courts, face an extremely high volume of lawsuits, a fact with important consequences discussed below.

*Feature 2: Low Success Rates.* The second important feature of detention facility civil rights litigation that contributes to its atypical institutional effects is that the vast majority of these lawsuits fail, and even those that do succeed tend to have very low damages. To use one year's outcomes as an example, in 1995, over 80% of prisoners' civil cases in federal district court were dismissed rather than settled or tried (the corresponding figure for the non-prisoner federal docket was 32%). The settlement rate was, likewise, extremely low (6% of cases, compared to 37% in other case types), as was the plaintiffs' trial victory rate (10% of trials, compared to 45% for other case types' plaintiffs).<sup>29</sup> And the evidence is that prisoner plaintiffs have been faring even worse in more recent years, at least in the cases that do not go to trial.<sup>30</sup> When prisoners do win or settle their cases, the damages tend to be very low. In 1993, for example, prisoner plaintiffs won 100 federal trials. The median award among them was only \$1,000. One of these actions resulted in a very large award; \$6.5 million. The average among the others was \$18,800—obviously much higher than the median, indicating that most awards were very small, but some few were substantially higher.

Neither plaintiffs' low success rates or low damages are surprising, given the limited legal rights those held in jail and prison can enforce, their relatively easy access to the courts, and the obstacles to

their effective litigation or settlement of their cases. These are explored below.

*a. Limited Legal Rights.* As already suggested, the Constitution gives those held in jails and prisons only limited legal rights. Even under Eighth Amendment "cruel and unusual punishment" jurisprudence, which is relatively expansive compared to the First Amendment or the Due Process Clause, current doctrine directs judges and juries to focus less on the actual conditions prisoners face and more on the prison officials' mental culpability. So plaintiffs need to persuade the judge or jury of more than a bad outcome, more than a defendant's knowledge of and ability to prevent that outcome, more than negligence. Moreover, individual government officers are immune from damages suits, even for proven constitutional violations, if their conduct was not objectively unreasonable because the right in question was not "clearly established."<sup>31</sup> These extremely defendant-friendly standards, joined with judge and jury suspicion and dislike of incarcerated criminals, have made prison and jail cases extremely hard for plaintiffs to win. One telling piece of evidence is the high rate of punitive damages among cases in which prisoners win at trial—about a quarter of all correctional civil trial victories include a (usually small) punitive damage award.<sup>32</sup> This demonstrates that juries are reluctant to award damages to prisoners except for extremely egregious conduct.

*b. Access to Courts.* But while courts and their fact-finders use very strict standards for liability in detention facility

civil rights cases, prisoners remain able to *file* cases fairly easily. Prisons and jails are required to provide prisoners with pen, paper, mail, and, more or less, a law library or other assistance.<sup>33</sup> Prior to 1996, prisoners were, like other indigent plaintiffs, exempt from filing fees; even since 1996, they are allowed to file prior to payment. (The court then bills their prison or jail account.) Since they nearly always proceed without counsel, prisoners have essentially no other litigation costs.

*c. Obstacles to Effective Litigation and/or Settlement.* At the same time, there are numerous features of the institutional landscape that prevent detention facility civil rights plaintiffs from litigating their cases effectively, and simultaneously undermine the ordinary incentives for settlement:

(i) The absence of counsel. In nearly 96% of their federal civil cases, prisoners have no lawyer. The counseled sliver of the docket is far more successful for its plaintiffs. Among cases terminated in 2000, counseled cases were three times as likely as pro se cases to have recorded settlements, two-thirds more likely to go to trial, and two-and-a-half times as likely to end in a plaintiff's victory at trial. One-quarter of detention facility civil rights settlements and one-third of plaintiffs' trial victories occurred in the four percent of cases with counsel.

(ii) Erroneous assessments of case values. Another large obstacle to settlement in detention facility cases is the informational advantage possessed by defendants, the more experienced and resourced party. This may sometimes

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actually promote settlement by allowing defendants to get off cheap; pro se plaintiffs may “settle big-money cases for peanuts.”<sup>34</sup> But probably more often the effect runs the other way: Uncounseled prisoners may often be particularly disinclined to settle for small amounts, even where a small sum is very reasonable in light of the expected outcome at trial.

(iii) Low litigation expenses. Another equally important obstacle to settlement is the low cost of post-filing litigation, both on the part of plaintiffs (who have essentially no additional costs) and defendants, who do not usually face the threat of expensive discovery that drives other litigants to settle cases. As for other litigation costs, for defendants who have full-time legal staff (all prisons, and some jails), the marginal pretrial litigation cost of a typical case is minuscule. Not only is an in-house legal staff less expensive than outside counsel, but experienced detention facility defense counsel have a variety of methods for minimizing their time outlay in low-probability cases, such as form or quasi-form pleadings and affidavits, and established relationships with detention facility personnel so that one phone call can suffice for an investigation. So the low cost of *not* settling, for both plaintiffs and defendants, operates to depress the settlement rate in individual detention facility litigation.

(iv) High settlement costs. The explanation most often proffered by detention facility officials for low settlement rates is not the low cost of *not* settling, described above, but the high cost of settling. Many detention system department heads and attorneys general have told interviewers that they have “no-settlement” policies, even if they have to fight with other state officials to maintain them. For example, Richard Stalder, head of the Louisiana prison system, explained several years ago:

“I argue with risk management people on this. They say, ‘Just give the guy the pair of tennis shoes,’ or the \$100 or whatever. That’s the traditional risk management approach. But I say, once you start paying on a nuisance basis, you’re going to have an exponential increase in the number of cases filed.”<sup>35</sup>

(v) The antagonistic milieu of detention facilities. Finally, even apart from their intuitions about the likely result on future filings of known settlements,

many detention officials simply hate to settle cases. The former head of corrections in Utah (who now works as a consultant on jail and prison litigation) said in an interview a few years ago that he encouraged his staff and lawyers “to be warriors”—that is, to fight all litigation tooth and nail. He was proud, he said, that “in Utah, we treated litigation like a blood sport—got rid of all the lawyers who were the least bit afraid and hired warriors.”<sup>36</sup> Prisoners and their keepers live, obviously, in a uniquely antagonistic milieu. It makes sense that correctional officers and those who are socialized into the attitudes of correctional officers would think of settling a case as “capitulating to an inmate”—an outcome that undermines a prison’s symbolic and perhaps actual order.<sup>37</sup> And, although it is probably a lesser influence on the low settlement rate, prisoners, too, are participants in the oppositional culture of their prison or jail. If, for example, the goal of a lawsuit is to harass detention personnel (as some repeat defendants claim is common), why settle? Regardless of who is to blame, it is clear that dialogue between pro se inmate plaintiffs and government officials is both difficult and rare. As William Bennett Turner, lead plaintiffs’ counsel for the trial in the *Ruiz* case in Texas, wrote in 1979, “[r]elatively few prison cases can be settled, primarily because meaningful negotiations between prisoners acting pro se and states’ attorneys are practically impossible.”<sup>38</sup>

For all these reasons, then—defendants’ informational advantage, low litigation expenses, the felt incentive effects of settlement, and the antagonism endemic to correctional culture—it is almost more surprising that *any* pro se correctional cases settle than that so few do.

*d. Low Damage Awards.* As described above, detention facility litigation joins a low rate of plaintiffs’ victories and settlements with extremely low damages, overall. Why? The most obvious hypothesis is that prisoner damages are small because the harm involved is trivial. But this is belied by the many accounts of grievous harm suffered by prisoners coupled with small verdicts to believe it. What is far more likely is that the ordinary rules of tort damages are limiting compensation. Unlike unincarcerated plaintiffs, injured prisoners who remain behind bars after the injury have no (or very low) lost wages and no medical expenses. So it is simply not

surprising that damages are low even in cases involving very serious injury. It is commonplace that juries tend to give noneconomic damages that are correlated with the economic damages they find.<sup>39</sup> This approach can net most prisoner plaintiffs virtually nothing<sup>40</sup> in even extremely serious cases. Moreover, it is not only the doctrine of damages that depresses verdict amounts. In many cases one would expect juries to lowball prisoners’ nonwage damages as an expression of disregard for them—even when liability is clear or even egregious. For pro se cases, a prisoner who is together enough to succeed in persuading a judge or jury on liability faces all the more skepticism about the magnitude of the harm he experienced. Lawyers who handle these detention facility cases report that these obstacles to large recovery are not completely insurmountable. For example, in cases in which the plaintiffs are the bereaved relatives of dead or comatose prisoners, a big verdict is possible if the lawyer is able to focus the jury’s attention entirely on the outrageousness of the alleged misconduct, rather than on the small economic losses. But these kinds of cases are not typical, and it takes a good deal of expertise to try them in a way that neutralizes the ordinary reactions of jurors.

#### IV. Results of Individual Damage Actions: Lawsuit Avoidance, Liability Avoidance.

The result of the high volume of lawsuits coupled with plaintiffs’ low success rate and low damages is twofold. First, it reduces the litigation system’s compensatory function. This point is sufficiently self-evident to require no further elaboration. Second, it shifts jail and prison officials’ attention somewhat away from *liability* avoidance to *lawsuit* avoidance. The most pressing feature of individual detention facility civil rights litigation for jail and prison administrators is not the risk of large payouts. After all, even small payouts are quite infrequent, and large payouts are rare indeed. What is more salient for detention facility officials is that the court filings require response.

*A. Lawsuit Avoidance.* Nearly regardless of its merits, and wholly apart from any deterrent effect it may have, litigation requires response. Faced with large numbers of lawsuits that made it through pre-service screening (that is, the round of case dismissals done by judges before the defendants are even notified of filings),

prison and, to a more limited extent, jail systems developed a set of institutional strategies for facilitating processing and response. The most obvious institutional move is to dedicate staff to the problem. States vary in their precise allocation of staff for this function, but all have both low- and high-level personnel who spend significant portions of their time dealing with detention facility civil rights litigation. There are lawyers and paralegals in prison departments and in offices of attorneys general; there are litigation officers, compliance officers, risk assessment personnel, and others. Even jails, which are mostly too small for this kind of approach, will often designate one person as the “litigation officer” in charge of coordinating responses to filed cases.

The consequences of having dedicated staff are manifold. Hired to respond to litigation, the assigned staff also act as law transmitters. This is by no means simply a technical assignment. Rather, it involves a kind of filtering process; given the nearly omnipresent ambiguity of legal requirements, staff inevitably must partially construct the law in order to create a coherent account of its regulatory demands. The content of that account is as much about organizational and inter-organizational politics as it is about what courts or legislatures say. As in other arenas studied by other researchers, some detention facility compliance personnel may exaggerate the “magnitude of the threat posed by law and the litigiousness of the legal environment” in order to underscore their own vital role within the organization and enhance their professional standing.<sup>41</sup> Indeed, sometimes this inflation effect (combined with the predictable fact that jobs attract people who think the job is important) means that officials assigned to ensure compliance with legal norms very often “tend to become internal advocates for the values that the practices symbolize,”<sup>42</sup> with positive result for constitutional compliance.

On the other hand, in the detention setting, “compliance” personnel may become jaded to the constitutional values they are designated to implement, instead developing a finely honed derision for prisoner complaints—in part to ensure that they are not too deeply identified with the prisoners by their colleagues. It was, for example, prison compliance personnel who, at the behest of the National Association of Attorneys General, put together influential lists of *Top Ten Frivolous Pris-*

*oner Lawsuits* that circulated in support of the 1996 Prison Litigation Reform Act.<sup>43</sup> Many of the examples given, when examined by federal appeals court judge Jon O. Newman, however, turned out to be false or exaggerated. It may be, moreover, that compliance personnel consciously or unconsciously try to discourage complaints rather than address their causes. So prison and jail professionalization and/or specialization of compliance functions are surely not *inevitably* good for prisoners. But it seems, generally (more precise information will have to await further research), that jail and prison compliance personnel are on balance apt to have a pro-prisoner influence in their organizations.

The need to respond to litigation does not impact only staffing. Just as important, systems that know they will be sued dozens or even hundreds of times each year develop practices that make responding to those lawsuits easier and more routine. In detention facilities, they write incident reports, videotape cell extractions, keep easily copied shift logs and the like. And they develop written policies and procedures easier to present in pleadings and testimony. As law professor and sociologist Jim Jacobs has observed, they bureaucratize.<sup>44</sup> And, as Jacobs and many others have argued, the impact of the resulting bureaucratization is by no means limited to litigation. It can entirely transform the agency in question.<sup>45</sup> (Again, size is a crucial variable here. For small facilities, including most jails but also many prisons, the reminder from lawsuits to maintain the bureaucratic ability to respond can be quite infrequent.) Given that pre-bureaucratic prison regimes have frequently, to quote political scientist John DiIulio, “bounced between the poles of anarchy and tyranny; between the Hobbesian state of inmate predators and the autocratic, arbitrary regime of iron-fisted wardens,”<sup>46</sup> it seems that those in prison and jail are better off when their incarcerating facilities have, for example, written policies, stated rules of conduct for their

staff, and the variety of practices and procedures that allow supervisors to monitor line officers. Whether such policies are followed in reality, is another question.

*B. Liability Avoidance.* According to the usual accounts of civil rights litigation, one major purpose of the damage-awarding system is supposed to be to “deter government, to some socially optimal extent, from violating constitutional rights by forcing government agencies to internalize the costs of their constitutionally problematic conduct.”<sup>47</sup> The rarity of substantial judgments, or even substantial settlements, poses a major challenge to any defense of detention facility civil rights litigation based on its deterrent effect. Detention facility litigation payouts are clearly dwarfed by the amount of harm caused by unconstitutional conduct in jails and prisons. But while higher and more frequent payouts probably would be a stronger deterrent, the near certainty of lawsuits (and consequent need to produce an accounting), coupled with even rare awards of damages, sufficiently publicized, keeps the *threat* of court sanction real and salient.

Of course, that threat works only minimally against line officers: The near-universal indemnification of officers by their employing agencies prevents the threat of liability from looming too large. Prisoners’ judgments or settlements can educate officers about what kind of conduct the broader world deems unacceptable, if an agency undertakes to inform officers about them. But education, while important, can only do so much. More coercive line-officer deter-

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rence depends on agency commitment to staff training and discipline, and on the variety of control techniques agencies commonly use to bring line-level governmental employees into line with agency objectives.<sup>48</sup>

But detention agencies at least often feel and care about the threat of litigation. Finally, then, we get to the final and most interesting question: What do they do about it? This is hard to answer, because prison administrators, if not jail administrators, tend to deny just about any effect of litigation. Prison administrators have something of a mantra that they worry more about good professional practice than about litigation. For example, according to the head of the National Institute of Corrections prisons division, at national meetings of state prison department directors, deputy directors, and wardens, “They don’t talk about lawsuits; they talk about good correctional policy. People aren’t running around afraid of lawsuits—that’s at most a tertiary motive.”<sup>49</sup> Pushed a little on specifics, prison policymakers admit to occasionally changing policies because of litigation, but only when the litigation educates them on good professional practice in a previously under-examined area, or alerts them to a previously hidden organizational variance from good professional practice. This occasionally happens, they say, with court-order cases. But for individual litigation, they describe this effect as extremely rare.<sup>50</sup>

More detailed inquiry into particular policy changes at particular agencies suggests, however, that changes in prison policy to fend off or respond to the possibility of damage actions are less unusual than interview subjects were willing to admit. For example, several large damage verdicts against the Federal Bureau of Prisons relating to prisoner suicides prompted high-level policy review of suicide prevention policies and practices.<sup>51</sup> And observers not as highly placed in prison hierarchies regularly attribute policy changes to fear of liability, as when a journalist who spent a year undercover as a line officer in New York’s Sing Sing prison attributed the state’s increased willingness to protect prisoners from each other to fear of liability. The frequency of rape at Sing Sing has gone down, the author says, because “[i]nmates who ask

for protection but fail to get it can make expensive claims.”<sup>52</sup>

It is possible, then, that the denials of deterrent impact one hears from prison officials are simply disingenuous. More likely, however, is that while prison officials are clearly not telling the entire story, one should take seriously what many such officials say so often—that they do not feel, phenomenologically, that they accede to litigation’s pressure by straying from good correctional practice, but are instead influenced by litigation’s incentives only when liability reduction coincides with professional norms.

This is not to say, however, that litigation has not been influential. The very reason that overlap of court-announced constitutional norms and professional norms is common is that the evolution of good professional practice in detention has been greatly influenced by court cases, and vice versa. As organizational theorists propose more generally: “Organizations and rule environments rarely encounter each other autonomously and confrontationally. Rather, both are constituted *together*, as part of a larger process of institutional ‘structuration.’”<sup>53</sup> This insight certainly holds true in the area of detention. Perhaps most generally, constitutional doctrine governing prisons and jails, as in so many areas, requires the kind of means-ends rationality that is most consistent with (if it does not actually require) bureaucratic organization, with some degree of top-down command and control. And, sure enough, this is the most basic requirement of current professional practice as well. Indeed, the American Correctional Association’s jail and prison accreditation standards focus heavily on written policies, a feature that critics complain causes standards to lack substantive bite.<sup>54</sup>

By comparison with prison administrators, jail administrators seem far less reluctant to admit that they frequently have changed policies and practices nearly entirely because of individual lawsuits. Jail administrators concede their own concern about damages exposure and admit that this anxiety has led them with some regularity to alter their jails’ operations, even when they don’t agree with the change as a matter of policy. As one jail director said in an interview, “We’re not doing things out of beneficence. If we’re, say, serving inmates special meals, that’s because we’ve been sued.”<sup>55</sup> Many sources seem to confirm jail administrators’ ten-

dency to worry about damage actions. For example, the National Institute of Justice’s Large Jail Network’s newsletter and conferences frequently canvas topics related to damage liability, and the American Jail Association features legal training at all of its conferences. Similar discussions seem not to occur in prison fora, and the American Correctional Association offers very little training focusing explicitly on civil rights liability reduction. In interviews and other encounters with jail officials, they frequently complain about the law’s impact on jail operations.

Why is there a greater feeling of coercion and more expressed resentment of litigation among jail officials? These sentiments do not simply reflect a lack of public relations polish, although that is certainly in play. Rather, several deeper distinctions may cause this difference. One reason is that jails are far less professionalized than are prisons. One would expect, then, a less thorough identification by jail administrators with coevolving standards of professional corrections practice and legal compliance. In addition, when steps that can minimize liability exposure cost real money, jails and prisons are very differently situated. Prisons, which get their money from state legislatures, have the usual kinds of public agency budgetary limits. But sheriffs are even more limited financially, because their budgets are set by a competing, and more fiscally constrained, governmental entity—their county commissions. Finally, sheriffs generally would prefer to spend their limited budgets on street services rather than on jails, because that is where expenditures are visible to the constituents on whose votes they depend for reelection.

The final reason that jail administrators feel more threatened by litigation is that they *are* more threatened by it, because jail litigation is likely to pose a larger risk in terms of both probability and magnitude of liability. Although jails face fewer cases in relation to their daily population, there are abundant reasons to think that jail cases are more serious, on average, than prison cases are, and that jails pay out more money, proportionately, than prisons do. First, jails are more dangerous than prisons, in large part because of the primary operational difference between the two types of facilities: Prisons take and hold prisoners while jails take and release them. This extremely fast turnover makes jails inherently more chaotic. More generally comparing jails

to prisons, classification of those in jails is more haphazard, jail routines are less regular, jail time is more idle, and jail inmates are more likely to be in some kind of crisis. People held in jail are also more likely to be vulnerable to harm in many ways—mentally ill, inexperienced with incarceration, drunk or high, or suicidal. In sum, one reason that jail officials seem more concerned about litigation than do prison officials is that the jails are worse places than prisons. A second source of jail officials' anxiety is an extra dollop of litigation exposure: Jail prisoners can suffer vastly greater economic harm than prison inmates, if they are employed or employable and lose wages because of an injury inflicted in jail, or if they need to pay for medical care. Third, jail prisoners are potentially more sympathetic figures to decision-makers, because they are not necessarily convicted criminals, and because their offenses, even if eventually proven, may be quite minor. Fourth, jail prisoners have somewhat less trouble finding lawyers, since they often can look after they get out. In some (though by no means all) large urban centers, lawyers in the personal injury bar regularly take on jail cases, or even specialize in jail and police cases. Fifth, observers report that jail lawyers are often less experienced and less expert litigators than are prison lawyers, in part because the job of county counsel has traditionally been a patronage reward for supporters of county powerbrokers. "In jails," says Bill Collins, the editor of the *Correctional Law Reporter*, who frequently trains jail officials on legal issues, "there's lots of learning the hard way."<sup>56</sup>

Finally, demographic differences between jails and prisons can augment the differential levels of liability exposure. Whereas prison inmates are disproportionately housed in rural areas, large jails, which house most of the prisoners (and probably defend most of the lawsuits), are in urban areas. Urban juries may be more openhanded to plaintiffs than rural juries are and, in any event, are widely believed to be so, which increases settlement pressure regardless of the true state of affairs.

For all these reasons, it seems very likely that jail damage actions generally pose a larger risk of liability—and of high damages—than prison cases do, and experienced participants in the litigation system think that this is in fact the situation. Unfortunately, there are no systematic data available with which to do a thorough comparison. But checks of all

damage awards from cases filed in 1993 show that one-third are from jail cases, which is probably quite disproportionate to the portion of cases filed by plaintiffs from jails.

Larger liability risk obviously puts pressure on jails to settle. Moreover, recalling the reasons for the low settlement rate in detention facility litigation in general, one would expect jails to settle proportionally more cases for more money than prisons do. Small- and medium-sized jails do have full-time lawyers, so they pay a far higher marginal cost to litigate. Jail prisoners mostly get out—so they do not necessarily tell each other about settlements, which lowers the cost of settling for jail administrators. Jail defense counsel, whether employed by their counties more generally or private lawyers on retainer, are less socialized into the world of detentions, so their ideas about settlements are less oppositional. And, finally, jail plaintiffs' readier access to lawyers means not only that the cases are more serious, but also that the plaintiffs are more likely to understand the actual value of their cases.

At the end of the day, then, both jail and prison systems do indeed respond to the salient threat of serious damages liability. If prison administrators are to be believed, litigation's deterrence of unconstitutional conduct by prison agencies is effective mostly around the edges. This article has argued, however, that this understates the role of litigation,

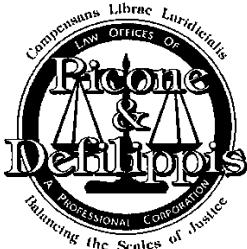
in part because prison administrators are not admitting all that goes on, and in part because the "good professional practice" prison administrators espouse is itself partially a product of the litigation system. In any event, in jails the liability threat has been sharper, and the identification with professional norms weaker.

**V. Conclusion**

There are sharp limits to the ability of prison and jail litigation to improve conditions of confinement. Non-litigation oversight mechanisms, in addition or instead, might well work better than litigation alone. But both individual and group litigation have for many years served a noticeable regulatory function, pushing administrators at least to conform their practices with the (admittedly minimal) constitutional floor. The PLRA has undermined this effect to some extent, but litigation remains a useful regulatory tool. █

*\* Copyright © 2006 Margo Schlanger. Permission is granted to copy for free or at-cost distribution to students enrolled in a class and to anyone who works at or is incarcerated in any institution. This chapter is based in very large part on material discussed (and sourced) more fully in two prior works—Inmate Litigation, 116 HARV. L. REV. 1555 (2003), and Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders, 91 N. Y. U. L. REV. 550 (2006). These and other relevant*

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## Litigation (cont.)

articles are available at <http://schlanger.wustl.edu>, as is information on the raw data sources used for this article and the code to reproduce the analysis here.

### Endnotes

1 The precise number was 2,186,230 as of mid-year 2005. See ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2005 (May 2006, NCJ 213133).

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

3 515 U.S. 472 (1995).

4 *Sandin* held that a prison need not provide any procedural protections against disciplinary consequences if those consequences are not "atypical" for prisoners. In the many systems in which "disciplinary segregation" has custodial conditions similar to "administrative segregation" (for example, protective custody or segregation pending internal investigation of an incident), *Sandin* means that prisons can impose the disciplinary version more or less at will. See *id.* at 486-87.

5 *Turner v. Safley*, 482 U.S. 78, 89 (1987) ("when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests"); *Johnson v. California*, 543 U.S. 499 (2005) (declining to "make an exception to the rule that strict scrutiny applies to all racial classifications," and therefore refusing "to apply the deferential standard of review articulated in *Turner v. Safley*" to California's prison racial segregation policy).

6 *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

7 Amy Stevens, *The 'Pro Bono' Payoff*, S.F. EXAMINER, Dec. 3, 1995, at A-12. The firm told a reporter that it planned to give \$2.4 million to charity and keep the rest for costs. *Id.*

8 These figures are derived from BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ICPSR STUDY NO. 4021, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 2000 (2005); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ICPSR STUDY NO. 3318, NATIONAL JAIL CENSUS, 1999 (2003). Both are available by study number at <http://www.icpsr.umich>.

9 See, e.g., *Russell v. Johnson*, No. 1:02-cv-00261, 2003 WL 22208029 at \*6-8 (N.D. Miss. May 21, 2003) (issuing death row injunction), *aff'd in part, vacated in part sub nom. Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004).

10 See, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146, 1155, 1282-83 (N.D. Cal. 1995) (issuing injunctive remedy governing California's Pelican Bay State Prison).

11 See, e.g., *Small v. Hunt*, 858 F. Supp. 510, 523-24 (E.D.N.C. 1994) (granting modification of prior order governing conditions at minimum and

medium security prisons of North Carolina).

12 See, e.g., *Armstrong v. Wilson*, 124 F.3d 1019, 1021 (9th Cir. 1997) (describing district court order governing treatment of prisoners with disabilities throughout California Department of Corrections).

13 See, e.g., *Goldsby v. Carnes*, 365 F. Supp. 395, 401-07 (W.D. Mo. 1973) (approving proposed consent judgment governing jail administration and discipline, nutrition, establishment of law library, and medical and dental care at Jackson County Jail, in Kansas City, Missouri).

14 See, e.g., Stipulation for Injunctive Relief, *Plata v. Davis*, No. C-01-1351, at 1 (N.D. Cal. June 13, 2002) (available as document PC-CA-0018-0005 at <http://clearinghouse.wustl.edu>). In October 2005, Judge Thelton Henderson found California in continuing violation of the *Plata* injunction and ordered the system's medical care put into receivership. See *Plata v. Schwarzenegger*, No. C-01-1351 (N.D. Cal. Oct. 3, 2005) (findings of fact and conclusions of law re appointment of receiver) (available as document PC-CA-0018-0007 at <http://clearinghouse.wustl.edu>).

15 See, e.g., *Washington v. Reno*, 35 F.3d 1093, 1096, 1104 (6th Cir. 1994) (ordering modification of injunction governing federal Bureau of Prisons' telephone service).

16 See, e.g., *Raymond Lee X v. Johnson*, 888 F.2d 1387 (unpublished table opinion), 15 Fed. R. Serv. 3d 344, 1989 WL 126502, at \*4 (4th Cir. 1989) (affirming district court ruling that Virginia prison was constitutionally required to offer religiously acceptable meals to prisoner members of Nation of Islam).

17 93 F.R.D. 390 (S.D. Ga. 1981).

18 BRADLEY STEWART CHILTON, PRISONS UNDER THE GAVEL: THE FEDERAL COURT TAKEOVER OF GEORGIA PRISONS 108-09 (1991).

19 Wilbert Rideau, *The Sexual Jungle* (1979), in WILBERT RIDEAU & RON WIKBERG, *LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS* 73, 94 (1992). The case mentioned was *Williams v. Edwards*, No. 71-98 (M.D. La.); the order in question was affirmed by the Court of Appeals, 547 F.2d 1206, 1213-14 (5th Cir. 1977).

20 See, e.g., Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2012 (1999).

21 Mark Kellar, *Responsible Jail Programming*, AM. JAILS, Jan.-Feb. 1999, at 78, 79.

22 *Thompson v. Bland*, No. Civ. 79-0092 (W.D. Ky.), consolidated with *Kendrick v. Bland*, No. Civ. 76-0079 (W.D. Ky.). For the first decree in the case, see *Kendrick v. Bland*, 586 F. Supp. 1536 (W.D. Ky. 1984). Information about this litigation is available at <http://clearinghouse.wustl.edu> (see case PC-KY-0007).

23 Lloyd Anderson, *Voices from a Southern Prison* 202 (2000) (quoting lawyer Barbara Jones).

24 *Id.* at 207.

25 Pub. L. No. 104-134, §§ 801-10, 110 Stat. 1321, 1321-66 to 1321-77 (1996) (codified at 11 U.S.C. § 523 (2000)); 18 U.S.C. §§ 3624, 3626 (2000); 28 U.S.C.

§§ 1346, 1915, 1915A, 1932 (2000); 42 U.S.C. §§ 1997a-1997h (2000)). The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

26 See Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y. U. L. Rev. 550, 581-582 (2006).

27 See *Plata v. Schwarzenegger*, No. C-01-1351 (N.D. Cal. Oct. 3, 2005) (findings of fact and conclusions of law re appointment of receiver) (available as document PC-CA-0018-007 at <http://clearinghouse.wustl.edu>). Other information about and filings from this case are available at <http://clearinghouse.wustl.edu>, under case no. PC-CA-0018.

28 See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1575-1578 (2003).

29 See *id.* at 1598, tbl. II.B.

30 See *id.* at 1658-1664.

31 See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

32 See Schlanger, *Inmate Litigation*, *supra* note 28, at 1602-1605.

33 See *Levis v. Casey*, 518 U.S. 343, 356 (1996) (reaffirming prisoners' right of "access to courts," though narrowing the right to one of "reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement"); *Bounds v. Smith*, 430 U.S. 817, 824-25, 828 (1977) (finding it "indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them," and holding that "the fundamental constitutional right of access to the courts requires prison authorities to . . . provid[e] prisoners with adequate law libraries").

34 Telephone interview of Paul Wright, Editor, *Prison Legal News* (May 15, 2002).

35 Telephone interview of Richard L. Stalder, Secretary, Louisiana Department of Public Safety and Corrections (Spring 2001).

36 Telephone interview of Gary W. DeLand, corrections consultant, former Executive Director, Utah Department of Corrections (Mar. 26, 2001).

37 Telephone interview of Dora Schiro, then-Director, Missouri Department of Corrections (May 30, 2001).

38 William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 637 (1979).

39 See Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 L. & SOC. INQUIRY 795, 817 (1998).

40 One of the few lawyers who actually takes prisoner cases on contingency fee credits the large verdicts lawyers in her firm have won to their efforts to get juries to step outside traditional damages: "You can't take a traditional approach to presenting damages in these cases, because there just aren't any.

The plaintiffs have low if any earnings potential; they weren't supporting anyone. So we look instead to show the jury how outrageous the defendants' conduct was." Telephone interview of Elizabeth Koob, plaintiffs' attorney specializing in prisoner damage actions (May 22, 2002).

41 Lauren B. Edelman, Stephen E. Abraham & Howard S. Erlanger, *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 L. & SOC'Y REV. 47, 49 (1992).

42 Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 L. & SOC'Y REV. 941, 963 (1999).

43 See Press Release, Citizens Against Lawsuit Abuse, CALA Praises Attorneys General Efforts; Officials Working To Stop Frivolous Lawsuits by Prisoners (Aug. 2, 1995) (on file with author) (praising the "move by the National Association of Attorneys General" and describing the coordinated release of "Top 10 lists" by twenty-four attorneys general); 141 CONG. REC. S14,629 (daily ed. Sept. 29, 1995) (statement of Sen. Kyl) ("Top 10 List: Frivolous Inmate Lawsuits in Arizona"; "Top 10: Frivolous Inmate Lawsuits Nationally"). For other examples of purportedly frivolous lawsuits, see 141 CONG. REC. S14,626-27 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch); 141 CONG. REC. S14,413-14 (daily ed. Sept. 27, 1995) (statement of Sen. Dole); *id.* at S14,418 (statement of Sen. Kyl); 141 CONG. REC. S7524-25 (daily ed. May 25, 1995) (statement of Sen. Dole).

44 James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts*, in NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 33, 54-55 (1983).

45 *Id.*; see also Malcolm M. Feeley & Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature*, in COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS 12, 25-28 (John J. DiIulio, Jr. ed., 1990).

46 JOHN J. DI IULIO, JR., GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT 236 (1987).

47 Daryl Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000).

48 See MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 162-69 (1980) (discussing management methods to hold workers to agency objectives); see PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 125-146 (1983) (discussing how agencies can "[m]obiliz[e] [o]rganizational [c]hange").

49 Telephone interview of Susan Hunter, Chief, Prisons Division, National Institute of Corrections (Apr. 5, 2001).

50 Telephone interview of Reginald A. Wilkinson, then-Director, Ohio Department of

Rehabilitation and Correction (Apr. 27, 2001)

51 Telephone interview of William G. Saylor, Director, Office of Research and Evaluation, Federal Bureau of Prisons (Apr. 11, 2001); telephone interview of Joyce A. Zoldak, Associate General Counsel, Federal Bureau of Prisons (Feb. 22, 2001).

52 TED CONOVER, *NEWJACK: GUARDING SING SING* 263 (2000).

53 Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 L. & SOC. INQUIRY 903, 922 (1996) (reviewing THE NEW INSTITUTION-

ALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991)).

54 See Elizabeth Alexander, *What's Wrong with the ACA?*, 15 NAT'L PRISON PROJECT J. 1 (2001).

55 Telephone interview of Patrick Bradley, then-Superintendent, Suffolk County (Mass.) House of Correction (Mar. 30, 2001).

56 Telephone interview of William C. Collins, Editor, *Correctional Law Reporter* (Apr. 18, 2001); see also DeLand Interview, *supra* note 36; telephone interview of Bernard J. Farber, Editor-in-Chief, Americans for Effective Law Enforcement publications (Apr. 2, 2001).

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