

## DISCUSSION

WILLIAM HELLERSTEIN, MODERATOR\*

**AUDIENCE COMMENT:** My name is Fred Stanzik. I'm a cooperating attorney with the Lewisberg prison project in Lewisberg, Pennsylvania, and I'm also a staff attorney with Susquehanna Legal Services in Williamsport. I have a question for Mr. Turner in response to the final comment he made concerning the construction of new prisons. I've been litigating a case against a local county prison for about five years. The conditions there were such that there was no room to implement some of the improvements we sought, such as improved medical facilities, a law library. Both the staff and the prisoners themselves were dissatisfied with the prison. The litigation resulted in a consent decree that calls for construction of a new prison. In these circumstances, I don't consider that to be a defeat. If I understand your position correctly, that building new prisons is necessarily something to be avoided, what remedy would you suggest in this case?

**WILLIAM BENNETT TURNER:** That's a good question. I think the building of a new prison should be the remedy of last resort after everything else has been tried, and after a cost-benefit analysis shows that there really is no alternative. I don't know what your prison is like, but are you confident that everyone who was there was supposed to be there and needed to be there for as long as they were being held there?

**AUDIENCE COMMENT:** No, I'm not.

**WILLIAM BENNETT TURNER:** Well then get them out and then talk about whether you need a new prison.

**AUDIENCE COMMENT:** Okay, but I still think that would not resolve the issue for this and other prisons within the area in which I work. There is a work release program and there are efforts to reduce the prison population; the prison itself has hired a release officer. Despite this, there's still a problem with overcrowding at the jail and there's still a problem with implementing some of the optional programs that would otherwise be available to administrators who would like to implement them, but who cannot do that in this facility. The decision to build a new prison will unavoidably result in some increased population capacity. However, I don't see any alternative for other facilities in that area. The prison was originally built to hold confederate prisoners. Very old facilities are not unusual for that area, nor for rural areas in general. Given the realities of litigating these conditions, I find it hard to accept the position that building new prisons is necessarily somehow wrong or a setback. My final point is that in talking to prisoners, who are there, they tell me that they would rather be in a more

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modern facility where they can have adequate medical facilities, where they can have a law library, where they can be protected. None of those things can occur in this particular jail.

ALVIN BRONSTEIN: It's been my experience, Bill, that they are not going to get the prisoners out, they're going to build a new prison anyway, with or without a lawsuit. Most new prison construction is not in response to law suits. It's in response to a real need, or at least a perceived need. What troubles me even more is the argument we have heard a number of times that improvements to prison will somehow legitimize the institution and that, therefore, perhaps we ought not make the improvements. It seems to me that unless you believe there is a reasonable possibility, not even a likelihood, but a reasonable possibility that prisons are going to disappear, in the next twenty or thirty years, then that argument is not one that can be made with any sense of conscience. There are people who are going to be in those prisons. Much as I would like to see prisons disappear, I don't believe they are going to. I don't think there's any chance of it happening, and therefore the argument that we legitimize these institutions by making improvements is just a bad argument.

AUDIENCE COMMENT: My name is Joe Hutchinson. Ms. Herman, you raised an intriguing point when you pointed out the opportunities for litigation in the state courts. We have a number of experienced attorneys here; I wonder if they would respond to the question of state court litigation as a viable alternative to litigation in the federal courts, especially in light of the efforts on the part of the Supreme Court to draw the federal courts out of prison litigation.

VINCENT M. NATHAN: One example comes to my mind, and that's the West Virginia litigation. My understanding is that there has been a successful case recently at the level of the West Virginia Supreme Court. My suspicion is that court litigation depends on the state court and the facts of the particular suit. I doubt that Al would suggest the whole approach be abandoned.

ALVIN BRONSTEIN: No, I wasn't suggesting that. Bill could probably talk a little more about California courts, which have been quite receptive.

WILLIAM BENNETT TURNER: I don't think the answer to that question is different from the answer to the questions of forum shopping generally. You look for which judge is going to try the case, what the findings of fact are going to be, and then who's going to make the ultimate law in the case—what your state supreme court looks like. By and large in California, I think that people are well advised to go to state court first, with the ultimate risk being that the electorate will throw the justices of the Supreme Court out of office.

SUSAN HERMAN: I would like to make two remarks about this subject. I gave a number of examples of successful state court litigation in the prisoners' rights area; I should be quick to point out that that's about all the examples there are. There are not a lot of other cases, this is still a pretty

new idea. Second, for people who are trying to evaluate the state versus the federal court question, I would like to recommend a very interesting article by Burt Neuborne, Legal Director of the ACLU, in the Harvard Law Review, called *The Myth of Parity*.<sup>1</sup> It's a very interesting analysis of how to make the decision about whether to go to state or federal court.

WILLIAM COLLINS: I would add a comment about the political realities. If you're going to sue a state prison located in a small county that has two superior court judges, and you ask one of those judges to take over running the state prison, the chances are that if he does, he won't be judge after the next election. If, on the other hand, the suit is in a large county with thirty or forty or a hundred judges, that may well be a different situation.

AUDIENCE COMMENT: My name is Steve Rosenfeld, and I'm a litigator, although certainly not a prison litigator. The question I have for the panel is this: The one thing that seems to unite all of you is your acceptance of litigation as an important and useful tool in solving problems like this; indeed, I think one of you said it's really the only useful tool at the present time; and I wonder whether considering the human resources, the amount of time and effort and person power that goes into bringing suits, litigating them, trying them, drafting decrees, enforcing decrees, appointing special masters, monitoring decrees, and bringing remedial law suits after that, whether it is, in the final analysis, a justifiable process for solving these problems or whether there is some better way to effect this kind of change?

ALVIN BRONSTEIN: I think there are alternative ways that ought to be tried, like mediation and other forms of dispute resolution. But I think that at this point in time the possibility of returning to really disastrous conditions is so great that we need the litigation approach. We raised this question with some of our experts: should we continue this kind of litigation? One of them said in response that he had worked on an icebreaker in World War II and prison litigation reminded him of that experience. He went up to the front of the boat, and there the big steel prow was breaking up the ice, and then he went to the back of the boat, and it was freezing up right behind it. That's exactly what would happen if attorneys general and corrections administrators around the country thought the ACLU was going to close its prison project.

WILLIAM COLLINS: I would suggest that there might be other ways of keeping public attention focused on corrections, but if the curtain is allowed to drop down again in front of the institutions, then the progress that's been made will be lost.

WILLIAM BENNETT TURNER: I think litigation is the clumsiest, most frustrating, costliest way of doing anything, but it's the only game in town because of the default of the other branches of government. Neither the

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1. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

legislative branch nor the executive branch has any incentive to do anything about this problem without the prod of litigation. I think it's a necessary evil.

AUDIENCE COMMENT: My name is Izzy Seeve, and I'm editor of *Current Concepts*, a small newsletter dealing with a number of social problems, including crime. I have a question for the gentleman who said he wanted prisons abolished entirely; while I agree with the speakers here that many prisoners who are not violent should be let out, I'm a little confused about the idea of abolishing prisons entirely. What about the prisoners who are violent? Should they be let out also?

ALVIN BRONSTEIN: No, I wasn't saying anything about letting people out; I said in an ideal world I would like to see the abolition of prisons. I don't know what the answer is to people who, based upon past behavior are really dangerous and violent. I don't want them on the streets. I was really making a point about politics, the reality of what's going on in this country. There is no expectation, at least as I see it, that we will abolish prisons. What I was saying, was, that in an ideal world, I would like to see no prisons.