

# The Essential but Inherently Limited Role of the Courts in Prison Reform

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## INTRODUCTION

To state the obvious, there is a crisis in California's prisons. There are far too many prisoners in much too little space with too few services. There seems no doubt that the budget crisis in California will continue to make this situation worse. Rather than more funding for desperately underfinanced prisons, there will be less. No effective solution is remotely in sight.

My thesis is that judicial action is essential and unquestionably will improve the situation in prisons. Courts, however, are inherently limited in how much they can accomplish in effective prison reform. The central problem facing the California prisons – too little money to pay for the needs of too many inmates – is one that courts are ill-equipped to solve. To be sure, they can and must order improvements, but courts are poorly suited to solving problems that require tremendous increases in spending and significant improvements in administration.

My analysis is developed in three points. First, there is a crisis in prisons in California and nationally. Second, the central cause of the crisis is a political process that is unlikely ever to provide an adequate solution. Third, courts can make a difference, but their role and effectiveness is inherently limited.

The conclusion is bleak, but not without hope. It is possible that the serious budget crisis confronting California could encourage political solutions. For example, to reduce the overwhelming prison costs, California's legislature could choose to reduce dramatically the prison population, releasing those who are serving long sentences for non-violent offenses and changing the law to lessen the numbers being incarcerated for such crimes in the future. Currently, however, there is no indication that such a reform is even being considered.

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## I. THE CRISIS

The central problem is that there are far too many prisoners. In California, there are 174,000 prisoners confined in facilities designed for 100,000 inmates.<sup>1</sup> More than 17,000 prisoners are housed in gymnasiums and classrooms which were never meant for this purpose.<sup>2</sup> It is estimated that an additional 50,000 prison beds will be needed by the state in the next 15 years.<sup>3</sup>

These figures do not include the population in county jails. Twenty jails are currently operating under court-ordered population caps and 12 more under self-imposed caps.<sup>4</sup> In 2005, 233,338 individuals avoided incarceration or were released early from jail sentences due to a lack of jail space.<sup>5</sup>

The problem, of course, is not limited to California. In 2003, the number of people in United States jails and prisons exceeded 2 million for the first time, rising to 2,019,234.<sup>6</sup> Further, the problem is particularly acute for racial minorities. An estimated 12 percent of African-American men ages 20 to 34 are in jail or prison.<sup>7</sup> “By comparison, 1.6 percent of white men in the same age group are incarcerated.”<sup>8</sup> There are over one million African-American prisoners, constituting about half the prison population,<sup>9</sup> yet African Americans constitute only about 12 percent of the country’s population.<sup>10</sup> One-third of African-American men in their twenties are in some form of government custody, whether in prison, on probation, on parole, or under some other type of court-ordered supervision.<sup>11</sup>

Nationally, five times more prisoners are incarcerated today than just a few decades ago.<sup>12</sup> “Between 1991 and 1999, the number of children with a parent in a federal or state correctional facility increased by more than 100%, from approximately 900,000 to 2,000,000.”<sup>13</sup> The nation’s incarceration rate is among the world’s highest, and five to ten times higher than the rates in other

1. OFFICE OF THE GOVERNOR, ARNOLD SCHWARZENEGGER, COMPREHENSIVE PRISON REFORM (2006), <http://gov.ca.gov/index.php?/fact-sheet/4966> [hereinafter “COMPREHENSIVE PRISON REFORM”].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Fox Butterfield, *Prison Rates Among Blacks Reach A Peak, Report Finds*, N.Y. TIMES, April 7, 2003, at A12.

7. *Id.*

8. *Id.*

9. As of 2006 there were 836,800 African American men in State or Federal prison or local jail, comprising 41% of the 2 million men in custody. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2006, 9.

10. U.S. CENSUS BUREAU, Census 2000, available at <http://quickfacts.census.gov/qfd/states/00000.html> [Last visited Jan. 26, 2009].

11. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1274 (2004).

12. *Id.* at 1272.

13. COMPREHENSIVE PRISON REFORM, *supra* note 1.

industrialized nations.<sup>14</sup>

By any measure, there is a serious problem with the size of the prison population in California and the United States. It is far in excess of prison capacity, and it has devastating effects on families and communities.<sup>15</sup>

## II. THE CAUSES OF THE CRISIS

The crisis is the product of many causes that have accumulated over a long period of time. First, there have been enormous political pressures in recent years to increase penalties for criminal offenses, notably the enactment of three-strikes laws across the country, which have had the effect of dramatically increasing prison populations. California's three-strikes law is particularly onerous as it does not require that a third strike be a serious or violent felony.<sup>16</sup>

In *Lockyer v. Andrade* – a case that I briefed and argued in the Ninth Circuit Court of Appeals and the United States Supreme Court – the Court upheld a life sentence with no possibility of parole for 50 years for an individual who had stolen \$153 worth of videotapes from K-Mart stores in San Bernardino, California.<sup>17</sup> This sentence was imposed under California's three-strikes law even though Andrade had never committed a violent crime. In *Ewing v. California*, the Court upheld a life sentence with no possibility of parole for 25 years for a man who stole \$1,200 worth of golf clubs.<sup>18</sup> Hundreds of individuals in California are serving life sentences under the three-strikes law for crimes like petty theft with a prior and for possessing small, use-quantities of drugs.<sup>19</sup> The Supreme Court in these two cases rejected challenges that such sentences were cruel and unusual punishment. The result is that states can and do incarcerate people for life when their third strike is shoplifting or possessing small amounts of illegal drugs.

Further, in California and nationally, there has been a dramatic increase in the use of mandatory minimum sentences,<sup>20</sup> while legislatures have imposed longer sentences for crimes.<sup>21</sup> Such policies have combined to contribute

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14. JOE DOMANICK, *CRUEL JUSTICE* 254 (2004).

15. See Roberts, *supra* note 11, at 1276.

16. CAL. PENAL CODE § 667(e)(2) (West 2009).

17. 538 U.S. 63, 66 (2003).

18. 538 U.S. 11, 18 (2003).

19. CALIFORNIA LEGISLATIVE ANALYST'S OFFICE, *A PRIMER: THREE STRIKES: THE IMPACT AFTER MORE THAN A DECADE* (October 2005) (listing offenses for which individuals were sentenced to prison under the three strikes law).

20. See Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 936 (2001).

21. Carla Barnett, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed By Prison Overcrowding? If Not, What Will?*, 39 NEW ENG. L. REV. 391, 394-95 (2005) (stating the huge number of people in American prisons can be attributed to many factors, including harsh sentencing guidelines and mandatory minimum sentences coupled with longer sentences for certain crimes, an increase in the use of incarceration over other non-incarceration

significantly to the growth of the prison population.

These increases in punishments are the result of significant political pressures that all push in one direction. No politician wants to be seen as soft on crime. Elected officials – both Democrat and Republican – have an incentive to vote for any bill that increases the punishment for a crime. To do otherwise, is to risk giving political opponents a powerful tool at the time of the next election. This has also contributed to the increased federalization of crime. Many offenses that were previously handled at the state level are now federal crimes.<sup>22</sup> The same pressures are at work: members of Congress do not want to seem soft on crime, so there is a great incentive to vote to make something a federal offense and little political incentive not to do so. The result is tremendous political pressure, in California and elsewhere, that operates as a one-way ratchet, providing for ever-greater criminalization and punishment, and never less.

Providing for longer prison sentences for more crimes has political benefits for legislators. Being perceived as soft on crime never is politically beneficial. The result is evident in the many ways punishments have increased – three-strikes laws, mandatory minimum sentences, greater penalties for crimes. The effect, of course, is ever-larger prison populations.

Second, there is a lack of political will to provide for adequate funding for prisons. There is no constituency with any political clout to pressure for sufficient funding for prison facilities or prison services. Politically powerless, prisoners certainly are a “discrete and insular minority.”<sup>23</sup> Prisoners cannot vote; in fact, a felony conviction often results in permanent disenfranchisement. In a system where campaign contributions matter greatly, prisoners have no money to give. And since prisoners come disproportionately from the poorer segments of society, they are unlikely to come from families with the resources to have significant influence in the political process. Fighting for dollars from legislatures is a competition amongst constituencies for scarce government resources and prisoners are particularly ill-equipped to pressure for prison funding and services.

Prison guards and their unions, especially in California, can be very powerful. But their advocacy has been for longer sentences, not for better prison conditions. For example, “the California Correctional Peace Officers Association [“CCPOA”] . . . has contributed massively in support of tough-on-crime positions on voter initiatives and has given money to crime victims’ groups, and public corrections officers unions in other states have endorsed

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forms of punishment, and the elimination of parole and the creation of “truth-in-sentencing” laws).

22. See, e.g., Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1277-1304 (1995); Charles D. Bonner, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905, 905-38 (1998).

23. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

candidates for their tough-on-crime positions.”<sup>24</sup> The CCPOA has been a powerful lobby for longer criminal sentences. They give “twice as much in political contributions as the California Teachers Association, though it is only one-tenth the size.”<sup>25</sup> By all accounts they are tremendously successful in their advocacy. But never have they used their influence to improve the conditions of prisons or the services provided to prisoners.

Third, there is more generally a lack of political will for adequate government funding of public services. The lack of sufficient funding for prisoners is actually part of a larger pattern of legislatures perceiving taxpayers as being unwilling to pay the taxes needed to adequately provide for government services. The pressure is to cut taxes when possible and never to raise them. In California, the requirement that the state budget and state tax increases be passed by a two-thirds majority of both houses of the legislature also makes it very difficult to provide adequate funding for government programs and services. As a result, California’s education system ranks 43<sup>rd</sup> in the country in per pupil expenditures when adjusted for regional cost differences.<sup>26</sup> Budgets inadequate to meet the needs of government are inevitably going to hurt the least politically powerful and the most politically vulnerable, particularly prisoners.

Together, these and other pressures lead to prisons that are desperately inadequate and underfunded. The current budget crisis will make matters much worse. There is even more competition for fewer dollars. Additionally, the tightening of credit may make it more difficult to issue bonds for new prison construction and other capital projects. A prison system that is already seriously underfunded is now likely to get even more so.

### III. THE COURTS’ ESSENTIAL BUT LIMITED ROLE

In recent years, some constitutional scholars as part of the “popular constitutionalism” movement have taken to questioning judicial enforcement of the Constitution. One of the most famous and most extreme versions of this view is forwarded in Harvard Law Professor Mark Tushnet’s book, *Taking the Constitution Away from the Courts*, which argues for the complete elimination of judicial review.<sup>27</sup> But this analysis contains a crucial flaw: in some instances the courts are the only entity with the will to enforce the Constitution. The political branches have inadequate incentives to comply with the Constitution when the rights of prisoners are violated. Unless judges act, constitutional violations in prisons will go unremedied. In fact, without the

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24. Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1203 (2008).

25. *Id.* at 1222.

26. CALIFORNIA EDUCATIONAL OPPORTUNITY REPORT: ROADBLOCKS TO COLLEGE (2006), <http://www.idea.gseis.ucla.edu/publications/eor06/fullreport/pdf/EOR-2006.pdf>.

27. MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

threat of judicial enforcement, legislatures and prison officials have little reason other than human decency to keep prison conditions in compliance with Constitutional requirements.

Courts can and do make a difference. In California, there is a long history of courts acting to improve prison conditions. For example, in *Madrid v. Gomez*, United States District Court Judge Thelton Henderson ruled that the “wretched misery” that inmates had to endure at Pelican Bay State Prison violated their civil rights.<sup>28</sup> Judge Henderson noted that federal courts are not usually instruments for prison reform, but faced with extensive findings of rampant abuse and constitutional violations, he held that judicial review was necessary.<sup>29</sup> He declared, “We are firmly convinced that the constitutional violations identified above will not be fully redressed absent intervention by this Court.”<sup>30</sup> The court found that prison officials failed to provide constitutionally adequate medical and mental health care. The opinion detailed insufficient staffing, inadequate training and supervision of medical staff, inaccurate and incomplete medical and psychiatric records, and grossly insufficient medical care – leading the court to appoint a special master to oversee remedying the constitutional violations.<sup>31</sup>

In *Coleman v. Wilson*, the United States District Court for the Eastern District of California found that the California Department of Corrections (“CDC”) was failing to provide inmates with the minimum of constitutionally adequate medical care.<sup>32</sup> The court found that there were inadequate screening procedures for identifying inmates who suffered from “serious mental disorders” both at the time of intake and while incarcerated.<sup>33</sup> The court also concluded that the CDC was chronically understaffed in the area of mental health care and that there were extremely deficient medical records.<sup>34</sup> This court, too, appointed a special master to ensure compliance with the Constitution.<sup>35</sup>

In 2005, in *Plata v. Schwarzenegger*, the District Court again found that the medical care in California’s prisons was far below the minimal level required by the Constitution.<sup>36</sup> Judge Henderson declared:

The prison medical delivery system is in such a blatant state of crisis that in recent days the defendants have publicly conceded their inability to find and implement their own solutions that will meet constitutional standards. . . . In light of this crisis and defendant’s concession that constitutional violations will

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28. 889 F. Supp. 1146, 1280 (N.D. Cal. 1995).

29. *Id.*

30. *Id.*

31. 889 F. Supp. 1146 *passim*.

32. 912 F. Supp. 1282 (E.D. Cal. 1995).

33. *Id.* at 1308.

34. *Id.* at 1307, 1315.

35. *Id.* at 1324.

36. 2005 WL 2932243 (N.D. Cal. 2005).

not be corrected for a long time to come, the Court is compelled to take it upon itself to construct a remedy that will cure the violations as soon as possible.<sup>37</sup>

Judge Henderson appointed an interim receiver to manage the CDC's delivery of health care services.<sup>38</sup> He made clear that he would use civil contempt powers if necessary to gain compliance.<sup>39</sup>

A three-judge court (comprised of district judges Henderson and Karlton and Ninth Circuit judge Stephen Reinhardt) is now overseeing the implementation of this order. Estimates are that the receiver, Clark Kelso, is seeking as much as \$8 billion to ensure a constitutionally adequate health care system for California's prisons.<sup>40</sup>

There is every reason to believe that medical care services are far better in California's prisons than they would be without such judicial intervention. There are other examples beyond medical care of courts making a difference when it comes to protecting those who are incarcerated. For example, the United States District Court for the Central District of California brought about an end to the practice of having inmates at the county jail sleep on the floors because of overcrowding.<sup>41</sup> The practice spread disease, as floors were filthy, and was terribly degrading.<sup>42</sup> It was done simply because there were not nearly enough beds in the county jail for the number of inmates.<sup>43</sup> As mentioned above, courts have put caps on jail populations to prevent tremendous overcrowding. Inmates whose constitutional rights have been violated can sue guards, and damage judgments in such cases can work as a deterrent to future violations.

I thus emphatically reject those who argue that courts cannot make a difference.<sup>44</sup> Courts can limit overcrowding in prisons and jails. Courts can order improvements in medical and mental health care. Courts can provide damages to those prisoners who are victims of unconstitutionally excessive force. Courts can end practices – such as forcing prisoners to sleep on the floor – that are unconstitutional and degrading.

But it must be recognized that courts are also limited in what they can do. First, the most important problem facing prisons is not having enough money for the size of their prisoner population. Courts certainly can issue injunctions even when compliance will cost substantial sums of money.<sup>45</sup> But courts

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37. *Id.* at \*1.

38. *Id.*

39. *Id.* at \*8.

40. Andy Furillo, *Federal Medical Receiver Wants \$8 Billion For California Prisons*, SACRAMENTO BEE, August 14, 2008, at 1A.

41. *Thomas v. Baca*, 514 F. Supp. 2d 1201 (C.D. Cal. 2007).

42. *Id.*

43. *Id.*

44. The most famous advocate of this position is GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

45. *See, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974) (state officers may be sued for

obviously lack the power of the purse and the ability to make expenditures. There is always the risk that the legislature simply will not appropriate the money needed. For example, if the receiver overseeing the medical system orders an additional \$8 billion in expenditures, there is a great likelihood that the money will not be forthcoming in light of the current budget crisis.

A court's options, then, are limited. It cannot realistically – and probably not legally – hold the members of the legislature in contempt of court for failing to provide adequate funding. In *Spallone v. United States*, the closest analogy, the Supreme Court overturned a federal district court's holding members of a city council in contempt for failing to enact an open housing law as the court had ordered.<sup>46</sup> The United States government successfully sued Yonkers for segregating public housing in violation of the Constitution and federal law.<sup>47</sup> When the city failed to take the needed steps, the district court announced that the members of the city council would be held in contempt until they acted.<sup>48</sup> The Court of Appeals affirmed, but the Supreme Court reversed. The Court held the district court could not impose contempt sanctions against individual city council members for not complying with provision of a consent decree in a civil rights suit without first imposing sanctions against the city alone in an attempt to secure compliance with remedial orders.<sup>49</sup>

The Court has expressed great concerns about holding individual legislators in contempt, citing the history of according legislators absolute immunity for their legislative acts.<sup>50</sup> Chief Justice Rehnquist noted that, "This sort of individual sanction effects a much greater perversion of the normal legislative process than does the imposition of sanctions on the city for the failure of these same legislators to enact an ordinance."<sup>51</sup> It is thus highly questionable whether a court could enforce an order requiring increased expenditure of government funds.

However, there is the possibility that a court on its own could order a tax increase. In *Missouri v. Jenkins*, the Supreme Court invalidated a federal district court's order of an increase in taxes to pay for compliance with a school desegregation order.<sup>52</sup> The Court noted, however, that, "[A] court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court."<sup>53</sup>

This latter statement, however, was the product of a 5-4 decision and it is questionable whether it would be followed today. The five Justices in the

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prospective injunctive relief even when the effect will be substantial costs of compliance).

46. 493 U.S. 265 (1990).

47. *Id.* at 268.

48. *Id.*

49. *Id.* at 280.

50. *Id.* at 279.

51. *Id.* at 280.

52. 495 U.S. 33 (1990).

53. *Id.* at 55.

majority were White, Brennan, Marshall, Blackmun, and Stevens. Justice Kennedy wrote a vehement dissent joined by Chief Justice Rehnquist and Justices O'Connor and Scalia. He strongly objected to courts being able to order legislatures to increase taxes to comply with court orders, writing:

In my view, however, the Court transgresses these same principles when it goes further, much further, to embrace by broad dictum an expansion of power in the Federal Judiciary beyond all precedent. Today's casual embrace of taxation imposed by the unelected, life-tenured Federal Judiciary disregards fundamental precepts for the democratic control of public institutions.<sup>54</sup>

In light of the very different composition of the Court today compared to that in 1990, it seems dubious whether a court can order an increase in taxes.

Thus, when the problem is a lack of money, courts are not powerless, but they are limited in what they can do.

The second limitation on judicial power is the inherent difficulty in courts formulating standards and enforcing them. Injunctions are best suited to prohibiting illegal conduct, such as ordering that individuals can no longer be forced to sleep on floors. But when the standard is more qualitative, it is far more difficult for courts to devise the standards which must be met. Courts also are limited in their ability to engage in on-going oversight to ensure compliance. Courts can appoint monitors, masters, and even receivers. But administering prisons in a manner that complies with the Constitution is obviously a task difficult for courts to accomplish.

Third, the Prison Litigation Reform Act ("PLRA") limits the ability of federal courts to provide remedies. In addition to imposing filing fees on prisoner suits and creating a strict exhaustion requirement, the Act limits the remedial powers of the federal courts. The PLRA provides, for example, that a court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."<sup>55</sup> The PLRA allows the government to move to terminate the relief at any time it believes the standards for issuance are no longer met<sup>56</sup> and even more importantly, provides that all federal court orders directed at prisons expire after two years.<sup>57</sup> Courts, of course, may continue orders beyond that, but only if they make the findings required by the Act.

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54. *Id.* at 58-59 (Kennedy, J., concurring in part and dissenting in part).

55. 18 U.S.C. § 3626(a)(1)(A).

56. In particular, 18 U.S.C. § 3626(b)(2) provides: "In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."

57. 18 U.S.C. § 3626(b)(1)(a)(i).

The PLRA does not make it impossible for federal courts to act to remedy unconstitutional prison conditions, but it surely makes it much more difficult. Even with a Democratic President and a Democratic Congress, it seems highly unlikely that there is the political will to revise the PLRA. After all, it was enacted during the Clinton presidency and signed by President Clinton. There is no indication that President Obama or the Democratic Congress has any plans to revise the PLRA as part of its legislative agenda.

Finally, it must be noted that the current Supreme Court and federal judiciary often may lack the inclination to find constitutional violations and enforce effective orders to improve prison conditions. Recent Supreme Court decisions involving prisoners have expressed the need for great deference to prison authorities.<sup>58</sup>

The current three-judge court overseeing the order to improve medical care in California's prisons – Judges Reinhardt, Henderson, and Karlton – were selected randomly, but no one would deny that these are not typical federal judges in their views about the role of the judiciary or in their ideology. If any judges would have the inclination and ability to make a difference in California's prisons, it is these individuals. It is unlikely, though, that there will always be judges like these overseeing prison litigation. Prison reform through the courts is essential, but rarely will be forthcoming in a manner to solve the enormous problems in California prisons.

#### CONCLUSION

Too often discussions about the ability of courts to succeed in enacting reform attempt to make broad generalizations. Gerald Rosenberg's famous book, *The Hollow Hope*, is foremost among these in offering a very pessimistic view of what judges can accomplish.<sup>59</sup> But the reality, especially when it comes to prisons, is far more nuanced.

Courts can make an essential difference. As explained above, it is often judges alone who are able and willing enforce the Constitution when it comes to prisons. But at the same time, the limits on the judicial power to remedy constitutional violations in prisons must be acknowledged.

Perhaps there will come a time when legislators will have the will and desire to deal with the prison crisis. The severe budget crisis confronting California and other states might provide an incentive to action. One way to reduce the state's costs would be to dramatically reduce the number of prisoners. A state could do so by legislation ordering the release of prisoners serving long sentences for non-violent crimes. Also, laws providing for such

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58. See, e.g., *Beard v. Banks*, 548 U.S. 521 (2006) (upholding prison regulation preventing prisoners in top security state prison from having access to reading material or family photographs); *Shaw v. Murphy*, 532 U.S. 223 (2001) (prisons can prohibit inmates from providing legal assistance to other inmates).

59. ROSENBERG, *supra* note 39.

incarceration – life sentences for shoplifting or for possessing small quantities of illegal drugs – can be changed. It isn't happening yet, but it could.

In the meantime, courts will need to do all that they can to remedy constitutional violations in prisons and jails. They may, at times, be limited in what they can accomplish, but judges have an essential role to play and can accomplish reforms where no one else is likely to succeed.

