Stanford Law School | Stanford Criminal Justice Center

DECEMBER 2014

Beyond Litigation:

A Promising Alternative to Resolving Disputes Over Conditions of Confinement in American Prisons and Jails

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INTRODUCTION

In 1976, Governor Jerry Brown and the California Legislature passed a series of laws creating the state's determinate sentencing structure.[1] Over the next 30 years, a tough-on-crime mindset drove legislators and voters to lengthen sentences and reduce opportunities for parole, resulting in a prison system packed to more than 200 percent of its design capacity.[2] By 2006, overcrowding in California Department of Corrections and Rehabilitation (CDCR) facilities was so bad that more than 168,000 inmates were packed into a prison system designed for only 84,000.[3] To cope with the population boom, the state built 22 mega-prisons and hired staff at a rapid rate.[4] But those new prisons immediately became overcrowded as well, and it became increasingly difficult for the state to properly care for inmates while maintaining order and discipline. As a result, the CDCR became the target of a series of class-action lawsuits focusing on nearly every aspect of its treatment of inmates in prison and on parole. As these cases were filed, the state chose to defend itself primarily through traditional prison litigation strategies. The approach was largely unsuccessful.

In the two most significant cases, *Plata v. Brown* and *Coleman v. Brown*, federal courts ruled that CDCR violated the Eighth Amendment by failing to provide inmates with adequate medical and mental health care, respectively.[5] In both cases, the state was unable and/or unwilling to make the necessary changes, and it mounted an aggressive defense that has lasted longer than a decade. Despite efforts in later years to invest in the prison health care system, and despite notable improvement in the relevant conditions, the state eventually lost these cases. The litigation resulted in the appointment of a receiver and special master to operate and oversee, respectively, the prison health-care system. It also led to the construction of the most expensive prison health care facility in California history and additional annual spending of more than $1.5 billion on inmate health care.[6] On top of these outcomes in the *Plata* and *Coleman* cases, the state suffered a further loss in a dramatic decision under the Prison Litigation Reform Act (PLRA).[7] A three-judge panel decided that overcrowding was a significant contributor to the state's inability to provide a constitutional level of care, and on that basis issued an order capping the California prison population at 137.5 percent of the system's design capacity.[8] Based on existing prison capacity, that meant reducing the population by more than 35,000 inmates.[9] To comply with the court order, Gov. Brown in April 2011 signed Assembly Bill 109 (AB 109), which shifted responsibility for the incarceration

and supervision of lower level offenders from the state to counties.[10] The implementation of AB 109, known generally as realignment, reduced the prison population by more than 27,000 inmates in the first two years.[11] But even with that drop California was unable to meet the mandated reduction targets, prompting the three-judge panel to appoint a compliance officer to ensure the state further shrinks its population as ordered.

Ultimately, while many aspects of the correctional health care system have improved because of the litigation, these benefits have come at great cost. First, the state government lost the right of its executive branch to control a significant portion of the prison system, including the right to fully implement sentences imposed on convicted criminals by state courts. Second, California has been forced to rapidly reduce its inmate population through massive shifts in its sentencing laws enacted as hastily drawn legislation. Because these events unfolded quickly in response to judicial pressure, there was little time to fully vet the potential effects on the correctional system—or establish a method for assessing broader impacts, including the effect on crime. Fortunately, the rise in crime rates predicted by some has not come to pass. Nonetheless, California has been compelled to spend far more per capita on inmate health care than any state in the nation - without seeing an end to court control. Finally, the state has been forced to pay tens of millions in fees to both plaintiffs' lawyers and court-appointed experts and overseers, who now exert tremendous influence over the prison system. Unfortunately, despite these seismic shifts in criminal justice policy and the precipitous reduction in prison population, the cases linger on, and the federal courts may still order the release of serious and violent offenders onto the streets.

The prison litigation has produced a final irony—but also a great opportunity to draw and apply lessons: The very same lawyers who successfully brought these suits against the state have now shifted their focus to California's county jails. Litigation targeting jail conditions and crowding is well under way in Monterey, Fresno, and Riverside counties[12] and has been threatened in Los Angeles, San Diego, San Francisco, Orange, Alameda, San Joaquin and San Bernardino counties. These jurisdictions are in jeopardy of following the state's path of engaging in expensive prison litigation—potentially resulting in substantial litigation costs, massive increases in health care spending, and, ultimately, the inability to incarcerate the offenders sentenced to serve sentences in the county jail. And they face this risk without the "insurance policy" of state government's much deeper pockets, and with facilities that are typically far older than the state prisons and not designed to house long-term offenders. Indeed, some county officials are now asking whether the state effectively "realigned" both its low-level offenders and its prison litigation problem to the counties via AB 109.

Is there a better way? Is it possible for counties—and inmates—to achieve a more positive outcome by taking a different tack? Given the state's disappointing experience with traditional litigation, this paper advocates a more proactive and collaborative approach, one in which lawyers for inmates and county officials work together to identify and evaluate conditions in the jails—without the need for expensive, time-consuming civil discovery.

Rather than relying on the courts and risking the entire case on the appointment of a favorable judge, the parties would jointly determine whether the county bears a constitutional obligation to improve jail conditions. The remedy would not be limited by terms set out in the PLRA but would instead be crafted through a collaborative process focused on improving the inadequate aspects of the system. Moreover, by jettisoning the PLRA and the traditional focus on addressing specific deficiencies, the parties could expand their lens and take a more holistic approach to fixing shortcomings in the criminal justice system. Finally, this new strategy would eliminate perhaps the most unproductive aspect of the current system—the endless monitoring and reporting of innumerable court-appointed experts and monitors paid handsomely to determine compliance with myriad court orders. Instead of relying on the fact-finding of such monitors, the parties would jointly employ a variety of experts to help fix problems as expeditiously as possible. This mechanism would reduce the time it takes to address deficiencies underlying the dispute and, thereby, cut the costs associated with those fixes, thus leaving both time and money for any structural changes needed to improve the health of the broader criminal justice system.

THE MOTIVATION FOR CHANGE

Using the court system and civil litigation to address alleged deficiencies in the conditions of inmate confinement is an ingrained habit of inmate advocates and government officials. Lawyers for inmates grow tired of informal complaints going unheeded and see no alternative that will both address the unconstitutional conditions and provide compensation for their time. Moreover, regardless of its faults, the traditional litigation approach can, over time, achieve results. So why change?

One reason identified by experienced advocates is the frustratingly slow process associated with civil litigation under the PLRA.[13] Fact-finding typically starts with the filing of California Public Records Act requests for documents along with interviews of inmates during normal visiting hours. While this process is a crucial step for putative claimants, it does not provide access to sensitive operational documents, such as security records, inmate movement logs, and files related to clinical visits. It also does not give plaintiff lawyers access to the staff and clinicians who could explain prison practices and procedures. Even after civil discovery is underway, the conditions at issue in a given case typically remain unaddressed and may worsen while the lawyers argue over the minutiae of PLRA compliance as well as requests for documents, interrogatories, admissions, and depositions. Indeed, some public officials, in misguided and shortsighted attempts to demonstrate that current conditions are acceptable, may deliberately decide not to address the problems raised during discovery. So while inmates' lawyers may ultimately win a long war of attrition, they are losing the day-to-day battle to improve their clients' lives.[14]

In addition, plaintiffs' attorneys typically litigate the early phases of these cases at their own expense—working without compensation

until, and unless, a violation of federal law is established. Even when the facts are strong, counsel for the inmates risk drawing an unfavorable judge or, in a damages case, an unsympathetic jury. Nor does the risk end with a favorable judgment, given the uncertainty associated with remedies. As many successful but ultimately frustrated litigants have found, courts often prove less capable of addressing complex prison or jail problems than the executive branch. Even when the court hires an expert to oversee the transformation of a system, the chosen appointee may lack the experience or capability to successfully carry out the court's mandate, leaving the plaintiffs with little recourse. Finally, in post-Realignment California, inmate-rights specialists acknowledge that they lack the resources to investigate allegedly unconstitutional conditions of confinement in multiple jurisdictions at once.[15]

On the other side of this coin, administrators shouldering a multitude of responsibilities in operating complex prison or jail systems have little time to devote to legal disputes. In the modern era, correctional management goes far beyond focusing solely on safety and security. Most local officials also are establishing rehabilitation and reentry programs designed to reduce recidivism; overseeing the construction of new state-funded facilities; maintaining compliance with ever-changing federal and state mandates; meeting with organized labor on training, compensation and staffing issues, and perpetually trying to stay within a budget they don't control.

Given these ongoing challenges, correctional administrators have little time to personally engage in legal cases. Instead, especially in the early stages of litigation, agency officials understandably leave these matters to government defense lawyers. As a result, these officials often avoid confronting the system weaknesses uncovered by the discovery process until the matter is close to trial. And even when faced with acknowledged deficiencies, the officials may not have the fiscal resources to do anything about the problem. In these situations, experienced administrators know that even when budgets are tight and previous requests have been denied, a court order to address a longstanding problem usually brings needed funding through an intra-jurisdiction transfer or new public finance measures. But by the time the facts of a case have been fully vetted, the matter has been to trial, and funds have finally been provided to the jail or prison, the ultimate cost to government is many times what it would have been had the problems been addressed at the outset. In the *Coleman* case, for example, the state has paid more than $11 million in attorney fees in the last five years and an astounding $22 million over the course of the litigation. During the same five-year period, the state paid $6 million in fees in the *Plata* case and $11 million over the life of the case.[16] In light of these problems with the current litigation-based system, many local leaders now recognize the need for a new approach.

A SIMPLE SOLUTION, A COMPLEX SETTING

Designing systems to resolve disputes without litigation is not a new idea. Law schools have been teaching the basics of alternative

dispute resolution for decades, and some now offer courses focusing on the fundamentals of crafting effective pathways that sidestep the courts. In *An Analytic Framework for Dispute Systems Design*, negotiation scholars Stephanie Smith and Janet Martinez offer a theoretical overview of how parties seeking to avoid inefficient litigation costs can create a model for dispute resolution.[17] They place the traditional system options for dispute resolution along a spectrum:

> Negotiation, on the left, does not involve a third-party neutral, and the parties retain control over both the process and outcome. Toward the middle, mediation, involves a third-party neutral who does not have the power to impose a binding decision. The processes on the right end of the spectrum, arbitration and trial, involve a third-party neutral who has the power to render a binding decision. As you follow the spectrum from left to right, the processes generally become increasingly formal; there is increasing control of a third party over the outcome, as well as the process; processes become more expensive in time and resources; and there is an increasing focus on the disputants' rights as opposed to their interests.[18]

Where adversaries in a legal dispute choose to operate on this spectrum will naturally vary. But key to designing any successful resolution system, scholars say, is to ensure that certain fundamental values form its foundation. Among these values are fairness and efficiency, as well as stability resting on satisfaction with the outcome and a dedication to avoiding recurrence of the disputes.[19] Also crucial is an understanding of the differences among interests, rights, and powers. Smith and Martinez argue that several components are essential for an effective dispute resolution system. One priority is defining the types of conflicts the system seeks to address and identifying what goals–both substantive and procedural–the resolution system intends to accomplish. These goals can include, in varying degrees of importance, efficiency and cost savings, minimizing the time invested by stakeholders, ensuring compliance via incentives or penalties, obviating future disputes, and addressing deeper and longer-term institutional defects.[20]

These agreed on objectives should then logically dictate process options, how these options relate to each other within the context of the institution, and how the proposed system is reinforced or constrained by external systems, including the formal legal system, and what incentives and disincentives (financial, relational, legal or other) exist for using the system.[21]

Ultimately, the success of the resolution will depend on accountability.[22] While advocates for the inmates will want significant accountability systems guaranteeing that the promised reforms will actually take place, the government will seek flexibility in order to address unforeseen and unavoidable delays due to labor disputes, regulatory challenges, conflicting court orders or fiscal crises. The challenge of reconciling these disparate points of view may be daunting, but it is not impossible to overcome—and the results will be worth the effort.

A FRAMEWORK FOR SUCCESS

With these general process principles in mind we can turn to the specific context of disputes under the Eighth Amendment, and, as applied to jail or prison litigation, the practical difficulties are numerous. Success demands that the parties agree on shared goals, are willing to engage in a collaborative process and endorse an approach that will fix problems in the correctional system in an expeditious and cost-effective manner. Both sides must be willing to work together from the earliest stages to assess the quality of the correctional system, create a workable remedy, and collaborate on a new paradigm for monitoring and accountability.

While this model is vastly different from the status quo, we are convinced that resolving disputes over prison and jail conditions without formal litigation is possible. But even if the parties buy in to an alternative approach, there must be a framework appropriate to correctional settings. Such a framework should include four basic elements.

1. DETERMINING THE FACTS ON THE GROUND.

For top inmate-rights law firms like the Prison Law Office and Rosen, Bien, Galvan & Grunfeld, it is not uncommon to receive hundreds of letters from inmates and their families asserting that the conditions of confinement at a prison or jail violate the United States Constitution. As the letters pile up, the lawyers begin the process of determining whether there is substance behind these claims. While this journey typically starts with correspondence, inmate visits, and gathering documents through requests for public records, it eventually requires lawyers to seek internal documents through the civil litigation process. In a case alleging shortcomings in inmate health care, for example, the process is particularly complex. Lawyers must determine whether there is timely access to basic care and specialty care, assess the quality of care provided by clinicians, evaluate the adequacy of health care facilities and records, and review pharmacy practices and all aspects of the related fields of behavioral health care. While this process eventually uncovers the facts on the ground, it is inefficient at best.[23]

Meanwhile, in most jail and prison settings, the administration has an inmate complaint or appeals process through which prisoner concerns are gathered, reviewed and adjudicated. The administrators also receive, compile, and respond to complaints and questions from the friends and family of inmates, advocates, counsel, staff, and the media. However, these systems rarely include any formal trend analysis, so it is difficult for administrators to glean the real problem areas from the merely perceived, much less the serious from the trivial.

In the collaborative approach, civil discovery is abandoned in favor of an agreement that the government will grant reasonable access to inmates, staff, and records by counsel and experts. The parties convene an initial meeting defining ground rules and limits on access, which should ultimately be

reduced to writing. One critical issue is whether findings of the investigation will be admissible in court. While the answer could differ depending on the setting, we suggest that all *documentary and physical evidence* should be admissible, regardless of how discovered, unless otherwise protected by state or federal laws on privacy or confidentiality. *Statements by inmates and staff* present a more difficult problem. While most documents and physical evidence would be ultimately discoverable regardless of the collaboration of the government, the statements of individuals might be protected or only provided with the advice and presence of counsel. Of course, even this limitation can be overcome if representatives of both sides handle the interviews together. While more time consuming, joint interviews can be a particularly informative process because it allows inmate representatives and correctional administrators to assess the credibility of the people living and working in the jail or prison, in real time. Often, this process will be enough to convince decision makers to take action on a problem that had previously been fact-finding team should consist of counsel only an allegation or, alternatively, convince advocates that the problems are not as serious as initially claimed.

Once the ground rules are established, the two sides should also decide on an investigative process. A systematic approach that reveals as much as possible about the facts should be the goal. Again, the point of this strategy is to gather everything that would be otherwise gathered in civil discovery, but to do so more efficiently and effectively. This type of information sharing requires cooperation by the operational teams who already know the system and how to access the necessary data. It also follows that the fact-finding team should consist of counsel representing inmates and the government, operations staff with experience in the field under scrutiny, and jointly-hired consultants—*but only if unique expertise in needed*. This team should be able to unearth the facts on the ground more quickly and thoroughly than traditional litigation and at a fraction of the cost.

2. DETERMINING THE APPROPRIATE STANDARDS

Once the conditions in a prison or jail are established, the next question is whether the existing system is good enough. Determining appropriate standards in cases alleging cruel and unusual punishment under the Eighth Amendment is traditionally the job of a court after arguments by the parties. The legal standard might seem helpful in these cases because it provides a reliable and predictable baseline from which to decide whether a particular set of circumstances in a jail meets constitutional minimums. But in reality, federal statutes and case law provide very little guidance. For example, it has been established that inmates cannot be subjected to a serious risk of substantial harm and that defendants must not be indifferent to that risk. As those very general parameters indicate, the U.S. Supreme Court has typically articulated the constitutional doctrine in very broad terms. In considering an inmate's claim of inadequate prison medical care the Court distinguishes "'deliberate indifference' to a prisoner's serious medical needs"[24] from "negligen[ce] in diagnosing or treating a medical condition."[25] The Court held that only the former violates

the Clause because Eighth Amendment liability requires "more than ordinary lack of due care for the prisoner's interests or safety."[26] In *Farmer v. Brennan*, the Court further elaborated upon the knowledge required in order for a prison official to be liable:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.[27]

The primary rationale for imposing liability on prison officials is that they have a duty to address the medical needs of inmates:

> These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death," the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common law view that "it is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself."[28]

Therefore:

> [D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983.[29]
>
> ….Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.[30]

But these general standards, in practice, provide little help to those deciding whether

the system in question is sufficient. In fact, several practitioners have said they believe these standards tend to create a ceiling for jail and prison conditions rather than a floor, as one would hope.

Fortunately, the constitutional legal standard is only one relevant factor in play with the collaborative approach. Free of the court and all that such a setting implies, the parties can more quickly move to establishing an effective and efficient system. The process begins with the systematic fact-finding described above. From there, the fact-finding team delineates the shortcomings of the system—not according to minimum standards under the law, but rather from the perspective of "what should be." This list of deficiencies, assembled collaboratively, becomes the basis for a corrective action plan.

From the perspective of the practitioner, this process is crucial. When Matthew Cate, one of the authors of this article, was Secretary of the California Department of Corrections and Rehabilitation, the leading frustration he experienced and heard from other administrators involved in traditional correctional litigation was the continual redefinition of desired outcomes necessary to satisfy the plaintiffs and courts—the "moving the goalposts" phenomenon. The administrator experiences a seemingly endless string of assessments, resulting in an ever growing and changing list of concerns, followed by new ideas for addressing the newly discovered problems and revised implementation plans, all of which need to be monitored and reassessed. Often lasting for years and spanning multiple correctional leaders, this iterative process is inefficient because correcting problems in a correctional setting is so complex. For example, in the health care arena, addressing a basic deficiency in access to care may involve expert-driven planning around sick-call protocols, inmate movement, recruitment, training of medical and custody staff, labor negotiations, review of appeals processes, medical records retention, and sick-call documentation as well as planning, permitting, construction or modification of facilities, all within a prison setting where serious assaults, riots, hostage-taking and escapes are always a possibility. Accordingly, many well-planned, time-consuming, and expensive steps taken to remedy initial shortcomings must be re-planned, reconstructed, renegotiated and retaken to meet the newly drawn "goal line." The results include wasted money, duplicative time-consuming processes, and ever-growing fees for counsel and experts, as well as cynicism among prison officials and state lawyers, who come to conclude that the whole process is hopeless.

The solution is two-fold. First, the parties must establish a comprehensive list of problems to be addressed. This list must be driven by the desire to build a sound, functional correctional system, without the costs associated with unnecessary bells and whistles. The purpose of the list is to establish a reasonable set of problems to be tackled, which may not be altered without agreement from both sides. While not immutable, the list must be a reliable planning document, meaning that its drafting will require substantial forethought and assessment. Assembling this list will necessarily require some sacrifice by inmate advocates, who argue that certain unforeseen issues may

not surface initially, but are nonetheless serious and in need of correction. While valid up to a point, this concern can be mitigated by an open discovery process and a thorough initial inspection conducted by both parties. Inmate advocates also note that while correcting initial deficiencies, prison and jail officials sometimes change their processes, protocols or personnel and create new issues. When new problems surface in this way, the collaborative model envisions a negotiation between the parties to determine whether amending the list of problems is warranted. Often, the answer will depend on whether the problem is serious enough to merit redress according to correctional standards mutually established at the outset.

3. REPLACING THE JUDGMENT OF A COURT WITH AN AGREEMENT BY THE PARTIES

Typically, the question of whether a jail or prison system meets constitutional minimums is decided by a judge applying the facts to the legal standards described above. Those standards have been established by courts in past cases and are often applied without much regard to practical factors, such as cost to the government, the safety of the staff or the long-term effectiveness of an approach. From the perspective of the courts, this makes perfect sense: a judge cannot legitimately consider relative efficiencies when the life and safety of inmates may literally be on the line. While the broadly worded Eighth Amendment standards quoted above certainly import notions of reasonableness, they do not make cost-benefit analysis the measure of constitutionality. But as a practical matter, cost-benefit analysis is what all parties to a dispute must eventually address. Given that, it should be possible to quickly repair life-threatening deficiencies inside prisons and jails while simultaneously crafting a long-term approach that safeguards inmates and also protects the public's interest in maintaining an effective and efficient correctional system. The key to this model is that both parties agree on what the system should look like. Once that happens, the happy ending is not far off—a collaborative approach that not only tackles the jointly-defined list of problems, but ultimately creates a better system overall.

In fact, one appealing dividend of this alternative model is that remedies can be developed with a holistic solution in mind—a solution reflecting the reality that a correctional system's problems may be driven by many other factors, including crowding, an insufficient budget, deteriorating facilities, or poor community transitions. For example, in the three years since the passing of AB 109, many counties have struggled with overcrowding, more criminally sophisticated inmates, and the need to accommodate longer sentences. Under the collaborative approach, the parties might jointly assess the systemic problems and decide that it is really crowding that is preventing the county from handling an access-to-care issue.

And while a court deciding an Eighth Amendment challenge over jail conditions lacks the power or jurisdiction to order changes in pre-trial detention policy, parties using alternative dispute resolution could veer in that

direction, embracing a solution that, for example, influences pretrial detention rates to reduce crowding and costs. They might accomplish this by adopting evidence-based practices to more accurately assess risk in their pretrial population, and by modernizing pretrial supervision techniques. Allowing more pretrial detainees to await trial in the community would meet inmate advocates' goal of improving health care access by reducing the strain on jail medical personnel. At the same time, such a policy would serve the interests of the community by reducing costs and better protecting public safety through the use of more sophisticated risk assessment methods. And more broadly, it would uphold the best intentions of the criminal justice system by ensuring that more residents are treated fairly and not incarcerated unnecessarily.

The potential of an alternative dispute resolution approach is especially appealing in cases involving the incarcerated mentally ill, a population that presents particularly complex problems for prison and jail administrators. Under the traditional model, courts typically try to solve problems by ordering the hiring of more clinicians, more assessments, more treatment hours, more group therapy, and more recreation time. While this approach may sometimes be needed, it ignores the difficulties in practice. Hiring psychiatrists, psychologists and counselors in rural settings is very difficult, and even in urban settings, a dearth of such mental health professionals makes their services terribly expensive. When the federal courts faced this obstacle in the *Coleman/Plata* cases, they ordered the state to double the pay for these clinicians across the board. Naturally, the costs were astronomical, but these expenditures also proved ineffective in some locations. If the parties confronted this problem under a collaborative approach, they might decide to raise salaries to address recruitment and retention issues, but also create a countywide system of wrap-around services to address the needs of the mentally ill more efficiently. Recognizing that the most expensive, ineffective setting to address mental illness is behind bars, the parties could negotiate agreements with county mental health directors, health and human services leaders, probation departments, and the courts to invest in community-based services designed to keep mentally ill people from entering or reentering the correctional system in the first place.

As this example illustrates, alternative dispute resolution allows—even encourages—adversaries to look beyond their narrow goals and consider how a remedy might be structured to improve the system as a whole. The most difficult challenge here is deciding when a system is "good enough." While lawyers on both sides are trained to always advocate for their client's interest and only stop when the court declares the matter closed, the collaborative approach requires something more—agreement on sufficiency and accountability. The best time to settle these critical issues is at the beginning.

4. SUFFICIENCY AND ACCOUNTABILITY

In the traditional approach to prison litigation, courts determine the existence of

constitutional infirmities, issue orders to address them and hire monitors, experts, compliance officers and masters to inspect facilities and issue reports. The parties often employ their own experts to conduct the same inspections, and even the lawyers repeatedly tour the facilities to assess compliance. Both sides review the experts' reports, argue over the validity of the findings, and request more or less extensive monitoring. Eventually, the court must decide when the problems have been sufficiently addressed.

This process, at least in the experience of CDCR, has proved to be ineffective and terribly expensive. As noted above, the attorney fees in these cases are substantial, but they pale compared to the fees paid to court-appointed experts and compliance officers. In the *Coleman* case, for example, the state has paid the *Coleman* special master and his staff more than $23 million in fees in the last five years. In *Plata*, the amount paid to experts was only $3.6 million, but that does not include the state's costs for the Office of the Receiver.[31] Moreover, these expenses do not include the millions paid to the state's own lawyers and experts. And despite these huge costs, the *Coleman* case continues to trudge along, decade after decade, without any end to the litigating, or the bills, in sight.

Under the alternative approach suggested here, sufficiency would be clearly defined from the start. The parties would agree to accomplish specific improvements, in a manner that considers the health of the overall system, over a specific period of time. Instead of relying on the court to hire experts, the parties would jointly hire accountability or compliance teams to ensure that milestones are met. And rather than paying by the hour for an expensive stream of reports, the accountability teams would shoulder responsibility for fulfilling the agreed upon goals.

For the collaborative method to work, the parties must jettison elements of the old accountability system that incentivized monitors to extend the case for their own fiscal well being. While most court-appointed experts and monitors are moral people trying to make honest assessments, there is an inherent conflict in paying people high hourly rates for a job that only ends when those same people declare a system in compliance. Even if monitors ignore their own financial interests and fairly evaluate a system, this inherent conflict nonetheless causes administrators to question the validity of the findings—and may lead them to invest only the absolute minimum toward resolving problems the experts expose. This tension may lead inmate advocates to believe the government is only interested in addressing problems with temporary or minimally effective solutions.

So what other payment model might work better? Borrowing the techniques used in commercial settings such as the building trades, the compliance team could be paid for success as defined by both parties. Under this model, the mutually desired final result would be established at the outset. Then, the parties would set an approximate timeline for achieving that goal. Finally, as part of the hiring process, the parties would not only look for qualified experts, but also those who could demonstrate an ability to help build the new

system, on a budget and in a reasonable period of time. To motivate the monitors, contracts could pay a bonus for the early accomplishment of goals. In addition, absent extraordinary circumstances, the experts' contract would end after the set date. Naturally, all aspects of the work would be open to discussion between the parties, who might decide to keep a particularly effective monitor beyond the point where the contractual time period has run.

The fiscal arrangement for plaintiffs' counsel could also be significantly improved. Rather than plaintiffs' counsel only being paid once a favorable judgment was entered in court, the county could conduct an initial assessment of the merits of the claims and, assuming they were deemed valid, immediately hire the plaintiffs' counsel as consultants—perhaps agreeing to pay something less than their normal rate as attorneys. In exchange, the lawyers would agree to become part of the team and their payment would be contingent upon their continuation in a productive role. As discussed above, the savings associated with reducing fees for attorneys and court experts would be substantial.

A FINAL PIECE OF THE PUZZLE

Given their winning record in cases filed over conditions of confinement in California prisons, plaintiffs' attorneys might be expected to harbor misgivings about a new approach. In fact, however, some of the leading lawyers in the field are eager for change—if a bit wary about potential perils. Some explanations for their interest are outlined earlier in this article. Donald Specter, Director of the Prison Law Office and California's widely acknowledged dean of prison litigation practice, says that despite his success with cases such as *Plata*, relief for his inmate clients comes at a painfully slow pace given the time and complexities of moving lawsuits into and through courts—and given the fact that "both sides fight to the death."[32]

Specter, who argued *Plata* before the U.S. Supreme Court, believes a collaborative resolution process with counties would likely produce a more effective, targeted and expeditious remedy than one delivered by the court. "Judges do the best they can, but they are not experts," Specter says. "When the court is involved, it's usually described as a blunt instrument rather than a scalpel." Moreover, trying a case in court inevitably leaves the outcome a mystery, whereas an alternative resolution process would mean far less risk and greater control of the results. "The discovery process can be extremely lengthy and contentious, and you never know what's going to happen with these cases in the end," notes Specter. "For our side there's always a risk that we'll lose. And for counties, there's always a risk a judge will impose something dramatic."[33]

Given such uncertainty, along with other downsides to traditional litigation, Specter has attempted an alternative resolution process in two counties where his inmate clients have raised concerns about jail conditions. In one, Fresno, that process has worked well, and, at the time of this brief's preparation, the parties were close to a consent decree. This successful conclusion, however, came only after an initial phase that included the filing of a lawsuit,

months of discovery, hiring of outside counsel by the county, and the expenditure of more than $1 million by local government on attorney fees, court costs and other expenses. Specter also said that it took strong leadership on the county team—and the forging of mutual trust among all lawyers—to overcome initial resistance to the alternative dispute resolution approach and allow it to roll out, sidelining the litigation. "There have been some bumps in the road, and we've had our share of disagreements," Specter says. "But ultimately the county is saving millions of dollars and we're on the road to resolving the deficiencies we found."[34]

Like Specter, Michael Bien, another experienced litigator who serves as lead counsel for mentally ill inmates in the long-running *Coleman* case, also expressed interest in avoiding court to achieve results. He is pursuing a case over jail conditions in Monterey County and negotiated with lawyers there over a possible lawsuit alternative. As of late 2014, however, negotiations had foundered. Bien said his concerns centered on obtaining an agreement providing certainty that deficiencies in the jails would be fixed within a set timeframe. County officials, meanwhile, were anxious about being locked into a framework that gave them no flexibility for unforeseen circumstances—such as changes in labor agreements or governing regulations—and failed to account for possible budget shortages. In the end, the Monterey example proves that old habits die hard and that decades of litigation have fostered a climate of deep mistrust on the correctional landscape. Despite his success in Fresno, Specter sums up one lingering concern within the plaintiffs' bar this way: "What will it take to get counties to keep conditions constitutional without the threat of a lawsuit? That's the $64,000 question."[35]

These concerns, especially the need for certainty of improved conditions in a reasonable time frame, are legitimate. However, government's need to avoid promising something it cannot deliver due to circumstances beyond its control is equally legitimate. In complex or systemwide cases, the parties might be advised to hire a mediator from the outset. A respected and experienced third party could bridge the gap between the government's need for flexibility in light of unforeseen difficulties, be they fiscal, labor or regulatory in nature, and the inmate advocates' desire for certainty in pursuing constitutional conditions in a reasonable period of time.

This approach has worked in the past. During Matt Cate's tenure as Secretary of CDCR, there was an officer discipline case, *Madrid v. Schwarzenegger*, where the plaintiffs were successful at trial, but progress in addressing the problems was slow to come. In response, the federal court took an unconventional approach. Rather than simply issuing orders, the court began meeting with the parties jointly to hammer out an implementation program. At these meetings, the court typically acted like a mediator seeking mutually agreeable solutions, rather than a judge threatening enforcement of a previous ruling. The court appointed a special master who was assigned to help the parties carry out the agreed-upon solutions as expeditiously as possible. The master also

acted as the eyes and ears of the court between the monthly group meetings. As a result, over a two-year period the state was able to create an entirely new officer-discipline process, issue new use-of-force protocols and begin training custody staff throughout the system. This creative process produced an amazing result—accomplished across a massive system in a relatively short period of time.

While this case demonstrates that alternative approaches can work to solve difficult problems insider complex correctional systems, it is not necessary to engage a court to achieve these results. As noted above, the court and special master in *Madrid* were actually acting as mediators or arbitrators most of the time—in effect coaching the parties toward agreement on the best solutions and ultimately deciding when the state had accomplished enough to warrant an end to the case. If correctly empowered at the outset, a skilled, professional mediator should be able to perform this same role, satisfying the plaintiffs' need for guaranteed progress while giving the government the ability to request additional flexibility when necessary.

CONCLUSION

The state and federal court systems were not designed to address systemic problems in large, complex bureaucracies. Recent examples in California have shown the limitations of traditional litigation in these settings, and have made it vividly clear that a new approach is needed—one anchored in collaboration, openness and system wide solutions. Success requires that the parties jointly determine the facts on the ground, and then decide the universe of issues to be addressed and how best to reach their shared goals. Ideally, collaboration will also produce agreement on a system of inspection and accountability. In some cases, however, a professional mediator might better tackle that job and help the parties balance accountability for progress with the flexibility needed to address unforeseen challenges. Shifting to a new dispute resolution model may seem risky and time-consuming. But it is certainly preferable to clinging to California's old ways, which have left a disappointing legacy of huge costs and poor results. With that history in mind, other jurisdictions would be well served by avoiding litigation and taking a different approach to this difficult government challenge.

Endnotes

[1] Uniform Determinate Sentencing Act, ch. 1129, 1976 Cal. Stat. 5140 (1976).

[2] *Brown v. Plata*, 131 S. Ct. 1910, 1923-24 (2011).

[3] JOAN PETERSILIA, CAL. POLICY RESEARCH CTR., UNDERSTANDING CALIFORNIA CORRECTIONS 1-2 (2006), *available at* http://static.prisonpolicy.org/scans/carc/understand_ca_corrections.pdf.

[4] *Plata*, 131 S. Ct. at 1917-21.

[5] Information Provided by CDCR in Response to Public Records Act (PRA) Request Submitted by Matthew Cate. (Dec. 10, 2014) (on file with author).

[6] Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat 1321-66 (1996) (codified in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.).

[7] *Plata*, 131 S. Ct. at 1910–11.

[8] *Id.* at 1923.

[9] Public Safety Realignment, ch. 15, 2011 Cal. Stat. 271 (2011).

[10] MAGNUS LOFSTROM & STEPHEN RAPHAEL, PUB. POLICY INST. OF CAL., PUB. SAFETY REALIGNMENT & CRIME RATES IN CAL. 13 (2013), *available at* http://www.ppic.org/content/pubs/report/R_1213MLR.pdf.

[11] Order Appointing Compliance Officer, *Plata v. Brow*n, 3:01-cv-01351-THE, Document 2779.

[12] BRANDON MARTIN & MAGNUS LOFSTROM, PUB. POLICY INST. OF CAL., KEY FACTORS IN CALIFORNIA'S JAIL CONSTRUCTION NEEDS 2 (2014), *available at* http://www.ppic.org/main/publication_quick.asp?i=.

[13] Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat 1321-66 (1996) (codified in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.).

[14] Telephone Interview with Don Specter, Exec. Dir., Prison Law Office (Oct. 30, 2014); Telephone Interview with Michael Bien, Managing Partner, Rosen Bien Gavin & Grunfeld LLP (Dec. 3. 2014).

[15] *Id.*

[16] Information Provided by CDCR in Response to Public Records Act (PRA) Request Submitted by Matthew Cate. (Dec. 10, 2014) (on file with author).

[17] Stephanie Smith and Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 Harv. Negot. L. Rev. 123, 124–25 (2009).

[18] *Id.* at 127.

[19] *Id.* at 127–29.

[20] *Id.* at 129-30.

[21] *Id.* at 130-31.

[22] *Id.* at 132-33.

[23] Telephone Interview with Don Specter, Exec. Dir., Prison Law Office (Oct. 30, 2014); Telephone Interview with Michael Bien, Managing Partner, Rosen Bien Gavin & Grunfeld LLP (Dec. 3. 2014).

[24] *Whitley v. Albers,* 475 U.S. 312, 319 (1986) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

[25] *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

[26] *Id.*

[27] *Farmer v. Brennan,* 511 U.S. 825, 837 (1994).

[28] *Estelle v. Gamble,* 429 U.S. 97, 103 (1976) (footnotes omitted) (citations omitted).

[29] *Id.* at 104-05 (footnotes omitted) (citation omitted).

[30] *Id.* at 106 (footnote omitted).

[31] Information Provided by CDCR in Response to Public Records Act (PRA) Request Submitted by Matthew Cate. (Dec. 10, 2014) (on file with author).

[32] Telephone Interview with Don Specter, Exec. Dir., Prison Law Office (Oct. 30, 2014).

[33] *Id.*

[34] *Id.*

[35] Telephone Interview with Michael Bien, Managing Partner, Rosen Bien Gavin & Grunfeld LLP (Dec. 3. 2014).