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Book Review: An Appeal to Justice: Litigated Reform of Texas Prisons. by Ben M. Crouch and James W. Marquart.

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much too simple and pedantic. Most of the intellectual and economic history is a heavily derivative, orthodox Progressive critique. For example, Kens attributes the substantive due process Justices' anti-statist beliefs to Social Darwinism, not dealing with more recent scholarship suggesting first that Social Darwinism was not as ubiquitous a political philosophy as we once thought, and secondly that not only were the Justices not Social Darwinists, most may not have been Darwinians at all. Kens also overstates the rigidity of the substantive due process Justices and does not give them sufficient credit for their great creativity—whatever else it was, *Lochner v. New York* was a highly creative piece of constitutional non-interpretivism. Kens's epilogue includes a quick survey of substantive due process scholarship in the 1980s, but this literature is not well-incorporated into the balance of the text.

Kens concludes by observing that President Franklin D. Roosevelt wanted to obtain support for his New Deal by putting an end to the judicial activism represented by *Lochner* and its progeny. But his own Court turned out to be far more willing to support the New Deal than to end judicial activism. Many of Roosevelt's appointees became enthusiastic supporters of the new wave of activism that began a generation later. In that respect, as many of the essays in the Paul & Dickman book suggest, the clock may never again be turned back. Judges, it seems, are inevitably super-legislators, and economic ideologies are their political parties.

AN APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS. By Ben M. Crouch[1] and James W. Marquart.[2] University of Texas Press. 1989. Pp. 304. Cloth, $27.50.

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This book reports the product of one of those rare occasions when researchers happen to be on site gathering data before a major change in policy and practice is imposed on an organization. One of the authors, Professor Ben Crouch, began a series of studies of Texas prison officers in 1973, worked briefly as a uniformed officer himself, and conducted additional studies during 1979 with the other author, Professor James Marquart, who also worked as a uni-

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formed officer from 1981 through 1983. Both authors were thus well positioned to measure the impact of a landmark case involving federal court intervention in the management of a state prison system.

Ruiz v. Estelle is important for several reasons. First, it involved Texas, the second largest state prison system, and one that had been characterized for years by its managers as "the best department of corrections in the country." Second, the court found that the "totality of conditions" in the Texas Department of Corrections (T.D.C.) violated the prisoners' constitutional rights and ordered changes which the authors characterize as "the most comprehensive civil action suit in correctional law history."

Crouch and Marquart's carefully documented study is important partly because it places the litigation in the context of the structure and operations of the T.D.C. which prompted the order issued in 1981. Even more important, this book examines the consequences of that order for Texas inmates, prison staff, and state officials. Following up their earlier work, the authors interviewed randomly selected inmates and officers at one prison during 1984 and 1985, conducted additional interviews during 1986 at all T.D.C. facilities except low security units and units for females, and gathered data on officer perceptions of the court ordered reforms; in 1987 they surveyed four hundred and sixty prisoners housed in the most secure prisons in the T.D.C.—the units most affected by the order. They also had access to a wide range of reports and information on personnel, the inmate population, disciplinary infractions, gang activities, and to the reports of the "special master" assigned by the judge to ensure compliance with his order.

In 1972 when prisoner David Ruiz, regarded by T.D.C. staff as a troublesome "writ writer," complained that Texas prisons were physically deteriorating, overcrowded, and dangerous, his petition came before a judge who was committed to judicial activism. Judge William W. Justice, characterized by one prison official as "a kamikaze liberal," had already ordered major changes in Texas youth prisons. He had also been the subject of bills of impeachment in the state legislature and of a proposal that a juvenile halfway house be constructed next to his home.

Judge Justice combined Ruiz's petition with civil suits filed by six other prisoners for a trial that began in October, 1978. As testimony about brutality and staff misconduct appeared in Texas newspapers, some 1500 inmates in seven Texas prisons engaged in work stoppages to show their support of the Ruiz complaints. Approximately three hundred and fifty prisoners, staff, and experts in penology provided testimony, with the FBI screening some five hundred potential inmate witnesses. (The Federal Bureau of Prisons also agreed to take custody of certain prisoners, including Mr. Ruiz, who were fearful of reprisals for their statements in court.) The differing views of the Texas system were evident in the testimony of two former officials of the federal prison system, one asserting that the T.D.C. was the "best in the world," the other testifying that the same system was "probably the best example of slavery remaining in this country." The trial concluded nearly one year later, in September, 1979. Fourteen months later Judge Justice issued a 250 page opinion which excoriated the Texas Department of Corrections. In his conclusion the judge stated:

> It is impossible for a written opinion to convey the pernicious conditions and the pain and degradation which ordinary inmates suffer within the TDC units—the gruesome experiences of youthful first offenders forcibly raped; the cruel and justifiable fears of the inmates, wondering when they will be called upon to defend the next violent assault; the sheer misery, the discomfort, the wholesale loss of privacy for prisoners housed with one, two, or three others in a forty-five foot cell or suffocatingly packed together in a crowded dormitory; the physical suffering and wretched psychological stress which must be endured by those sick or injured who cannot obtain adequate medical care; the sense of abject helplessness felt by inmates arbitrarily sent to solitary confinement or administrative segregation without proper opportunity to defend themselves or to argue their causes; the bitter frustration of inmates prevented from petitioning the courts and other governmental authorities for relief from perceived injustices.

Under the "totality of conditions" standard, a number of prison conditions, no one of which creates an intolerable environment, are regarded as cumulatively violative of constitutional norms. Prior to Judge Justice's decision this standard had been adopted by federal courts in cases involving the prisons of Mississippi, Arkansas, and Alabama.

The T.D.C. was ordered to make specific changes in nine areas including overcrowding, security, and supervision (e.g., hiring more guards, eliminating staff brutality, and the "building tender" system of inmate guards), improvements in health care, disciplinary procedures and the conditions of solitary confinement, the cessation of harassment of inmates seeking access to the courts, upgrading fire, safety, and sanitation equipment and procedures, and reducing the size of inmate populations, including a stipulation that prisons be built near large population centers rather than in rural areas. The judge provided deadlines for implementing the order, and appointed an experienced special master to supervise the process.

Texas authorities accepted some features of the order in a partial consent decree which related to reductions in overcrowding, improvements in the quality of medical care, work safety, hygiene, and the procedures related to the use of chemical agents, solitary confinement, and administrative segregation. They strongly resisted, however, the broader holdings relating to control and discipline. Their resistance took the form of "informal non-cooperation" with the special master and his monitors located at the various prisons and an appeal of Judge Justice's order to the Fifth Circuit Court of Appeals. That court initially granted a partial stay of the order but one year later also concluded that the "T.D.C. imposes cruel and unusual punishment on inmates in its custody as a result of the totality of conditions in the prisons." The court did, however, modify and reverse some of the provisions of Judge Justice's order. Instead of being required to reduce overcrowding through parole, furlough, and "good time," the state was allowed to decide for itself how to solve the problem; the order to build small prisons closer to cities rather than in rural areas was overturned, as was a requirement that the state provide each prisoner with a one-man cell by November 1, 1983. The court of appeals dismissed the state's claims that the trial was unfair, that the findings were incorrect, and that the U.S. Department of Justice should not have been allowed to intervene in the case.

Of all the elements in the court order none was more fundamental to the operation of Texas prisons than the use of "building tenders." The practice of using inmates in place of civilian guards, employed in several southern states, had a history of almost one hundred years in Texas, and grew out of tactics used to control slaves during the antebellum era. Up to the time of the Ruiz case, the building tender system was essential to controlling T.D.C. inmates and getting the work in the fields done. Building tenders possessed almost limitless authority, including the right to arm themselves with blackjacks, clubs, and knives. In return for keeping the other inmates quiet, orderly, and working hard, the building tenders received good time reductions in their sentences, were not required to work in the fields, were granted free movement within the prison building and access to senior prison managers, as well as extra food and clothing. These inmates also received unqualified support and protection from the guard force to administer whatever corrective measures were necessary when other prisoners resisted their orders, or threatened or attacked them. As the state's prison population grew, particularly during the 1970s, the T.D.C. staff became even more dependent on the building tender system. Crouch and Marquart provide a detailed account of the control practices developed over the years by the building tenders, including the use of terror tactics, physical violence, and public beatings to subdue and intimidate the inmate population.

Indicators of how important the maintenance of order is in a prison system can be seen in the election to the Presidency of the American Correctional Association during the period, 1947-72, of the two directors of the T.D.C.—directors who continued the building tender system which Judge Justice found violated the constitutional rights of all Texas prisoners. Texas officials prior to 1981 spoke with pride of a prison system that had low rates of assaults on staff and inmate homicides, which was comprised of prisons that were clean and efficient, and where the products of inmate labor made the system almost self supporting. During the 1970s when violence occurred in many prisons across the country, the Texas Department of Corrections experienced only two inmate murders, two strikes, and one disturbance.

After losing its appeal in the Fifth Circuit as Texas took steps to abolish the building tender system, the inmate population moved increasingly out of control. By the end of 1984 some four hundred and four inmates had been stabbed and another twenty-five killed in fights and disturbances that year. Homosexual rape, extortion, drug use, and the power of inmate gangs increased. In 1985, Texas accounted for almost one fourth of all the inmate deaths that occurred in U.S. prisons—twenty-seven, along with 237 non-fatal stabbings. Assaults on officers increased from twenty in 1983 to 4,144 in 1986. Even with large numbers of new officers hired to replace the building tenders, Texas prisons became the most dangerous in the country for staff and inmates. It is therefore not surprising that the survey of the inmates indicated that personal safety was more problematic after, rather than before, the reforms were introduced.

The authors next describe the steps taken by the T.D.C. to finally re-establish control in its prisons. Beginning in late 1985 the state began placing large numbers of inmates in "lockdown"—long term administrative segregation—a strategy which originated at the U.S. Penitentiary at Marion, Illinois in response to the murder of two guards in separate incidents on the same day and a series of inmate murders and assaults. A lockdown regimen isolates inmate troublemakers and gang leaders in single cells, all day every day (except for an hour of exercise), eliminates most congregate activity, and allows movement of inmates singly or in small groups, only under restraints, and with more officers than inmates present. After the lockdown regimen was established, homicides in Texas prisons dropped to five in 1986 and to three in 1987. By 1987, two-thirds of the prisoners reported to the authors that they felt safe.

Texas prisons have moved, according to Crouch and Marquart, from a period of "repressive" order, through a "legislative" order phase, into a new "bureaucratic" order era. During these stages the relationship between state authorities and the federal district court changed from minimal contact, to adversarial contact, to less adversarial contact, a trend that has also appeared in other states. According to the authors, the most important reason for the current, more congenial relationship, "is that prisons have simply gotten better at operating constitutionally." Administrators in prison systems not directly effected by federal court actions have learned to learn from the experience of their peers. In 1987 Judge Justice commended Texas legislators, the governor, and Department of Corrections administrators for the progress they had made in meeting the conditions of his order.

An Appeal to Justice is a very well written, well documented account of an historic event in American legal and penal history; one which tested the proposition that the requirements of constitutional law can be balanced with the maintenance of order in a penitentiary system.

IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE. By Joseph R. Grodin.[1] Berkeley and Los Angeles, CA.: University of California Press. 1989. Pp. xxi, 208. $20.00.

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Professor Joseph R. Grodin's breezy account of his odyssey from practicing lawyer (and protege of Matthew Tobriner) to law professor to California Court of Appeal justice, to California Supreme Court justice and back to law professor, is notable, first of all, for what it is not. It is not a philippic against the electoral tide that carried him, Chief Justice Rose Bird, and Associate Justice Cruz Reynoso off the California Supreme Court in 1986. Nor is it a calculatedly provocative statement of judicial philosophy in the vein of Justice Richard Neely of the West Virginia Supreme Court.[3] Nor is it an in-depth analysis of the decisions and internal politics of the court on which he served.[4] Rather, it is a thoughtful and bal-

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3. R. NEELY, HOW COURTS GOVERN AMERICA (1981).

4. Professor Preble Stolz wrote such an account of the Bird Court, prior to Grodin's