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Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy

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LAWYERS AT THE PRISON GATES: ORGANIZATIONAL STRUCTURE AND CORRECTIONS ADVOCACY

Susan P. Sturm*

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This Article began as an informal inquiry conducted at the request of the Edna McConnell Clark Foundation into the current status and future directions of corrections advocacy. The Clark Foundation has provided considerable financial support over the past twenty years to organizations such as the National Prison Project, the Youth Law Center, the Southern Center for Human Rights, and the Juvenile Law Center, each of which is deeply involved in providing representation to inmates in corrections litigation. The Clark Foundation asked me to conduct this inquiry to aid the Foundation in assessing its future role in supporting corrections litigation. The research focused initially on gathering the information necessary to inform the Foundation's consideration of strategies for expanding the scope and quality of lawyers providing representation to inmates seeking to bring correctional institutions into compliance with the Constitution. This Article, along with a companion article entitled *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639 (1993), builds on that research and makes the results of the inquiry available to academics, practitioners, and policy makers working in the area of corrections and public interest advocacy. These articles would not have been possible without the generous support of the Edna McConnell Clark Foundation.

This Article reflects the time, energy, and insight of many people. My student researchers provided extraordinary assistance in the course of this project. Glen Bernstein, Jennifer Spotila, and Amy Weigand went beyond the call of duty in their conduct and analysis of interviews. Along with Ann Bartow, Peter Mendelsohn, Jamie Palter, and Darron Rosenblum, they provided invaluable research and editorial assistance. I was also very fortunate to collaborate with Jerry Jacobs in the Sociology Department at the University of Pennsylvania, who was very generous with his time and advice in designing the survey of corrections litigators and analyzing the data generated. He also supervised the work of Suet Lim, a sociology graduate student who devoted many hours of work to entering and analyzing the results of the data. I am very grateful to both for their assistance. I also want to thank Randall Berg, John Boston, Steve Bright, Alvin Bronstein, Lani Guinier, Ed Rubin, Bob Schwartz, Mark Soler, and Barbara Woodhouse for their thoughtful comments on an earlier draft of this Article.

Finally, I cannot adequately express my appreciation to the many individuals who were so generous with their time and insights in responding to the survey and interview questions. I am particularly grateful for the generosity of the public interest advocates who devote their professional (and often personal) lives to corrections work—an extremely important and mostly uncelebrated activity. Their deep commitment, integrity, and steadfast pursuit of justice for their clients, often under difficult working conditions, is truly inspirational. This Article is dedicated to their efforts.

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INTRODUCTION

The rise of the public interest law movement ushered in an era of intense debate over the best way to provide legal representation to those unable to afford private counsel.¹ This debate has involved two related dimensions of public interest representation. First, advocates and observers of public interest

1. For a history and summary of this debate, see JOEL F. HANDLER ET AL., *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* (1978); JACK KATZ, *POOR PEOPLE'S LAWYERS IN TRANSITION* (1982); MARK KESSLER, *LEGAL SERVICES FOR THE POOR: A COMPARATIVE AND CONTEMPORARY ANALYSIS OF INTERORGANIZATIONAL POLITICS* (1987).

practice disagree over the proper role of lawyers acting on behalf of poor and underrepresented clients. They offer competing visions of representation spanning a continuum, from providing equal access to the courts for as many poor people as possible,² to attacking the causes and effects of poverty and powerlessness.³

The second dimension of the debate over public interest advocacy concerns the appropriate locus of legal services delivery within the legal profession. Proponents of a staff attorney system of legal services delivery argue that the professional obligation to provide adequate legal representation to poor people requires the involvement of professional public interest and legal services lawyers.⁴ Critics of legal services, along with funding organizations seeking to reduce their commitment to litigation, contend that the private bar is equipped and willing to assume significant responsibility for providing this representation.⁵

The two dimensions of the debate over public interest representation frequently overlap. Those who argue for a more proactive, change-oriented role typically prefer representation by professional, full-time public interest lawyers.⁶ Those who

2. See Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 282, 286-97 (1982).

3. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 293-391 (1988) (developing model of "law reform" or "impact" work); Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 338 (1978) (contrasting dominant concern over corporate and bureaucratic failure with emphasis on individual grievances and with grass roots organizing); Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1608 (1989) (developing concept of nurturing sensibilities and skills compatible with fight for collective social change); William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 485 (1984) (noting that ideal of practice is "constituting or reconstituting nonhierarchical communities of interest"). For a discussion of competing models of public interest advocacy, see *infra* Part I.A.

4. See LUBAN, *supra* note 3, at 302-04; Marie A. Failing & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1, 55 (1984) (stating that "the poor have a strong interest in publicly funded legal assistance in civil cases").

5. See SAMUEL J. BRAKEL, *JUDICARE, PUBLIC FUNDS, PRIVATE LAWYERS AND POOR PEOPLE* 123-29 (1974); Andrea J. Saltzman, *Private Bar Delivery of Civil Legal Services to the Poor: A Design For a Combined Private Attorney and Staffed Office Delivery System*, 34 HASTINGS L.J. 1165, 1169-75 (1983) (summarizing the arguments for a private bar delivery system); see also Samuel J. Brakel, *Legal Services for the Poor in the Reagan Years*, 68 A.B.A. J. 820, 821 (1982) (discussing the implications of the Reagan Administration's desire to dissolve the staff attorney system).

6. See, e.g., Roger C. Cramton, *Why Legal Services for the Poor?*, 68 A.B.A. J. 550, 554 (1982) (arguing that the national legal services program furthers societal

support an individual services model often advocate relying heavily upon private practitioners to provide pro bono representation.⁷

The debate over the proper structure of legal services delivery often rests on a set of empirical assumptions about the behavior of lawyers in particular institutional contexts. For example, proponents of a staff attorney delivery system argue that staff attorneys have greater expertise in the crucial aspects of public interest representation than private practitioners.⁸ Proponents of the private attorney delivery system argue that "private lawyers are less vulnerable to political interference than staff lawyers."⁹ These empirical assumptions have not been adequately tested and may be incorrect or overbroad.

In addition, proponents of particular models of representation frequently propose a universal norm of advocacy for public interest representation and a concomitant system of service delivery designed to implement that model. They fail to link their view of the lawyer's appropriate role with a particular institutional context or legal problem. Yet each model's desirability may vary with the needs and constraints of particular institutions and problems.

Finally, the discussion frequently ignores the potential of collaboration to enhance the representational capacity of each organizational advocate. There is, however, an emerging trend toward cooperative representation by coalitions of lawyers from the private, public, non-profit, and law school settings, particularly in complex, lengthy, institutional reform litigation.¹⁰ This trend is driven by the increased variety, complexity, and expense of public interest litigation: no one sector of the legal profession has the expertise and resources to provide adequate representation for the range of problems needing legal attention. Yet few commentators have discussed how to allocate

goals such as "helping the poor to help themselves."); John A. Dooley, *Legal Services for the Poor: The Debate Between Staffed Programs and Judicare*, 17 CLEARINGHOUSE REV. 193, 198 (1983) (noting that the office of economic opportunity decided to fund staff programs because it wanted "a broad definition of the work, a degree of loyalty to poor people's issues, and a willingness to try all advocacy tools").

7. See, e.g., Brakel, *Legal Services for the Poor in the Reagan Years*, *supra* note 5, at 821; Saltzman, *supra* note 5, at 1174-75 (summarizing arguments of judicare proponents).

8. Saltzman, *supra* note 5, at 1171-72.

9. *Id.* at 1174-75.

10. See Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 737-38 (1993).

responsibility for public interest advocacy based upon the strengths and limitations of the various sectors of the legal profession.

This Article attempts to fill these gaps in the discussion of public interest advocacy by exploring the roles of various legal organizations in providing representation to inmates challenging the conditions and practices in prisons, jails, and juvenile justice institutions.¹¹ It is an outgrowth of a study conducted for the Edna McConnell Clark Foundation on the extent and quality of representation in corrections litigation. It puts forward an organizational change model of public interest advocacy as the most promising strategy for legal representation in the corrections area. It then identifies the major organizational providers of representation, assesses where they fall on a continuum of practice models, and presents advocates' views of the potential and limitation of each organizational setting to provide adequate representation.

This analysis underscores the importance of collaboration among legal organizations to meet the varied and sometimes competing demands facing lawyers in corrections cases. Within each organizational setting, repeat players—lawyers with sustained involvement and expertise in corrections cases—currently play the central role in generating and sustaining advocacy.¹² Organizations specializing in corrections litigation currently provide the most sustained and intensive representation, and act as the hub of other organizational involvement in corrections. Yet, they lack adequate resources and expertise to meet the enormous legal need and to provide the combination of informal advocacy skills and complex litigation expertise demanded by the institutional change model of representation. Legal services organizations, private firms, and law school clinics each play a more limited but potentially significant role in representing inmates. Lawyers and policy makers have yet to capitalize on the potential for

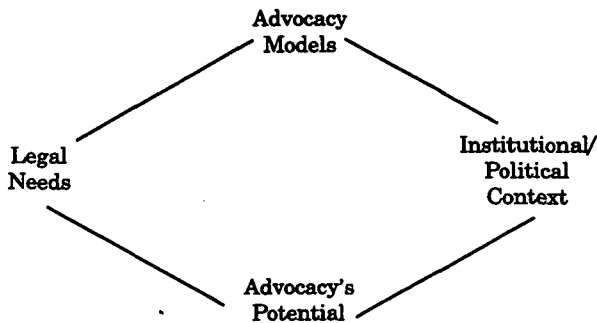
11. The term "jail" generally refers to institutions for the confinement of adults who are awaiting trial or who have been convicted of minor offenses and sentenced to terms of incarceration which in most states may not exceed one year. The term "prison" generally refers to an institution housing adults convicted of more serious crimes and sentenced to confinement periods in excess of one year. Correctional institutions for juveniles include detention facilities housing children detained prior to court disposition and institutions housing children who have been found to be delinquent and committed to state custody.

12. See Mark Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 114-19 (1974).

creative collaboration among various organizational players to achieve an effective legal services delivery system. This Article identifies the distinctive niche that each organizational player could occupy, and concludes with some proposals to encourage creative collaboration and a greater appreciation of the need to integrate litigation and non-litigation strategies for correctional reform.

I. THE ELEMENTS OF A THEORY OF CORRECTIONS ADVOCACY

Any meaningful assessment of the advocacy roles played by various organizations providing representation in corrections cases requires a working theory of representation. Unlike many discussions of lawyers' roles, this Article grounds its conception of the appropriate advocacy role in the particular legal problems of the client group and in the institutional context in which these problems arise. This conception of the advocate's role emerges from an understanding of the nature of the legal problems at stake, the dynamics of the institutional and political setting that contributes to these problems, and the relative potential of various forms of advocacy in achieving change within this context. The diagram below depicts the dynamic relationship among each element of this theory of advocacy:



This Section identifies four models of public interest representation that emerge from the scholarly literature and interviews with corrections lawyers. It then provides a brief overview of the legal needs of inmates, the institutional and political context of corrections institutions, and legal advocacy's potential to respond to these needs. Finally, it returns to the four models of advocacy and situates them within the framework of corrections.

A. Models of Public Interest Advocacy

Commentators generally bifurcate public interest advocacy into two categories: individual service and law reform/impact advocacy.¹³ Although this dichotomy captures a fundamental cleavage in perspective on advocacy roles, it fails to reflect the full range of choices facing public interest advocates. In addition to the individual service model, three additional models of advocacy emerge from the debate: the impact litigation model, the institutional change model, and the political empowerment model. These three models share a change orientation and a focus on group representation; indeed, many lawyers combine them in practice. Lawyers' activities and priorities, however, frequently reflect the adoption of a particular model as an organizing framework.

The individual service model focuses on providing quality representation for those who seek but cannot afford legal counsel.¹⁴ Marshall Breger has attempted to provide a conceptual framework for the individual service model by developing a theory of access rights. He posits that "each citizen should have an equal claim to legal assistance when such assistance is necessary to vindicate significant interests."¹⁵ This approach rejects the propriety of selecting clients or issues for representation based on the "social utility" of their cases, in favor of providing legal representation on a first come, first serve basis based on a client's articulated legal needs. It emphasizes the importance of preserving individual autonomy and maximizing the likelihood of achieving fair decisions in cases involving poor people.

The law reform or impact litigation model focuses on maximizing the impact of litigation on the legal rules and on other similarly situated institutions.¹⁶ This model charges the lawyer with responsibility primarily for designing and winning law

13. See Failinger & May, *supra* note 4, at 5. For a description of this distinction between service and impact litigation, see JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 26-27 (1978); KESSLER, *supra* note 1, at 18-19; cf. Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207 (1976) (describing impact litigation).

14. Failinger & May, *supra* note 4, at 16.

15. Breger, *supra* note 2, at 295.

16. For a discussion and critique of the law reform model, see Sturm, *supra* note 10, at 706-16.

suits with the greatest potential for furthering the substantive interests of client groups.¹⁷ Inspired by the litigation strategy that culminated in *Brown v. Board of Education*,¹⁸ this model emphasizes the importance of selecting cases based on their potential impact on the law and their likely ripple effect on institutions not before the court.¹⁹ The model focuses on litigation as the means of pursuing an advocacy strategy and on the importance of a coordinated, centralized strategy to introduce favorable legal norms and avoid unfavorable precedent. A leading special master describes this approach as defensive strategy: "in today's climate, [advocates] must be willing to take the risk of bad law into account. [They] must have a national perspective because every case that goes up is a threat to the reform movement."²⁰

David Luban offers a normative defense of the law reform/impact litigation model. He concedes that:

public interest lawyers bent on law reform recruit clients as plaintiffs; that they sometimes manipulate their clients and put the interests of the cause above those of the clients; that they occasionally file class actions, even though a large part of the class invoked, sometimes a majority, opposes them; and that there will be times when "their handling of test cases serves, not the enlightened self-interest of the poor, but the political theories of the lawyers themselves."²¹

He justifies the law reform model based on its significance to effective political advocacy, the substantive justice of the

17. Lucie White calls this vision of change oriented advocacy "the contest of litigation." Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 755.

18. 347 U.S. 483 (1954).

19. See JACK GREENBERG, *LITIGATION FOR SOCIAL CHANGE: METHODS, LIMITS, AND ROLE IN DEMOCRACY*, (1974) (Thirtieth Annual Benjamin N. Cardozo Lecture delivered before The Ass'n of the Bar of the City of New York, Oct. 31, 1973) (discussing strategies used in litigation campaigns aimed at social change in the areas of school segregation, welfare rights, and bail); MICHAEL MELTSNER & PHILIP G. SCHRAG, *PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION* (1974) (grounding criteria for case selection on timeliness of issue and orderly development of legal reform).

20. Interview with Vincent Nathan, Partner, Nathan & Roberts and Special Master, in Washington, D.C. 6 (July 19, 1991) [hereinafter Nathan Interview] (transcript on file with author).

21. LUBAN, *supra* note 3, at 317 (quoting CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 940 (1986)).

underlying cause, and the impossibility of relying on existing class members to represent the interest of future generations.²²

The institutional change model emphasizes advocacy strategies that target particular institutions or systems with illegal practices that affect a significant number of clients.²³ The model employs a variety of strategies directed at applying sustained pressure on such institutions or systems to conform to legal norms and eliminate abuses. One approach involves confronting particular institutions "with an increasing number of individual grievances, coordinated by a group of experienced advocates whose commitment and continuous attention is ordinarily only available to the regular players in the system."²⁴ Publicizing the existence of inadequate conditions, coalition building with community groups, and direct political and administrative negotiation supplement this high volume strategy. Another strategy focuses on the remedial stage of institutional reform litigation:

Under the implementation model, the remedial stage becomes the focus of litigation planning, resource allocation, and development of an overall advocacy strategy. . . . Factors such as the potential involvement of capable and supportive insiders, the political environment, or the existence of a local advocacy network may take precedence over significance of the legal principle at stake.²⁵

Finally, the political empowerment model focuses on mobilizing those directly affected by institutional inadequacies to advocate on their own behalf. It calls upon lawyers to "nurture sensibilities and skills compatible with a collective fight for social change."²⁶ This model emphasizes the importance of helping a group identify its own needs, perspectives, and strategies.²⁷ This process requires a commitment to client control over strategy. Lawyers pursuing this model "must know how to work with others in brainstorming, designing, and executing

22. *Id.* at 321, 323, 348.

23. See Gary Bellow, *The Legal Aid Puzzle: Turning Solutions into Problems*, WORKING PAPERS FOR NEW SOC'Y, Spring 1977, at 52, 59.

24. *Id.*

25. Sturm, *supra* note 10, at 727.

26. López, *supra* note 3, at 1608.

27. Simon, *supra* note 3, at 486; White, *supra* note 17, at 764; see also López, *supra* note 3, at 1608.

strategies aimed immediately at responding to particular problems and, more generally, at fighting social and political subordination."²⁸

These four models of public interest advocacy offer differing views of the role lawyers should play in providing public interest representation. One's choice of model depends in part on an overarching ethical conception of lawyers' appropriate role. This Article focuses on a less recognized but equally significant set of considerations: the types of legal problems presented and their amenability to judicial or administrative redress.

B. Legal Problems of Inmates

Inmates of correctional institutions face a host of legal problems. Many of these problems are unrelated to institutional conditions and practices. Inmates bring with them to prison a range of common civil legal problems, such as personal injury, social security, and family law matters.²⁹ In addition, their status as criminal offenders and their removal from the community leads to additional civil legal problems, in areas such as immigration, divorce and custody, and bankruptcy. Inmates also seek legal assistance in pursuing challenges to their criminal trial, sentence, and parole status.³⁰

Some of the programs discussed in this Article do provide representation to inmates in civil and criminal matters unrelated

28. López, *supra* note 3, at 1608.

29. See Geoffrey P. Alpert & C. Ronald Huff, *Prisoners, the Law, and Public Policy: Planning for Legal Aid*, 7 NEW ENG. J. ON PRISON L. 307, 319 (1981) (summarizing a study detailed in Geoffrey P. Alpert, *Prisoners' Right of Access to Courts*, 51 WASH. L. REV. 653 (1976), which analyzed the case load distribution of existing prisoner legal assistance programs in Washington State and found that 30% of the case load involved civil problems unrelated to incarceration and 15% involved family problems).

30. See *id.* at 318-19 (reporting findings of a study in Washington state that 20% of the case load of prisoners' complaints involved collateral attacks and 20% involved institutional, parole, and sentencing problems, and findings of an A.B.A. study which estimated that 20% of prisoners' legal problems involve collateral attacks, 12% involved parole problems, and 10% involved sentencing); PRISON LAW OFFICE, FISCAL YEAR 07-01-90 THRU 06-30-91, ANNUAL CASE COMPILATION (1991) (listing the number of cases brought by inmates at San Quentin and Davis by problem areas, including a total of 256 parole cases and 73 sentencing cases). For a description of the types and numbers of requests for assistance received by a prisoners' legal services program in its first year of existence, see Robert C. Hauhart, *The First Year of Operating a Prisoners' Legal Services Program: Part II*, 24 CLEARINGHOUSE REV. 219 (1990).

to institutional conditions.³¹ The need for these services vastly overshadows available resources.³² Although these legal problems matter tremendously to inmates and should command attention, they are not the focus of this Article.

A second major category of legal need involves the validity of administrative decisions concerning individual inmates. Every aspect of life in prison requires interaction with government officials, and every interaction presents the potential for a legal conflict.³³ Where inmates live, what work they perform, what services they receive—all of these decisions present issues of classification. Conflict among inmates or between inmates and corrections officers usually leads to disciplinary proceedings. Legal advocacy also involves representation of inmates in these administrative proceedings and in appeals from administrative decisions.³⁴

The third category of legal need—and the focus of this Article—involves the conditions and practices in correctional institutions. Inmates must depend on the government for fulfillment of their basic needs for food, clothing, shelter, protection from violence, and medical care. Yet many correctional institutions continue to deprive inmates of these basic necessities.³⁵ Many of the requests for legal assistance seek redress for individual deprivation, most notably in the areas of medical care and brutality. These individual cases often present examples

31. Generally, these kinds of legal problems are handled either by a state or local legal assistance project for inmates or by a law school clinic. For a breakdown of the clinics that handle civil matters that do not involve prison conditions, see *infra* Part VII.B.

32. See Interview with Charles Dorsey, Executive Director, Maryland Legal Aid Bureau, in St. Petersburg, Fla. 4 (July 19, 1991) [hereinafter Dorsey Interview] (transcript on file with author) (estimating that Prison Project reaches less than 10% of statewide need in prisons and jails). A study of unmet legal needs in nursing homes, prisons, jails, and mental health facilities in New York state found that prisoners in county jails are among the most seriously underserved populations. PATRICIA J. ARTHUR, NLADA, REPORT TO PAG FUNDING CRITERIA COMMITTEE [sic] 13 (1992) (quoting THE SPANGENBERG GROUP, NEW YORK LEGAL NEEDS STUDY, DRAFT FINAL REPORT 134 (1989)). A study conducted by Prison Legal Services of Michigan in 1987 "found that all but one state in the country providing civil legal services to prisoners operate with an attorney to client ratio far below that recommended by the ABA." *Id.* at 13-14.

33. In fact, corrections litigation is in part responsible for this bureaucratization of prison life. Sturm, *supra* note 10, at 667-68.

34. See Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 439 (1993) ("The prison deals so pervasively with the inmates' lives that there are many ways in which disputes may arise.").

35. See Sturm, *supra* note 10, at 687-91 (describing continuing threats to health and safety facing inmates in correctional institutions and the need for litigation to address these threats).

of institutional inadequacies that affect all of the inmates, such as overcrowding, inadequate systems for health care delivery, and unsafe living conditions.

C. *The Institutional and Political Constraints Facing Corrections Advocates*

Corrections' status in the political and professional arena frames both the need for and limitations of legal advocacy. Correctional institutions tend to be isolated from public scrutiny, while their inadequacies are often viewed as an issue that does not warrant public concern or expenditure of resources.³⁶ By definition, most prisons remove inmates from the community and limit their access to the public and the media. The remote location of many institutions contributes to their isolation. Inmates lack political power. In addition to their unpopular status, "[m]any prisoners come from groups that already suffer from political powerlessness—people of color and the poor."³⁷ Corrections as a field has not yet developed a level of professional standards and accountability to perform an effective oversight role.

As a result, prison reform does not fall high on the list of public priorities. The public tolerates and even justifies poor conditions in correctional institutions as an appropriate punishment for criminal violations.³⁸ Corrections administrators frequently lack the resources necessary to maintain minimally adequate living conditions. They also lack direct control over the size of their population.³⁹ Sentencing policies and practices, determined by legislators and judges, contribute to overcrowding

36. See Sturm, *supra* note 10, at 669 (noting that correctional institutions were "previously insulated from rigorous scrutiny by their remote locations, the lack of public concern over their inadequacies, and their careful control over public access").

37. Susan P. Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 845 (1990). According to a recent Bureau of Justice Statistics report, the jail incarceration rate per 100,000 whites increased from 68 in 1984 to 109 in 1992, while the comparable incarceration rate for blacks increased from 339 to 619. ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE BULLETIN: JAIL INMATES 1992, at 2 (1993).

38. The Supreme Court has provided some rhetorical support for this sentiment. See *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) ("To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.").

39. Sturm, *supra* note 37, at 840-41.

by increasing the proportion of individuals sentenced to prison and the length of their sentences.⁴⁰ Parole boards with authority to release inmates who have served their minimum sentences have generally tightened release criteria.⁴¹ None of these officials bears direct responsibility for inhumane institutional conditions caused by overcrowding.

The status of inmates poses special constraints on lawyers' capacity to represent their interests. Inmates' legal status prevents lawyers from realistically pursuing many of their clients' preferences and interests. The law accepts the legitimacy of a system that deprives inmates of autonomy and imposes discomfort and hardship. Advocates may have no realistic prospect of responding to many of inmates' most pressing concerns.⁴² Moreover, inmates face serious constraints on their access to counsel, their capacity to participate actively in advocacy, and their freedom to organize. Institutional rules and regulations typically restrict organizing activity by inmates, and the Supreme Court has upheld these restrictions.⁴³

D. The Potential of Corrections Advocacy to Promote Institutional Reform

In a related article entitled *The Legacy and Future of Corrections Litigation*,⁴⁴ I assess litigation's impact on correctional institutions and its potential as part of an advocacy strategy to improve conditions and practices. Lawyers involved in litigation and other forms of advocacy have had their greatest positive impact in the following areas: opening correctional institutions to public scrutiny, encouraging the adoption of

40. EDNA MCCONNELL CLARK FOUND., AMERICANS BEHIND BARS 10 (1992); Sturm, *supra* note 37, at 841.

41. EDNA MCCONNELL CLARK FOUND., *supra* note 40, at 10.

42. See Eisenberg, *supra* note 34, at 438 ("Many prisoners file suit because the prison administration had dealt with them in some arbitrary, irrational, bureaucratic, or dehumanizing manner, even when no constitutional—or even legal—right is involved. . . . 'What to most people would be a very insignificant matter becomes, because of the nature of prison life, of real concern to the prison inmate.'" (quoting THE FEDERAL JUDICIAL CENTER, TENTATIVE REPORT: RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 12 (Oct. 6, 1975))).

43. See *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (upholding prison regulations imposing a ban on a Prisoners' Labor Union's meetings and inmate solicitations).

44. 142 U. PA. L. REV. 639 (1993).

minimal standards governing prison conditions and practices, legitimizing the problems of inmates in political discourse, applying sustained pressure to increase the resources and expertise available to the field, and eliminating egregious conditions and practices.⁴⁵

These past successes provide a framework for defining the role of advocacy in the future. Advocacy will of necessity emphasize implementing legal norms within a particular institution or system.⁴⁶ The emphasis on implementation suggests that advocacy should proceed simultaneously in several different directions. Litigation, which will "focus on implementing well-established, minimal standards of decency," has become "increasingly complex, fact intensive, adversarial, and costly."⁴⁷ Litigation challenging conditions and practices in correctional institutions likely will require sophisticated litigation tools and the capacity to oversee large, complex cases. These cases require, for example, massive document management, familiarity with the vagaries of class action and Section 1983 litigation, and trial skills.⁴⁸ Many of those interviewed expressed the view that discovery and trial in corrections litigation are very similar to other forms of complex litigation: "Once the case is selected and the strategy determined, any good lawyer can litigate."⁴⁹ "Discovery is discovery."⁵⁰ "Litigation is a process. Lawyers can always look up the law and figure it out."⁵¹

At the same time, successful implementation depends upon administrative and political advocacy, vigorous and effective monitoring of remedial decrees, creative use of experts in problem-solving, and continual presence within the institutions

45. See Sturm, *supra* note 10, at 662-81.

46. For a more complete discussion of the increasing significance of an implementation model of advocacy, see *id.* at 716-35.

47. *Id.* at 716.

48. See, e.g., Interview with Robert Cullen, Senior Corrections Attorney, Georgia Legal Services, in Atlanta, Ga. 9 (Aug. 10, 1991) [hereinafter Cullen Interview] (transcript on file with author); Interview with Stephen O. Kinnard, Partner, Jones, Day, Reavis & Pogue, in Atlanta, Ga. 2 (Aug. 12, 1991) [hereinafter Kinnard Interview] (transcript on file with author).

49. Interview with Allen Breed, Director, National Institute of Corrections, in San Francisco, Cal. 4 (July 19, 1991) [hereinafter Breed Interview] (transcript on file with author).

50. Interview with Leslie Sooson, Associate, Sonnenschein, Nath & Rosenthal, in Chicago, Ill. 6 (Aug. 9, 1991) [hereinafter Sooson Interview] (transcript on file with author).

51. Interview with John Sparks, Partner, Brobeck, Phleger & Harrison, in San Francisco, Cal. 1 (July 18, 1991) [hereinafter Sparks Interview] (transcript on file with author).

posing the problems. Corrections specialists and general litigators agree that the remedial stage of corrections lawsuits differs in important respects from other complex litigation.⁵² To fashion a remedy that will bring about constructive change, one must understand both the significance of the remedial stage to the success of the litigation and the corrections context and culture. As one corrections litigator stated, “[t]he [implementation] stage doesn’t resemble complex litigation. . . . You must get into the prisons as institutions. . . . You must know who in the organization will do the work so they can get assigned. It is about the interplay between litigation and pressure.”⁵³ Innovative approaches to fact-finding, remedial formulation, and monitoring are often key to successful implementation of corrections decrees.⁵⁴

Corrections advocates have also begun to recognize the importance of building coalitions with insiders in the corrections field and linking litigation with broader strategies of political and administrative advocacy.⁵⁵ This push toward implementation transforms litigation itself, as lawyers struggle toward more consensual forms of fact-finding and problem solving that blur the distinction between litigation and politics.

E. Revisiting the Models of Public Interest Advocacy

The foregoing discussion indicates that corrections advocacy has a place for each of the four models of public interest advocacy. The individual service model responds to the overwhelming need for representation in individual cases.⁵⁶ Like most legal

52. See *infra* notes 111–12 and accompanying text.

53. Interview with Donna Brorby, Partner, Turner & Brorby and plaintiffs’ counsel in *Ruiz*, in San Francisco, Cal. 3–4 (July 19, 1991) [hereinafter Brorby Interview] (transcript on file with author).

54. See Sturm, *supra* note 10, at 685. A common criticism of plaintiffs’ lawyers concerns their failure to recognize and take into account in their remedial orders the dynamics of running a correctional institution. As a result, consent decrees negotiated by lawyers often fail to remedy the problems targeted by litigation.

55. This insight concerning the significance of cooperation by insiders emerged as an important theme in many of the case studies on corrections litigation and judicial intervention. See *id.* at 683–84.

56. A study comparing the success rates of prisoner civil rights cases with and without counsel suggests that the appointment of counsel dramatically increases the likelihood of success in these cases. Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 770–71 (1988).

services programs representing the poor, corrections advocates cannot begin to meet the demand for legal representation.⁵⁷ Necessity requires some system for selecting cases to maximize available resources and avoid spreading services so thinly that no one obtains adequate representation.⁵⁸ Moreover, in the corrections context many problems raised by individual cases concern systemic problems which necessarily implicate the interests of other inmates. For example, if an inmate's complaint of violence stems from a systemic overcrowding or understaffing problem, any remedy will affect other inmates living in the same conditions. In many instances, group representation offers the only prospect for respecting inmates' individual autonomy. In cases challenging systemic problems, the individual service model may not produce even individual relief unless institutional and systemic concerns inform case selection, advocacy, and remedial strategies.

The impact litigation model can also play a significant role, particularly in situations presenting novel problems or arising under new sources of law.⁵⁹ The impact litigation model, however, does not respond to the central challenge facing corrections advocates implementing reform. Moreover, because of the recent reluctance of federal courts to expand the scope of constitutional protection to inmates, limited opportunity currently exists for doctrinal innovation in the corrections area.⁶⁰ Finally,

57. For example, North Carolina Prisoners Legal Services reports 3500 to 4000 new requests for legal assistance from inmates each year. Telephone Interview with Marvin Sparrow, Director, North Carolina Prisoners Legal Services 5 (Aug. 2, 1991) [hereinafter Sparrow Interview] (transcript on file with author). The Southern Center for Human Rights receives about 20-25 letters per week requesting legal assistance. Interview with Nancy Ortega, Staff Attorney, Southern Center for Human Rights, in Atlanta, Ga. 1 (Aug. 11, 1991) [hereinafter Ortega Interview] (transcript on file with author).

58. For a fuller discussion and justification of lawyers' decisions to select cases for representation based on some criteria other than first-come, first-serve, see LUBAN, *supra* note 3, at 317-57 (discussing the recruitment of clients for suits aimed at law reform); Failinger & May, *supra* note 4, at 16 ("[L]aw reform proponents sanction case selection procedures which would consistently choose the suit or legal action which has the greatest impact on the greatest number of poor persons' interests."); Bellow & Kettleleson, *supra* note 3, at 343-53 (discussing potential ethical constraints on public interest attorneys' choices of clients or issues).

59. Programs for disabled children in juvenile institutions and problems associated with prisoners afflicted with AIDS are good examples of such situations. See Sturm, *supra* note 10, at 733.

60. *Id.* at 711. In *The Legacy and Future of Corrections Litigation*, I offer several additional explanations for the decline of the test case model of law reform, including: (1) the natural life cycle of social change and practices; (2) "the success of early efforts to institutionalize legal norms"; (3) the complexity inherent in changing the behavior

state and local actors dominate corrections policy and implementation at the state level. A national law reform strategy, although significant, will not address the local concerns that often drive correctional decisions and practice. Advocacy necessary to implement nationally defined goals frequently requires ongoing involvement at a state or local level.⁶¹

The empowerment model also faces serious limitations as an organizing framework for advocacy. Legal representation of inmates itself elevates the status of inmates by promoting the view that inmates deserve decent treatment and have needs and concerns that must be taken seriously and addressed.⁶² Group empowerment, however, is more difficult to pursue. Prison rules and regulations explicitly disempower inmates from making many important decisions even about their day-to-day life. Advocates must confront the risk of creating expectations for a fundamental change in status without a realistic prospect of meeting such expectations. Advocates must also face the prospect that inmates will use their involvement in litigation to enhance their individual power and status at the expense of other inmates.⁶³

The institutional change model thus offers the greatest promise as an organizing framework for corrections advocacy. It draws on the other three models but provides a focus for case selection and choice of advocacy strategy. It permits individual case representation but suggests allocating resources in the manner that enables individual advocacy to achieve institutional accountability. It also meets and capitalizes on the challenge of implementing the large number of outstanding orders in corrections cases.

of complex systems; and (4) "the inherent limitations of the law reform model." *Id.* at 711-14.

61. *Id.* at 734-35.

62. See JAMES B. JACOBS, *The Prisoners' Rights Movement and Its Impacts*, in *NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT* 36 (1983). ("Just by opening a forum in which prisoners' grievances could be heard, the federal courts destroyed the custodians' absolute power and the prisoners' isolation from the larger society."). One advocate spoke eloquently of the empowering effects of legal access on inmates. "The self-esteem of these inmates goes up tremendously. They were in shock that anyone responded to their letter. It gave them a feeling of self-confidence and control." Ortega Interview, *supra* note 57, at 8.

63. Susan P. Sturm, *The Rhode Island Prison Decree*, in DAVID W. LOUISELL ET AL., *CASES ON PLEADING AND PROCEDURE* 1243, 1246 (6th ed. 1989) ("The leadership of the National Prisoners Reform Association within the prison . . . only maintains power through the court-ordered reforms, by maintaining the administration's dependence on them for compliance with the decree."). See Sturm, *supra* note 37, at 825 ("Inmates subject to daily deprivation and institutionalized powerlessness are likely to be most interested in enhancing their place within the prison's social structure.").

This conceptual framework for corrections advocacy offers a perspective from which to assess the potential role of the five major organizational players in providing representation to inmates: (1) national organizations specializing in corrections litigation; (2) regional and local organizations specializing in corrections; (3) legal services organizations; (4) private firms; and (5) law school clinics. The next Section of this Article explains the methodology used to gather information about the extent and nature of representation provided by these major organizational players in corrections cases. The remainder of the Article examines these organizations in terms of the roles that they play and the factors that influence their role definitions. Such factors include their selection criteria, their expertise, the extent and source of their funding, and their location and geographical scope. Finally, this Article explores the potential for collaboration to enhance the capacity of each organizational player to provide effective and comprehensive advocacy.

II. METHODOLOGY

This study began as an informal, open-ended examination of the organizations with the most extensive involvement in corrections litigation, with an emphasis on organizations funded by the Edna McConnell Clark Foundation. It then expanded to a more comprehensive survey of organizations and individuals to determine the extent and nature of their involvement in litigation challenging conditions of confinement in correctional institutions. The research consisted of several information gathering methods. First, structured interviews were conducted with lawyers in each of the organizational settings involved in corrections litigation. The directors of all of the programs specializing in corrections litigation were interviewed, as well as staff members in some of the organizations. Other lawyers that were interviewed included directors and staff attorneys of legal services programs, directors of clinical programs engaged in some form of corrections advocacy, legal directors of state affiliates of the American Civil Liberties Union, and attorneys

in private practice.⁶⁴ In addition to lawyers, interviews were conducted with several corrections experts, masters, judges, directors of programs that recruit private attorneys for pro bono representation, and academics. In total, over 100 interviews were conducted.⁶⁵

Second, the research included a written survey of legal services offices, law firms, and law school clinics concerning their involvement in corrections advocacy.⁶⁶ The pool of legal services programs surveyed consisted of organizations listed as members of the National Legal Aid and Defender Association. Organizations whose titles clearly indicated that they did not represent inmates were excluded from the pool. Responses were received from 220 out of 385 organizations surveyed, yielding a response rate of fifty-seven percent.

Law firms in three different pools were sent the questionnaire. The first pool, which will be referred to as the "large-firm pool," consisted of firms with over sixty lawyers that identified themselves as having some pro bono program.⁶⁷ Responses were received from 73 of the 304 firms surveyed, yielding a response rate of twenty-one percent. The second pool, which will be referred to as "the random-firm pool", consisted of every eightieth firm listed in the *Martindale-Hubbell Law Directory*.⁶⁸ Responses were received from 84 of the 508 firms surveyed, for a response rate of seventeen percent. The response rate of the third pool, consisting of one half of the firms listing civil rights as a specialty in *Martindale-Hubbell*, was too low to warrant inclusion in the data analysis.

64. Due to resource constraints, legal services directors in organizations that do not have programs specializing in corrections were selected based on their attendance at the National Legal Aid and Defenders Association Meeting in the summer of 1991. Within this population, considerable geographic diversity was achieved.

Private practitioners were selected to achieve diversity in both size and geographical area. Firms were interviewed in each major region of the country. In addition, attorneys in large and small firms that have handled a substantial amount of corrections litigation were identified through a process of networking and interviewing corrections specialists.

65. A listing of the individuals interviewed is provided in Appendix A. Some of the interviews were conducted by Glen Bernstein, Jennifer Spotila, and Amy Weigand, second-year law students who assisted me in conducting the research.

66. The questionnaire was developed with the assistance of Professor Jerry Jacobs, a sociologist at the University of Pennsylvania. Analysis of the data was performed with the assistance of Suet Lim, a graduate student in sociology, under the supervision of Professor Jacobs. A sample of the private firm survey is provided in Appendix B.

67. This list was provided by Esther Lardente, a consultant to the American Bar Association (ABA) on pro bono involvement by private firms.

68. MARTINDALE-HUBBELL LAW DIRECTORY (1991). Every 80th firm was surveyed to produce a total pool of approximately 500 randomly selected firms.

The law school clinic pool included every law school listed in *The AALS Directory of Law Teachers 1991-92*.⁶⁹ Law schools that responded by indicating that they do not have any clinical programs were excluded from the pool. Responses were received from 95 of the 177 law schools surveyed, for a response rate of fifty-four percent.

Third, an informal survey was conducted of federal court clerks concerning the current status of programs for appointing counsel to represent *pro se* plaintiffs in cases challenging conditions of confinement in correctional institutions. Thirty-five district courts and ten courts of appeals responded to the survey.⁷⁰ Finally, I surveyed the directors of programs identified in the National Prison Project's *Prisoners Assistance Directory*⁷¹ as representing inmates in conditions of confinement cases to determine the current status of their programs' involvement.

The remainder of the Article presents the data obtained from this research and analyzes it in relation to the roles played by various organizational players, the factors that influence that role definition, and the organization's place in a legal services delivery system for inmates.

III. NATIONAL ORGANIZATIONS SPECIALIZING IN CORRECTIONS LITIGATION

Two national organizations—the National Prison Project of the American Civil Liberties Union (NPP) and the Youth Law Center (YLC)—specialize in representing inmates in corrections cases.⁷² These organizations dominate the field of corrections litigation by virtue of their extensive involvement, their visibility, and their prominence in the network of corrections litigators. They handle more cases than other national organizations and participate in many significant institutional cases

69. ASSOCIATION OF AMERICAN LAW SCHOOLS, *THE AALS DIRECTORY OF LAW TEACHERS 1991-92* (1991).

70. John Greacen, the Clerk of the United States Court of Appeals for the Fourth Circuit, helped conduct this survey.

71. THE NATIONAL PRISON PROJECT, AMERICAN CIVIL LIBERTIES UNION, *PRISONERS ASSISTANCE DIRECTORY* (1990) [hereinafter NPP PRISONERS ASSISTANCE DIRECTORY].

72. NPP primarily addresses conditions in adult correctional institutions, although it handles a small number of cases involving juvenile institutions. YLC represents juveniles housed in jails, juvenile detention centers, and training schools. YLC also provides representation to children in cases involving child welfare and health care.

on both a national and local level. As of January 1990, NPP was involved in 33 of the 41 states and other jurisdictions "under court order or consent decree to limit population and/or improve conditions in either the entire state system or its major facilities."⁷³ NPP has brought some jail litigation, although the majority of its cases have been in state institutions. In the overwhelming majority of these cases, NPP acts as lead counsel.⁷⁴

Although statistics concerning the number of major juvenile institutions under court order are not available, YLC achieves a similarly wide scope of involvement in the juvenile corrections area.⁷⁵ Unlike NPP, YLC functions as both a national and local organization. A significant portion of its work involves California institutions. The difference in geographic orientation, along with important distinctions between the adult and juvenile corrections context, emerge as factors affecting the advocacy roles played by NPP and YLC.⁷⁶

The scope of the involvement of these organizations is particularly striking in light of their relatively small size. NPP employs eight staff lawyers, including the Executive Director. YLC's staff consists of seven lawyers, not all of whom handle corrections cases.⁷⁷

73. THE NATIONAL PRISON PROJECT, AMERICAN CIVIL LIBERTIES UNION, STATUS REPORT: THE COURTS AND THE PRISONS (1990) [hereinafter NPP STATUS REPORT] (on file with the *University of Michigan Journal of Law Reform*).

74. Elizabeth Alexander, NPP's Associate Director for Litigation, estimates that NPP is lead counsel in 90% of its cases. Interview with Elizabeth Alexander, Associate Director for Litigation, National Prison Project, in Washington D.C. 14 (Nov. 15, 1990 & July 13, 1991) [hereinafter Alexander Interview] (transcript on file with author).

75. YLC has been involved in jail litigation in Alabama, California, Colorado, Idaho, Kentucky, Maine, New Mexico, and Ohio, detention center litigation in Arizona, California, Florida, Utah, and Washington, and in training school litigation in California, Florida, Idaho, New Mexico, North Carolina, Oregon, and South Carolina. See YOUTH LAW CENTER, CASES—PAST AND PRESENT 1–8 (1991) (on file with the *University of Michigan Journal of Law Reform*).

76. See *infra* notes 93–102 and accompanying text.

77. No other national litigating organization devoted solely to corrections issues has ever existed. In the past, other national organizations have had significant involvement in these cases. Such involvement, however, has diminished, or in many areas, disappeared. For example, the NAACP Legal Defense and Educational Fund formerly participated in a number of significant corrections cases around the country. They discontinued their involvement years ago, however, due to inadequate staffing and resources and due to a perception that the National Prison Project would continue to do what was required. Telephone interview with Steve Ralston, Director of Litigation, NAACP Legal Defense and Educational Fund 1 (July 14, 1992) [hereinafter Ralston Interview] (transcript on file with author).

The Special Litigation Section of the Civil Rights Division of the United States Justice Department has also investigated and brought litigation challenging conditions of confinement in state institutions. The Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997a (1988), authorizes the Attorney General to sue state and

Both national organizations place considerable emphasis on the impact litigation model of advocacy. Their national focus, and emphasis on and expertise in litigation reflect and reinforce this law reform emphasis. These factors also enable them to play a central role in supporting the field by sharing their expertise and insight with others. The two organizations articulate somewhat different levels of commitment to the institutional change model of advocacy. Both face considerable obstacles to effective performance of an institutional change role, because of the dearth of political advocacy groups in corrections and the decentralization of corrections policy making for state institutions. But the two organizations differ in the extent of their involvement in state and local advocacy. These differences may stem from important distinctions between adult and juvenile corrections, as well as the greater extent of local involvement by YLC.

Because of the uniqueness and significance of these national corrections organizations, this Section devotes considerable attention to NPP and YLC and their role in corrections advocacy.

A. Overseeing a National Strategy: Case Selection, Expertise, Resources, and Field Development

1. Case Selection: Hallmarks of the Impact Litigation Model—The process and results of case selection by the national organizations reflect their impact litigation orientation. Both NPP and YLC concentrate on class-action litigation challenging general conditions of confinement, overcrowding, and other systemic problems affecting large numbers of inmates. Neither organization attempts to provide individual service to inmates on

local officials who operate institutions in which a pattern or practice of flagrant or egregious conditions deprive residents of their constitutional rights. Before CRIPA's enactment, the Carter administration's Special Litigation Section devoted considerable resources to prison litigation. For example, it reportedly spent over one million dollars litigating *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), and private counsel in that case reports that *Ruiz* would have been impossible without Department of Justice resources. Brorby Interview, *supra* note 53, at 3. The Justice Department also paid for all the reports and experts in *United States v. Michigan*, 680 F. Supp. 270 (W.D. Mich. 1988). Alexander Interview, *supra* note 74, at 5. Under the Reagan and Bush administrations, however, the Justice Department essentially abandoned its role in promoting constitutional prison conditions through litigation. Indeed, it has switched sides in particular lawsuits to help states avoid judicial intervention, filed amicus briefs urging the lifting of population caps, and offered to assist states and localities tied up in litigation. *Id.* The role of the Justice Department in corrections litigation under the Clinton Administration remains to be seen.

a regular basis.⁷⁸ They generally do not represent individual inmates unless the relief will benefit other similarly situated inmates, and they turn down most requests for representation.⁷⁹ In fact, NPP's Associate Director for Litigation stated that it was almost never appropriate for NPP to take a case that affects a small number of inmates because it is not "a good use of resources." The organization has "a role in preserving a litigation strategy."⁸⁰ NPP and YLC rarely bring damages actions and will do so only as part of a strategy to accomplish the equivalence of injunctive relief.⁸¹

The national organizations treat case selection as crucial to their ability to carry out their organizational mission. Both NPP and YLC strive to serve as national trouble-shooters, and this is reflected in their method and criteria for selecting cases. Each organization chooses its cases through a self-conscious and structured process that forces the organization to consider potential cases in relation to overall organizational priorities.⁸² Case-selection decisions are made by the staff attorneys, who repeatedly spoke of the importance of independence in selecting cases.⁸³ Attorneys expressed strong concern over the prospect

78. A staff associate at NPP is responsible for responding to inmate mail, and NPP has developed standardized letters and forms for this purpose. Alexander Interview, *supra* note 74, at 34. YLC receives a small number of direct complaints from juveniles, who appear to be much less likely to complain to outsiders about institutional problems. Interview with Mark Soler, Executive Director, Youth Law Center, in Philadelphia, Pa. 7 (June 17, 1992) [hereinafter Soler Interview] (transcript on file with author).

79. See Alexander Interview, *supra* note 74, at 12.

80. *Id.* at 19.

81. For example, NPP filed 20 related damages actions as part of a coalition to address the problem of rape in Prince Georges County jail. *Id.* at 33.

82. NPP assigns one lawyer responsibility for collecting requests for legal assistance and preparing a memorandum for legal staff meetings at which cases are selected. Most cases are not accepted, and extensive factual development based on publicly available information typically precedes the decision to file a law suit. Information is gathered from such sources as grand jury reports, state legislative reports, extensive inmate interviews, and, where possible, a tour of the facilities, sometimes with an expert. *Id.*

YLC follows a similar process of case selection. Any YLC staff member may take calls, during which the staff member will obtain basic information and make an initial assessment as to whether the case meets the organization's acceptance criteria. If the case has potential, the attorney presents the case at a corrections staff meeting to decide whether it meets the organization's goals and justifies the use of resources and staff. If the case looks promising, an attorney is assigned to "work it up," a process entailing examination of the pleadings, phone calls, and travel to the jurisdiction for further investigation. Soler Interview, *supra* note 78, at 6.

83. Cf. KESSLER, *supra* note 1, at 39 (describing the correlation between alternatives to individual client driven case selection and the ability to undertake law-reform activity).

of increased foundation involvement in selecting cases or targeting areas for attention.⁸⁴ The staff resists court appointment as a method of case selection, noting the danger of losing control over their mission if they become reactive in their approach.⁸⁵ Unlike some state and regional organizations, the national organizations do not rely upon inmate letters as a source of identifying problems warranting organizational involvement or analyze inmate mail to detect patterns of institutional abuse.⁸⁶

Each organization attempts to select cases that will have broad implications for a state system or for the law generally.⁸⁷ They consider the practical and legal significance and urgency of the issue and the potential negative consequence of losing, both upon the possibility of reform within a jurisdiction and upon the law generally. NPP lawyers expressed particular concern for orderly presentation of legal issues and for pursuing a national strategy. Several staff attorneys criticized local counsel for concerning themselves solely with their clients' interests, sometimes at the expense of national strategy.⁸⁸

Examples of recent cases selected by NPP illustrate the organization's commitment to the orderly development of national legal norms. For example, NPP "took a case that presents in a safe, narrow context a post-*Wilson* issue. [We were] thinking strategically and defensively to cover our rear in light

84. See Interview with Alvin Bronstein, Executive Director, National Prison Project, in Washington, D.C. 8 (Aug. 15, 1991) [hereinafter Bronstein Interview] (transcript on file with author). Mr. Bronstein observed that it is "generally inadvisable and potentially dangerous to have the funding source decide your litigation program. . . . We want to be able to respond to what we think is important." *Id.* Foundations place a premium on achieving demonstrable results and thus may contribute to national organizations' emphasis on high visibility and broad impact. See Neil K. Komesar & Burton A. Weisbrod, *The Public Interest Law Firm: A Behavioral Analysis*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 80, 88-89 (Burton A. Weisbrod et al. eds., 1978). Because these incentives reinforce the priorities articulated by the staff attorneys, however, they may not be experienced as constraints on organizational independence.

85. Interview with Ed Koren, Staff Attorney, National Prison Project, and former Director, National Jail Project, in Washington, D.C. 6 (July 31, 1991) [hereinafter Koren Interview] (transcript on file with author). Mr. Koren stated that NPP rarely takes cases from judges because then "judges think they can control our docket. . . . We must keep our independence. It is part of our strength in managing and selection of our docket and where resources go." *Id.*

86. See *infra* note 148 and accompanying text.

87. Bronstein Interview, *supra* note 84, at 7; Soler Interview, *supra* note 78, at 2 (articulating organizational goals of YLC, including: "[t]o stop the worst things happening to children in the system; to attack particular inhumane practices; to affect the greatest number of children; to develop principles which will apply to other jurisdictions").

88. See Alexander Interview, *supra* note 74, at 30.

of *Wilson*. [We want to] get a message out: We are still winning cases after *Wilson*.⁸⁹ The Executive Director of NPP also expressed strong interest in exploring international law as the new frontier of law reform in the corrections arena.⁹⁰

The extent to which case selection decisions rest purely on attorneys' views of a case's significance and merit should not be overstated. Attorneys at NPP and YLC described their organizations as a scarce resource, and these attorneys reported that they do consider the availability of adequate local representation in deciding whether to become involved.⁹¹ Staff availability and interest play a significant role in the case selection process.⁹² NPP's position as a project of the American Civil Liberties Union also affects its case selection process and its role.⁹³ Almost every state has an affiliate office of the ACLU.⁹⁴ As a national project,

89. Bronstein Interview, *supra* note 84, at 8. In *Wilson v. Seiter*, 111 S. Ct. 2321, 2326 (1991), the Supreme Court held that plaintiffs must prove deliberate indifference to prevail in conditions of confinement cases.

90. Bronstein Interview, *supra* note 84, at 8 (urges strategy of using the developing international standards of decency to challenge standards and policy in the United States).

91. For example, Mark Soler described the problem of incarcerating juveniles in adult facilities as one that individual lawyers could handle because the law is well-established and the remedy is relatively straightforward. Soler Interview, *supra* note 78, at 5.

92. Alexander Interview, *supra* note 74, at 13; Bronstein Interview, *supra* note 84, at 7.

93. The American Civil Liberties Union has a national litigation office located in New York, a national legislative office located in Washington, and a series of special projects with national scope (such as the Women's Law Project and the Children's Law Project in addition to the National Prison Project).

94. The affiliates vary considerably in size and activity, from large offices with sizeable staff and resources to offices staffed only by a non-attorney director. In general, these offices provide representation in cases with a wide range of civil rights and civil liberties issues, including conditions and practices in correctional institutions. They frequently work with cooperating private sector attorneys and often will cover the expenses of the litigation with the express agreement that attorneys' fees awarded in the litigation will be donated to the ACLU. Most affiliates do not specialize in corrections litigation. In many states the affiliates must provide representation in a wide range of civil liberties cases because they are the only active civil rights or civil liberties organizations. Their involvement usually depends upon the availability of private cooperating counsel willing to assume major responsibility or upon the willingness of the NPP to co-counsel the litigation. Interview with Harvey Grossman, Legal Director, ACLU of Illinois, in Chicago, Ill. 4 (Aug. 13, 1991) [hereinafter Grossman Interview] (transcript on file with author); Interview with Laurie Seidenberg, President of the Board, Wyoming Chapter of the ACLU 1 (Aug. 14, 1991) [hereinafter Seidenberg Interview] (transcript on file with author); Interview with Betty Wheeler, Executive Director, ACLU of San Diego, in San Diego, Cal. 3 (July 1, 1991) [hereinafter Wheeler Interview] (transcript on file with author).

Some ACLU affiliates, such as those in Illinois, Colorado, Massachusetts, Connecticut, Pennsylvania, and the Mountain States regional office, have undertaken in-house

NPP is obligated to support local affiliates, and NPP attorneys report that they devote considerable time to assisting affiliates with pending litigation.⁹⁵ Requests from affiliates for NPP involvement constitute an important source of referrals.⁹⁶

NPP and YLC staff, along with other lawyers familiar with their work, emphasized the importance of the national organizational perspective in selecting appropriate cases. Because they are not limited geographically, the national organizations have the capacity to intervene in areas that lack local advocates equipped or willing to handle corrections cases. Most states lack an effective local organization specializing in corrections advocacy, and in many instances NPP and YLC represent the only opportunity for effective representation in cases challenging institutional conditions.⁹⁷ Their longevity and national scope gives them a comprehensive perspective unmatched by other organizations.⁹⁸ They consider a national perspective to be crucial to understanding patterns and recurring problems, the relationship of a particular case to the big picture, and the potential impact of a case on other jurisdictions.⁹⁹

NPP's emphasis on litigation as the primary mode of advocacy also reflects the organization's commitment to the impact litigation model. Staff attorneys at NPP devote most of their time

responsibility for major institutional litigation. For example, the Illinois office operates an institutionalized persons project and has developed considerable expertise in this area. Grossman Interview, *supra*, at 1. The staff counsel of the Mountain States office covers a 10 state area and has done a great deal of jail and prison litigation. Bronstein Interview, *supra* note 84, at 1. The Pennsylvania affiliate is part of a team litigating a statewide overcrowding case, and the affiliate is paying a substantial portion of the expenses in that case. Even those affiliates that have handled major litigation have a relatively small corrections docket. Grossman Interview, *supra*, at 8.

95. Bronstein Interview, *supra* note 84, at 1.

96. Koren Interview, *supra* note 85, at 1 ("We are among the family of ACLU projects. Contacts are made through affiliates. We put high priority on assistance to affiliates.")

97. See *infra* Part III.

98. Interview with John Boston, Legal Director, Prisoners Rights Project, Legal Aid Society of New York, in New York, N.Y. 12 (July 23, 1991 & Aug. 7, 1991) [hereinafter Boston Interview] (transcript on file with author); Interview with John Gresham, Associate Director, Prisoners Legal Services of New York, in New York, N.Y. 1 (July 29, 1991) [hereinafter Gresham Interview] (transcript on file with author) ("There is lots I learn from the National Prison Project. They have their tentacles in all the states. People are doing the same sort of thing independently and out of touch."); Nathan Interview, *supra* note 20, at 6 (asserting that NPP's "national orientation" is critical).

99. See Nathan Interview, *supra* note 20, at 6 ("In today's climate, [advocates] must be willing to take the risk of bad law into account. [They] must have a national perspective because every case that goes up is a threat to the reform movement.")

and energy to litigation. Even the lawyers identified within the organization as most engaged in non-litigation advocacy estimated that they spend approximately 75 percent of their time litigating.¹⁰⁰ YLC's lawyers also orient their activities largely around litigation, but the organization devotes considerable resources to non-litigation activity such as media work, legislative advocacy, and public education.¹⁰¹ Soler explained YLC's more extensive involvement in non-litigation activity as reflecting differences between adult and juvenile corrections: "[t]he sympathy factor provides leverage for juvenile advocacy" and there are "more non-lawyers interested in juvenile corrections."¹⁰²

2. *Expertise and Field Development: The Advantages of Repeat Players*—The staff attorneys' background and expertise equip NPP and YLC to provide national leadership in conducting corrections litigation. Both organizations have considerable expertise in complex litigation and corrections policy. They each have lawyers on staff with substantial experience in class actions and Section 1983 litigation. Both directors and at least half the staff attorneys have been with the organization for more than ten years.¹⁰³ They regularly handle large, complex cases, and have had extensive national experience with corrections litigation.¹⁰⁴

This accumulated expertise equips NPP and YLC with advantages in their ability to conduct corrections litigation common

100. Interview with Adjoa Aiyetoro, Associate Director for Administration, National Prison Project, in Washington, D.C. 1–2 (July 31, 1991) [hereinafter Aiyetoro Interview] (transcript on file with author); Koren Interview, *supra* note 85, at 1 ("My priority is the cases I am working on."). Aiyetoro expressed interest in moving toward a more political approach to advocacy, and characterized as "short sighted" the decision in the late 1960s and early 1970s to focus mostly on litigation. Aiyetoro Interview, *supra*, at 4.

101. Soler Interview, *supra* note 78, at 5–6, 10. Most of Soler's examples of extensive YLC involvement in coalition building and other forms of political advocacy are geographically concentrated where YLC is based.

102. *Id.* at 10.

103. Four of NPP's eight attorneys have been involved in corrections litigation for over 13 years, with Alvin Bronstein and Ed Koren participating from the inception of the prisoners' rights movement. Four of YLC's seven lawyers, including the director, have been involved with juvenile litigation for over 10 years, most of which took place at YLC.

104. See *supra* text accompanying notes 72–75. Neither organization has used paralegals to the extent possible in major document cases. See Nathan Interview, *supra* note 20, at 5 (stating that it is "important to learn to delegate work to paralegals [because] [i]t reduces the cost of litigation and the amount of upfront expenditure"); Soler Interview, *supra* note 78, at 13 (stating that YLC does not have experience with cases involving over 10,000 documents).

to "repeat players."¹⁰⁵ Indeed, the expertise and accumulated work product of the national organizations may account for the tremendous scope of their involvement in corrections litigation. Their familiarity with the substantive law enables them to avoid "reinventing the wheel" in every case. Each organization has developed extensive brief banks on the recurring issues in corrections litigation. Each has developed an extensive file of expert witnesses, including detailed knowledge of their past performance and future potential.¹⁰⁶ This access to experts dramatically enhances the capacity to settle and litigate corrections cases because of the importance of expert testimony in corrections litigation and the key role experts can play in settlement, remedial formulation, and implementation.¹⁰⁷

NPP and YLC also benefit from their national reputations as experts who are willing to go anywhere with "big guns."¹⁰⁸ This reputation can give them a decided advantage in settlement negotiations.¹⁰⁹ Expertise in the substantive law and familiarity with the institutional setting can also enable them to settle cases without the necessity of lengthy discovery.¹¹⁰

Indeed, their accumulated wisdom has prompted NPP and YLC attorneys to develop more expansive conceptions of litigation that respond to the demands of the correctional context. They have focused considerable energy on developing strategies for addressing such issues as the appropriate remedies in particular problem areas, the use of consent decrees, coordinated approaches to jail litigation, and the use of experts in settlement, trial, and remedial development.¹¹¹ For example,

105. See Galanter, *supra* note 12, at 98-100 (noting that the advantages of repeat players include specialized expertise, economies of scale, long-term strategy, ability to "play for rules", and bargaining credibility).

106. Alexander Interview, *supra* note 74, at 7; Soler Interview, *supra* note 78, at 11.

107. See Sturm, *supra* note 10, at 720-21.

108. Soler Interview, *supra* note 78, at 6.

109. See Alexander Interview, *supra* note 74, at 35 (describing case in which local legal services attorney handled initial settlement discussions without success, but state's interest in settlement increased markedly when NPP became involved in the negotiations); Telephone Interview with Howard Belodoff, Associate Director, Idaho Legal Aid Services 3 (July 24, 1991) [hereinafter Belodoff Interview] (transcript on file with author) ("[There is an] intangible effect of a big organization behind a case. It makes defendants more inclined to settle, especially with an AG who doesn't know what to do."); Cullen Interview, *supra* note 48, at 10; Interview with Ralph Knowles, Partner, Doffermyre, Shields, Canfield & Knowles, and former Associate Director of the National Prison Project, in Atlanta, Ga. 2 (Aug. 10, 1991) [hereinafter Knowles Interview] (transcript on file with author); Soler Interview, *supra* note 78, at 9, 16.

110. Sparks Interview, *supra* note 51, at 3.

111. See, e.g., Ted Janger, *Expert Negotiation Brings New Approach to Prison*

NPP has developed an "expert panel" approach to remedial development, using experts selected by the parties to perform fact-finding, negotiate compliance plans, and monitor implementation efforts.¹¹²

The prominence, visibility, and expertise of the national organizations has fostered their role in supporting and developing the field of corrections litigation. Perhaps most important, they have become the key participants in the national dialogue about corrections policy. Alvin Bronstein and Mark Soler are regular and visible participants in major corrections conferences.¹¹³ They do extensive public speaking about corrections issues. Corrections officials frequently request technical assistance from NPP and YLC outside the context of litigation.¹¹⁴ They frequently emerge as the only national representatives of inmates' interests in the public and professional debate about institutional conditions and practices.¹¹⁵

Lawyers around the country in a wide range of organizational settings view NPP and YLC as experts in the field and rely on them for strategic advice and technical assistance.¹¹⁶ Many of

Litigation in Hawaii, 6 NAT'L PRISON PROJECT J., Winter 1985, at 6-7 (noting that parties relied on expert mediators to meet court-ordered prison specifications, thus eliminating "the adversarial nature of the process"); Alexander Interview, *supra* note 74, at 36 (describing innovative uses of experts in settlement discussions, such as joint factfinding and collaboration in developing remedial plans; signalling that lawyers should play a different and less directive role in remedial formulation). John Boston, Legal Director of the Prisoners Rights Project of the New York City Legal Aid Society, stated that the NPP has turned prelitigation settlement, threats, and publicity into a science. Boston Interview, *supra* note 98, at 12.

112. For a thorough discussion of these innovative approaches to remedial formulation, see Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1365-76 (1991).

113. Bronstein Interview, *supra* note 84, at 3 ("I meet with officials we are suing quite frequently in nonadversarial arenas. I met Mike Quinlan [Director of Federal Bureau of Prisons] and Perry Johnson [American Correctional Association] at a conference in Ottawa. We sit and talk about things we were not involved in litigating. . . . They recognize us as experts in their field."); Soler Interview, *supra* note 78, at 7 (referring to numerous conferences and speaking engagements).

114. Alexander Interview, *supra* note 74, at 6; Soler Interview, *supra* note 78, at 1.

115. For example, NPP recently played the major role in opposing the American Correctional Association's decision to weaken the standards governing the minimum amounts of space that should be provided to inmates. See Elizabeth Alexander, *The New Turn of the Screw: Why Good News About Controlling Incarceration Rates Safely May Not Be Welcome*, 66 S. CAL. L. REV. 209, 213 (1992).

116. Boston Interview, *supra* note 98, at 14-15 ("The National Prison Project is probably one of the most effective institutional reform organizations that has existed. It provides specialized expertise for people all over the country."); Soler Interview, *supra* note 78, at 16 ("The Youth Law Center gets calls from all over, not just for litigation but about all kinds of things."). NPP and YLC have developed extensive brief banks to draw on during new litigation, and both groups have experience with a wide range of corrections issues. See *supra* notes 105-06 and accompanying text.

the litigators interviewed described NPP's and YLC's assistance in identifying and obtaining experts as the organizations' most significant contribution.¹¹⁷ YLC and NPP also provide technical assistance to attorneys involved in corrections litigation.¹¹⁸

Both NPP and YLC also provide written materials to the field generally and in response to specific requests for information. Both have a brief bank, which they share with plaintiffs' lawyers upon request. Articles and books by NPP and YLC attorneys are among the few practice-oriented materials published in the field.¹¹⁹ NPP also publishes the *NPP Journal* and prepares a

117. Interview with Ruth Ann DeWolf, Legal Director, Correctional Law Project, Chicago Legal Assistance Foundation, in Chicago, Ill. 4-5 (Aug. 12, 1991) [hereinafter DeWolf Interview] (transcript on file with author); Dorsey Interview, *supra* note 32, at 4; Telephone Interview with Neil Himelein, Managing Attorney, Community Legal Aid Society of Delaware 7 (Aug. 28, 1991) [hereinafter Himelein Interview] (transcript on file with author) ("But for the National Prison Project, I don't know what we would have done."); Telephone Interview with Grace Lopes, Managing Attorney, D.C. Prisoners Legal Services Project 6 (July 15, 1991) [hereinafter Lopes Interview] (transcript on file with author); Telephone Interview with John Midgely, Staff Attorney, Evergreen Legal Services 5 (Aug. 1, 1991) [hereinafter Midgely Interview] (transcript on file with author); Telephone Interview with Ernie Sanchez, Executive Director, Idaho Legal Aid Services 4 (Aug. 6, 1991) [hereinafter Sanchez interview] (transcript on file with author); Sparrow Interview, *supra* note 57, at 1, 7; Telephone Interview with Bob Stalker, Director of Litigation, Advocacy and Training, Evergreen Legal Services 9 (July 16, 1991) [hereinafter Stalker Interview] (transcript on file with author). NPP and YLC keep a current file of experts who testify in corrections cases, and the organizations share this information with lawyers seeking expert witnesses. The national organizations frequently are asked to co-counsel cases to cover the cost of experts. Although they are not equipped to provide experts routinely, they do so in particularly significant cases.

118. Boston Interview, *supra* note 98, at 15 ("Al Bronstein came up with expert witnesses, participated in strategy sessions, and then went home."); Breed Interview, *supra* note 49, at 4 ("If lawyers are new in the field, the first thing they do is call the National Prison Project."); Brorby Interview, *supra* note 53, at 4 (NPP is a "repository of what is most known and current in law and in prisons."); Nathan Interview, *supra* note 20, at 10 ("When I got my first case, Al Bronstein sat with me for half a day orienting me. I would have handled the case very differently had it not been for that meeting."). NPP is most active in providing such assistance to ACLU affiliates and lawyers within the ACLU and corrections network.

YLC also provides technical assistance to lawyers around the country. When YLC declines to take a case, it typically will offer the names of other child advocates in the area, names of experts, and information about strategies that have worked in other states and that might work in the case at hand. YLC staff attorneys receive requests for information and technical assistance from around the country. They attempt to link private attorneys and local advocates to whatever advocacy network exists in their particular locale. Sanchez Interview, *supra* note 117, at 4; Soler Interview, *supra* note 78, at 7; Sparks Interview, *supra* note 51, at 3.

119. See, e.g., Alvin J. Bronstein, *Offender Rights Litigation: Historical and Future Developments*, in PRISONERS' RIGHTS SOURCEBOOK 5 (Ira P. Robbins ed., 1980) (providing an overview of legal developments in the area of prisoners' rights); Edward I. Koren et al., *A Primer for Jail Litigators: Some Practical Suggestions for Surviving and Prevailing in Your Lawsuit*, in 2 PRISONERS AND THE LAW 17-3 (Ira P. Robbins ed., 1993).

status report on major prison litigation that is quoted widely in governmental and scholarly publications as well as in newspapers.

The national organizations provide additional support to the field by holding conferences and strategy sessions on significant issues in the corrections field.¹²⁰ These conferences also enhance the organizations' ability to develop coherent litigation strategies and to share these strategies with others involved in similar litigation.

3. *Resources: The Foundation of Independence*—Until now, the national organizations have had a great deal of financial stability, resources, and independence compared to their organizational counterparts. Unlike many of the state and legal services organizations, national groups are not funded by state agencies or others with an interest in limiting the type of litigation they bring.¹²¹ They have received substantial general financial support from the Edna McConnell Clark Foundation for their corrections litigation, with few constraints imposed on the organization's activities.¹²²

This financial stability and independence has afforded national organizations considerable flexibility in selecting cases, using resources to obtain experts, undertaking major litigation, engaging in non-litigation activities, and influencing the case selection decisions of other organizations that lack adequate resources to pay for experts and discovery. Their travel budget enables them to provide representation in areas that lack any local access to lawyers in major corrections cases. Their ability to pay the costs of experts at the outset of litigation has been crucial to their success as litigators and negotiators.¹²³ It also

120. For example, NPP recently held two conferences to develop a strategy for dealing with *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), a case toughening the standard for proving that prison conditions constitute cruel and unusual punishment, and with *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992), a case involving the standard for modifying consent decrees in institutional reform cases. Both cases presented issues of great concern to corrections litigators.

121. See *infra* Part IV.B.

122. See EDNA MCCONNELL CLARK FOUND., ANNUAL REPORT 80 (1991) (showing that for the Fiscal Year 1990–91, the Clark Foundation paid \$595,000 in grants to support NPP, and \$276,753 in grants to YLC for its efforts to achieve “constitutional conditions for juveniles in correctional institutions”). There is some question concerning the future level and certainty of financial support from the Clark Foundation for corrections litigation. The Clark Foundation recently decided to gradually phase out unrestricted, general support for corrections litigation. This decision could dramatically affect the capacity of grantees to continue their role as leaders in correctional advocacy.

123. See Alexander Interview, *supra* note 74, at 8 (emphasizing significance of access to experts to NPP's effectiveness); see also Soler Interview, *supra* note 78, at 9 (“The

enables them to pursue a national strategy by covering expert fees in cases brought by competent local counsel that present important and timely issues.¹²⁴ Their ability to finance major litigation has become even more important since *West Virginia University Hospital, Inc. v. Casey*,¹²⁵ which precludes the recovery of most expert fees. Their resources have enabled them to forgo attorneys' fees in appropriate cases in order to achieve a favorable settlement.¹²⁶ Also, staff attorneys identified the organizations' financial stability as a major factor in their ability to engage in a significant amount of non-litigation activities, which do not generate attorneys' fees.¹²⁷

B. Implementation and Local Advocacy: The Achilles Heel

Both NPP and YLC staff acknowledged the centrality of implementation to effective correctional advocacy. As Mark Soler stated, "the real issue is how to reach that critical mass of reform, when everyone jumps on the bandwagon, instead of impeding progress."¹²⁸ Performance of this institutional change role requires familiarity with the players and with the political context within a particular correctional system. It also demands regular, ongoing involvement with the system. Advocates achieve this sustained contact by bringing a high volume of inmate complaints about institutional practices. They also pursue the institutional change model by intensively monitoring decrees mandating improvements in conditions and practices. Whatever the approach, performance of the institutional change role requires a commitment to implementation in a particular institution or system.¹²⁹

National organizations face particular hurdles in pursuing the institutional change model of correctional advocacy. They

key to YLC's relationship with firms is its greater resources, . . . [and] its role in bankrolling cases and co-counseling.").

124. Alexander Interview, *supra* note 74, at 4; Soler Interview, *supra* note 78, at 9.

125. 499 U.S. 83 (1991) (limiting expert fees to \$30 per day); see Alexander Interview, *supra* note 74, at 1 (NPP facing a new financial situation because of *Casey*; after *Casey*, it "de-accepted" a case which would provide no attorneys' fees and require large expenditures for experts).

126. Alexander Interview, *supra* note 74, at 36.

127. For a description of these activities, see *supra* notes 101-02 and accompanying text.

128. Soler Interview, *supra* note 78, at 9.

129. See *supra* notes 23-25 and accompanying text.

are by definition remote geographically from most of the jurisdictions in which they sue. Because of their national focus, they may lack detailed knowledge of the particular system at issue, its strengths, and its important internal players. Such organizations may not have contacts with internal players who can facilitate settlement and implementation. They also lack the credibility, presence, and continuity in the local arena that may be necessary in the implementation stage of litigation. Consequently, they must depend on experts and local advocates to assess the political and institutional dynamics, the potential for building a successful corrections coalition, and prospects that litigation will promote constructive change.¹³⁰

If a local advocacy network exists and can be supported and developed by the national organizations, this collaboration enables the national organizations to overcome their geographical and institutional obstacles to pursuing the institutional change model. In the juvenile justice arena, such coalitions occur more frequently and enable YLC to play a significant role in supporting institutional change.¹³¹ Adult corrections offers fewer opportunities for collaboration with local advocates and coalitions.¹³² Where such coalitions do exist, NPP has played an important role in coordinating and supporting their efforts.¹³³

130. Soler Interview, *supra* note 78, at 11 (stating that he always seeks local counsel in another jurisdiction to keep track of what is going on locally, as they know the local judges and idiosyncracies of local practice). See Interview with Barry Krisberg, President, National Center for Crime and Delinquency, in San Francisco, Cal. 7-8 (July 17, 1993) [hereinafter Krisberg Interview] (transcript on file with author) (emphasizing the importance of political considerations in determining where to sue and the limitations of national organizations in assessing those political considerations).

131. See Krisberg Interview, *supra* note 130, at 4 ("Youth Law Center is exemplary in its attention to remedy. They pay a lot of attention because of their child protection mission. They want better outcomes."). For example, YLC described the organization's participation in a multi-faceted advocacy effort to eliminate the incarceration of juveniles in adult jails in California. A state law prohibiting such incarceration passed as a result of four suits filed on the same day, along with substantial publicity, press conferences, meetings with legislators, lobbying, and drafting of legislation. The suits were specifically referred to in the legislative history of the statute. Soler Interview, *supra* note 78, at 5-6.

132. Krisberg Interview, *supra* note 130, at 6 (limited potential for coalition building in adult area).

133. For example, Adjoa Aiyetoro coordinates a community advocacy effort to coincide with the statewide conditions suit currently pending in federal court. Aiyetoro Interview, *supra* note 100, at 1, 4; Interview with Angus Love, Director, Institutionalized Persons Project, Pennsylvania Legal Services, in Philadelphia, Pa. 7 (July 12, 1992 & July 14, 1992) [hereinafter Love Interview] (transcript on file with author). NPP is currently part of a coalition of lawyers handling the statewide prison case in Pennsylvania, which includes local advocates with considerable corrections expertise. The team includes the ACLU affiliate, Legal Services' Institutionalized Persons Project, and David

In the absence of an effective local corrections network, however, national organizations face certain limitations in their capacity to fulfill the institutional change model of advocacy. To select appropriate cases for pursuing institutional change, advocates require an understanding of the local culture and political scene. NPP now depends primarily on local affiliate offices to provide this information. However, NPP usually works with the smaller affiliates, which are less likely to have substantial involvement or expertise in corrections issues.¹³⁴ If local counsel is not actively involved in the litigation, national organizations may lack the information necessary to weigh the political and institutional implications of litigation.¹³⁵ Some members of the advocacy community express the concern that national organizations sometimes fail to consider the political ramifications of litigation and ignore the concerns of the local advocacy community and of clients.¹³⁶

National organizations face particular challenges in monitoring and enforcing decrees. Both NPP and YLC face the almost impossible task of monitoring decrees in over twenty states.¹³⁷ Also, to the extent that national organizations place a high premium on visibility and impact, they are less likely to devote substantial resources to routine monitoring.¹³⁸ Staff attorneys at both NPP and YLC acknowledge the difficulty of monitoring decrees from afar. They have attempted to address the problem by relying on local counsel to handle the enforcement stage, unless problems arise requiring further litigation.¹³⁹

Rudovsky, a private practitioner and fellow at University of Pennsylvania Law School with considerable expertise in corrections.

134. Bronstein Interview, *supra* note 84, at 1.

135. See, e.g., Krisberg Interview, *supra* note 130, at 7 (describing current approach to selecting overcrowding cases as "hit or miss," and expressing concern that national approach to case selection is "not necessarily consistent with political considerations").

136. See Meda Chesney-Lind, *Patriarchy, Prisons, and Jails: A Critical Look at Trends in Women's Incarceration*, 71 PRISON J. 51, 62-63 (1991) (discussing the NPP's push for construction of a new women's prison in Hawaii despite local concerns about the proposed prison's size and level of security); Krisberg Interview, *supra* note 130, at 4, 5 (criticizing impact litigation approach to case selection and advocating approach targeted at rekindling prison reform movement); cf. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 490-91 (1976) (describing the difference between clients and constituents, and discussing their conflicting interests).

137. See *supra* notes 73, 75 and accompanying text.

138. See Krisberg Interview, *supra* note 130, at 4; cf. Komesar & Weisbrod, *supra* note 84, at 88-89 (discussing public interest litigation firms' preference for "big cases" over legal research, memo drafting, and litigation enforcement cases).

139. The approach preferred by the NPP for monitoring cases is to handle the case through the development of the remedy, and then to send the case back to the local setting for the local lawyers to handle the routine monitoring. NPP wants to be called back in when there are national implications to the jurisdiction's noncompliance, or

In many cases, however, this approach fails to meet the demands imposed by the implementation stage.¹⁴⁰ Often, local counsel does not assume an active role at the remedial stage, leaving cases without any active oversight.¹⁴¹ Moreover, unless the national organization has had ongoing involvement in enforcement activity, it will lack information concerning the adequacy of local compliance activity.¹⁴² In addition, the day-to-day contact and "hassling" of the system represents a critical aspect of institutional advocacy. Without it, many of the desired changes in practice and culture will not occur.¹⁴³ Experts with extensive involvement in corrections litigation expressed concern over national organizations' reluctance to assume responsibility for enforcement unless a crisis arises.¹⁴⁴ National organizations face similar constraints on their role in local administrative and legislative advocacy outside the litigation context.¹⁴⁵ In some cases, lawyers have attempted to address these problems by developing decrees that rely on monitoring by local agencies or the advocacy community.¹⁴⁶

Thus, national organizations play a crucial role in bringing and supporting impact litigation, providing a national perspective on corrections issues, and participating in the national

when there are problems with the implementation process. Alexander Interview, *supra* note 74, at 16; Bronstein Interview, *supra* note 84, at 4.

140. Breed Interview, *supra* note 49, at 1 (stating that national organizations have been "mediocre in follow-through").

141. *Id.* at 1 (local affiliates who have tremendous demands on their time are not very involved in cases once the trials end); Bronstein Interview, *supra* note 84, at 4 ("In most cases, we have to do most of the monitoring."). Bronstein reports that NPP is involved in a Rhode Island case that has not had local counsel since the 1980s. "Monitoring means a couple of trips up [to Rhode Island] a year." *Id.* For a discussion of the limitations facing private firms and legal services programs in monitoring remedies, see *infra* notes 272-75, 350-55 and accompanying text.

142. Telephone Interview with Randall Berg, Executive Director, Florida Justice Institute 3 (Feb. 4, 1992) [hereinafter Berg Interview] (transcript on file with author) ("The real work has to be done at the local level on implementation—keeping people's feet to the fire, bugging the special master, etc.").

143. See *id.* ("National organizations get a decree and they are gone."); Brorby Interview, *supra* note 53, at 6 (discussing importance of "hassling the system in response to inmate complaints").

144. Breed Interview, *supra* note 49, at 1; Nathan Interview, *supra* note 20, at 7 (also acknowledging resource limitations).

145. Aiyetoro Interview, *supra* note 100, at 3 (stating that legislators will not listen to national people, but will listen to local community—people who can lobby and get their attention).

146. Lawyers report decrees calling for regular inspections by agencies such as a fire marshal's office, OSHA, or the state department of Health and Human Services. Alexander Interview, *supra* note 74, at 45, 49. Some lawyers have looked to public defenders and local prisoners' rights groups with regular inmate contact for compliance review. Lawyers also have begun experimenting with the use of grievance mechanisms as monitoring tools. *Id.*

dialogue on conditions and practices in correctional institutions. Their potential to pursue specific institutional change depends upon their effective collaboration with local lawyers and advocacy groups.

IV. REGIONAL, STATE, AND LOCAL ORGANIZATIONS SPECIALIZING IN CORRECTIONS ADVOCACY

Regional, state, and local organizations specializing in corrections advocacy constitute a second type of organizational player in the advocacy arena. At least fifteen states and the District of Columbia have programs within their jurisdictions with a staff of more than one lawyer that provide legal representation to prison and jail inmates.¹⁴⁷ In addition, the Southern Center for Human Rights (SCHR) (formerly the Southern Prisoners Defense Committee) provides representation to inmates incarcerated in southern prisons and jails. These programs vary widely in their scope of involvement and the advocacy role they play.

Some local programs offer services corresponding most closely to the individual service model of advocacy. They provide primarily individual representation or counseling in individual cases.¹⁴⁸ These programs tend to depend upon the state or locality for funding, and they often operate with explicit limitations on their involvement in class actions and conditions of confinement cases. One of these programs was created specifically to fill a vacuum in individual representation to inmates left by the demise of legal services and law school clinical programs formerly providing these services.¹⁴⁹ Several of these programs provide advice only and may not actually represent

147. These states include California, Florida, Georgia, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New York, North Carolina, Pennsylvania, Texas, Vermont, Washington, and the District of Columbia. This information was compiled from responses to the corrections survey and interviews with each organization listed in the National Prison Project's PRISONERS ASSISTANCE DIRECTORY as providing representation to prisoners. NPP PRISONERS ASSISTANCE DIRECTORY, *supra* note 71.

148. Based on interviews with program directors, annual case reports, and information reported in the National Prison Project's PRISONERS ASSISTANCE DIRECTORY, this category includes the D.C. Public Defender Service, the Texas Center for Correctional Services, Legal Services for Prisoners, Inc., Kansas, Legal Assistance to Minnesota Prisoners, Prison Legal Services of Michigan, and the Vermont Prisoners Rights Office. *See id.*

149. Robert C. Hauhart, *The First Year of Operating a Prisoners' Legal Services Program: Part I*, 24 CLEARINGHOUSE REV. 106, 108 (1990).

inmates.¹⁵⁰ They generally provide representation to the entire state or locality, and they consequently face tremendous demands on their services. They usually attempt to provide at least some service to all those who request it and use informal administrative advocacy wherever possible to resolve problems.¹⁵¹ Some focus primarily on administrative hearings and civil problems unrelated to institutional conditions. These organizations do not generally pursue institutional change¹⁵² because of their service orientation, formal constraints imposed by their funding source, limited attorney involvement, and huge caseloads.¹⁵³

150. Michigan and Minnesota provide only advice or legal research, and Michigan's program does not handle civil rights complaints. NPP PRISONERS ASSISTANCE DIRECTORY, *supra* note 71, at 28; Telephone Interview with Phil Marron, Director, Legal Assistance to Minnesota Prisoners 1 (July 19, 1991) [hereinafter Marron Interview] (transcript on file with author). Texas' staff of three includes no attorneys, and attempts to resolve complaints administratively. If they are unable to do so, the staff attempts to refer the case to private counsel, who are paid at an hourly rate of \$16.80. Telephone interview with W.C. LaRowe, Director, Texas Center for Correctional Services 1 (July 15, 1992) [hereinafter LaRowe Interview] (transcript on file with author).

151. See Telephone Interview with David Rozwasky, Director, Inmate Legal Assistance Program, Connecticut Prison Association 1 (July 17, 1992) [hereinafter Rozwasky Interview] (transcript on file with author) (attempts to resolve issues administratively where possible).

152. See Telephone Interview with Jeffrey Dworkin, Director, Vermont Prisoners Rights Office 1 (July 24, 1992) [hereinafter Dworkin Interview] (transcript on file with author) (commenting that because the office is overburdened, only two lawyers and one paralegal service the entire state, any hint of monetary recovery will be referred out; the office does not bring conditions or medical care class actions because of resource constraints); Telephone Interview with Stephen Kessler, Director, Legal Services for Prisoners Inc., Kansas 1 (July 10, 1992) [hereinafter Kessler Interview] (transcript on file with author) (office handles primarily individual problems, not systemic problems). A memo written by a program attorney and quoted in Hauhart's article on the D.C. program summarizes the limitations facing these service oriented programs:

What are we accomplishing for our clients? This question haunts me. . . . All too often, I hear myself telling or writing clients what I *cannot* do rather than what I can achieve This is a result of legislative limitations, inadequate staff resources, and the fragmented focus of the program Overall I feel the program . . . is a set-up for all involved Unfortunately, the unmet need exceeds the few tasks that [I feel] I have accomplished.

Hauhart, *supra* note 30, at 228 n.39.

153. See Interview with Robert Hauhart, Director, Prisoners' Rights Program of D.C., Public Defender Services, in Washington, D.C. 1 (Aug. 14, 1991) [hereinafter Hauhart Interview] (transcript on file with author) (Last year they opened 1100 applications for service, and the average caseload was about 220). In an article describing the program's first year of operation, Hauhart noted that "[t]he burden of the caseload has been a dominant feature of the program priorities and agenda so far." Hauhart, *supra* note 30, at 228.

A second, relatively small group of regional and local programs identifies with the institutional change model of corrections advocacy. These organizations focus exclusively on institutional change litigation and advocacy.¹⁵⁴ They generally do not handle individual cases or damages actions unless they present issues that will benefit a large number of other inmates. They focus on seeking and enforcing injunctions in class actions challenging conditions and practices affecting large numbers of inmates. These programs vary widely in staff size and scope of involvement. At the high end of the continuum, New York Prisoners' Rights Project (PRP) has a staff of ten experienced corrections litigators focusing on conditions in New York City's adult correctional institutions. PRP is involved in virtually every major correctional institution in New York City and in every major case involving conditions and practices in those institutions.¹⁵⁵ In contrast, the Correctional Law Project serves all of Chicago's inmates with one full-time attorney, one part-time attorney, a paralegal, and a half-time secretary.¹⁵⁶ Evergreen Legal Services serves all of Washington state with two attorneys, a litigation coordinator, and a secretary.¹⁵⁷

A third group consists of organizations providing some mixture of representation in individual cases, administrative advocacy, and cases aimed at institutional change.¹⁵⁸ These programs generally attempt to provide some level of individual representation to inmates, in addition to pursuing class action litigation and administrative and political advocacy. Again, they vary widely in their size, resources, and scope of involvement. For example, New York Prisoners Legal Services (N.Y. PLS) and North Carolina Prisoners Legal Services have large staffs

154. Based on interviews with program directors, these programs include the Southern Center for Human Rights, the Prisoners' Rights Project of the Legal Aid Society of New York, Legal Services for Prisoners with Children in San Francisco, the Juvenile Law Center in Philadelphia, Evergreen Legal Services in Washington, the Florida Justice Institute, and the Correctional Law Project of the Chicago Legal Assistance Foundation.

155. Boston Interview, *supra* note 98, at 1.

156. DeWolf Interview, *supra* note 117, at 1.

157. Interview with Ada Shen-Jaffe, Executive Director, Evergreen Legal Services, in St. Petersburg, Fla. (July 20, 1991) [hereinafter Shen-Jaffe Interview] (transcript on file with author).

158. Programs falling in this category include Prisoners Legal Services in New York, Prisoners Law Office in California, North Carolina Prisoners Legal Services, Inc., Massachusetts Correctional Legal Services, Institutionalized Persons Project of Pennsylvania Legal Services, Florida Institutional Legal Services, Inmate Legal Assistance in Connecticut, Maryland Legal Services Prisoners' Rights Project, and D.C. Prisoners' Legal Services.

and participate in a substantial portion of the prison litigation occurring in their respective jurisdictions.¹⁵⁹ Other programs are considerably smaller and less comprehensive in their scope of involvement.¹⁶⁰

Thus, the state and local programs run the gamut in the types of cases they handle.¹⁶¹ Their orientation toward correctional advocacy differs in important respects from that of the national organizations. Instead of an emphasis on impact litigation, lawyers in these organizations describe their goals in terms of individual service or institutional change. In a few cases, organizations strike a balance in their pursuit of institutional change and other advocacy roles that could serve as a model for service delivery. Most of the state and local organizations face resource and political constraints, however, that limit the extent and mode of advocacy that they provide.

A. *The Institutional Change Orientation: Scattered Success Stories*

Lawyers working in local organizations specializing in corrections litigation show a tendency to focus their attention on "bottom up" rather than "top down" institutional change. Each lawyer interviewed from the state and local organizations, without exception, discussed the problems facing particular

159. North Carolina Prisoners Legal Services has a staff of 13 lawyers and has brought litigation in almost every institution in the state. Generally, prisons not under court order either have cases pending against them or are newer, better-run facilities. Sparrow Interview, *supra* note 57, at 4. Prisoners Legal Services in New York (N.Y. PLS) has 32 lawyers and 15 paralegals on staff. Its Associate Director estimates that N.Y. PLS is counsel in at least half the prison cases in New York in which inmates have legal representation. They handle cases involving challenges to custody, civil non-prison matters, post-conviction issues, parole and sentencing issues, and institutional problems. N.Y. PLS gets 8000 requests for assistance a year. As of March 1991, they had 5118 cases pending. Their most common type of case is a challenge to the findings of a disciplinary hearing. Gresham Interview, *supra* note 98, at 4.

160. For example, six attorneys on the staff of the Prison Law Office cover the state of California, and five staff attorneys cover the state of Florida. For other examples, see sources cited *supra* note 32.

161. Most of these programs do not represent juveniles. See, e.g., Kessler Interview, *supra* note 152, at 1 (handles problems of inmates in prisons and jails); Rozwasky Interview, *supra* note 151, at 1 (no longer accepting juvenile cases); Interview with Dick Taylor, Executive Director, North Carolina Legal Services, in Chicago, Ill. 6 (Aug. 12, 1991) [hereinafter Dick Taylor Interview] (transcript on file with author) (program does not do any juvenile work).

institutions in their jurisdictions, and described their advocacy goals as centered on achieving change in those institutions. This orientation manifests itself in a variety of ways.

Most telling perhaps is local corrections advocates' explicit rejection of the law reform model of advocacy and their identification with an institutional change model.¹⁶² Robert Schwartz, Executive Director of the Juvenile Law Center, described his advocacy orientation in terms of "participation in change activities."¹⁶³ The Juvenile Law Center "uses litigation less than most public interest firms because we have always looked at litigation in relation to what we are trying to achieve and what the other options are. . . . The availability of an option you don't use empowers other options."¹⁶⁴ As the Director of North Carolina Prisoners Legal Services (N.C. PLS) noted:

NPP looks for big cases, milestones, important rulings. PLS does volume, the brunt of the work. . . . We tend to concentrate on specific cases and solutions which apply to them, [and we] shy away from issues of law because we are likely to lose in the present political climate.¹⁶⁵

For example, N.C. PLS brings guard assault cases in the state administrative forum for processing tort claims, despite criticism from public interest lawyers for failing to pursue the civil rights implications of these cases. The lawyers say they will do whatever works and choose the remedy most likely to provide swift and certain relief.¹⁶⁶

John Boston, the Legal Director of the Prisoners' Rights Project, identified the prospects for achieving institutional change as a key determinant in case selection. The organization balances the manageability and resource requirements of a case against the remedy likely to be implemented.¹⁶⁷ Boston explicitly rejected the validity of the test case idea for most issues: "[t]here is no multiplier. The idea of a test case has no reality. There

162. Boston Interview, *supra* note 98, at 6 (rejecting saliency of test case model); Ortega Interview, *supra* note 57, at 2 ("Part of our agenda is to improve the system in any way we can.").

163. Interview with Robert Schwartz, Director, Juvenile Law Center, in Philadelphia, Pa. 4 (July 8, 1991 & July 10, 1992) [hereinafter Schwartz Interview] (transcript on file with author).

164. *Id.*

165. Sparrow Interview, *supra* note 57, at 4, 7.

166. *Id.* at 3; Dick Taylor Interview, *supra* note 161, at 4.

167. Boston Interview, *supra* note 98, at 4.

is a fundamental problem at the central office level. . . . Taking one prison and turning it into a model of how to do business does not radiate to other institutions.”¹⁶⁸ Indeed, Boston emphasized that institutions evolve in reaction to litigation, so that subsequent cases frequently differ in important respects from their predecessors.¹⁶⁹

The lawyers staffing the state and local organizations reported considerable reliance on inmates’ expressed preferences and concerns in deciding which cases to bring and how to approach these cases, in contrast to the national staff attorneys. Many of these organizations keep track of inmate letters and complaints and use these letters to identify serious problems that deserve sustained attention.¹⁷⁰ Some of these organizations conduct periodic surveys of inmates to determine issues of greatest concern to them.¹⁷¹ They described much more extensive contact with their clients and with inmates generally than did national staff attorneys.¹⁷² They were more apt to comment on the importance

168. *Id.* at 5–6.

169. *Id.* at 3–4 (“The second medical care case is different from the first one. The context and landscape change a lot . . . in ways that are related to how institutions function.”).

170. *See id.* at 1–2 (inmate complaints are the primary referral source; derives litigation agenda in large part from perception of areas of greatest concern to inmates, tempered by predictions of successful implementation of relief); DeWolf Interview, *supra* note 117, at 4 (they keep statistics on inmate complaints received, which serve as an important determinant of whether to bring class action); Gresham Interview, *supra* note 98, at 4 (case selection process identifies issues of concern to large group of inmates within particular institutions); Ortega Interview, *supra* note 57, at 1, 3–4 (organization keeps track of inmate letters and uses coding system to identify and categorize complaints against particular institutions); Sparrow Interview, *supra* note 57, at 4 (inmate letters constitute primary referral source for cases).

171. *See, e.g.,* Love Interview, *supra* note 133, at 3 (describing client survey by Institutionalized Persons Project).

172. Ortega Interview, *supra* note 57, at 2 (“When we litigate a case, we go out to the jail on a weekly basis or every ten days, which you have to do in jail cases because of client turnover.”) Stalker Interview, *supra* note 117, at 4, 7 (stating that he maintains regular contact with inmates through relationships with project staff and is familiar with an informal network of inmates who have been at institutions for long periods, and relies on them for monitoring compliance). This higher level of contact with inmates by state and local organizations is not surprising in light of the greater proximity of their offices to prisons and jails in their jurisdiction. Indeed, in co-counselled cases, NPP lawyers explicitly allocate responsibility for inmate contact to local lawyers. *See* Ortega Interview, *supra* note 57, at 5 (although NPP was lead counsel, SCHR attorney acting as co-counsel visited more frequently with the clients and had more contact with prisoners than NPP, as well as handling inmate witnesses in court).

In some states, the prisons actually house the lawyers providing representation to the inmates, and the inmates have easy access to the program. *See* Interview with Barry Barkow, Director, Massachusetts Correctional Legal Services, in Boston, Mass. 2 (Aug. 15, 1991) [hereinafter Barkow Interview] (transcript on file with author);

of litigation to the status and dignity of inmates,¹⁷³ and on the potential dangers to their clients associated with bringing litigation against their keepers.¹⁷⁴

In contrast to the national organization lawyers, many of the lawyers in the state and local organizations consciously avoid high visibility and public exposure of the organization's advocacy role. They view high visibility as a political liability that would interfere with their ability to work constructively within the local institutional and political community:

[NPP has] the visibility so that other folks who get into these cases can use them as a resource. NPP's visibility is a strength. We do not do newsletters and the stuff needed to keep a high level of visibility. To be effective in the Southeast, I need to be as invisible as I can be most of the time to work with Southern bureaucrats. If one goes out and toots one's one horn, [it] inflames the ego of Southern characters. . . . [Our] voice tends to be specific to the department, the legislature, and the Bureau of Prisons.¹⁷⁵

In place of high visibility, the institutional change oriented lawyers emphasized regularity and continuity of contact as essential to their success.¹⁷⁶ Many of the lawyers interviewed

Hauhart Interview, *supra* note 153, at 1. Some program directors view on-site programs as the model service delivery system because they permit inmates to initiate contact, promote administrative resolution of problems and save money and time. See Barkow Interview, *supra*, at 6. Others expressed concern about on-site programs' ability to control their caseload and to devote adequate attention to inmates housed in other facilities. See Sparrow Interview, *supra* note 57, at 4. This difference in perspective is attributable in part to lawyers' adherence to different models of advocacy.

173. Nancy Ortega of the Southern Center for Human Rights considers empowering individual inmates to be an important aspect of her role. She noted that the "self-esteem level of these inmates goes up tremendously" with their active involvement in litigation, and that inmates "were in shock that anyone responded to their letter." The cases sometimes increased inmates' "self-confidence and feeling of control" and made them "better able to manage in the prison." Ortega Interview, *supra* note 57, at 8.

174. *Id.* ("Inmates get intimidated by prison officials. . . . It is difficult for these guys to bring these suits and remain with them. Subtle things can be done to them that we cannot prove in court.")

175. Cullen Interview, *supra* note 48, at 6; see also Sparrow Interview, *supra* note 57, at 3 (North Carolina Prisoners Legal Services avoids the public eye as much as possible and doesn't seek publicity in connection with its cases because the organization does not want to be identified as a political group and perceives the public to be hostile to prison reform).

176. Barkow Interview, *supra* note 172, at 6 ("Arms length on site assistance programs are the most effective and economical. Issues get addressed more effectively because they often can be handled administratively."); Boston Interview, *supra* note 98, at 1 ("In New York City, we have regular contact with people in the prison system and private providers of medical care. We are engaged with the Department of

underscored local programs' familiarity with the procedures, problems, and players of institutions they regularly sue, and their resulting advantages in selecting the cases most likely to respond to serious problems and to produce results.¹⁷⁷ Some local lawyers described a strategy of creating a sustained advocacy presence by intervening in a large number of cases raising issues of compliance with legal and institutional rules.¹⁷⁸ Others rely upon their intensive and ongoing involvement in monitoring compliance with court orders and consent decrees as the basis of their ongoing relationship with the prison system.¹⁷⁹ Both strategies rest on the assumption that the regular presence of lawyers raising questions concerning institutional conditions and practices itself creates accountability and pressure for reform.¹⁸⁰

Corrections on a regular basis on a very broad range of issues because of the consent decree Familiarity breeds communication."); Interview with Stephen Bright, Executive Director, Southern Center for Human Rights, in Atlanta, Ga. 3 (Aug. 11, 1991) [hereinafter Bright Interview] (transcript on file with author) (emphasizing the importance of continuity of public interest practitioners and becoming part of the politics of an institution); DeWolf Interview, *supra* note 117, at 6 (describing her tendency to be less adversarial because she has to work with the Department of Corrections a lot and must have a good working relationship); Gresham Interview, *supra* note 98, at 8 ("NPP is covering the nation so they cannot know a system in detail. I know [the Commissioner] . . . I know the facts about how things work, how records are kept, how the staff is deployed, what they do to screw people over.").

177. See, e.g., Interview with Michael W. Bien, Partner, Rosen, Bien & Asaro, in San Francisco, Cal. 2 (July 18, 1991) [hereinafter Bien Interview] (transcript on file with the author) ("Prison Law Office staff have a better feel of what is going on day to day. They are really in there more. That is crucial for us. They can find witnesses, potential plaintiffs. They know people, what works, and the scope of cases pending in California."); see also Interview with Luther Ortin, Partner, Brobeck, Phleger & Harrison, in San Francisco, Cal. 4 (July 18, 1991) [hereinafter Ortin Interview] (transcript on file with author) (stating that the Prison Law Office had a lot of contact with inmates and that they knew what kinds of reports to ask for).

178. Cullen Interview, *supra* note 48, at 6 ("I have good access to the prison administration. I write a lot of letters describing allegations of inmates. They respond routinely and fast. If it has merit, cases can often be resolved at that level. If the case involves a systemic issue, I can go to the media where I have good contacts.").

179. Boston Interview, *supra* note 98, at 1 (process of enforcing consent decrees creates vehicle for sustained presence of Prisoners' Rights Project in city corrections on broad range of issues; observes similar relationship between N.Y. PLS and New York State Department of Corrections); Bright Interview, *supra* note 176, at 1 (emphasizing importance of compliance work in achieving results); Cullen Interview, *supra* note 48, at 5 (emphasizing importance of local presence "on the ground" to be able to be "on site" on a regular basis to enforce decrees).

180. See JAMES B. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY 123 (1977) ("It is the [Ill.] PLS staff members' daily presence at the prison, their persistent questioning of the rules, their relentless demands to see files and records, and the fear they invoke in the hearts of many of the prison staff that has the most profound effect on the day-to-day administration of the prison."); cf. Bellow, *supra* note 23, at 59-60 (advocating high volume strategy targeting particular institutions and problems as the most effective means of achieving institutional change).

Lawyers in the state and local organizations also place much greater emphasis on linking litigation with other forms of advocacy and pursuing non-litigation forms of advocacy. Their interviews underscored the value of developing credibility with the local and state correctional institutions in empowering them to resolve many issues informally:

One reason that administrative advocacy and policy work are so successful is that officials take seriously the threat of litigation; because Prisoners Legal Services is a successful litigator, discriminating in the choice of cases, and doing cases that affect a lot of people, they are respected.¹⁸¹

The interviews produced many examples of the perceived importance of continuity and expertise in achieving settlement.¹⁸² Local experts also play the role of supporting and developing the field of corrections advocacy, albeit on a more localized scale than the national organizations. A number of programs have developed and distributed self-help manuals and materials.¹⁸³ Some of the state and local corrections organizations have also developed materials and brief banks that they make available upon request.¹⁸⁴

181. Lopes Interview, *supra* note 117, at 4; see also Boston Interview, *supra* note 98, at 14 ("We have developed such credibility that no one messes with us institutionally."); Soler Interview, *supra* note 78, at 9 ("YLC is known for its track record and willingness to spend whatever is necessary. This has a deterrent effect. . . . It enables us to help reach that critical mass of reform when everyone jumps on the bandwagon instead of impeding progress.").

182. Nancy Ortega of the Southern Center for Human Rights (SCHR) described how she participated in a coalition that met with the commissioner of Georgia's corrections system and persuaded him to change the state's AIDS policy, in part based upon SCHR's previous litigation against Alabama involving the same issues and upon the threat of similar litigation in Georgia. Ortega Interview, *supra* note 57, at 5. Angus Love reports: "Beat them a few times and create a costly threat in attorneys' fees. Next time they may be more willing to settle." Love Interview, *supra* note 133, at 8. Robert Cullen described a collaborative relationship with a Department of Corrections Director that developed from major class action (*Guthrie*), and his ability to "milk the *Guthrie* approach of beating them into the ground for years. Senior management people that are *Guthrie* veterans are petrified of the judiciary." Cullen Interview, *supra* note 48, at 5.

183. These programs include the Southern Center for Human Rights, Prisoners' Law Office in San Francisco, the Institutional Law Project in Pennsylvania, the Correctional Project of the Chicago Legal Assistance Foundation, and the Prisoners Rights Project.

184. The Chicago Legal Assistance Foundation's Correctional Law Project has prepared a manual that is made available to every lawyer appointed in a pro se prison case in the Northern District of Illinois. John Boston of the Legal Aid Society of New York's Prisoners Rights Project has written extensively in the field and prepares a

Local corrections advocates also played up their role in pursuing forms of advocacy other than litigation as a result of their contacts within the prison and the local political and legal community.¹⁸⁵ For example, John Gresham of Prisoners Legal Services of New York reported that he regularly consults with the prison administration, the legislature, and the media about prison issues. He and others in the organization have made a major effort to cultivate contacts beneficial to the client group, including the bar, church groups, health care organizations, philanthropic organizations, and the media.¹⁸⁶ Prisoners Legal Services in the District of Columbia has also emphasized involvement in the local community and in political issues.¹⁸⁷

Advocates and experts generally perceive nonlegal advocacy as particularly promising and important in the juvenile area.¹⁸⁸ Robert Schwartz, the Executive Director of the Juvenile Law Center, described his involvement in a wide range of nonlitigation activities that place him "at the table" on a wide range of issues important to children in the juvenile justice system, including serving on a committee that selected new leadership of juvenile institutions and participating in task forces and committees that determine public policy relating to juveniles.¹⁸⁹ At the initiation of the Juvenile Law Center, participants in the juvenile justice system negotiated a resolution of litigation concerning conditions and overcrowding in Philadelphia juvenile institutions. The parties used interest-based mediation, facilitated by a neutral mediator, to

quarterly docket of every federal case bearing on corrections issues, complex litigation, and remedies. The docket is published in part in the *National Prison Project Journal*.

185. See, e.g., Aiyetoro Interview, *supra* note 100, at 3 (stating that legislators won't listen to national people, but to the local community). But see Sparrow Interview, *supra* note 57, at 3 (stating that the organization does little non-litigation work because of a general office policy against advocacy and attorneys' preference to "practice law").

186. Gresham Interview, *supra* note 98, at 9.

187. Koren Interview, *supra* note 85, at 5. Prison Legal Services in Washington, D.C. coordinated the formulation of a policy proposal on HIV and prisoners that enlisted the support of experts, the local advocacy community, and the government. Lopes Interview, *supra* note 117, at 4; see also DeWolf Interview, *supra* note 117, at 9 (Correctional Law Project does a lot of substantive policy work, committee participation, and work with the courts and the bar, and sees these activities as an effective means of attaining results).

188. See Breed Interview, *supra* note 49, at 3 ("In any metropolitan community, you find any number of support groups to help in a juvenile matter, where those groups hardly ever exist on the adult side."); Krisberg Interview, *supra* note 130 at 3, 4, 6 (discussing potential for coalition building and effective linkages between litigation and other advocacy efforts in juvenile area).

189. Schwartz Interview, *supra* note 163, at 1, 5.

of the individual representation they provide.¹⁹⁸ They also reported that budgetary limitations constrained their use of experts, discovery, and other activities crucial to effective representation.¹⁹⁹ Recent cuts in funding from Interest on Lawyer's Trust Accounts Programs (IOLTA) have placed additional strain on limited resources.²⁰⁰ Limited travel budgets also forced staff to refuse travel-intensive cases.²⁰¹

State and local programs also face obstacles to adopting the focused, high volume approach to institutional change advocated by Gary Bellow.²⁰² Many of these programs must serve a wide geographic area covering numerous institutions. They are physically remote from the institutions at issue, and their energies are diffused around the state. The sheer volume of cases makes it difficult for them to justify defining a focus on one particular institution for their individual cases.²⁰³

Resource constraints also limit the capacity of local programs to monitor and enforce compliance with outstanding court

198. See Cullen Interview, *supra* note 48, at 6 (resource constraints force office to be essentially crisis oriented); Sparrow Interview, *supra* note 57, at 4 (reporting that North Carolina Prisoners Legal Services was forced to discontinue filing jail class actions because of lack of funding); Stalker Interview, *supra* note 117, at 1, 5 (limited resources and staff constrain ability to accept and handle cases). This finding is consistent with other studies. See KESSLER, *supra* note 1, at 109; Gary Bellow, *Legal Aid in the United States*, 14 CLEARINGHOUSE REV. 337, 342-43 (1980); Bellow, *supra* note 23, at 52.

199. Ruth Ann DeWolf reports that her office always does the less expensive discovery first. DeWolf Interview, *supra* note 117, at 4. Robert Stalker also reports that funding limits his office's ability to pay for experts. Stalker Interview, *supra* note 117, at 2, 10. Dick Beltz in Florida reports that the attorneys transcribe depositions themselves half the time to save money. Telephone Interview with Dick Beltz, Director, Florida Institutional Legal Services 2 (July 10, 1991) [hereinafter Beltz Interview] (transcript on file with author). Howard Belodoff in Idaho reports that he cannot initiate a mental health class action because it is too complicated and the need for expert witnesses is too great. Where possible, he avoids depositions and tries to use local experts, but none exist within the areas of expertise most needed. Belodoff Interview, *supra* note 109, at 6.

200. See Barbara C. Clark, *Interest Rate Decline Jeopardizes Stable IOLTA Funding*, 14 NAT'L LEGAL AID & DEFENDER ASS'N CORNERSTONE, Fall 1992, at 2 (noting that as a result of declining interest rates, 60% of IOLTA programs participating in the survey face income declines, resulting in cuts of up to 42% in funding for legal services). Interest on Lawyers' Trust Accounts programs distribute money to non-profit organizations that provide civil legal services to the public. They are funded by interest accrued on interest-bearing checking accounts into which lawyers deposit client monies that are too small or short-term to generate enough interest to warrant a separate escrow account. IOLTA programs exist in every state (except for Indiana). PETER FREED, REPORT FOR THE CLARK FOUNDATION ON INTEREST ON LAWYERS' TRUST ACCOUNTS 1-2 (1991) (unpublished report, on file with the *University of Michigan Journal of Law Reform*).

201. See, e.g., Bright Interview, *supra* note 176, at 2; Shen-Jaffe Interview, *supra* note 157, at 5.

202. See *supra* note 23 and accompanying text.

203. See *supra* note 152-53 and accompanying text.

orders.²⁰⁴ For example, Georgia Legal Services' director reports that the program should be monitoring all of the institutions under consent decree, but that the attorneys do not "have a handle" on all outstanding court orders.²⁰⁵ Robert Stalker of Evergreen Legal Services reports that no one is monitoring the decree in *Capps v. Atiyeh*²⁰⁶ because there are no attorneys left in the program.²⁰⁷

Lawyers in local organizations reported that organizational dependence on state or local governments for financial support dramatically affected the organization's mission and scope of involvement. These lawyers reported explicit, state-imposed constraints on the types of litigation that they are permitted to bring and threats of funding cuts as a result of particular litigation.²⁰⁸ State-funded programs often face explicit directions to focus exclusively on providing direct service to inmates in individual cases, and staff attorneys reported constraints imposed on their programs' authority to handle class actions or to sue state departments of corrections.²⁰⁹ Indeed, one organization turned down a substantial contract with the state of Washington to do prison litigation because the state would have required

204. See *supra* notes 150–53 and accompanying text (describing the impact of funding constraints on state and local programs and legal services).

205. Interview with Phyllis Holman, Executive Director, Georgia Legal Services, in St. Petersburg, Fla. 6–7 (July 21, 1991) [hereinafter Holman Interview] (transcript on file with author). Holman reported that the office is considering the possibility of suspending new case involvement to allow lawyers more time to monitor outstanding decrees. *Id.*

206. 559 F. Supp. 894 (D. Or. 1982).

207. Stalker Interview, *supra* note 117, at 8.

208. KESSLER, *supra* note 1, at 56–57 (stating that commissioners responded to jail suit by threatening to cut funding of legal services program); see Cullen Interview, *supra* note 48, at 3 (expressing concern over whether legal services will continue to support corrections litigation); Dworkin Interview, *supra* note 152, at 2 (stating that Vermont's governor introduced a bill to eliminate the prison program); Telephone Interview with Nancy Feldman, Director, Office of Inmate Advocacy, New Jersey Office of the Public Advocate 1 (July 15, 1992) [hereinafter Feldman Interview] (transcript on file with author) (stating that a decision was made to phase out the program gradually); Stalker Interview, *supra* note 117, at 7 (stating that Oregon recently de-funded the prison litigation project); Dick Taylor Interview, *supra* note 161, at 8–9 (stating that the state is looking constantly for other ways to meet its obligation under *Bounds* and that "it creates a minefield" when a program has "a funding source who is an adversary in every piece of litigation done and is also asked for basic support for other representation").

209. See, e.g., Shen-Jaffe Interview, *supra* note 157, at 5 (stating that when Evergreen Legal Services (ELS) began winning conditions of confinement suits, the state prohibited the organization from using state funds to bring class actions). Programs in Michigan, Texas, and Minnesota are also prohibited from filing actions; they provide advice only. See *supra* note 150.

the program to obtain prison officials' approval before filing a conditions challenge.²¹⁰

State funding also affected the lawyers' definition of their role in many cases. Three of the local programs—those in Massachusetts, Maryland, and North Carolina—constitute the state's method for meeting its obligation to provide inmates with access to courts,²¹¹ and are under contract with the state to provide legal representation to inmates. Because these programs are the sole avenue to court access for most inmates, attorneys in these programs described a special obligation to respond to every prisoner complaint received.²¹² Staff attorneys in the programs attempting to combine direct service and impact litigation reported an ongoing struggle to find alternative funding sources to free up their staff to engage in impact litigation.²¹³

Many programs looked to attorneys' fees as a funding source free of state-imposed constraints to supplement their funding and enable them to pursue impact litigation. Local programs relied on fees to expand the scope of their coverage and to support more creative and change-oriented litigation.²¹⁴ Many lawyers,

210. Shen-Jaffe Interview, *supra* note 157, at 5–6 (ELS has not taken state funding since 1989 because of a mandatory requirement not to file a conditions challenge without the approval of the warden).

211. Maryland fulfilled its obligation to provide access to the courts by providing legal services to inmates, which was found to be "an acceptable alternative to adequate legal research facilities." *Hall v. Maryland*, 433 F. Supp. 756, 781 (D. Md. 1977), *modified*, *Carter v. Mandel*, 573 F.2d 1721 (4th Cir. 1978). The state was later ordered to continue to maintain and support the legal services program. *Carter v. Kamka*, 515 F. Supp. 825, 833 (D. Md. 1980). North Carolina failed to provide adequate access to law libraries, and was ordered by the court to provide legal representation by contracting with Legal Services of North Carolina. *Smith v. Bounds*, 657 F. Supp. 1327, 1332–33 (E.D. N.C. 1986). Kansas' program, although it is not required by the court, has been relied on by the state as the basis for refusing to expand the law libraries in its correctional facilities. Kessler Interview, *supra* note 152, at 1.

212. Sparrow Interview, *supra* note 57, at 5. North Carolina Prisoners Legal Services (NCPLS) receives approximately 300 requests for assistance per month. NCPLS's Priority Statement provides that "ensuring adequate access to the proper judicial forum is the overriding concern of NCPLS." Most complaints are handled by counselling and advice, or brief service such as administrative resolution. In addition, NCPLS investigates every pro se complaint referred by the court, and it evaluates whether representation is warranted. Only meritorious cases receive representation. *Id.*

213. NCPLS used all nondedicated state funds to initiate jail class actions, but had to stop initiating new actions because it lacked funding. The organization is hoping to recover its deficit from a projected attorneys' fee award. *Id.*

214. See Telephone Interview with Elliot Berry, Senior Staff Attorney, New Hampshire Legal Services 3 (Aug. 22, 1991) [hereinafter Berry Interview] (transcript on file with author) (reporting that an office used attorneys' fees recovered in a prison case to hire a paralegal to do monitoring and informal dispute resolution); Cullen Interview, *supra*

however, did not view the availability of attorneys' fees as providing independence in their selection and conduct of litigation. Some programs condition continued involvement in corrections litigation on lawyers' success in generating attorneys' fees. This requirement reportedly skews the types of corrections cases brought toward smaller cases with a proven track record.²¹⁵ It also influences lawyers' strategy and decision making in ongoing litigation.²¹⁶ For example, lawyers reported settling cases early because fees were needed to assure the program's survival.²¹⁷

Thus, attorneys in local programs specializing in corrections present a picture of unrealized potential; most local programs lack the resources necessary to capitalize on the strategic advantages of continuity, credibility, and expertise. The few exceptional programs with adequate resources perceive themselves as an important and effective promoter of institutional change in correctional institutions. Most states, however, have no program providing representation in corrections cases or lack a program with adequate staff and resources to handle major cases or respond to overwhelming need. In many states, the National Prison Project, Youth Law Center, or a local affiliate office of the American Civil Liberties Union represents the only possibility for representation by an organization that specializes in corrections. Inmates seeking legal assistance frequently must depend on representation by other sectors of the legal profession. Three other major organizational

note 48, at 3 (reporting that corrections litigation must generate \$150,000 in income to fund two lawyers and a secretary); Sparrow Interview, *supra* note 57, at 4 (stating that NCPLS's involvement in jail litigation depends on recovery of projected attorneys' fees); Specter Interview, *supra* note 192, at 1 (reporting that the Prisoners' Law Office is "pretty self-sufficient," and that § 1988 attorneys' fees are the only way the organization survives).

215. For example, Angus Love reports that he cannot embark on a major class action without outside backing. Love Interview, *supra* note 133, at 6.

216. According to Angus Love, the need to earn attorneys' fees influences the types of cases he can bring. He may be inclined to accept an early settlement offer that may be less advantageous to his client than one available later in the litigation because he needs the money for the program's survival. *Id.*

Bob Cullen also reports that resources affect the kinds of cases brought and how they are litigated. He would like to use more experts. He could not bring a statewide jail case because of limited resources. Rather, he must pursue cases that will be relatively simple to litigate and that are likely to generate fees. His operation must be crisis oriented. In short, his ability to bring new litigation is limited. "The squeaky wheels get the grease." Cullen Interview, *supra* note 48, at 4-6.

217. Love Interview, *supra* note 133, at 6.

participants provide representation to inmates in corrections cases: legal services, private firms, and law school clinics.

V. LEGAL SERVICES PROGRAMS

Legal services programs—programs providing general civil legal assistance to indigent people—constitute another potential source of representation for inmates. At least in theory, legal services organizations constitute a promising source of corrections advocates. As one legal services lawyer stated, concern for individual rights animates the prisoners' rights issue, and legal services lawyers already focus on preserving these rights and on improving the system of justice for the poor and for minorities.²¹⁸ Legal services attorneys have a commitment to these types of issues and to concerns affecting poor and minority clients.²¹⁹ Legal services offices also span the country and exist in relatively rural areas, offering the potential for coverage to inmates in remote geographical areas.²²⁰ Finally, given the range of public interest concerns implicated by a poverty law practice, we might predict that legal services lawyers have some of the skills and expertise called upon to handle corrections cases.

The widely shared assessment of legal services' general role in corrections advocacy, however, portrays just the opposite picture. Experts, lawyers specializing in corrections litigation, and legal services lawyers involved in corrections portrayed legal services as playing a minimal role in corrections advocacy and expressed profound pessimism concerning the potential for an expanded role in the future.²²¹

218. Sanchez Interview, *supra* note 117, at 4.

219. *Id.*

220. The National Legal Aid and Defender Association provided the author with a list of 385 organizational members, which served as the data base for the survey of legal services involvement in corrections litigation. Of the programs responding to the survey, 68% of the general legal services programs and 86% of the program with a specialized corrections program have a state correctional institution within their service area. Almost all legal services programs have a jail within their service area.

221. Breed Interview, *supra* note 49, at 4 (reporting that legal services lawyers appear to have little interest in prison and jail cases); Himelein Interview, *supra* note 117, at 2 (Eighth Amendment concerns of prisoners are not central to legal services' mission); Telephone Interview with Regina Rogoff, Executive Director, Legal Aid Society of Central Texas 4 (Aug. 5, 1991) [hereinafter Rogoff Interview] (transcript on file with author) ("If funding [is] withdrawn from corrections specialists, legal services [is] not

The results of the legal services survey and interviews suggest that the picture of current involvement and future potential is more complex. In some jurisdictions, legal services programs provide the only lawyers willing to handle these cases.²²² Forty percent of the programs responding to the survey have at least one staff attorney with some background in corrections litigation. A small number of programs have senior lawyers on staff who have been litigating corrections cases for years and have substantial experience with class action litigation.²²³ Legal services offices frequently are used as local counsel by national, regional, and statewide programs specializing in corrections.²²⁴ Legal services programs are involved in twenty-two of the forty-one states with court orders involving conditions in major institutions or entire systems.²²⁵ In most of these cases, however, legal services acts as co-counsel with other organizations such as the National Prison Project, which functions as lead counsel.²²⁶ Most legal services programs have only limited involvement in corrections, and they rarely handle these cases on their own.²²⁷

The data evidences a marked distinction in level and type of involvement between generalist programs and programs with a lawyer or program specializing in corrections advocacy. Those programs with a specialized project targeting institutionalized persons or a senior staff attorney specializing in corrections

likely to step into the vacuum; when your plate is full, you have to give something up."); Soler Interview, *supra* note 78, at 14 (describing his perception of a low level of involvement of legal services programs in corrections litigation).

222. See, e.g., Telephone Interview with Neil McBride, Director, Rural Legal Services of Tennessee 2 (July 12, 1991) [hereinafter McBride Interview] (transcript on file with author) ("No one else in the geographical area handles prison cases.").

223. See generally Cullen Interview, *supra* note 48, at 4 (describing a handful of seasoned corrections litigators sprinkled throughout legal services).

224. See Alexander Interview, *supra* note 74, at 6 (describing reliance on legal services programs as local counsel in many cases); Soler Interview *supra* note 78, at 11 ("There is a natural affinity there [between corrections experts and legal services lawyers].").

225. Alexander Interview, *supra* note 74, at 1-2 (identifying counsel in cases reflected in the NPP STATUS REPORT).

226. *Id.*

227. See DeWolf Interview, *supra* note 117, at 9 ("Almost no cases arise in neighborhood offices."); Hauhart Interview, *supra* note 153, at 3 ("Local legal services programs are not involved in corrections."); Soler Interview, *supra* note 78, at 14. Handler, Hollingsworth, and Erlanger found that 60% of legal services lawyers in the national survey received pressure to engage in less law reform activity, particularly from bar groups and private lawyers, while 31% reported receiving pressure to engage in more law reform from such groups as the Office of Economic Opportunity (OEO) and client groups. HANDLER ET AL., *supra* note 1, at 64-65.

develop a short-term agreement to end overcrowding in the juvenile detention center and a long-term plan of regular meetings among officials to develop a unified approach to juvenile justice in Philadelphia.¹⁹⁰

Thus, corrections specialists in local corrections advocacy groups expressed particular affinity for the institutional change model, and in the few instances of organizations with adequate resources and expertise, represent a promising approach to advocacy that can meet the particular demands of corrections issues.

B. The Unfulfilled Promise: Pervasive Pressures of Poverty and Politics

The preceding section paints a picture of strategic advantage for local organizations specializing in corrections, based upon continuity, commitment, and presence. However, a parallel and recurring theme that overshadowed this strategic advantage for most lawyers in these organizations was one of unfulfilled promise due to resource constraints and political pressures imposed by local funding sources. With only three exceptions,¹⁹¹ the organizations' directors reported that inadequate resources dramatically limited their organization's capacity to provide effective advocacy and establish an organizational presence within its jurisdiction.

A handful of organizations are able to play a significant role in the face of resource constraints through a variety of creative staffing and targeting approaches. Two organizations collaborate extensively with large private firms and developed ongoing co-counseling relationships that significantly increased their litigation capacity.¹⁹² Several other organizations attempted to maximize their impact by limiting their involvement to major

190. See Robert G. Schwartz, *Philadelphia Solves Juvenile Crowding by Mediation*, OVERCROWDED TIMES: SOLVING THE PRISON PROBLEM, Mar. 1991, at 16. The implementation of these agreements has led to a reduction in prison population and the development of effective population control mechanisms. See *id.* at 17.

191. These exceptional programs have a relatively stable binding base. Their staffs emphasize the importance of independence and relative financial stability in their capacity to perform their advocacy role.

192. See Lopes Interview, *supra* note 117, at 2 (much of Prisoners' Legal Services Project's "big work" is done with private attorneys, typically through co-counseling); Telephone Interview with Donald Specter, Director, Prison Law Office (July 16, 1992 & July 24, 1992) [hereinafter Specter Interview] (transcript on file with author) ("Most of the organization's class action cases, at least in the liability phase, are with co-counsel, primarily firms; PLO has good working relationship with these firms.").

issues of shared concern implicating structural questions.¹⁹³ Finally, programs with corrections expertise and ongoing contact with corrections issues and actors reported a sustained presence in their locale, despite resource constraints.¹⁹⁴

Many of the state and local programs, however, particularly smaller or more service-oriented ones, are extremely limited in their capacity to handle large, complex litigation, at least without more experienced co-counsel.¹⁹⁵ Smaller programs lack the staffing flexibility that is necessary to handle a large corrections case.¹⁹⁶ Their lawyers tend to be less experienced in complex litigation.¹⁹⁷ Furthermore, their huge caseloads of individual disputes requiring continual attention limit the opportunity to handle major litigation. Their lack of regular exposure to complex litigation also prevents them from developing the litigation skills or familiarity with procedural innovation frequently demanded by major institutional litigation.

Limited resources further constrain the capacity of local programs to engage in effective advocacy. Many local staff lawyers commented that caseload and resource constraints often force them to reject important cases and to compromise the quality

193. See DeWolf Interview, *supra* note 117, at 2-3; Shen-Jaffe Interview, *supra* note 157, at 5.

194. See Cullen Interview, *supra* note 48, at 5 (discussing the advantages achieved through expertise and continuity, despite limited resources); Shen-Jaffe Interview, *supra* note 157, at 1 (Evergreen Legal Services makes every attorney a part of the team on a complex case, promoting a high level of job satisfaction, avoiding isolation, and increasing attorney continuity and expertise). Some of the state and local organizations have leadership and staff members with extensive class action and corrections experience. For example, the Legal Aid Society of New York's Prisoners Rights Project has a large staff experienced in complex prison litigation, and its Director (John Boston) is a nationally recognized expert in corrections and civil rights law.

195. See Love Interview, *supra* note 133, at 5 (acknowledging that the staff of Institutionalized Persons Project is relatively inexperienced in complex litigation).

196. Alexander Interview, *supra* note 74, at 5, 32 ("To keep all the balls in the air, someone must be available to collaborate on large cases. You can't do the cases that need to be done with one person. They are so big that you must have the flexibility to divide up the work."). Vermont's program, with a staff of two attorneys, cannot provide representation in class actions involving conditions or systemic problems. Dworkin Interview, *supra* note 152, at 2. Pennsylvania's program is staffed by designating one person in each of five offices as the specialist in institutional litigation. These offices handle only a few class actions; without some source of outside support, they cannot bring major conditions litigation or litigation challenging system wide problems. Love Interview, *supra* note 133, at 4. One office split this position among six staff attorneys, each of whom spends five percent of his time on corrections and mental-health cases. *Id.*

197. See, e.g., Love Interview, *supra* note 133, at 5 (describing himself as "not at an advanced litigation stage"); Rozwasky Interview, *supra* note 151, at 1 (describing relatively young staff with limited experience in complex litigation); cf. KESSLER, *supra* note 1, at 92 (explaining that programs staffed primarily by recent graduates are less able to engage in a significant amount of law reform).

exhibit more extensive involvement in litigation and a much broader and more proactive conception of their advocacy role.²²⁸ Programs without such a specialized project generally tend to define their role in reaction to external pressures forcing their involvement and to limit their involvement to litigating one or two cases. The majority of legal services programs do not provide representation to inmates in cases challenging conditions of confinement in correctional institutions.

Even for the programs with a special project or expert staff, the location of the specialized program within a general legal services institution profoundly affects the nature and extent of service delivery. Corrections litigators perceive deep ambivalence within the legal services community over its involvement in corrections litigation. The lawyers' orientation to advocacy often combined a reactive, scatter-shot conception with a law reform/impact litigation approach. Legal services lawyers active in corrections litigation portrayed the structural, political, and resource constraints affecting legal services organizations as profoundly limiting their involvement in corrections cases.

A. The Significance of Repeat Player Status

Most legal services programs do not have specialized programs serving inmates of correctional institutions or lawyers specializing in corrections litigation. Thirty-seven legal services organizations, however, reported that they have a specialized project targeting problems of people incarcerated in correctional or mental institutions. Of these programs, twenty-five currently have specialized projects providing legal representation to inmates of correctional institutions.²²⁹

228. Indeed, several of the organizations that specialize in corrections issues, which were discussed in the previous section, are affiliated with legal services or legal aid programs, including North Carolina Prisoners Legal Services, Legal Aid Society Prisoners Rights Project, Evergreen Legal Services, the Institutionalized Persons Project of Pennsylvania Legal Services, and Georgia Legal Services.

229. Among respondents to the survey with specialized programs for corrections or mental health cases were 16 organizations also included in the section describing organizations specializing in corrections litigation.

The data show that repeat player status—regular and ongoing involvement in corrections litigation by lawyers within legal services—correlates with more extensive and intensive involvement in corrections work. Specialization dramatically increases the likelihood, extent, and continuity of involvement in corrections cases.

1. *Extent of Involvement in Corrections Cases*—Table 1 shows the level of past and recent involvement of legal services programs.²³⁰

TABLE 1
LEGAL SERVICES ORGANIZATIONS' INVOLVEMENT
IN CORRECTIONS LITIGATION

| | |
|---------------------------------|-----|
| Ever involved | 55% |
| Involved within past 5 years | 36% |

This table shows that only thirty-six percent of the legal services programs responding to the survey have been involved in any such litigation within the last five years. Interviews with legal services staff attorneys and directors indicate that legal services programs dramatically reduced their involvement in corrections litigation after President Reagan cut the legal services budget in the early 1980s.²³¹ Those programs that have handled corrections cases within the past five years expressed an interest in minimizing or eliminating their future involvement.²³²

230. The results of the survey are likely to inflate the level of involvement in corrections litigation, because legal services programs active in corrections litigation were more likely to respond to the survey than programs that do not handle these cases. For this reason, these statistics should be viewed as the upper-bound estimates of the true level of legal services involvement.

231. See, e.g., Telephone Interview with Pat Arthur, Staff Attorney, Evergreen Legal Services 1 (June 2, 1993) (stating that "[t]he Legal Services Corporation does not provide any funding specifically for the representation of eligible clients in institutions"); Himelein Interview, *supra* note 117, at 3 (after reduction of funding and staff cutbacks in 1980, there was a decision not to allocate resources to prison cases).

232. See Belodoff Interview, *supra* note 109, at 1 (stating that he would not accept another jail case without co-counsel because the last case occupied too much time); Telephone Interview with Robert Gross, Executive Director, New Hampshire Legal Services 1 (Aug. 28, 1991) [hereinafter Gross Interview] (transcript on file with author) (program not inclined to take on any more corrections cases); Rogoff Interview, *supra* note 221, at 3-4 (program no longer involved in corrections cases).

The involvement of programs with specialized projects serving institutionalized persons²³³ has been much more stable than that of general legal services programs. Twenty-eight of the twenty-nine specialized projects ever involved in corrections litigation have been involved within the last five years, as compared with fifty out of the ninety-three programs without specialized projects. Specialized programs handled sixty-three percent of all the cases reported in the survey.²³⁴ Interviews confirm that programs with specialized projects tend to have more substantial involvement in corrections litigation than general legal services programs do, and programs with specialized projects have remained involved in the area despite general funding cuts.²³⁵ Unless someone in the local office has clout and a commitment to corrections cases, most offices pursue only limited involvement.²³⁶ When senior lawyers with expertise in corrections cases leave, legal services' involvement in corrections cases frequently ends.²³⁷

2. *Strategy and Conception of Advocacy*—Generalists and specialists also differ in their conception of their role in providing representation to inmates in corrections cases. These differences emerged both in the comments of individual lawyers, the patterns of case selection, and the types of cases and activities pursued by the organizations. As the data summarized below demonstrate, neither group defines its role in terms of individual service, and for the most part, neither group provides representation to an individual unless his or her case has implications for others similarly situated. Legal services lawyers generally did not describe empowerment as an important goal of their corrections representation. The comments and caseloads of legal services lawyers centered on the institutional change and impact/law reform models of

233. Twenty-four percent of the programs ever involved in corrections litigation and 36% of the programs involved within the last five years have a specialized project for institutionalized persons.

234. This figure was calculated by tabulating the responses to a question concerning the referral source of cases.

235. See Cullen Interview, *supra* note 48, at 8; Gresham Interview, *supra* note 98, at 9; Shen-Jaffe Interview, *supra* note 157, at 3.

236. See Interview with LeAnna Gipson, Director, Monroe County Legal Services, in St. Petersburg, Fla. 5 (July 19, 1991) [hereinafter Gipson Interview] (transcript on file with author) (stating that personal preference of the director was the key factor in the office's previous involvement in corrections cases); Gross Interview, *supra* note 232, at 2 (stating that it takes leadership from the director, a staff attorney, or someone in the community pushing for the program to do corrections cases).

237. In one case, the attorney interested in corrections cases left. When the office's funding was reduced, a decision was made not to allocate resources to a corrections case. See Himelein Interview, *supra* note 117, at 3.

corrections advocacy. However, legal services lawyers and organizational projects specializing in corrections reflected a greater level of involvement in and commitment to an organizational change model of advocacy.

Tables 2 and 3 below analyze the types of corrections cases brought by legal services programs that have been involved in corrections cases within the past five years.²³⁸

These tables indicate that, to the extent that legal services programs are involved in corrections cases, they focus on class actions involving general conditions of confinement in male prisons and jails. Table 2 shows that approximately seventy percent of the programs responding have brought class actions within the past five years.

Table 3 shows over fifty percent of the cases brought by legal services programs involve general conditions of confinement in jails. Legal services programs' involvement in women's and juvenile correctional institutions is much more limited. Unlike many state and local organizations specializing in corrections, legal services programs generally restrict their representation in individual cases unless serious problems affecting other inmates are presented. Only twelve percent of the programs responding have filed any cases involving classification or other administrative hearings. Almost twice as many programs brought injunction actions than damages actions.²³⁹

The interviews corroborate legal services' reluctance to pursue an individual service model of corrections advocacy. Most of the lawyers interviewed stated that their programs did not accept individual cases and usually refused to pursue damages cases.²⁴⁰ The only exceptions were the programs that receive state funding expressly to provide inmates with representation pursuant to court orders remedying inadequacies in the states' provision of access to courts.²⁴¹

238. Many corrections cases fall in more than one of the categories identified in Tables 2 and 3. For example, most class action cases also fall in the categories of cases challenging conditions of confinement and seeking injunctive relief. Many cases challenge both general conditions of confinement and discrete problems, such as medical care.

239. Programs funded by the Legal Services Corporation are required to refer fee-generating cases, and may accept such cases only if they have been refused by the private bar. Love Interview, *supra* note 133, at 3; Sparrow Interview, *supra* note 57, at 4.

240. See Belodoff Interview, *supra* note 109, at 5 (program will not accept damages cases or individual complaints since it handles only systemic problems or problems common to a class, which are usually undertaken as class actions).

241. See Dorsey Interview, *supra* note 32, at 4-5 (noting that the state-funded Maryland Legal Aid Bureau provides representation to inmates in areas of civil

TABLE 2
PERCENTAGE OF LEGAL SERVICES PROGRAMS
BRINGING PARTICULAR TYPES OF CASES
WITHIN THE PAST FIVE YEARS²⁴²

| Projects | General Programs | Specialized |
|--------------------|------------------|-------------|
| Class Actions | 68.6% | 87.5% |
| General Conditions | 68.8% | 8.9% |
| Discrete Issues | 62.7% | 81.3% |
| Injunctions | 78.4% | 84.4% |
| Damages | 39.2% | 31.3% |

TABLE 3
BREAKDOWN OF TYPES OF ISSUES HANDLED BY LEGAL
SERVICES PROGRAMS INVOLVED IN CORRECTIONS
CASES WITHIN THE PAST FIVE YEARS²⁴³

| | Prisons (Male) | Prisons (Male) | Jails (Female) | Juvenile Facilities |
|--|-------------------|-------------------|-------------------|------------------------|
| General Conditions of Confinement | 31.3% | 13.3% | 54.2% | 15.7% |
| Medical Care | 30.1% | 9.6% | 26.5% | 6.0% |
| First Amendment ²⁴⁴ | 21.7% | 2.4% | 1.2% | 2.4% |
| Disciplinary rules and procedures | 22.9% | 7.2% | 9.6% | 6.0% |
| Classification and other administrative hearings | 12.1% | 6.0% | 8.4% | 2.4% |
| Guard brutality | 16.9% | 2.6% | 9.6% | 4.8% |
| AIDS issues | 8.4% | 3.6% | 12.1% | 0.0% |
| Programming ²⁴⁵ | 8.4% | 6.0% | 9.6% | 8.4% |
| Other | 19.3% | 9.6% | 9.6% | 4.8% |

rights, access to courts, inmate grievance proceedings, and civil suits in state court); Sparrow Interview, *supra* note 57, at 5-6 (program investigates every pro se complaint and accepts those with a valid legal claim, supporting facts, and a substantial matter in controversy in terms of dollar value or number of people involved).

242. The percentages in this table do not total 100 because multiple entries are possible.

243. These results present the combined responses of general programs and programs with projects specializing in institutionalized persons. The percentages in this table do not total 100 because multiple entries are possible.

244. This category includes cases involving religious discrimination, censorship, and freedom of association.

245. This category includes claims involving programming activities such as education, recreation, employment, and job training.

The data suggest some significant differences between general legal services programs and those specializing in corrections litigation regarding the types of cases that they handle and the advocacy roles that they perform. Legal services specialists in corrections articulate an institutional change model as their frame of reference for evaluating their role in corrections. Their descriptions of their case selection process, implementation activities, and involvement in non-litigation advocacy reflect this greater emphasis on institutional change.

In contrast, legal services generalists tend to consider corrections cases not in relation to issues of conditions and practices in correctional institutions, but in relation to the problems facing poor people in general. They eschew an identification with correctional institutions and inmates as an important focus of their institutional change activity. This difference in orientation emerges in their approach to case selection, implementation, and involvement in non-litigation advocacy. It also mirrors differences expressed by legal services lawyers in expertise and skills of corrections specialists and generalists.

Table 2 above shows that eighty-eight percent of the specialized programs, as compared to sixty-nine percent of the general legal services programs, handle class action litigation. Specialized programs also reflect a greater level of involvement in general conditions of confinement cases than generalist programs. This data suggests that specialized projects are more likely to emphasize cases that affect large numbers of inmates and challenge institutional patterns, although it does not differentiate between cases pursuing an institutional change and law reform model of advocacy.

The differences in advocacy orientation are more pronounced in the programs' approach to case selection. Table 4 compares the referral source of cases handled by generalists and specialists in corrections litigations. Table 4 demonstrates that over two-thirds of the cases handled by general legal services programs resulted from direct request by an inmate, as compared with forty-six percent of the cases handled by specialized programs. Also, attorney interest was more than twice as likely to account for generalists'

TABLE 4
REFERRAL SOURCE OF CASES HANDLED
BY LEGAL SERVICES

| | General Program | Specialized Program |
|--------------------------------|-----------------|---------------------|
| Court Appointment | 5.4% | 20.3% |
| Civil Liberties Organization | 3.8% | 19.0% |
| Pro Bono Referral Organization | 0.1% | 1.0% |
| Attorney Interest | 16.1% | 7.1% |
| Client Request | 67.7% | 46.0% |
| Other | 7.0% | 6.8% |

involvement in corrections cases than involvement of specialists.²⁴⁶ Specialized programs were four times as likely as general programs to become involved as a result of court appointment or referral by a civil liberties organization.

Interviews demonstrated that programs with specialized projects serving inmates are more likely to articulate an affirmative and proactive approach to selecting and pursuing corrections cases. Lawyers and programs specializing in corrections discussed case selection in relation to the potential impact of a particular case on large numbers of inmates or on institutional practices and conditions generally.²⁴⁷ They also describe a greater

246. Interviews confirmed the significance of attorney interest in determining legal services involvement in corrections cases. See Gross Interview, *supra* note 232, at 2 (“[E]specially since there is such a fight for money within legal services, involvement in corrections takes leadership from the director, staff attorney, or someone in the community pushing for the program to do corrections work. There aren’t clients walking in the door, so someone else with power must [push to become involved] in corrections.”); McBride Interview, *supra* note 222, at 2 (extent of handling of corrections cases depends to some degree on expertise and interest of staff, in contrast to income related areas, where if they lost their main experts in that field they would actively look for someone to replace those people).

247. See, e.g., Midgely Interview, *supra* note 117, at 2 (expressing concern with improving conditions and affecting as many people as possible). Programs with projects or attorneys specializing in corrections litigation are more likely to encourage lawyers generally to combine individual service work with impact litigation and law reform. See, e.g., McBride Interview, *supra* note 222, at 1 (stating that staff lawyers are expected to devote 50% of their time to impact litigation); Shen-Jaffe Interview,

institutional presence in the legal and correctional community on corrections issues.

In contrast, generalist lawyers and legal services programs rejected an activist approach to corrections advocacy, and expressed deep ambivalence over the organization's involvement in corrections litigation. Lawyers perceived a general desire to minimize or avoid involvement in corrections cases.²⁴⁸ They developed no special approach to selecting corrections cases and processed inmates' requests for representation through the general intake process, although inmates typically requested representation in writing or over the telephone rather than in person.²⁴⁹ Table 4 shows that general legal services programs were considerably less likely to receive referrals from other civil liberties organizations. Legal services lawyers described their approach to case selection as reactive and scatter-shot: because legal services offices usually represent only those people who seek their assistance, they generally have not been very effective in representing institutionalized populations.²⁵⁰ Heavy caseloads and "lack of control over intake limit [many] programs' capacity to do anything other than respond randomly to needs."²⁵¹

The current process for establishing legal services priorities institutionalizes generalists' tendency to rank corrections cases

supra note 157, at 1 (state support work is integrated into the program instead of farming out complex cases to a support center); *cf.* KATZ, *supra* note 1, at 102-03 (discussing the significance of changing caseload priorities toward impact litigation in redefining Legal Aid organizations as independent guardians of poverty rights rather than community service providers).

248. See Gross Interview, *supra* note 232, at 1 (stating that two active prison cases were enough and that he was not inclined to take on any more corrections cases); Himelein Interview, *supra* note 117, at 2 (legal services should represent prisoners in family law and landlord/tenant matters as it does other poor people, but not in Eighth Amendment cases because of a lack of resources); McBride Interview, *supra* note 222, at 2 (reporting that program brought a local jail conditions class action two years ago, and has brought one since, even though there have been complaints because the program is not devoting time to other priorities).

249. Berry Interview, *supra* note 214, at 3 (inmates know about the program and call collect); McBride Interview, *supra* note 222, at 2 (cases processed through meetings held to decide whether to accept major cases are likely to take a long time or require greater resources).

250. PENNSYLVANIA BAR ASS'N, REPORT OF THE PENNSYLVANIA BAR ASS'N TASK FORCE FOR LEGAL SERVS. TO THE NEEDY, 30 (1990) [hereinafter BAR REPORT] ("Legal services program directors testified that they have to reject requests from [prisoners for legal help. . . .] [one director stated] 'I've got letters on my desk from prisoners who have got real legal problems; the letters aren't answered.'" Berg Interview, *supra* note 142, at 4.

251. McBride Interview, *supra* note 222, at 1.

in relation to other poverty law issues and virtually insures that corrections will remain a low priority for most legal services offices.²⁵² Since 1980, legal services programs have suffered a dramatic reduction in funding and staffing, forcing many programs to restrict their service to emergency needs.²⁵³ As a result, most legal services programs have limited their representation to emergency needs involving denial of welfare benefits, lockouts by landlords, and domestic violence.²⁵⁴ Moreover, legal services programs are required by statute to establish programmatic priorities through a local board with representatives of the client population, the community, and the staff. Inmates rarely participate in this process of priority setting, and corrections issues tend to be low on the priority list for legal services programs.²⁵⁵ Fifty percent of the legal services programs not currently involved in corrections litigation cite other priorities as the main explanation for their lack of involvement. One program director asks, “[i]f prisoners are fed, clothed, and cared for, how can we justify serving them and not the homeless?”²⁵⁶ Another is more blunt: “[l]ots of people in general are not being served. With such limited resources, one must decide who to let die.”²⁵⁷

In addition, Legal Services Corporation funds are allocated based on census information concerning poverty levels in the area. Institutionalized persons are not included in the census count that is used to determine levels of “basic field funding.”²⁵⁸ Consequently, most programs will not appropriate field office

252. A campaign to change the funding formula is currently underway by the Institutions and Alternatives Section of the National Legal Aid and Defender Association. Arthur Interview, *supra* note 231, at 1.

253. For example, Pennsylvania reports a reduction in legal services attorneys of almost 31% and a reduction in paralegals of almost 26%. BAR REPORT, *supra* note 250, at 9. See KESSLER, *supra* note 1, at 9 (stating that by 1984, Legal Services Corporation’s budget was cut from \$321 million to \$241 million); Ronald Sullivan, *Poverty Lawyers Swamped by Work*, N.Y. TIMES, July 24, 1989, at B3 (stating that programs are so swamped that some “perform the legal equivalent of triage—taking the most urgent and serious cases”); Mary Thornton, *Legal Aid Cuts Found to Have Drastic Effects*, WASH. POST, Nov. 13, 1983, at A9 (stating that programs are so swamped that some turn away many eligible potential clients).

254. See, e.g., Cullen Interview, *supra* note 48, at 5 (program’s priorities focus on basic necessities of food, health, housing, income, and safety); McBride Interview, *supra* note 222, at 1 (same).

255. See Berg Interview, *supra* note 142, at 1; Shen-Jaffe Interview, *supra* note 157, at 4.

256. Himelein Interview, *supra* note 117, at 2.

257. Gipson Interview, *supra* note 236, at 3.

258. See ARTHUR, *supra* note 32, at 1 n.1.

money to represent institutionalized clients because this would further decrease the resources available for poor people who are counted in the funding formula.²⁵⁹ "In most states, the legal services community is localized and programs are small and geographically based. There is no mechanism for state-wide priority setting that diverts resources to special client populations, so there are no prison units."²⁶⁰ Ambiguity over whether inmates should be served by the legal services program representing their permanent residence or their temporary residence in the corrections institution further undermines the incentive to accept inmates as clients.²⁶¹

3. *Expertise*—Differences in the nature and extent of expertise in corrections and complex litigation also contribute to the higher rate and scope of involvement by legal services specialists. Legal services programs with a specialized corrections project typically have lawyers with corrections background and expertise.²⁶² In a number of programs, these lawyers also had substantial experience and expertise in complex litigation.²⁶³ Expertise reportedly contributes significantly to programs' continued involvement in corrections litigation by creating a constituency within the organization for devoting resources to corrections advocacy²⁶⁴ and reducing the start-up costs of taking on a corrections case.²⁶⁵ Senior staff lawyers or program directors with considerable background and experience in corrections described themselves as having the clout to continue their involvement in these cases and to obtain resources necessary for experts, discovery, and monitoring.²⁶⁶

259. Shen-Jaffe Interview, *supra* note 157, at 5.

260. *Id.*

261. Most institutions are in rural areas, but inmates typically are from urban centers covered by different programs. Dick Taylor Interview, *supra* note 161, at 5.

262. Indeed, every program that identified itself as having some specialization in corrections had at least one senior staff attorney with considerable experience in corrections litigation and advocacy.

263. *See, e.g.*, Belodoff Interview, *supra* note 109, at 1 (attorneys sometimes work on corrections cases with him to learn about complex litigation); Berry Interview, *supra* note 214, at 2 (initially drawn into corrections litigation because he had more trial experience).

264. *See supra* note 236.

265. *See* Gross Interview, *supra* note 232, at 2 (describing difficulty of moving staff into the corrections area, with the exception of lawyers currently specializing in corrections); *supra*, text accompanying notes 105–07 (describing how the expertise of national organizations promotes efficiency).

266. *See supra* note 109.

Many legal services lawyers, however, particularly those in small, rural programs, likely have little or no experience with corrections cases or complex litigation. Most programs cannot afford to specialize in corrections cases, and they cannot devote the time and resources necessary to develop expertise in these cases.²⁶⁷ Among the legal services programs surveyed, limited expertise is cited by forty-seven percent of the programs not involved in corrections cases as a reason for their noninvolvement. The cases that legal services lawyers typically handle do not require the development of skills in complex litigation.²⁶⁸ "The typical welfare case involves the interpretation of facts and regulations. Most legal services lawyers have no experience with experts or class [action] cases. This is a deficit of drawing from legal services to handle corrections cases."²⁶⁹ Moreover, legal services programs generally face obstacles to recruiting qualified staff and a relatively high turnover rate among their lawyers.²⁷⁰

4. *Activities Devoted to Institutional Change*—Legal services specialists in corrections differed considerably in their emphasis

267. These findings are consistent with those of other studies of legal services programs. See KESSLER, *supra* note 1, at 50 (stating that, as a result of high volume and caseload policies, lawyers "have little time to devote to any particular case"). Kessler summarizes the literature exploring the factors affecting program behavior of legal services. These factors include characteristics of individual staff members, recruitment criteria, evaluation measures, caseload policies, and training. Kessler suggests that the organizational environment of programs interacts strongly with other factors to affect organizational activity. *Id.* at 20–28.

268. Soler Interview, *supra* note 78, at 15 ("Legal services lawyers often are less experienced in complex litigation. Lawyers five to ten years in legal services may not have taken a deposition or done a major document production. Many states have law reform units for those who rise to the top."); Stalker Interview, *supra* note 117, at 1 (stating that regular local offices lack the expertise necessary for corrections cases).

269. Gresham Interview, *supra* note 98, at 5.

270. See, e.g., BAR REPORT, *supra* note 250, at 13 ("The drastic funding cuts to legal services have resulted . . . in . . . low pay, difficulty in recruiting, and a high turnover rate of staff, with a corresponding further decline in service."); Bellow, *supra* note 23, at 52 (stating that, due to low salaries and heavy caseloads that result from underfunding, the tendency is to throw poorly trained and inexperienced lawyers into frustrating situations); Peter Kendall, *Indebted New Lawyers Shun Public Service*, CHI. TRIB., Jan. 20, 1991, § 2, at 1 (describing the difficulty in recruiting law school graduates for public interest work); Thornton, *supra* note 253, at A9 (stating that the number of lawyers in staff offices decreased by about 30% between January 1981 and January 1983, with many programs losing their most experienced lawyers); Sandra Torry, *Legal Aid Program Struggles to Attract Top Candidates for Low Pay*, WASH. POST, Dec. 17, 1990, at F5 (describing difficulties in recruiting qualified staff attorneys). John Gresham noted that high staff turnover among legal services offices is typical, and that many leave after two or three years. Gresham Interview, *supra* note 98, at 4.

on activities specifically directed at organizational change. Lawyers with expertise in corrections described implementation of outstanding decrees as a central aspect of their involvement in corrections advocacy.²⁷¹ Indeed, experienced corrections advocates described their early involvement in corrections litigation as naive in its neglect of the importance of remedial enforcement.²⁷² Lawyers operating within the demands of generalist legal services programs indicated that legal services provides little support for enforcement and monitoring.²⁷³ Even experts in corrections reported difficulties in meeting the demands of enforcement. Neil Himelein states that his monitoring efforts were successful for about a year, but that now he just skims inmate correspondence and the documents provided by the corrections department.²⁷⁴ Bob Stalker of Evergreen Legal Services reports that no one is monitoring the decree in a major prison case because there are no attorneys left in the program.²⁷⁵

Legal services specialists in corrections differed markedly from generalists in their reported involvement in non-litigation advocacy. Corrections specialists were considerably more likely to engage in administrative and legislative advocacy.²⁷⁶ In contrast, legal services programs without specialized units handling corrections cases generally do not become active in linking litigation to broader strategies of corrections reform. Table 5 below sets forth the extent of nonlitigation activity by legal services programs involved in corrections litigation in the last five years.

271. Cullen Interview, *supra* note 48, at 5.

272. Berry Interview, *supra* note 214, at 5 (describing the frustration of initially high expectations); Himelein Interview, *supra* note 117, at 4 (describing himself as guilty of naively thinking the Department of Corrections would comply in good faith).

273. Berry Interview, *supra* note 214, at 2.

274. Himelein Interview, *supra* note 117, at 6.

275. Stalker Interview, *supra* note 117, at 8.

276. *See, e.g.*, Belodoff Interview, *supra* note 109, at 5 (administrative advocacy includes: trying to administratively resolve medical treatment complaints; participating in committee appointed by governor to study corrections system; and attempting to expand corrections advocacy beyond lawsuits where possible); Cullen Interview, *supra* note 48, at 5 (describing the importance of administrative advocacy); Love Interview, *supra* note 133, at 3 (describing involvement in organizing client community and church group support).

TABLE 5
LEGAL SERVICES' PARTICIPATION IN NONLITIGATION
ACTIVITIES RELATED TO CORRECTIONS

| | |
|--|-----|
| Programs Without Specialized Corrections Project | 17% |
| Programs with Specialized Corrections Project | 59% |
| Legal Services Programs Generally | 34% |

Only eight of the forty-six general legal services programs that have handled corrections cases in the last five years report involvement in any nonlitigation activity. These results provide further support for the conclusion that repeat players are more likely to become involved in broader strategies of reform than one shot players.²⁷⁷ Restrictions on lobbying and other political activities, heavy caseloads, and a desire to maintain a low public profile, particularly in corrections matters, help explain legal services' limited involvement in nonlitigation advocacy.²⁷⁸

B. Politics and Poverty: Compounding the Constraints on Effective Corrections Advocacy

Funding and political constraints further limit the capacity of legal services offices to play a significant role in the corrections arena. Legal services offices frequently are funded by the state and face strong pressure not to sue county and local officials.²⁷⁹ As one lawyer stated, "[i]t is more difficult to raise basic operating funds for controversial work the closer you are to home."²⁸⁰

277. See Galanter, *supra* note 12, at 100-03, 145-46.

278. Sparrow Interview, *supra* note 57, at 3.

279. Stalker Interview, *supra* note 117, at 1 (stating that politics causes at least one Washington office to avoid jail cases because the program fears negative consequences from the city, based on other programs' experience). Alabama Legal Services steers away from these cases because they are politically difficult. Atlanta Legal Services had their funding cut in response to their acceptance of a jail case. This makes them "think twice before they would do it again." Ortega Interview, *supra* note 57, at 5.

280. Dick Taylor Interview, *supra* note 161, at 5.

Because general legal services programs depend upon local officials for funding and cooperation in their non-corrections advocacy, local political pressure is particularly effective in discouraging high profile involvement in corrections cases.²⁸¹

Resource constraints further limit the capacity of legal services offices to become involved in the type of complex, lengthy litigation frequently required to pursue corrections claims.²⁸² Almost half of the legal services programs that do not handle corrections cases attribute their lack of involvement to the attorney time required by these cases. Size, complexity, and expense of corrections cases, also emerging from the survey as significant discouraging factors, compound the problem of inadequate staff and resources.²⁸³ Legal services offices face overwhelming demands for representation, and thus resist involvement in complex cases that will tie up lawyers in protracted proceedings: "[t]hese cases are so labor intensive that they threaten to swallow up the office's ability to serve the noninstitutionalized population. Corrections cases have tied up three out of the eighteen lawyers . . . for the entire state."²⁸⁴ "A

281. There are several ways in which the local environment constrains legal activity. For example, local commissioners can threaten to cut the legal services budget in response to the initiation of reform litigation. See KESSLER, *supra* note 1, at 56-59.

This Article does not attempt to analyze rigorously the factors accounting for differences among legal services programs in their involvement in corrections litigation. The presence of a senior staff attorney committed to corrections seemed to represent the most common characteristic of general programs with substantial involvement. Other studies do suggest considerable variation among legal services programs in their level of involvement in complex, law-reform oriented activity. See HANDLER, *supra* note 13, at 17-47 (discussing the variety of "legal rights activities" engaged in by different organizations); KATZ, *supra* note 1, at 65-70 (discussing the differences in the activities engaged in by Legal Services and Legal Aid); KESSLER, *supra* note 1, at 98-103 (discussing the relationship between lawyers' preferences for reform or service oriented activities and the actual mix of activities engaged in by legal services programs). Kessler ranked five programs on a "proactive-reactive" continuum and found that the large urban programs spent considerably more time dealing with problems requiring reform strategies than the suburban or rural programs. *Id.*

282. Belodoff Interview, *supra* note 109, at 1 (stating that he would not file a new jail case without co-counsel because the last one occupied his time for a six to seven week period); Sanchez Interview, *supra* note 117, at 4 (stating that many jail complaints show that conditions are ripe for major litigation, but that his program does not have the resources to take additional cases).

283. See *infra* notes 301, 328, 335 (discussing the discouragement of private firm involvement in corrections litigation as a result of these factors).

284. Berry Interview, *supra* note 214, at 2.

program needs to be able to handle cases without pulling anyone completely away from their regular caseload."²⁸⁵

In addition, legal services lawyers cited the high costs associated with corrections litigation as a factor discouraging involvement. Seventy-two percent of the legal services programs handling corrections cases within the last five years indicate that the availability of funding for experts significantly limits the capacity of their offices to handle corrections cases. Many of those interviewed indicated that resource constraints dramatically limit their ability to accept and prosecute corrections cases.²⁸⁶ Moreover, most legal services programs are located in metropolitan areas, far from prisons, and legal services offices rarely have funding for extensive travel.²⁸⁷

In sum, repeat player status predisposes legal services lawyers to identify with corrections issues and pursue a proactive, advocacy role that emphasizes institutional change. However, the overwhelming majority of legal services programs are generalists who tend to resist substantial involvement in corrections advocacy and limit their activity to a reactive, case-specific role. Structural, financial, and geographic factors also limit the capacity of legal services specialists to play an institutional change advocacy role.

VI. PRIVATE FIRMS

The controversy over the appropriate locus of public interest representation centers upon the role that private practitioners can and should play. Supporters of private firm involvement point to the potential for high quality, individual service that private practice offers. They also put forth the assumption that firms offer greater independence from political interference and greater accessibility because of their decentralized and highly diverse

285. *Id.* The labor intensive character of corrections cases may account for the fact that the size of the legal services office correlates with the level of involvement in corrections litigation. Seventy-five percent of the programs involved in corrections litigation have more than five attorneys on staff.

286. *See supra* note 282.

287. Shen-Jaffe Interview, *supra* note 157, at 5 (stating that time and money needed for travel creates access problems). The Legal Services Corporation investigated a staff attorney specializing in corrections because of her extensive travel expenditures. *Id.* Of those programs that have been involved in corrections litigation within the past five years, the overwhelming majority are located within a major metropolitan area. *See infra* Table 14.

geographic locations.²⁸⁸ Supporters of a staff attorney model frequently minimize the potential for private practitioners to play a significant role in corrections litigation and in public interest advocacy generally.²⁸⁹ They portray private practitioners as exhibiting limited interest in pursuing these cases and a narrow, service-oriented conception of their advocacy role. Corrections specialists often presented this negative conception of private firm involvement as an explanation for their limited efforts to recruit private firms as co-counsel in corrections litigation.²⁹⁰

The interviews and survey results suggest that by polarizing the issue of private firm involvement, the debate misses the more promising question of how firms can best contribute to a *network* of representation for inmates in corrections cases. Although the data confirms the sense that most firms currently limit their involvement in corrections advocacy, assume a reactive, service-oriented posture, and resist repeat player status, a small but significant group of private firms devotes considerable resources and time to these cases. These firms do become repeat players, and, through financial support and collaboration with corrections specialists, bring successful and significant corrections litigation that could not otherwise proceed. As in legal services, interest and commitment by lawyers with leadership roles in the firm

288. See Saltzman, *supra* note 5, at 1174-75.

289. See Cramton, *supra* note 6, at 550-54 (discussing the benefits of the activities of legal services lawyers); Dooley, *supra* note 6, at 198-99 (arguing that private lawyers may be unwilling to accept cases involving corrections litigation or may not be knowledgeable about these types of cases). Many of the legal services and public interest practitioners exhibited a deep skepticism over the possibility of effective public interest advocacy by private practitioners. Some of this skepticism can be traced to the Reagan assault on legal services, which proceeded through proposals to replace staffed legal services programs with *judicare* and other sparsely staffed models that relied heavily on private firm involvement. See LUBAN, *supra* note 3, at 298-300.

290. See, e.g., Barkow Interview, *supra* note 172, at 9 (observing that private law firms handle corrections cases differently than his office does because they are in business to make money, and that everyone would be better off if his organization handled all of these cases); Himelein Interview, *supra* note 117, at 1 (observing that bigger firms are worried about keeping clients happy, even as they try to justify non-involvement in corrections cases using less self-interested terms such as conflicts of interest); Stalker Interview, *supra* note 117, at 2 (stating that program usually does not refer corrections cases to private firms because they lack experience and interest). Esther Lardente, an expert in private firm involvement in *pro bono* activity, reported that legal services lawyers exhibit enormous resentment and fear about referring cases to the private bar. "It is like pulling teeth to get people to send cases." Interview with Esther Lardente, Consultant, American Bar Association, in Washington, D.C. 5 (June 13, 1991) [hereinafter Lardente Interview] (transcript on file with author).

emerge as a recurring characteristic of the firms that play this important role in corrections litigation.

*A. The Norm: Limited, Sporadic,
and Reactive Involvement*

1. *The Extent of Private Firms' Current Involvement*—The extent of private-firm involvement in corrections cases varies widely depending on the size, location, and pro bono policies of the firm. Large firms with some form of a pro bono program are significantly more likely to handle corrections cases, largely due to their acceptance of court appointments in pro se cases.²⁹¹ With some important exceptions, however, large private firms generally do not handle major institutional litigation. To the extent that private firms are involved in such litigation, they tend to be small firms with lawyers who are heavily identified with the public interest community.

Table 6 shows the results of the survey concerning the level of firms' past and current involvement in corrections litigation.

TABLE 6
LAW FIRMS' INVOLVEMENT IN CORRECTIONS LITIGATION

| | Ever Involved | Last 5 Years |
|-------------------------|---------------|--------------|
| Large Firms | 64.4% (47) | 58.9% (43) |
| Randomly Selected Firms | 4.8% (4) | 0.0% |

These figures suggest that the level of involvement is significantly greater among large law firms with a pro bono program than among randomly-selected firms.²⁹² Approximately two-thirds of the large firms responding to the survey indicated that they have been involved in at least one corrections case within the past five years. This figure is only fifteen percent of the total sample,

291. Associates at such firms are likely to devote a considerable amount of time to those cases. See *infra* note 318 and accompanying text.

292. The results of the survey indicate that the level of private bar involvement has not changed significantly over time.

however, and likely overstates the proportion of firms engaged in active corrections litigation. The relatively low response rate of firms to the survey and the absence of participation by randomly selected firms also suggests that the survey results overstate the extent of involvement by private firms in corrections cases.²⁹³ The level of involvement reported by the random pool of firms is extremely low—none reported any involvement in corrections litigation within the past five years. In addition, lawyers involved in recruiting private practitioners to handle corrections cases indicate that private-firm involvement among large firms is much more limited than the survey results indicate, with some notable exceptions. Recruiters characterized corrections cases as among the most difficult to refer to private lawyers, and observed that very few firms volunteer to accept these cases.²⁹⁴ Most of the legal services private bar involvement coordinators interviewed do not even refer corrections cases to private firms.²⁹⁵

Corrections specialists and others who have attempted to recruit private firms identify small firms consisting of lawyers with prior public interest experience and commitment as the primary area of private sector involvement in corrections litigation.²⁹⁶ In areas with an active pro bono presence, such as Detroit, San Francisco, and North Carolina, there is a network of small public interest

293. I received at least 10 letters and telephone calls from firms indicating that they were not responding to the survey because they did not handle corrections cases.

294. See, e.g., McBride Interview, *supra* note 222, at 3 (prisoners' cases are refused by private attorneys more frequently than other types, even those with a very good chance of generating attorneys' fees); Telephone Interview with Christine McDermott, Director, Delaware Volunteer Legal Services 8 (July 23, 1991), [hereinafter McDermott Interview] (transcript on file with author) (stating that firms often do not like to take prison cases because they are time consuming and the clients are often difficult to work with); Interview with Lea Witte, Director, Chicago Volunteer Legal Service Foundation, in Chicago, Ill. 3 (Aug. 14, 1991) [hereinafter Witte Interview] (transcript on file with author) (corrections cases involving prison conditions are difficult to "sell" to attorneys).

295. See Telephone Interview with Ayres Gardner, Director, Pro Bono Project of Georgia 4 (July 22, 1991) [hereinafter Gardner Interview] (transcript on file with author) (stating that she has been unable to find any private practitioners willing to accept corrections referrals); Telephone Interview with Scott Manion, Director, Florida Legal Services Private Bar Involvement Program 3 (Aug. 14, 1991) [hereinafter Manion Interview] (transcript on file with author) (program does not refer corrections cases); Interview with Carl Poirot, Director, San Diego Volunteer Lawyer Program, in San Diego, Cal. 4 (July 5, 1991) (same); Witte Interview, *supra* note 294, at 4 (same).

296. See Alexander Interview, *supra* note 74, at 6 (NPP co-counsels almost exclusively with lawyers from small firms with public interest background); Sanchez Interview, *supra* note 117, at 3 (most firms on Private Attorney Involvement panel are small firms); Shen-Jaffe Interview, *supra* note 157, at 3 (small firms consisting of prior legal services attorneys); Sparrow Interview, *supra* note 57, at 5 (most co-counsel comes from firms of three or four attorneys).

oriented firms involved in corrections litigation. Corrections litigators frequently mention the same small group of committed and expert private practitioners engaged in this area of litigation.²⁹⁷

An analysis of the breakdown of private firm involvement in major prison cases also suggests greater involvement by small rather than large private firms, at least in major institutional litigation. Out of the forty-one states listed in the 1990 *National Prison Project Status Report on the Courts and the Prisons* as having institutions or systems under court order as of January 1990, large firms represented plaintiffs in three states plus the District of Columbia. In contrast, small civil rights firms were involved in twenty-nine states.²⁹⁸

Interviews with both private-firm lawyers and corrections specialists suggest that private firms that have been involved in a substantial corrections case tend not to be repeat players,²⁹⁹ and that many of those who have been involved in major litigation in the past have reduced or terminated their involvement. One quarter of the firms involved in corrections cases handled only one such case within the past five years, and over one half have been involved in three or fewer cases during that time period. Many of the partners at large firms who have handled corrections litigation indicated that they would be reluctant to take another such case.³⁰⁰ A surprising number of lawyers who have devoted major portions of their legal careers to corrections litigation have drastically curtailed their involvement, left the field, or plan not to accept any new cases.³⁰¹

Advocates of a pro bono model of public interest representation argue that private firms afford greater access to representation because they exist in remote areas that otherwise lack any practicing attorneys.³⁰² However, the results of the present study

297. These names include David Rudovsky in Philadelphia, Gaston Faire in North Carolina, Bill Sheppard in Florida, Alice Benheim in Arizona, Bill Turner, Donna Brorby, Michael Bien and Sanford Rosen in San Francisco, and Bill Quigley in Louisiana.

298. See NPP STATUS REPORT, *supra* note 73, at 1-5.

299. See Galanter, *supra* note 12, at 116.

300. See *infra* notes 301, 329.

301. Comments along these lines were made by many of those interviewed. See, e.g., Knowles Interview, *supra* note 109, at 1. Interview with David Richmond, Partner, Pepper, Hamilton & Scheetz, in Philadelphia, Pa. 9 (July 29, 1991) [hereinafter Richmond Interview] (transcript on file with author); Interview with William B. Turner, Partner, Turner & Brorby, in San Francisco, Cal. 1 (July 19, 1991) [hereinafter William Turner Interview] (transcript on file with author).

302. See *supra* note 288 and accompanying text.

suggest that private firms rarely provide such representation in non-metropolitan areas. The overwhelming majority of the firms likely to be involved in complex pro bono litigation are located in a major metropolitan area.³⁰³ Lawyers involved in recruiting private firms for pro bono cases described Washington D.C., New York City,³⁰⁴ San Francisco, Detroit, and North Carolina as the areas with considerable private bar involvement in corrections cases. Table 7 shows the location of large private firms involved in corrections litigation within the past five years.

TABLE 7
LOCATION OF LARGE PRIVATE FIRMS HANDLING
CORRECTIONS CASES WITHIN THE PAST FIVE YEARS

| | |
|-----------------------|-----------------------|
| Metropolitan Area | 100.0% |
| Non-metropolitan Area | 0.0% |
| Northeast | 53.5% |
| South | 9.3% |
| West | 11.7% |
| North Central | 25.6% |
| TOTAL | 100.1% ³⁰⁵ |

Every large firm involved in corrections litigation within the past five years is located in a major metropolitan area. This finding is consistent with the comments of corrections litigators, who describe the difficulty of finding lawyers willing to handle corrections cases in rural areas.³⁰⁶ The rural states were described as having relatively low levels of private-bar involvement in corrections litigation and in pro bono cases generally.³⁰⁷ With the exception of North Carolina and southeastern Florida, the level

303. As of 1989, 52% of the 500 largest law firms were located in the 10 largest cities in the United States. Ninety-seven percent of the large firms identified as having a pro bono program were located in major metropolitan areas.

304. Although a significant percentage of New York firms represent inmates in cases referred by the courts, interviews and the survey data suggest that New York firms have not provided significant representation in complex, fact intensive cases. See Boston Interview, *supra* note 98, at 15 (stating that private bar involvement in New York City is primarily pro bono involvement in individual cases); Bronstein Interview, *supra* note 84, at 2 (stating that New York firms are difficult to recruit, and that it is rare for big firms to become involved in fact intensive cases).

305. The total exceeds 100% because figures were rounded off to the nearest tenth.

306. Bronstein Interview, *supra* note 84, at 7; Soler Interview, *supra* note 78, at 9.

307. Lardente Interview, *supra* note 290, at 4.

of private-bar involvement in corrections litigation in the South was described as particularly low.³⁰⁸

2. *A Minimalist Approach to Individual Service*—Private practitioners that do provide representation in corrections cases generally articulate a reactive, individual service orientation. Frequently, lawyers define their involvement in reaction to the needs and demands of courts seeking assistance in pro bono cases. They do not identify with either corrections as a problem or with inmates as a constituency. Indeed, private firms generally exhibit an interest in limiting their involvement, particularly regarding experienced litigators and out-of-pocket expenses.

The results of the survey of firms suggest that law firms are less involved in class action litigation concerning general conditions of confinement than are legal services programs or law school clinics.³⁰⁹ Although forty-eight percent of the large firms who reported handling corrections cases within the past five years have handled at least one class action, only fourteen percent of the corrections cases brought by large firms surveyed were class actions. Moreover, of those firms currently involved in corrections litigation who expressed interest in future involvement, only eighteen percent identified general conditions cases and eleven percent identified class actions as areas of future involvement.

Data also show that law firms assume a reactive posture in defining their involvement in corrections cases.³¹⁰ Of the firms

308. Lawyers from the Southern Center for Human Rights noted a small core of interested lawyers in Georgia but virtually no interest among large firms in Georgia, or the private bar generally in Alabama and Louisiana. Bright Interview, *supra* note 176, at 4; Ortega Interview, *supra* note 57, at 3. The legal panel for the ACLU affiliate in Mississippi currently is inactive because of the lack of any interest shown by the local bar. Telephone Interview with Deirdre Janney, Executive Director, ACLU of Mississippi 2 (Aug. 2, 1991) [hereinafter Janney Interview] (transcript on file with author).

One lawyer in a private Atlanta firm who conducted a study of potential firm involvement in death penalty cases noted the low level of current pro bono involvement and the social stigma attaching to those who represent criminals. He also described Texas's pro bono involvement as a disgrace. Kinnard Interview, *supra* note 48, at 2.

309. The survey results concerning the breakdown of types of cases handled by firms are of limited value due to the low response rate of firms to the questions concerning the character of their case load. Because they are consistent with the qualitative data and with the results of other studies, however, they are suggestive of the nature of firm involvement in corrections cases.

310. See Knowles Interview, *supra* note 109, at 1 ("Taking a case is more a function of happenstance than strategy—a letter from an inmate or a call from a judge."); Love Interview, *supra* note 133, at 7 (stating that private practitioners "don't know a good case from a bad one"); cf. Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 375–78 (1988) (stating that creativity and strategic decisionmaking in

which have not represented inmates within the last five years, sixty-two percent of the large firms and sixty-six percent of the randomly-selected firms cite "no requests for representation" as a reason for their lack of involvement. Private firms generally become involved in corrections cases via court appointment.³¹¹ Table 8 shows the referral source of cases handled by large firms responding to the survey.

TABLE 8
REFERRAL SOURCE OF CORRECTIONS CASES
HANDLED BY PRIVATE FIRMS³¹²

| | |
|--------------------------------|-------|
| Court Appointment | 57.0% |
| Civil Liberties Organization | 14.1% |
| Pro Bono Referral Organization | 11.1% |
| Attorney Interest | 7.4% |
| Client Request | 9.6% |
| Other | .7% |

The survey results indicate that fifty-seven percent of all the cases handled by large firms resulted from court appointment, and that sixty-one percent of the firms handling corrections cases accept corrections cases through court appointment.

Court-appointed cases tend to involve individuals seeking damages or limited injunctive relief. Cases received through court appointment are unlikely to address systemic problems, especially because courts do not attempt to screen cases for referral based on their potentially significant impact. Courts' primary goal in

case selection are confined largely to cases brought by public interest or federally funded legal services lawyers).

311. Interview with Richard Johnstone, Partner, Hale & Dorr, in Boston, Mass. 4 (Aug. 17, 1991) [hereinafter Johnstone Interview] (transcript on file with author) (firm accepts corrections cases exclusively through court appointment); Kinnard Interview, *supra* note 48, at 1 (appointed by magistrate pursuant to requirement that members of the Southern District accept court appointments in pro bono cases); Interview with Beth Parker, Partner, McCutchen, Doyle, Brown & Enersen, in San Francisco, Cal. 4 (July 19, 1991) [hereinafter Parker Interview] (transcript on file with author) (reporting that firm will never turn down a pro bono request from a federal judge); Richmond Interview, *supra* note 301, at 1 ("Judge's referral is the firm's exclusive form of involvement in corrections cases.").

312. Because no firms in the random pool have been involved in corrections litigation within the last five years, this table presents the responses of firms in the large-firm pool only.

appointing counsel is to provide representation in cases presenting exceptional circumstances such as potentially meritorious claims presenting complex evidentiary issues, a plaintiff who is unable to investigate the case adequately, or a plaintiff who is particularly incompetent.³¹³ One clerk surveyed cited this fact as a possible explanation for the difficulty in finding private firms willing to take these cases. Indeed, lawyers reported that practitioners avoid joining the Southern District of Georgia because of its requirement that members accept appointments in prisoners' pro se cases.³¹⁴

In fact, the consensus among both the private practitioners and the public interest lawyers interviewed is that most firms drafted by the courts to handle these cases are reluctant participants who want to minimize the time and resources they devote to these cases.

The most common request I get is from attorneys in private law firms who cannot devote the time to the case. They must bill hours. I get a lot of calls from attorneys around Georgia and Alabama who say they want to do as little as possible on a case because they "don't have the time or the expertise to do the job."³¹⁵

The corrections specialists described numerous experiences with law firms who take a case and then do not follow through³¹⁶ or who drop out of litigation at a late stage.³¹⁷ Large firms involved in corrections cases most commonly assign them to young

313. Out of 35 districts that responded to a survey conducted of representative district and appellate clerks, 20 have some program or procedure for appointing private counsel in pro se prisoner cases. Districts with such a program frequently consider the merit and complexity of the prisoners' rights case and the competence of the plaintiff to present that case as the criteria for appointment of counsel. *See, e.g.,* Cooper v. Sheriff, Lubbock County, 929 F.2d 1078, 1084 (5th Cir. 1991); Hodge v. Police Officers, 802 F.2d 58, 61-62 (2d Cir. 1986). Only one of the districts considers the number of inmates affected or the importance of the issue as a factor in determining whether to appoint counsel. *See also* Eisenberg, *supra* note 34, at 451-54 (providing an overview of court appointed counsel programs for prisoners).

314. Kinnard Interview, *supra* note 48, at 2.

315. Ortega Interview, *supra* note 57, at 1; *see also* Love Interview, *supra* note 133, at 5 (stating that he receives many phone calls from private lawyers saying that they cannot take the case).

316. Specter Interview, *supra* note 192, at 1.

317. Barkow Interview, *supra* note 172, at 9 (stating that when they co-counsel with large firms, Massachusetts Correctional Legal Services ends up doing all the work); Love Interview, *supra* note 133, at 5 (telling of an example where private firm co-counsel withdrew two weeks before trial).

associates who lack the credibility, experience, and judgment of seasoned litigators.³¹⁸ All of the expert corrections litigators who provide technical assistance in response to telephone inquiries report that many of the calls are from junior associates who have been “cut loose” with a corrections case.

Many law firms have also shown surprising resistance to financing corrections litigation. Most of the private lawyers interviewed described their firms’ reluctance or refusal to cover any out-of-pocket costs of the litigation. “The expenditure of time was not the problem. It was the tangible expenses. . . . The managers of the firm had an easier time if not called upon to lay out money.”³¹⁹

Not surprisingly, private firms generally have not been involved in advocacy other than in the context of formal litigation. Of the firms surveyed that handle corrections litigation, only twenty-four percent engage in any nonlitigation activities, such as lobbying, education, or consulting. Several partners have been involved in bar committees on corrections and prepared reports on corrections for those committees. Others serve on the board of

318. Bien Interview, *supra* note 177, at 2; Gresham Interview, *supra* note 98, at 8 (stating that people very frequently call saying that this is their first case and that they are on their own); Kinnard Interview, *supra* note 48, at 3; Interview with Judge Morris Lasker, United States District Court for the Southern District of New York, in New York, N.Y. 2 (Nov. 14, 1990) [hereinafter Lasker Interview] (transcript on file with author) (“Big firms assign these cases to the most junior people who are at a distinct disadvantage. Their judgment is not good. They have no sense of proportion. They make big things out of everything.”); Love Interview, *supra* note 133, at 7 (stating that partners give advice but that cases are handled basically by new associates); Ortin Interview, *supra* note 177, at 4 (“Associates spend a lot more time doing pro bono than partners A partner may be supervising 12 pro bono matters, but the time they spend on each is not that great.”); Parker Interview, *supra* note 311, at 2 (“There is a handful of partners who do a lot of pro bono work. Most is done by associates.”).

Partners are somewhat less involved in corrections litigation relative to associates than in pro bono cases generally. These results are consistent with the findings of other studies of pro bono involvement by private firms. See Timothy J. Lindon & Susan M. Hofman, *Pro Bono: Can It Survive the Bottom Line?*, WASH. LAW., Sept./Oct. 1990, at 29 (finding in a survey of lawyers at private firms in Washington, D.C. that recent graduates perform more pro bono work than older attorneys).

319. Sparks Interview, *supra* note 51, at 4; see also Bien Interview, *supra* note 177, at 4 (stating that he hopes that other organizations will advance fees for experts); Dorsey Interview, *supra* note 32, at 2; Himelein Interview, *supra* note 117, at 1; Parker Interview, *supra* note 311, at 3; Interview with Patricia Refo, Partner, Jenner & Block, in Chicago, Ill. 4 (Aug. 12, 1991) [hereinafter Refo Interview] (transcript on file with author) (stating that it is easier to convince the firm to give hours than to get them to pay for the costs of the case); Richmond Interview, *supra* note 301, at 10; Dick Taylor Interview, *supra* note 161, at 2–3 (stating that small firms cannot afford to do corrections cases by themselves and that much of the work done by private attorneys in North Carolina would not happen if PLS was not there to support it).

directors of corrections organizations.³²⁰ A few of those interviewed teach or occasionally speak to community groups about their involvement.

The data suggest a variety of explanations for firms' reluctance to embrace corrections advocacy. The incentive structure in many private firms discourages lawyers from devoting substantial time to corrections cases. In firms without a policy or commitment at the highest level of the firm to pro bono work, associates devote time to pro bono cases at the risk of sacrificing partnership opportunities.³²¹ Partners devoting time to this litigation risk undercutting their position in the firm by working on unpopular cases and failing to generate adequate income.³²² Many geographic areas lack a legal culture supportive of pro bono work. Twenty-two percent of the randomly sampled firms report that limited pro bono work explains their lack of involvement in corrections cases. Even in firms with pro bono policies and partners committed to pro bono work, lawyers reported pressure to limit the amount of time devoted to such work.³²³ Advancement in the firm

320. See Bronstein Interview, *supra* note 84, at 7; Interview with Alex Landon, Sole Practitioner, in San Diego, Cal. 3 (July 8, 1991) [hereinafter Landon Interview] (transcript on file with author); Soler Interview, *supra* note 78, at 5; Sparks Interview, *supra* note 51, at 2.

321. Brorby Interview, *supra* note 53, at 6 (describing considerable career sacrifices taken by those active in corrections litigation, and reporting associates' impressions that those active in pro bono do not aspire to partnership); Lardente Interview, *supra* note 290, at 3 (describing frequent incidents of young lawyers who do outstanding pro bono work and then do not get partnership, and expressing concern over the message conveyed when this happens); Interview with William J. "Zak" Taylor, Partner, Brobeck, Phleger & Harrison, in San Francisco, Cal. 1 (July 18, 1991) [hereinafter Zak Taylor Interview] (transcript on file with author) (after two pro bono cases handled when he was an associate, partners thought he should "cool it out for a while").

322. See Bien Interview, *supra* note 177, at 2 (reporting that firm developed a competitive environment for both associates and partners that required lawyers to produce billable hours to get compensation, and that he was advised that "[p]artners should be on the pleadings, but associates should be doing most of the hours"); Zak Taylor Interview, *supra* note 321, at 2 (reporting that extensive pro bono involvement resulted in significant set back in partnership because not as economically productive as other partners).

323. See Bien Interview, *supra* note 177, at 2; Kinnard Interview, *supra* note 48, at 1, 4 (stating that "Doing pro bono work doesn't help you. Younger people would be more involved if they felt they had the green light" and adding that he does not staff the case the way he would a private case, explaining that "I don't want to drag in others, since we are not going to get paid anyway"); Richmond Interview, *supra* note 301, at 2 (stating that pro bono is acceptable if you don't spend an unreasonable amount of time); Zak Taylor Interview, *supra* note 321, at 2; Interview with Tim Turner, Partner, Shepard, Mullin, Richter & Hampton in San Diego, Cal. 2 (July 7, 1991) [hereinafter Tim Turner Interview] (transcript on file with author) (stating that these cases are a problem if they interfere with productivity); see also Lindon & Hoffman, *supra* note 318, at 29, 58-59 (stating that billable hour pressures, pressure to build a billable client base, and desire for advancement are dominant obstacles to pro bono involvement).

for both partners and associates typically depends on excellence in fee generating work. There is evidence suggesting that tough economic times have made pro bono work even more difficult in large firms.³²⁴

In some communities, there are also political disincentives to accepting corrections cases. Some local lawyers are afraid of angering judges and do not like the idea of suing the state or the county.³²⁵ One legal services lawyer active in corrections litigation described an unwritten rule in the Georgia Attorney General's office: that if your firm sues the Corrections Department, you will no longer receive any state business.³²⁶ Especially in rural counties, many private firms represent the county and conflict of interest prevents their involvement.³²⁷ Thus, the argument that private firms are less vulnerable to political pressures ignores the realities constraining private firm involvement in controversial matters.

The demands imposed by large, complex corrections cases discourage continued private firm involvement even among those that have developed expertise in this area.³²⁸ Some found the cases too demanding, and spoke of being "burned out" by the cases.³²⁹ Some prefer other types of public interest work.³³⁰

324. Bien Interview, *supra* note 177, at 3 (saying that pro bono now is much harder to do as the firm becomes determined to increase revenues per partner and to tighten competition); Kinnard Interview, *supra* note 48, at 4 ("With economic problems, nonbillable work is way down on the list."); Refo Interview, *supra* note 319, at 3 (stating that it is a tough time for pro bono work); see also Steve Albert, *Is Pro Bono the Next Recession Victim?*, *RECORD*, Dec. 24, 1992, at 1 (Pro bono programs "have begun to feel the effects of attorney layoffs and the slowed hiring of associates. . . . [P]artners at large firms admit privately that they have kept some associates busy in the past year or so doing pro bono work. Nonetheless, partners in charge of pro bono efforts agree [that] their jobs were easier when business was better.").

325. Soler Interview, *supra* note 78, at 12.

326. Cullen Interview, *supra* note 48, at 2.

327. Holman Interview *supra* note 205, at 2; Lardente Interview, *supra* note 290, at 4. In large firms that are willing to handle these cases, the problem of potential conflict of interest can be resolved through the use of Chinese walls and other techniques. Richmond Interview, *supra* note 301, at 7.

328. See *supra* text accompanying notes 48-55.

329. See Knowles Interview, *supra* note 109, at 6 ("These cases are an enormous time and psychological drain . . . You just wear out."); William Turner Interview, *supra* note 301, at 1 ("At my age and stage of life, I do not want to invest so many years in a case. Life is too short.").

330. See Interview with David Casey, Partner, Peckham, Lobel, Casey, Prince & Tye, in Boston, Mass. 2 (Aug. 20, 1991) [hereinafter Casey Interview] (transcript on file with author); Interview with David Rudovsky, Partner, Kairys & Rudovsky, in Philadelphia, Pa. 3 (July 9, 1991 & July 30, 1991) [hereinafter Rudovsky Interview] (transcript on file with author).

Private firms' capacity to handle corrections cases may also be limited by financial concerns,³³¹ particularly for small firms that cannot carry a big case without regular payments.³³² Lawyers cited the difficulties of taking risks in private practice when the firm faces financial difficulties.³³³ A corrections specialist who previously litigated corrections cases from private practice commented that "in private practice, you must constantly worry about what cases will do to your practice. Time pressures are a real impediment to involvement."³³⁴

Private practitioners' limited involvement in corrections litigation also stems from their perception of corrections as a foreign and unfamiliar world they would prefer not to enter. Fifty-two percent of the large firms and sixty-six percent of those randomly sampled cite inadequate expertise as the explanation for their lack of involvement in corrections cases.³³⁵ The survey results also indicate a lack of interest in corrections as an important factor explaining firms' limited involvement. Forty-one percent of large firms attribute their lack of involvement to a preference for other types of pro bono work. Fifty-seven percent of the large firms cited "increased expressions of interest by attorneys" as a factor likely to increase firm involvement in corrections litigation.

Most general practitioners lack the federal court and class action experience necessary to provide adequate representation in conditions of confinement litigation.³³⁶ Moreover, attorneys in private practice generally lack the familiarity with the correctional context that is so essential to effective representation in these cases.³³⁷ Private practitioners lack familiarity with the

331. Cf. Garth et al., *supra* note 310, at 377-78, 381-82 (1988) (asserting that lawyers concerned about fees will aim for lawsuits than can be won easily and will produce large amounts).

332. One expert described a major case in which the plaintiffs' lawyers had to borrow money to continue in the case. "They were distracted by fee generating work [and] limited in the time and attention they [could] devote to the case. They also know exactly how much they have to bring in to keep the doors open." Expert Interview (To preserve neutrality in ongoing litigation, the identity of the source of this statement will not be disclosed.).

333. Interview with Peter Fenn, Partner, Fenn & King, in Boston, Mass. 4 (Aug. 19, 1991) [hereinafter Fenn Interview] (transcript on file with author); Ortega Interview, *supra* note 57, at 2.

334. Midgely Interview, *supra* note 117, at 1.

335. These figures were tabulated from the survey results. The tables presenting these results are on file with the author.

336. See *supra* note 309 and accompanying text.

337. There are some notable exceptions, such as Michael Bien, Donna Brorby, David Rudovsky, and William Turner, all of whom specialize in complex corrections litigation. See *infra* Part VI.B.

relevant law. "People handling these cases in private practice are starting out at a pretty basic level."³³⁸ Some firms have been reported to have a lengthy start-up time due to their need to become familiar with basic aspects of corrections cases.³³⁹

Private practitioners' lack of expertise and identification with the correctional context emerged as a recurring concern affecting the nature of private firm representation. Advocates described numerous examples of firms' lack of awareness or concern for systemic problems and for the general effects their case may have on a prison.³⁴⁰ Also, corrections experts with extensive involvement in litigation report that private practitioners sometimes lack sensitivity to correctional culture and are unwilling to take the time to master the context.³⁴¹ They may be more likely to consider only the short-term interests of their clients.³⁴² Corrections experts spoke critically of this exclusive focus on the interests of the individual client, arguing that it sometimes adversely affected the long-term interests of the client and the class. They reported numerous examples of a lack of sensitivity to the interests of inmates and a willingness to take positions that conflict with their clients' interests.³⁴³ Specialists also report receiving many complaints from inmates that their private counsel will not answer their phone calls or respond to their letters.³⁴⁴

Lawyers and experts observed that private practitioners' financial interests sometimes influence their strategy and decision making, to the detriment of the inmates. They cited examples of law firms which were reluctant to settle during the remedial stage of litigation because of their financial interest in fees for monitoring work.³⁴⁵ There also were reports of settlements that

338. Krisberg Interview, *supra* note 130, at 5.

339. Ortin Interview, *supra* note 177, at 4.

340. Alexander Interview, *supra* note 74, at 9, 30; Berg Interview, *supra* note 142, at 2; Boston Interview, *supra* note 98, at 7; Bright Interview, *supra* note 176, at 4 (citing examples of private practitioners who did not know what they were doing and "screwed up" the case and the law in the jurisdiction); Bronstein Interview, *supra* note 84, at 9; Gipson Interview, *supra* note 236, at 3; Zak Taylor Interview, *supra* note 321, at 2.

341. Expert Interview (To preserve neutrality in ongoing litigation, the identity of the source of this statement will not be disclosed.).

342. *Id.* at 6; Alexander Interview, *supra* note 74 at 30; *cf.* Garth et al., *supra* note 310, at 377.

343. *See, e.g.*, Alexander Interview, *supra* note 74, at 15 (describing the position taken by a law firm representing a class in the United States Court of Appeals that some remedy other than prisoner release should be adopted).

344. Brorby Interview, *supra* note 53 at 6; Ortega Interview, *supra* note 57, at 3; Stalker Interview, *supra* note 117, at 2.

345. Alexander Interview, *supra* note 74, at 11.

appear to compromise the interests of the class and favor those of the lawyer.³⁴⁶

Perhaps the area where law firms' lack of corrections expertise is potentially most damaging involves remedies. Many of the private practitioners interviewed considered the remedial stage to be quite different from traditional litigation and considered themselves ill-prepared to manage the remedial stage without assistance.³⁴⁷ These concerns echoed those of corrections specialists, who cited examples of unworkable remedies developed by private counsel or simple lack of attention paid to the case once the trial was won.³⁴⁸ Many were skeptical of private firms' willingness to use more innovative processes of remedial formulation and oversight.³⁴⁹

Small-firm practitioners can be overwhelmed by the monitoring responsibilities demanded by a single case, and such lawyers frequently cannot devote the time needed to stay abreast of the decree.³⁵⁰ Interviews suggest that lawyers in large firms frequently are reluctant to devote the time to monitoring:

Compliance takes a lot of leg work. Law firms do not do that. Attorneys refer complaints to the court who refers them to attorneys who sit on them because something else is on the front burner.³⁵¹

Corporate firms have not done a good job representing the class in other than a litigation mode. They make little or no

346. *Id.* at 11 ("I sometimes see consent decrees where it looks like the lawyer was paid off."); Krisberg Interview, *supra* note 130, at 5 ("Their tendency is to cut a deal and get out.").

347. *See, e.g.*, Ortin Interview, *supra* note 177, at 3; Parker Interview, *supra* note 311, at 5.

348. Alexander Interview, *supra* note 74, at 9, 30; Koren Interview, *supra* note 85, at 5.

349. An exception is small private firms that specialize in corrections or civil rights litigation, which have been described as quite successful in their remedial efforts. *See, e.g.*, Mark Soler & Loren Warboys, *Services for Violent and Severely Disturbed Children: The Willie M. Litigation*, in *STEPPING STONES: SUCCESSFUL ADVOCACY FOR CHILDREN* 61, 96 (Sheryl Dicker ed., 1990) (describing the extraordinary work of attorneys from small private law firms); Nathan Interview, *supra* note 20, at 4 (describing Turner & Brorby as equals of NPP lawyers).

350. *See, e.g.*, Rudovsky Interview, *supra* note 330, at 3 (stating that a prison case involving conditions of confinement is too large for one person in a small practice and that he monitors less than he should).

351. Ortega Interview, *supra* note 57, at 3.

attempt to hassle the system in response to inmate complaints. They can't handle the every day shit.³⁵²

Where possible, firms look to local corrections organizations to perform this enforcement role.³⁵³

Finally, enforcement can entail the most difficult aspect of corrections litigation, requiring an ongoing series of negotiations and litigation concerning the content of the order, the steps necessary to comply, and the prerequisites to terminating judicial oversight. Unless private firms have access to corrections expertise or a willingness to commit the time necessary to master the context, they are not likely to oversee implementation effectively.³⁵⁴

B. The Exception: Sustained Commitment and Collaboration with Specialists

There are some notable exceptions to the general tendency of firms to limit or avoid involvement in corrections litigation. A small but significant number of large firms with effective pro bono programs and committed partners who become personally involved in handling corrections cases have devoted considerable and sustained energy and resources to major institutional cases.³⁵⁵ In most instances, extensive large firm involvement coincides with a move toward a team approach to corrections advocacy, linking corrections specialists and legal services lawyers with private practitioners.³⁵⁶

352. Brorby Interview, *supra* note 53, at 6.

353. Parker Interview, *supra* note 311, at 3; Soler Interview, *supra* note 78, at 9.

354. See *supra* notes 134–43 and accompanying text (discussing implementation problems experienced by national organizations).

355. For example, Covington & Burling in Washington, D.C., Jenner & Block in Chicago, and Holland & Hart in Denver represent inmates in major conditions cases. Morrison & Forster in San Francisco essentially adopted a local jail by sending a mailing to inmates indicating the firm's willingness to represent them. Breed Interview, *supra* note 49, at 4.

356. San Francisco lawyers describe a "prison mafia"—a regular group of small and large firms who have been involved in major institutional litigation over the past 10 years. Don Specter of the Prison Law Office reports that he regularly co-counsels these cases with one of four or five San Francisco firms. Specter Interview, *supra* note 192, at 1. Several small firms in San Francisco also specialize in corrections litigation. Prisoners Legal Services regularly co-counsels class action litigation with large D.C. law firms, including Covington & Burling, Arnold & Porter, and Van Ness, Feldman & Curtis. Lopes Interview, *supra* note 117, at 2.

A small number of large private firms assumes primary responsibility for major institutional litigation, usually at the request of a judge or as a result of the commitment of a partner to an issue or organization.³⁵⁷ The key to obtaining this private-firm expertise in corrections cases is the commitment of experienced law firm partners with the power to commit their firms to the litigation.³⁵⁸ In virtually every instance where partners have been involved in this way, the partner has had some prior experience or contact with either corrections issues or the entity recruiting their participation. Several partners active in corrections litigation serve on the board of directors of the organization that recruited their aid on a case.³⁵⁹ Others have had previous experience with problems confronting correctional institutions.³⁶⁰ Many of the partners involved in corrections litigation have a strong personal commitment to public interest work.³⁶¹

In cases with partners actively involved in the litigation, firms often provide extensive back-up and support, including associate, paralegal, and support staff.³⁶² Firms that assume major responsibility have reported devoting huge amounts of lawyer-hours to these cases.³⁶³ Some of the law firms that have

357. Covington & Burling in Washington, D.C., Morrison & Foerster and McCutchen, Doyle, Brown, & Enerson in San Francisco, Holland & Hart in Denver, and Jenner & Block in Chicago were described as engaged in ongoing, major corrections litigation challenging conditions of confinement and/or overcrowding in major institutions or entire systems. Morrison & Foerster reported the greatest amount of pro bono work of any firm in the country in 1989—over 54,000 hours. Cameron Barr, *Doers and Talkers*, AMERICAN LAW., July–Aug. 1990, at 51, 52.

358. See Lardente Interview, *supra* note 290, at 1. Such involvement is the exception rather than the rule.

359. See, e.g., Bronstein Interview, *supra* note 84, at 4 (stating that Jim Crawford is President of the local ACLU affiliate); Sparks Interview, *supra* note 51, at 1, 2 (stating that a partner who involved himself in the California Youth Authority case was on the board of Youth Law Center).

360. See, e.g., Bronstein Interview, *supra* note 84, at 7 (stating that the pro bono coordinator at Covington & Burling, a firm with considerable involvement in corrections litigation, is a former staff member at NPP); Johnstone Interview, *supra* note 311, at 5 (stating that he previously worked for the [State] Department of Corrections); Kinnard Interview, *supra* note 48, at 1 (stating that he was appointed to a bar committee to study the problem of private-bar involvement in death penalty cases); Richmond Interview, *supra* note 301, at 2 (stating that and he investigated a prison riot with Jim Crawford, and that he was on a blue ribbon commission on corrections).

361. See Bronstein Interview, *supra* note 84, at 3 (describing Jim Hartley, a partner at Holland & Hart, as committed to public interest); Knowles Interview, *supra* note 109, at 2.

362. But see Kinnard Interview, *supra* note 48, at 4 (stating that he would hesitate to use "substantial firm resources in the case").

363. Firms reporting involvement in corrections litigation over the past five years report that associates have devoted an average of 880 hours and partners an average of 172 hours during this span.

committed to this litigation have laid out massive amounts to cover the costs of experts, discovery, and trial.³⁶⁴

Interviews with partners in these firms and with specialists who have been co-counsel with them on corrections cases suggest that these firms typically rely upon specialists in corrections litigation or upon ACLU affiliates to determine the viability and significance of a particular case and to guide their advocacy strategy.³⁶⁵ Private practitioners described an evolution in their orientation toward their corrections involvement as a result of their collaboration with corrections specialists. They were more likely to discuss the relationship of their particular case to a broader strategy of institutional change and to take into account group interests and concerns in defining their role.³⁶⁶

Lawyers who participated in collaborations involving private firms and public interest specialists emphasized the significant role that firms specializing in complex litigation play in corrections advocacy. Large firms in particular were cited for their skill in handling complex litigation.³⁶⁷ Lawyers specializing in areas such as environmental toxic tort and antitrust litigation commented upon the parallels between their routine work and

364. For example in *Gates v. Deukmejian*, No. Civ. S-87-1636 (E.D. Cal. 1990), McCutchen, Doyle, Brown & Enerson generated \$1,585,178.70 in fees, Brobeck, Phleger & Harrison generated \$800,818.20 in fees, and Rosen & Phillips generated \$668,635.00 in fees. Memorandum of Points and Authorities in Support of Plaintiffs' Application for Attorneys' Fees and Costs, *Gates v. Deukmejian*, No. Civ. S-87-1636 (E.D. Cal. filed June 4, 1990) (on file with the *University of Michigan Journal of Law Reform*). In that case, the court awarded plaintiffs a total of \$6,627,399.66 for attorneys' fees and \$346,226.26 as costs and disbursements. *Id.* at 1.

365. See Specter Interview, *supra* note 192, at 1 ("The secret of success is to get a partner personally involved. PLO [the Prison Law Office] has been working with the same people for years. We have won all our big cases so firms get fees back. When I bring other cases, they trust that they are bringing a case that is important and winnable.").

366. See Parker Interview, *supra* note 311, at 3 (describing importance of her interaction with Allen Breed, a corrections expert, in defining her strategy and in forming her transactional approach to her corrections cases); Sparks Interview, *supra* note 51, at 3.

367. Alexander Interview, *supra* note 74, at 14; Ortega Interview, *supra* note 57, at 1 (stating that co-counseling with private firms enabled her to tap into firms' expertise as experienced litigators); Bien Interview, *supra* note 177, at 4 ("We [private firms] have more experience managing and trying large complex cases."); Bronstein Interview, *supra* note 84, at 2 (large firms are well equipped to handle complicated cases which are heavily fact oriented). Interview with Michael Keating, Partner, Foley, Hoag & Eliot, in Boston, Mass. 2 (Aug. 15, 1991) [hereinafter Keating Interview] (transcript on file with author) (same).

class-action corrections cases.³⁶⁸ Discovery was mentioned most frequently as a particular strength of large firms.³⁶⁹ One corrections specialist noted the extraordinary ability of large firms and their paralegals to organize and analyze documents. He stated that “[t]he documents were delivered to the firm and one week later it was done.”³⁷⁰ Another specialist noted that “[f]irms can present a solid wall front to the opposition. The defendants knew that they could not inundate us with documents.”³⁷¹

Private practitioners and public interest lawyers alike commented on the legitimizing effect of private firm involvement in corrections cases. Public interest litigators sometimes face hostility from or limited credibility with local judges and politicians, particularly if they are not part of the local legal community.³⁷² Lawyers perceived a considerable difference in judges’ attitudes toward corrections cases when partners from private firms are involved:

You are dealing with local courts with local judges that know the power of the firm so you get instant respect and influence when you go in with one of these cases. Usually when [NPP] goes into another locality, we have to build that. That takes some time and some doing.³⁷³

The private lawyer on the case golfs with the judge. That doesn’t hurt.³⁷⁴

368. See, e.g., Bien Interview, *supra* note 177, at 3; Richmond Interview, *supra* note 311, at 3.

369. Alexander Interview, *supra* note 74, at 14; Knowles Interview, *supra* note 109, at 3; Lopes Interview, *supra* note 117, at 2; Ortin Interview, *supra* note 177, at 4; Parker Interview, *supra* note 311, at 5; Rudovsky Interview, *supra* note 330, at 2.

370. Soler Interview, *supra* note 78, at 13; see also Lopes Interview, *supra* note 117, at 2 (“With legal memos, firms can do in a few days what Prisoners Legal Services would require a month to do.”).

371. Refo Interview, *supra* note 319, at 10.

372. The Executive Director of the Youth Law Center described one experience where a judge would not address him in chambers and would speak directly to local counsel only. Soler Interview, *supra* note 78, at 11. Other advocates describe experiences indicating that judges suspect that they will say whatever the inmates want them to say. Ortega Interview, *supra* note 57, at 2. Allen Breed, a special master with extensive corrections experience, reports that judges “sometimes don’t respect public interest lawyers. They admire them, but think they are caught up in a social change process.” Breed Interview, *supra* note 49, at 1.

373. Koren Interview, *supra* note 85, at 5.

374. Bright Interview, *supra* note 176, at 2.

Experienced litigators can intimidate defendants. Also, judges won't look at him like a flaming liberal. Some judges are more likely to listen.³⁷⁵

The judge was impressed that a senior partner in a San Francisco firm was there. . . . Judges listen in a different way when it's a law firm.³⁷⁶

Public interest lawyers who have co-counseled with firms also described the positive impact that this collaboration could have on their role in the case. One lawyer commented that his experience with the firm led him to be more organized in his own case preparation. Public interest lawyers also remarked on the disciplining effect of litigating with a partner at a large firm: "[i]t was the closest thing we could have to a federal judge on the case. . . . He held us up to a microscope and made us argue for everything. He wouldn't let us get away with some of the things we would try."³⁷⁷ Partners in smaller firms also proved "excellent litigators, committed to the issues, and willing to be mentors to the younger PLS lawyers."³⁷⁸

In addition, many lawyers considered several areas of specialization particularly appropriate for private firms to handle on their own. Private firms have had notable success in handling attorneys' fee litigation for corrections specialists, and these referrals allow specialists to devote more time to the substantive issues.³⁷⁹ Many lawyers also deemed firms better able to try damages cases, particularly if such firms handle malpractice or plaintiffs' tort litigation as part of their general practice.³⁸⁰

A small number of private practitioners who have ongoing involvement in corrections litigation have been very successful in the implementation stage of litigation.³⁸¹ Because their time

375. Ortega Interview, *supra* note 57, at 2.

376. Breed Interview, *supra* note 49, at 1; *see also* DeWolf Interview, *supra* note 117, at 11; Refo Interview, *supra* note 319, at 3; Soler Interview, *supra* note 78, at 12.

377. Soler Interview, *supra* note 78, at 12.

378. Dick Taylor Interview, *supra* note 161, at 2.

379. Bien Interview, *supra* note 177, at 7; Bright Interview, *supra* note 176, at 2; Nathan Interview, *supra* note 20, at 5.

380. Alexander Interview, *supra* note 74, at 31; Boston Interview, *supra* note 98, at 11; Ortega Interview, *supra* note 57, at 3; Stalker Interview, *supra* note 117, at 2.

381. *See* Breed Interview, *supra* note 49, at 6 (describing extensive involvement of Michael Bien in monitoring compliance); Bronstein Interview, *supra* note 84, at 3 (describing Covington & Burling's involvement in D.C. jail litigation as a rare example of follow-through and commitment to corrections litigation by a large firm); Nathan

is covered by attorneys' fees, the lawyers have the capacity and incentive to devote the time necessary to follow through in these cases.³⁸²

Participation by private firms in corrections litigation potentially can mobilize influential lawyers to advocate informally on behalf of correctional reform. There have been cases in which private practitioners who are well-connected politically have worked with the legislature and local government officials to facilitate the settlement of aspects of litigation.³⁸³ Influential lawyers who previously were ignorant of the problems facing correctional institutions and hostile to inmates report that involvement in such cases taught them about the seriousness of the problems and the humanity of the clients.³⁸⁴ This heightened sensitivity to correctional problems may interest other lawyers in handling corrections cases.

Thus, private firms generally face considerable obstacles and disincentives to meaningful involvement in corrections advocacy. However, those firms that do become involved have brought considerable expertise and resources to a collaborative effort. This collaboration has expanded the orientation toward representation and the capabilities of both private practitioners and public interest lawyers engaged in corrections advocacy.

VII. LAW SCHOOL CLINICS

Law school clinics constitute another player in the field of organizations providing legal representation for inmates in corrections cases. Clinics generally define their involvement in particular cases in relation to their educational mission.

Interview, *supra* note 20, at 1 (describing successful monitoring efforts by the small private firm Turner & Brorby); Richmond Interview, *supra* note 301, at 7 (describing extensive involvement in enforcing consent decree).

382. See Bien Interview, *supra* note 177, at 8 (stating that a monitoring fees are an important part of the firm's income); Breed Interview, *supra* note 49, at 2 (stating that small private firm specializing in prison litigation is doing an excellent job in monitoring compliance); Bright Interview, *supra* note 176, at 2 (private firm does good job monitoring[compliance]); Rudovsky Interview, *supra* note 330 at 5-6 (stating that attorneys' fees are an important part of the firm's income).

383. Alexander Interview, *supra* note 74, at 2 (stating that local counsel in particular litigation did an excellent job working with the legislature).

384. See Kinnard Interview, *supra* note 48, at 4; Sparks Interview, *supra* note 51, at 4.

Most clinicians emphasize client centered counselling, litigation skills and training as central to their pedagogical goals. The scope, logistics, and client access problems common to corrections cases thus predispose many clinicians against significant involvement in major corrections litigation.

Some law school clinics, however, do form ongoing institutional relationships with particular correctional institutions. These programs establish a presence through substantial involvement in administrative and individual case advocacy. Through this sustained presence, institutional change-oriented advocacy emerges as an important aspect of law school clinic involvement. Indeed, the programs that specialize in corrections and focus at least in part on providing legal representation in a particular institution, such as the Danbury Prison Project at Yale Law School, were portrayed as the most stable and educationally viable of the clinical programs that handle corrections cases.

A. The Extent of Clinics' Current Involvement

Most law school clinical programs have not provided representation to inmates in correctional institutions within the past five years.³⁸⁵ Of those that have been involved, only a small proportion regularly represent inmates in cases challenging prison conditions. Table 9 shows the level of involvement of law school clinical programs in cases challenging conditions and practices in correctional institutions.

TABLE 9
LAW SCHOOL CLINICS' INVOLVEMENT
IN CORRECTIONS LITIGATION

| | |
|------------------------|-------|
| Ever Involved | 52.4% |
| Within Past Five Years | 35.2% |

385. This neglect of corrections in clinical education is only one example of the law schools' failure to expose law students to the legal issues surrounding corrections. Only 17 of the 95 programs responding to the survey offer a course on corrections as part of their academic curriculum.

These figures show that the level of involvement by clinics within the past five years is considerably lower than the overall clinic involvement. This finding is consistent with interviews of clinic directors and survey comments indicating that many law school clinics have discontinued programs that provide representation to inmates.³⁸⁶ The survey results show that thirty-six law schools, however, continue to have some kind of program providing such representation. Table 10 provides a further breakdown of the extent of law school clinic involvement.

TABLE 10
THE SCOPE OF LAW SCHOOL CLINICS'
INVOLVEMENT IN CORRECTIONS LITIGATION

| | |
|--|-----------|
| Volunteer student-run programs | 4 |
| Programs providing solely out-of-court legal assistance | 5 |
| Representation only at administrative hearings | 2 |
| Advice only | 3 |
| Programs providing occasional representation ³⁸⁷ | 15 |
| Programs regularly providing representation in corrections cases | 12 |
| TOTAL | 36 |

B. The Constraints Flowing From Individual Service and Adversary Process as the Pedagogical Model

Although clinical programs vary considerably in the nature and extent of legal services provided, most programs focus on individual service as their primary model of representation. Tables 11 and 12 below show the breakdown of the types of cases brought by law school clinics within the past five years.³⁸⁸ These programs focus on providing individual representation to inmates. Although sixty-six percent of these

386. See Hauhart, *supra* note 149, at 108 (documenting clinical programs that have discontinued involvement in corrections cases).

387. "Occasional representation" is defined as fewer than ten cases over a five-year period.

388. Many corrections cases fall into more than one of the categories identified in Tables 11 and 12. For example, most class action cases also fall into the categories of cases challenging conditions of confinement and seeking injunctive relief. Many cases challenge both general conditions of confinement and discrete problems, such as medical care.

programs have handled at least one class action within the past five years, only eight percent of the cases handled by law school clinics during this period were class actions.³⁸⁹ Table 12 indicates that law school clinics focus on cases challenging discrete problems in male prisons, involve themselves minimally in jails and in female prisons, and provide virtually no representation to juveniles in correctional facilities. Clinic involvement in disciplinary cases and administrative proceedings greatly exceeds the involvement of legal services or private firms. A substantial proportion of the clinics participate in cases challenging medical care and general conditions of confinement in male prisons.

TABLE 11
PERCENTAGE OF LAW SCHOOL CLINICS
BRINGING PARTICULAR TYPES OF CASES
WITHIN THE PAST FIVE YEARS³⁹⁰

| | |
|-------------------------------------|-------|
| Class Actions | 65.6% |
| Injunctions | 71.9% |
| Damages | 53.1% |
| General Conditions | 59.4% |
| Cases Challenging Discrete Problems | 90.6% |

Clinics' method of case selection further reflects their reactive, individual service orientation. Most of those interviewed routinely accept cases at the request of the court and do not generally focus their case selection priorities on cases likely to prompt broad institutional change. As Table 13 on the following page illustrates, clinics rely upon court appointment more than any other source for referral of corrections case.

389. This figure was computed by tabulating the total number of class actions reported by the clinics. It does not include representation by clinics in administrative hearings.

390. The percentages reflected in this table do not total 100 because multiple entries are possible.

TABLE 12
BREAKDOWN OF TYPES OF ISSUES HANDLED BY LAW
SCHOOL CLINICS INVOLVED IN CORRECTIONS
CASES WITHIN THE PAST FIVE YEARS³⁹¹

| | Prisons (Male) | (Prisons (Female) | Jails | Juvenile Facilities |
|---|-------------------|----------------------|-------|------------------------|
| General Conditions of Confinement | 43.8% | 3.1% | 12.5% | 6.3% |
| First Amendment | 43.8% | 6.3% | 3.1% | 0 |
| Disciplinary Rules and Procedures | 56.3% | 6.3% | 3.1% | 0 |
| Classification | 34.4% | 3.1% | 3.1% | 0 |
| Guard Brutality | 50.0% | 9.4% | 12.5% | 0 |
| Medical Care | 14.8% | 0 | 3.1% | 3.1% |
| AIDS Issues | 21.9% | 6.3% | 0 | 0 |
| Programming ³⁹² | 25.0% | 6.3% | 6.3% | 0 |
| Representation in Administrative Proceedings | 31.3% | 9.4% | 3.1% | 3.1% |
| Other | 18.8% | 6.3% | 3.1% | 0 |

TABLE 13
REFERRAL SOURCE OF CORRECTIONS CASES
HANDLED BY LAW SCHOOL CLINICS

| | |
|-------------------------|-------|
| Court Appointment | 38.2% |
| Civil Liberties Group | 13.1% |
| Pro Bono Referral Group | 2.3% |
| Attorney Interest | 6.6% |
| Client Request | 20.2% |
| Legal Services | 12.3% |
| Other Sources | 7.4% |

Yet as this Article has shown, court appointment generally is not effective as a means of selecting cases most likely to have an impact on conditions and practices.³⁹³

391. The percentages reflected in this table do not total 100 because multiple entries are possible.

392. These cases include claims involving programming activities such as education, recreation, employment, and job training.

393. See *supra* notes 313-18 and accompanying text.

Law school clinics' definition of their educational mission is the predominant explanation for their limited involvement in major corrections litigation. Clinics must grapple with an inherent tension between choosing significant cases and meeting their educational objectives.³⁹⁴ Although some clinics consider the significance and potential overall impact in selecting cases,³⁹⁵ most choose their cases based primarily upon their perceived educational value.³⁹⁶ Clinicians interviewed generally evaluate the educational merit of cases based on their capacity to inculcate traditional litigation skills as defined by the individual service model of advocacy.³⁹⁷ Every clinician interviewed spoke of the importance of discrete, manageable cases that progress quickly and preferably can be completed within a semester or a year.³⁹⁸ They want students to have hands-on responsibility for a case, and, if possible, to see it through from start to finish.

For this reason, many clinics avoid conditions of confinement cases and other major, fact-intensive cases that require sophisticated litigation skills.³⁹⁹ Instead of the typical clinic allocation of student responsibility and faculty supervision, students in conditions cases play more of a back-up role, with faculty assuming primary responsibility for the litigation.⁴⁰⁰

394. Telephone Interview with Howard Eisenberg, Professor and Director of Clinical Programs, Southern Illinois University 20 (July 18, 1991) [hereinafter Eisenberg Interview] (transcript on file with author) (stating that "it is unusual to have clinic goals coincide with correctional program" litigation needs); Gresham Interview, *supra* note 98, at 9.

395. See Eisenberg Interview, *supra* note 394, at 9; Telephone Interview with Susan Kay, Associate Professor of Law, Vanderbilt Law School 4 (Aug. 6, 1991) [hereinafter Kay Interview] (transcript on file with author); Telephone Interview with Jay Pottenger, Clinical Professor and Supervising Attorney, Yale Law School 1 (July 29, 1991) [hereinafter Pottenger Interview] (transcript on file with author).

396. Kay Interview, *supra* note 395, at 4; Pottenger Interview, *supra* note 395, at 1; Telephone Interview with William Rich, Professor of Law and Clinical Director, Washburn University School of Law 2 (July 18, 1991) [hereinafter Rich Interview] (transcript on file with author).

397. For a critique of this approach to clinical education, see Harold A. McDougall, *Lawyering and the Public Interest in the 1990s*, 60 *FORDHAM L. REV.* 1, 9-10 (1991).

398. See, e.g., Pottenger Interview, *supra* note 395, at 1; Rich Interview, *supra* note 396, at 3; Telephone Interview with Dean Rivkin, Professor of Law and Director, University of Tennessee Legal Clinic, University of Tennessee Law School 4 (Aug. 5, 1991) [hereinafter Rivkin Interview] (transcript on file with author).

399. See Boston Interview, *supra* note 98, at 16 (conditions litigation requires more thought, involvement and work by clinical faculty); Bronstein Interview, *supra* note 84, at 2; Pottenger Interview, *supra* note 395, at 3.

400. Eisenberg Interview, *supra* note 394, at 2, 8 ("The student's role in most of the prisoner litigation is supportive, not primary."); Rich Interview, *supra* note 396, at 3; Rivkin Interview, *supra* note 398, at 4 ("In larger actions the model is less collective and more like a senior partner and associate style.").

"The older and more complex a case becomes, the more difficult it is to take on new students. It is easier to do the job myself."⁴⁰¹ Most clinicians consider students' role in major litigation to be educationally inferior, and the time demands imposed by the cases to hurt both faculty and students.⁴⁰² Only two of the seven clinicians interviewed identified pedagogical advantages to impact litigation, such as the exposure to discovery, the opportunity to work on appeals, and the "unusual opportunity to observe and learn."⁴⁰³ Even these clinicians were troubled by the size and duration of corrections cases and insisted that corrections cases must be part of a larger mix of cases.⁴⁰⁴

Clinicians' individual service orientation also predisposes them to down-play the potential educational value and significance of monitoring and enforcement activity. The benefits of involvement in remedial enforcement—exposure to the complexities and challenges of judicially imposed bureaucratic change—do not fit neatly into traditional categories of legal representation. Clinical faculty do not generally consider monitoring to be educationally valuable and thus seek to limit students' involvement in the implementation stage.⁴⁰⁵

Clinics also tend to limit their involvement in nonlitigation advocacy of correctional issues. Only thirty-one percent of the clinics that handle corrections cases engage in any nonlitigation advocacy. Programs supported by the Legal Services Corporation face prohibitions on certain forms of nonlitigation advocacy. State supported clinics report limiting their involvement in nonlitigation advocacy for political reasons.⁴⁰⁶ Most of the clinical faculty interviewed do not view nonlitigation work as part of their teaching mission.

Clinics funded directly by the state or by public universities face additional constraints on their ability to handle major corrections litigation. Publicly funded clinics may be prohibited from taking law suits to change state public policy,⁴⁰⁷ or from pursuing cases against the state that could result in

401. Rich Interview, *supra* note 396, at 6.

402. Pottenger Interview, *supra* note 395, at 3; Rich Interview, *supra* note 396, at 2; Rivkin Interview, *supra* note 398, at 4.

403. Eisenberg Interview, *supra* note 394, at 11. *See also* Pottenger Interview, *supra* note 395, at 3.

404. Eisenberg Interview, *supra* note 394, at 11.

405. *See* Pottenger Interview, *supra* note 395, at 6; Rich Interview, *supra* note 396, at 7.

406. Rivkin Interview, *supra* note 398, at 3.

407. Marron Interview, *supra* note 150, at 2 (stating that his program handles only civil legal problems of inmates).

attorneys' fee awards.⁴⁰⁸ One clinic "got its wrist slapped by the university" for getting involved in a case challenging conditions in a local jail.⁴⁰⁹ Another state-funded clinic reported that it does not play a role in monitoring decrees because of the tension with the state that would result.⁴¹⁰

Logistical constraints are another factor affecting clinics' case selection. Clinics limit their caseload to institutions that are accessible to the university.⁴¹¹ There is also a consensus that clinics face considerable impediments to effective representation in complex and lengthy corrections cases. Forty-four percent of the clinics that do not handle corrections cases cite lack of expertise as the explanation. Unless they have active co-counsel, clinical faculty must handle cases alone or with student assistance. Students typically lack the skills necessary to develop and litigate these cases, and it is time consuming to teach these skills.⁴¹² Corrections cases typically outlast students' involvement with the clinic, and thus clinic cases suffer from a lack of continuity of student involvement. By the time students develop any expertise in these cases, the semester is over.⁴¹³ Faculty then must train new students.⁴¹⁴

Although the clinical faculty do frequently have considerable expertise in complex litigation or corrections issues, their primary commitment to teaching discourages them from accepting cases that require them to assume major responsibility. Most of the clinicians interviewed had extensive corrections and trial experience prior to their clinical appointment.⁴¹⁵

408. Rivkin Interview, *supra* note 398, at 1 (stating that there is a tacit understanding that his clinic will not pursue these cases).

409. Bronstein Interview, *supra* note 84, at 9.

410. Rivkin Interview, *supra* note 398, at 6.

411. Eisenberg Interview, *supra* note 394, at 9-10.

412. Eisenberg Interview, *supra* note 394, at 16 ("It is a time consuming proposition to teach students about the Federal Rules of Civil Procedure and what discovery looks like. Students come to us pretty green. They are doing everything for the first time and, as a consequence, it takes a lot of time.")

413. Yale minimizes this problem by starting the clinic in the first year and staffing each case with a new student, an experienced student, and a faculty member. Pottenger Interview, *supra* note 395, at 4.

414. Alexander Interview, *supra* note 74, at 9; Eisenberg Interview, *supra* note 394, at 11; Rivkin Interview, *supra* note 398, at 5.

415. See, e.g., Eisenberg Interview, *supra* note 394, at 1 (stating that he worked as a state public defender for eight years and handled significant conditions cases); Pottenger Interview, *supra* note 395, at 6 (stating that he handled corrections and other complex litigation as pro bono cases in private practice); Rivkin Interview, *supra* note 398, at 1, 6 (stating that he worked as a law clerk for pro se clients and then for

Clinicians that devote considerable time to corrections cases also develop the familiarity with particular institutions and contacts with inmates that are invaluable in litigating these cases. Yet, only those practitioners who perceived a significant pedagogical benefit from student involvement in corrections cases sustained their involvement over time. A surprising number of lawyers specializing in corrections described experiences where clinics simply dropped out of corrections litigation once they determined that such litigation was not pedagogically rewarding.⁴¹⁶

This does not mean that clinics never pursue institutional change-oriented advocacy. Those clinics, such as the clinic at Yale Law School, that have a project specializing in prison litigation, and that focus at least some of their work on a particular institution, sustain more extensive and varied involvement and attempt to link individual service to institutional patterns and problems.⁴¹⁷ Also, the relatively rare clinicians with a strong interest in corrections report sustained involvement in corrections advocacy and an interest in linking skills education to a broader, proactive approach.⁴¹⁸

Thus, law school clinics that focus their activities upon particular institutional settings provide the continuity of contact and outside scrutiny needed to pursue institutional change. They also provide representation in some jurisdictions that otherwise lack any legal service to inmates. Nevertheless, logistical constraints and pedagogical concerns informed by an individual service model of clinical teaching predispose many clinics to limit or avoid involvement in corrections advocacy.

Appalachian Research and Defense Fund handling corrections cases and has been handling these types of cases for more than 20 years).

416. Boston Interview, *supra* note 98, at 16; Gresham Interview, *supra* note 98, at 9; Love Interview, *supra* note 133, at 5.

417. The prison clinic project at Yale has been in operation for 20 years. The clinic has a contract to provide legal services to inmates at Danbury prison, where it devotes approximately one-third of its time to administrative hearings. In addition, the clinic does institutional reform work for state and federal prison inmates, with its most substantial activity involving medical care issues. Pottenger Interview, *supra* note 395, at 1, 3.

418. See, e.g., Eisenberg Interview, *supra* note 394, at 4; Kay Interview, *supra* note 395, at 6.

VIII. TOWARD A COLLABORATIVE MODEL OF CORRECTIONS ADVOCACY

This Article has shown that no one sector of the legal profession is situated to meet the complex demands of corrections advocacy. Local corrections specialists offer the greatest potential to pursue the institutional change model. With adequate resources and independence, they can combine formal and informal advocacy, become ongoing participants in the public dialogue about prison conditions, and coordinate the activities of other actors engaged in corrections advocacy. Yet, their emphasis on local institutional change fails to provide a national presence or to take a broad view of the field. More importantly, most states lack any corrections litigation program, and those that have such a program lack adequate resources and independence to play an effective role.

The national corrections specialists provide the visibility and field support essential to playing a role in the national discussion of corrections issues. They have the expertise and scope to lead the field in law reform litigation, to develop innovative techniques for addressing prison litigation, and to provide support to new corrections litigators. They also have the perspective and resources to troubleshoot in the many areas of the country that lack local counsel for important corrections problems. National Specialists, however, must depend on local advocates to perform the institutional change role so crucial to effective corrections advocacy. Remedial enforcement and informal advocacy pose particular challenges for the national specialists.

Legal services programs face overwhelming demands on their resources and attention. Their primary concern with providing across-the-board representation to poor people, their system for allocating resources, and their dependence on local and state government for financing tend to limit legal services' potential as a significant provider of institutional change advocacy. Nevertheless, they remain an important part of the service delivery system because they are geographically dispersed and involved as local counsel. Indeed, legal services programs are among the few organizations that have provided significant representation in jail cases, which tend to be local and more discrete in scope. Also, programs that have created specialized units representing inmates do effectively pursue institutional

change, even in the face of dramatic resource constraints. With a change in funding approach and a greater emphasis on institutionalized persons, legal services offers the potential to play a much more significant role in the future in corrections advocacy.

Private firms have not generally demonstrated great promise as major players in corrections advocacy and proponents of an institutional change model of advocacy. However, the small number of firms that have collaborated with corrections specialists or undertaken corrections litigation as a specialty offer tremendous expertise in complex litigation, significant resources and staff support, and a measure of credibility to the courts and mainstream bar.

Finally, law school clinics have also exhibited resistance to embracing corrections advocacy as a mainstay of their program for pedagogical and logistical reasons. Law school clinics that target administrative and legal advocacy in particular correctional institutions, however, offer tremendous potential as institutional change advocates and educators.

The key to overcoming the limitations facing each sector of the legal profession lies in creative collaboration. The communities that have developed litigation teams combining the efforts of law firms, legal services lawyers, law school clinics, and corrections specialists also appear to sustain the greatest level of involvement of each organizational player. The interaction among the various organizational players expands the perspective and skills that each brings to the advocacy effort. It also disperses the economic and staff burden more broadly, allowing each organization to pursue other goals without compromising their commitment to a particular case. It overcomes the obstacles of limited expertise and familiarity with corrections that so many private practitioners described as a significant factor preventing their involvement. Collaboration generates and sustains interest in and hope for the advocacy effort. Advocates who participated in team efforts repeatedly emphasized the importance of collegial support in sustaining their interest and involvement. Many of those who described frustration with their corrections work indicated that participation in a team endeavor would be critical to their continued involvement in corrections. They also perceived such collaboration as crucial to the success of any major corrections initiative.

Finally, geographical differences in composition of the legal services delivery system necessitate a diversified approach to

corrections representation. The overwhelming majority of the organizations providing representation to inmates are located in metropolitan areas. As shown in Table 14, only a small percentage of law school clinics and legal services programs are located in non-metropolitan areas. Yet because most prisons are located in remote, rural areas, inmates may have difficulty obtaining legal representation.

TABLE 14
LOCATION OF PROGRAMS PROVIDING REPRESENTATION
TO INMATES IN CORRECTIONS CASES

| | Metropolitan | Non-metropolitan |
|--------------------|--------------|------------------|
| Large Firms | 100.0% | 0.0% |
| Legal Services | 80.7% | 19.3% |
| Law School Clinics | 71.9% | 28.1% |

Table 15 suggests that law firms are most involved in the Northeast, legal services programs in the South, and law school clinics in the North-Central region of the country.

TABLE 15
REGIONAL DISTRIBUTION OF ORGANIZATIONS PROVIDING
REPRESENTATION TO INMATES IN CORRECTIONS CASES

| | Northeast | South | West | North Central |
|----------------|-----------|-------|-------|---------------|
| Large Firms | 53.5% | 9.3% | 11.7% | 25.6% |
| Legal Services | 16.9% | 38.6% | 21.7% | 21.7% |
| Clinics | 37.5% | 15.6% | 6.3% | 40.6% |

Thus, an effective legal services delivery system for corrections would self-consciously allocate responsibility among specialists and generalists, public interest and private firm lawyers to encourage involvement and build on the strengths of each sector of the legal profession. Corrections specialists, particularly at the local level, would form the center of any advocacy team effort. As this Article has shown, if these

organizations are adequately staffed and funded, they are situated to pursue effectively an institutional change advocacy strategy and to coordinate test cases and individual services to complement that strategy.⁴¹⁹ Although their primary roles are as litigators and advocates, these organizations also provide a range of support and co-counselling activities key to the participation of law firms, legal services offices, and ACLU affiliates in major corrections litigation. The specialists who co-counsel cases are looked to for assistance with case strategy and other important decisions, maintenance of the relationship with the client, use of experts, and planning of the remedy.⁴²⁰ This assistance is frequently critical to generalists' capacity to provide adequate legal representation in corrections cases.⁴²¹

Organizations specializing in corrections also provide technical assistance to practitioners. Such assistance has been reported to increase willingness to handle corrections cases.⁴²²

419. See *supra* Part IV.

420. Lopes Interview, *supra* note 117, at 2; Soler Interview, *supra* note 78, at 11; Sparks Interview, *supra* note 51, at 1; see also *supra* Part IV.A.2.

421. One lawyer vividly described the importance of collaborating with corrections experts to his capacity to provide adequate representation:

When I first got appointed to the prison case, I called SPDC [Southern Prisoners Defense Committee, now known as Southern Center for Human Rights]. The case was [a] logistical nightmare. I had to rely heavily on the people at SPDC just to get my arms around what the problem is, how to make information requests, who is in the network, and what to ask for. Without them, I would have wasted an enormous amount of time. I would not have done a good job. If you don't have an organization like SPDC, you are going to have significant slippage in the quality of representation. People don't want to do these cases. Even if they do them, if they are left on their own, the level of representation is going to be inadequate.

Kinnard Interview, *supra* note 48, at 2.

422. Although Barry Barkow of Massachusetts Corrections Legal Services rarely co-counsels cases, he does refer cases to law firms on the condition that his organization will provide technical assistance. Barkow Interview, *supra* note 172, at 4. For cases declined by YLC, the organization typically will provide the names of other child advocates in the area, information about what has worked in other states, names of experts, and strategy assistance. YLC staff attorneys receive requests for information and technical assistance from around the country. They attempt to link private attorneys and local advocates to whatever advocacy network exists in their particular locale. Sanchez Interview, *supra* note 117, at 4; Soler Interview, *supra* note 78, at 7; Sparks Interview, *supra* note 51, at 3.

The Southern Center for Human Rights and some of the state and local organizations also devote significant time responding to requests for assistance from lawyers who lack expertise in corrections. At least two local and state corrections organizations—the Correctional Law Project and Prisoners Legal Services of New York—provide assistance to lawyers appointed by the court to represent inmates in pro se cases. Several private lawyers emphasized the value of having a local organization available to provide technical assistance and back-up, and these lawyers expressed some doubt that they would rely

Table 16 shows that a significant proportion of legal services programs, large private firms, and law school clinics identified increased availability of back-up support, training, and technical assistance as likely to increase their involvement in corrections litigation.

TABLE 16
INTERVENTIONS LIKELY TO INCREASE ORGANIZATIONAL INVOLVEMENT IN CORRECTIONS LITIGATION

| | Legal Services | Large Firms | Law School Clinics |
|---|----------------|-------------|--------------------|
| Increased back-up support, training, technical assistance | 49.4% | 36.4% | 37.5% |
| Co-counseling with expert organization | 39.8% | 34.1% | 28.1% |

In addition, organizations specializing in corrections litigation provide training for lawyers handling corrections cases.⁴²³ They play the crucial role of training the next generation of corrections lawyers by hiring law students to work as summer associates or fellows.⁴²⁴ Specialist organizations also play a critical role in recruiting other lawyers to participate in corrections cases, either on their own or as part of a team of lawyers. Most of the private firms and legal services lawyers

as heavily on a national organization for hands-on support. See Kinnard Interview, *supra* note 48, at 3; Sparks Interview, *supra* note 51, at 4.

423. Both NPP and YLC have been involved in training lawyers to handle corrections cases, although they currently lack the resources to undertake a programmatic approach to training. Currently, NPP only provides training in response to requests, most of which come from local affiliates. NPP has taught continuing legal education programs in conjunction with law schools. These programs have had an attendance of over 100 people and have been identified as good recruiting tools for both local affiliates and corrections cases. In Idaho, the training program was videotaped at the request of the Director of the Department of Corrections. The program is shown as part of the training package for correctional officers and is included in the inmates' law library. Bronstein Interview, *supra* note 84, at 2. District of Columbia Prisoners Legal Services holds a training program twice a year under the auspices of the District of Columbia Bar. Lopes Interview, *supra* note 117, at 1.

424. For example, Ed Koren estimates that approximately 100 students have worked at NPP over the last 15 years. SCHR was described by one lawyer as a "bullpen for good people" and its director has been said to "clone" lawyers committed to this field. Koren Interview, *supra* note 85, at 5.

interviewed that have handled major cases would not have done so without the participation of NPP, YLC, or another specialist organization able to guide and support their involvement in these cases.⁴²⁵ Their participation is essential to the formation of litigation teams involving lawyers in private practice⁴²⁶ and legal services lawyers.⁴²⁷ State and local organizations are particularly important in this recruitment effort. They are most likely to have the contacts with the local bar and knowledge of potential participants in legal services and private firms.⁴²⁸ They also can sustain an ongoing effort in the corrections arena.⁴²⁹

425. Sparks Interview, *supra* note 51, at 3 (stating that his firm would not take a case like the California Youth Authority case without co-counsel like YLC); Rudovsky Interview, *supra* note 330, at 3-4 (stating that none of the local actors has done a system-wide case and that NPP's expertise in the Pennsylvania statewide case is crucial); Specter Interview, *supra* note 192, at 1 (describing the network of San Francisco firms that co-counsel with the Prison Law Office); Ortin Interview, *supra* note 177, at 3 (stating that PLO and NPP were essential to his law firm's participation); Soler Interview, *supra* note 78, at 9 (stating that some firms will take over cases completely, primarily damages cases, but that normally they want ongoing assistance); Dick Taylor Interview, *supra* note 161, at 2 (stating that PLS resources are greater than those of small private firms, who depend on PLS for financing cases).

426. Coalitions of lawyers in large firms, small firms, ACLU affiliates, and corrections organizations have developed in San Francisco, at the initiation of Mark Soler of YLC and Don Specter of PLO. Bien Interview, *supra* note 177, at 5 ("Don Specter is responsible for getting people here as well organized as we are. If there is an overall strategy, he is at the heart of it."). YLC co-counsels a number of its major California cases with large firms, and YLC has been very successful in obtaining litigation and financial support from large firms in San Francisco. Mark Soler reports that he has never been turned down by a large firm asked to participate in juvenile institutional litigation.

NPP is currently part of a coalition of lawyers challenging overcrowding in the entire Pennsylvania prison system. The litigation team includes the ACLU affiliate, Legal Services' Institutionalized Persons Project, and David Rudovsky, a private practitioner with considerable expertise in the corrections field. Rudovsky Interview, *supra* note 330, at 2.

427. Legal services programs that have handled corrections cases within the past five years do participate in litigation teams and have played an important role as local counsel in major corrections cases. Fifty-five percent of the general legal services programs and 94% of the institutionalized persons projects involved in corrections litigation within the past five years report that they have collaborated with other organizations in conducting this litigation. Legal services programs participated in litigation as part of a team in over 17 of the states with major correctional institutions operating under court order as of January 1990.

428. For example, Grace Lopes, the Director of D.C. Prisoners' Legal Services ("PLSP") at the time of this study, has had considerable success in recruiting private firms. She has worked in Washington, D.C. for years and knows the bar well. Many of the PLSP board members are partners in local firms. PLSP gets involvement from firm attorneys not through a pro bono referral organization, but by calling someone personally known by a board member because "[b]lind recruitment is unlikely to be successful." Lopes' primary recruitment technique is to target a senior partner at a firm that can advance the case, give the firm a blueprint of the litigation in a written memorandum, and then follow up with a meeting. She refers only meritorious cases with compelling facts. Lopes Interview, *supra* note 117, at 2.

429. For example, Don Specter of the Prison Law Office describes a good working relationship with four or five large firms in San Francisco that regularly co-counsel cases with his organization. See Specter Interview, *supra* note 192, at 1.

Many of those most actively involved in corrections advocacy have yet to capitalize on the potential for collaboration to enhance the extent and quality of corrections advocacy. Many local and state offices currently do not co-counsel or refer corrections cases on a regular basis.⁴³⁰ Typically, the national organizations are minimally involved in recruiting large firms to handle corrections cases. NPP relies primarily upon lawyers recruited by ACLU affiliates as co-counsel, who tend to come from small firms with previous public interest experience.⁴³¹ In its out-of-state cases, YLC also has limited involvement with large firms, and YLC finds lawyers by calling legal services or other public interest lawyers within the jurisdiction. National organizations generally are considered less effective than local groups as recruiters for pro bono participation by private firms.⁴³²

Legal services programs generally have not assumed the role of creating and supporting litigation teams handling corrections cases, although programs have participated in such teams in major suits. Although every legal services program accepting funds from the legal services corporation is required to spend one-eighth of their budget on private attorney involvement, interviews with directors of the volunteer lawyer programs suggest that most of these programs do not refer corrections cases.⁴³³ Most legal services lawyers involved in corrections cases do not generally co-counsel cases, and they are skeptical about the benefits of private-bar involvement.⁴³⁴

430. See, e.g., Barkow Interview, *supra* note 172, at 4 (stating that he does not co-counsel cases or rely much on the private bar for major litigation); Gresham Interview, *supra* note 98, at 5 (describing limited involvement of private firms).

431. Alexander Interview, *supra* note 74, at 16.

432. Lardente Interview, *supra* note 290, at 1; Soler Interview, *supra* note 78, at 11 (stating that he knows the local community, maintains partners on the board of YLC, and has ongoing relationships and hosts events to help in recruitment, but that out-of-state, he must rely on personal contacts in the jurisdiction where possible, through either legal services or ACLU offices).

433. Gardner Interview, *supra* note 295, at 3 (stating that his program has been unable to find anyone to refer cases to other than Bob Cullen at Georgia Legal Services); McDermott Interview, *supra* note 294, at 6-7 (stating that good cases often proceed without counsel because Delaware Volunteer Legal Services does not know how to find the good cases, the ones they would want to refer, and that they are unable to screen cases to see if they have merit); Poirot Interview, *supra* note 295, at 2 (stating that he does not refer corrections cases because they do not have the local resources to handle these cases); Witte Interview, *supra* note 294, at 4 (stating that Chicago Volunteer Legal Services Foundation does not refer corrections cases and that they will not take cases with "noncooperative clients").

434. Barkow Interview, *supra* note 172, at 4; DeWolf Interview, *supra* note 117,

Most private firms also fail to collaborate with other organizations to enhance their capacity to handle corrections cases or their willingness to participate in them.⁴³⁵ Many of the private firm lawyers interviewed did not work with or even consult organizations with corrections expertise.⁴³⁶ Only thirty-nine percent of the law firms surveyed that handle corrections litigation have worked with any organization, and less than ten percent have worked with NPP, YLC, or a local prisoners' rights group. Firms tend not to be tied into the corrections network and often do not know that one exists.⁴³⁷

Court appointment programs—the primary means of involving private firms in corrections cases—generally fail to facilitate collaboration between private firms and specialists.⁴³⁸ Most court appointment programs are not currently designed to match qualified counsel with cases most likely to affect the quality of life in the institution. Only three out of thirty-five districts responding to the survey reported having a screening procedure that included any input by corrections specialists. Only two of the programs encourage private practitioners to use the services of local corrections litigators, and most provide little or no training or support of any kind to lawyers accepting court appointments.⁴³⁹

at 5; Gresham Interview, *supra* note 98, at 7; Holman Interview, *supra* note 205, at 2; Sanchez Interview, *supra* note 117, at 1. Esther Lardente, a specialist in pro bono involvement, noted that the legal services community generally exhibits enormous fear and resentment of private bar involvement as a result of the attempt by the Reagan Administration to eliminate legal services and substitute private bar representation for poor people. Consequently, legal services offices tend to refer nonpriority cases. Lardente Interview, *supra* note 290, at 5.

435. See Bien Interview, *supra* note 177, at 4; Kinnard Interview, *supra* note 48, at 5; Parker Interview, *supra* note 311, at 3; Sparks Interview, *supra* note 51, at 6.

436. See Johnstone Interview, *supra* note 311, at 4; Keating Interview, *supra* note 367, at 2; Richmond Interview, *supra* note 301, at 4.

437. Krisberg Interview, *supra* note 130, at 4–5 (stating that he regularly is called by private firms and is “often shocked that they do not know the national network . . . They are starting at ground zero”); Nathan Interview, *supra* note 20, at 3 (stating that lawyers do not use NPP the way they could).

438. This information reflects the results of the informal survey of court appointment programs, which is described more fully in the Methodology section, *supra* Part III.

439. See Eisenberg Interview, *supra* note 394, at 5. Several court appointment programs report innovations that hold considerable promise for fostering collaboration between private bar practitioners and specialists in corrections. Several districts do involve local experts in selecting appropriate cases for referral. At least one has contracted with a local organization to develop a manual for participants in the pro se program and to offer regular training for lawyers willing to serve on the pro se panel. See RESULTS OF THE SURVEY OF PRISONERS 3 (1993) (unpublished report, on file with the University of Michigan Journal of Law Reform).

Law school clinics that have in-house programs generally do not co-counsel cases with private practitioners. Some of these programs have a formal relationship with legal services and regularly collaborate with legal services programs. Indeed, one-half of the clinics surveyed that handle corrections cases collaborate with other organizations in these cases. Because of their preference for small, discrete cases that students can handle, however, law school clinics generally do not play a lead role in building litigation teams or attracting private firm involvement in corrections cases.⁴⁴⁰

Thus, collaboration offers considerable unexplored potential to increase the level and quality of representation for inmates in corrections cases.

CONCLUSION

This Article has developed a theoretical framework for assessing the role of lawyers representing inmates in cases challenging conditions and practices in correctional institutions. It offers the institutional change model of corrections advocacy as the most promising framework for structuring representation in corrections cases. Not surprisingly, the articulation of the desired advocacy norm is only the first step in the process of its realization. Many of those involved in pursuing this vision of effective advocacy face tremendous obstacles. State and local organizations—which should constitute the foundation of corrections advocacy—face overwhelming caseloads and limited resources. National organizations—the preeminent experts and the architects of a national strategy—face the prospect of a funding crisis. Lawyers generally socialized to value trial advocacy over all other forms of intervention face the task of rethinking their conceptions of litigation to embrace nonadversarial processes and to link litigation with legislative and administrative advocacy. Every sector of the legal profession exhibits serious inadequacies in their remedial capacity—a critical component of the institutional change model. Law schools face the daunting task of rethinking their educational mission to

440. See *supra* Part IV.A.

broaden their emphasis and equip future lawyers to pursue this emerging advocacy role.

Repeat players—organizations, projects, or individuals specializing in corrections litigation—have played, and must continue to play, a central role in realizing the institutional change vision of corrections advocacy. Their efforts account for the overwhelming proportion of significant corrections litigation.⁴⁴¹ Organizations specializing in corrections litigation report the most substantial and sustained involvement in litigation challenging conditions of confinement. They also lead the way in the process of revitalizing public interest advocacy to meet the challenges of institutional change. Finally, their involvement is critical to the prospect of attracting and sustaining the involvement of private firms and legal services organizations in corrections advocacy.

The current level of support for and involvement in corrections advocacy does not begin to address the level of need for representation.⁴⁴² This Article underscores the particular inadequacy of representation for juveniles and women. Many of the organizations studied provide minimal or no representation to these groups. As in any implementation effort, the prospect for realization of the institutional change advocacy model depends on the development of a strategy for increasing the levels of support for and involvement in corrections advocacy.

One such initiative is currently underway within the legal services community. The Institutions and Alternatives Section of the National Legal Aid and Defenders Association has undertaken to increase the level of support for institutionalized persons within legal services, in part by including institutionalized persons within the population counted in determining funding levels.⁴⁴³

Recent case law has opened the door to the possibility of using litigation to challenge directly the inadequacy of representation afforded inmates in corrections cases, particularly

441. This finding is consistent with the results of other empirical studies. For example, one study found that "a substantial percentage (50%) of the certified class action suits that closed between 1979 and 1984 in the Northern District of California were the product of law firms created directly by broad funding agencies trying to generate legal power for the unrepresented and underrepresented." Garth et al., *supra* note 310, at 370.

442. See *supra* Part III.B.

443. Arthur Interview, *supra* note 252, at 1.

in the area of juvenile and women's corrections. In at least one case, juveniles have been found to have special needs requiring the provision of access to an attorney to meet the constitutional requirement of providing inmates with meaningful access to courts.⁴⁴⁴ Similarly, some courts have found that women prisoners have special needs that require the provision of assistance of counsel.⁴⁴⁵ Courts have begun to recognize that law libraries are insufficient to meet the needs of adult male prisoners who are illiterate, mentally incapacitated, or confined in segregation for lengthy periods.⁴⁴⁶ Finally, several courts have ordered states to fund programs providing legal representation to inmates as a remedy for failure to provide adequate access to law libraries.⁴⁴⁷

The potential of this recent case law concerning access to law libraries⁴⁴⁸ to enhance the level and quality of corrections representation has yet to be fully explored. However, the experience of current programs resulting from such litigation reveals that this approach is no panacea for corrections advocacy. In some instances, states were described as instituting extremely limited programs, and then using their existence to excuse the inadequacy of the state's law libraries.⁴⁴⁹

444. See *John L. v. Adams*, 969 F.2d 228, 233-34 (6th Cir. 1992) (holding that a system failing to provide juveniles with access to legal representation violates the constitutional duty to provide access to courts). The Supreme Court has recognized a right of access to courts for inmates' presentation of constitutional claims related to their confinement. *Bounds v. Smith*, 430 U.S. 817 (1977). Courts have not always interpreted this right of access to require states to provide legal representation to inmates. In most cases involving adult males, courts have instead offered states a choice between providing adequate law libraries or providing adequate assistance from persons with legal training. See, e.g., *Knop v. Johnson*, 977 F.2d 996, 999, 1003 (6th Cir. 1992). Most states have opted to provide law libraries in lieu of legal representation.

445. See, e.g., *Canterino v. Wilson*, 546 F. Supp. 174, 216 (W.D. Ky. 1982), *aff'd*, 875 F.2d 862 (6th Cir.), *cert. denied*, 493 U.S. 991 (1989).

446. See *Knop*, 977 F.2d at 1005-06. Although this recognition has not necessarily been found to warrant a requirement of legal representation, it does open the door to exploring ways of improving access to counsel, through such means as court appointment programs and law school clinics.

447. See *supra* note 211 and accompanying text. For example, North Carolina Prisoners Legal Services receives \$1.2 million and Maryland Legal Aid Prisoners Rights Project receives \$400,000 pursuant to court orders requiring states to provide legal representation due to the state's failure to provide adequate law libraries following court orders to do so. *Dorsey Interview*, *supra* note 32, at 3; *Sparrow Interview*, *supra* note 57, at 7.

448. See *supra* note 211.

449. *Cullen Interview*, *supra* note 48, at 4 (describing Georgia's Prison Legal Counseling Project as a ploy by the state to justify having only 4 law libraries in the entire state system; the program provides assistance in parole and other administrative areas and advice in section 1983 cases, but is not permitted to provide representation in civil rights actions).

Programs funded pursuant to court order face a perpetual struggle with a hostile funding source which is their adversary in almost every case.⁴⁵⁰ For these reasons, current recipients of *Bounds* funding advise that the Department of Corrections should not be given unilateral responsibility for developing a system to provide inmates with legal representation, but should collaborate with existing organizations already providing representation. In addition, programs should have an outside source of funding, in order to maintain their legitimacy and independence.

This study highlights the importance of creative collaboration among corrections specialists, legal services lawyers, private practitioners, and law school clinicians to avoid the pitfalls facing each sector of the legal profession and to achieve adequate levels of representation to inmates. Public interest representation has begun to evolve to meet this challenge. The debate over the appropriate form of public interest advocacy must be recast to reflect and inform this evolution in the theory and structure of legal representation.

450. See *supra* Part IV.B.

APPENDIX A**NAME AND ORGANIZATIONAL AFFILIATION
OF INDIVIDUALS INTERVIEWED**

- Adjoa Aiyetoro, Associate Director for Administration, National Prison Project
- Elizabeth Alexander, Associate Director for Litigation, National Prison Project
- Pat Arthur, Staff Attorney, Evergreen Legal Services
- Karl Baker, Assistant Director, Defender Association of Philadelphia
- Sandra Baker, Public Defender, Tuscaloosa, Alabama
- Barry Barkow, Director, Massachusetts Correctional Legal Services
- Betsy Barnat, Assistant to Executive Director, National Prison Project
- Howard Belodoff, Associate Director, Idaho Legal Aid Services
- Dick Beltz, Director, Florida Institutional Legal Services
- Randall Berg, Executive Director, Florida Justice Institute
- Elliot Berry, Senior Staff Attorney, New Hampshire Legal Services
- Michael W. Bien, Partner, Rosen, Bien & Asaro
- John Boston, Legal Director, Prisoners Rights Project, Legal Aid Society of New York
- Allen Breed, Director, National Institute of Corrections
- Stephen Bright, Executive Director, Southern Center for Human Rights
- Alvin Bronstein, Executive Director, National Prison Project

Donna Brorby, Partner, Turner & Brorby, and plaintiffs' counsel in *Ruiz*

David Casey, Partner, Peckham, Lobel, Casey, Prince & Tye

Richard Cohen, Legal Director, Southern Poverty Law Center

Meg Connolly, Director, Volunteer Lawyer Project, Boston Bar Association

William Craig, Partner, Wiggin & Dana

Robert Cullen, Senior Corrections Attorney, Georgia Legal Services

Ruth Ann DeWolf, Legal Director, Correctional Law Project, Chicago Legal Assistance Foundation

Charles Dorsey, Executive Director, Maryland Legal Aid Bureau

Jeffrey Dworkin, Director, Vermont Prisoners Rights Office

Howard Eisenberg, Professor and Director of Clinical Programs, Southern Illinois University

Malcolm Feeley, Professor of Law, University of California, Berkeley, Boalt Hall School of Law

Nancy Feldman, Director, Office of Inmate Advocacy, New Jersey Office of the Public Advocate

Peter Fenn, Partner, Fenn & King

Ayres Gardner, Director, Pro Bono Project of Georgia

David Geiger, Partner, Foley, Hoag & Eliot

LeAnna Gipson, Director, Monroe County Legal Services

John Gresham, Associate Director, Prisoners Legal Services of New York

Robert Gross, Executive Director, New Hampshire Legal Services

Harvey Grossman, Legal Director, ACLU of Illinois

Judith Guibert, Co-Director, University of North Carolina
Prisoners' Rights Project

Lani Guinier, Professor of Law, University of Pennsylvania Law
School

Robert Hauhart, Director, Prisoners' Rights Program of D.C.,
Public Defender Service

Neil Himelein, Managing Attorney, Community Legal Aid
Society of Delaware

Phyllis Holman, Executive Director, Georgia Legal Services

Rebecca Isaacs, Acting Director, Legal Services for Prisoners
with Children

Deirdre Janney, Executive Director, ACLU of Mississippi

Richard Johnstone, Partner, Hale & Dorr

Susan Kay, Associate Professor of Law, Vanderbilt Law School

Michael Keating, Partner, Foley, Hoag & Eliot

Stephen Kessler, Director, Legal Services for Prisoners, Inc.,
Kansas

Stephen O. Kinnard, Partner, Jones, Day, Reavis & Pogue

Ralph Knowles, Partner, Doffermyre, Shields, Canfield &
Knowles, and former Associate Director, National Prison
Project

Ed Koren, Staff Attorney, National Prison Project, and former
Director, National Jail Project

Barry Krisberg, President, National Center for Crime and
Delinquency

Dick Kurtenbach, Executive Director, ACLU of Kansas and
Western Missouri

Alex Landon, Sole Practitioner

Esther Lardente, Consultant, American Bar Association

W.C. LaRowe, Director, Texas Center for Correctional Services

Judge Morris Lasker, United States District Court for the
Southern District of New York

Anson Levitan, Senior Attorney, Legal Aid Society of San Diego

Lance Liebman, Dean and Professor of Law, Columbia
University School of Law

Grace Lopes, Managing Attorney, D.C. Prisoners Legal Services
Project

Angus Love, Director, Institutionalized Persons Project,
Pennsylvania Legal Services

Scott Manion, Director, Florida Legal Services Private Bar
Involvement Program

Phil Marron, Director, Legal Assistance to Minnesota Prisoners

Neil McBride, Director, Rural Legal Services of Tennessee

Christine McDermott, Director, Delaware Volunteer Legal
Services

John Midgely, Staff Attorney, Evergreen Legal Services

Anthony Miranda, Partner, Foley, Hoag & Eliot

Vincent Nathan, Partner, Nathan & Roberts and Special
Master

Aryeh Neier, Executive Director, Human Rights Watch

Judge Jon Newman, United States Court of Appeals for the
Second Circuit

Aldred O'Ferrell, Director, Inmate Services Division, Maryland
Public Defender

Nancy Ortega, Staff Attorney, Southern Center for Human
Rights

Luther Ortin, Partner, Brobeck, Phleger & Harrison

Carl (Toby) Oxholm, Partner, Hangley, Connolly, Epstein,
Chicco, Foxman & Ewing

John Packel, Deputy Assistant Director and Chief of Appeals
Unit, Defender Association of Philadelphia

Beth Parker, Partner, McCutchen, Doyle, Brown & Enersen

Carl Poirot, Director, San Diego Volunteer Lawyer Program

Jay Pottenger, Clinical Professor and Supervising Attorney,
Yale Law School

Lonnie Powers, Executive Director, Massachusetts Legal
Assistance Corporation

Steve Ralston, Director of Litigation, NAACP Legal Defense
and Educational Fund

Patricia Refo, Partner, Jenner & Block

William Rich, Professor of Law and Clinic Director, Washburn
University School of Law

David Richmond, Partner, Pepper, Hamilton & Scheetz

Dean Rivkin, Professor of Law and Director, University of
Tennessee Legal Clinic, University of Tennessee Law School

Regina Rogoff, Executive Director, Legal Aid Society of Central
Texas

David Rozwasky, Director, Inmate Legal Assistance Program,
Connecticut Prison Association

David Rudovsky, Partner, Kairys & Rudovsky

Ernie Sanchez, Executive Director, Idaho Legal Aid Services

Robert Schwartz, Director, Juvenile Law Center

Laurie Seidenberg, President of the Board, Wyoming Chapter
of the ACLU

- Gary Senner, Partner, Sonnenschein, Nath & Rosenthal
- Michael Sheehan, Partner, Sheehan, Solomon & Swaine
- Ada Shen-Jaffe, Executive Director, Evergreen Legal Services
- Linda Singer, Director, Center for Community Justice and
Partner, Lichter, Tristman, Singer & Ross
- Gail Smith, Staff Attorney, Legal Aid Society of San Diego
- Mark Soler, Executive Director, Youth Law Center
- Leslie Sooson, Associate, Sonnenschein, Nath & Rosenthal
- John Sparks, Partner, Brobeck, Phleger & Harrison
- Marvin Sparrow, Director, North Carolina Prisoners Legal
Services
- Donald Specter, Director, Prison Law Office
- Robert Stalker, Director of Litigation, Advocacy and Training,
Evergreen Legal Services
- Max Stern, Partner, Stern & Shapiro
- Dick Taylor, Executive Director, North Carolina Legal Services
- William J. "Zak" Taylor, Partner, Brobeck, Phleger & Harrison
- Tim Turner, Partner, Shepard, Mullin, Richter & Hampton
- William B. Turner, Partner, Turner & Brorby
- Tedd Ford Webb, Consultant
- Laurie Weinstein, Staff Attorney, Special Litigation Section,
Department of Justice
- Betty Wheeler, Executive Director, ACLU of San Diego
- Lea Witte, Director, Chicago Volunteer Legal Services Foundation

**Toni Wolfman, Coordinator of pro bono program, Foley, Hoag
& Eliot**

APPENDIX B**LAW FIRM SURVEY ON
CORRECTIONS LITIGATION**

Your responses to this questionnaire will be maintained confidentially, and data obtained from the questionnaire will be disseminated in the aggregate only, without individual attribution to your firm.

1. Please indicate the following information:
 - a. Firm name _____
 - b. Address _____
 - c. Phone number _____
 - d. Name and position of person responding _____

 - e. Number of attorneys in firm as of June 1991:
Partners: _____ Paralegals: _____
Associates: _____
TOTAL ATTORNEYS: _____
 - f. Areas of practice _____
 - g. Areas of specialty _____
2. Does your firm provide representation in criminal cases?
Y N
3. How many lawyers did your firm hire in the past year?

4. Over the past five years, what is the average number of lawyers your firm has hired annually?

5. Does your firm have a program for providing legal representation to the poor and/or disadvantaged?

Y N

If yes, please check each answer that applies to your firm's pro bono program:

_____ written pro bono policy (please attach)

_____ pro bono committee

_____ individual responsible for coordinating pro bonoprogram (please provide name and position)

_____ representation by firm lawyers in individual pro bono cases

_____ special pro bono program (please describe)

6. Please indicate the aggregate number of hours spent by legal staff in your firm on pro bono litigation. (If precise figures are not available, please estimate to the best of your ability.)

Partners' time_____

Associates' time_____

Paralegals' time_____

7. Please indicate the types of pro bono cases your firm has handled in the last 5 years.

_____ Representation to indigents in individual civil cases

_____ Family law

_____ Discrimination

_____ Immigration

- ___ Criminal representation
 - ___ Representation of nonprofit institutions
 - ___ First Amendment
 - ___ Reproductive freedom
 - ___ Other (please describe) _____
-

8. Has your firm handled any class actions on a pro bono basis?
 Y N

9. Has your firm represented inmates in cases concerning conditions and practices in correctional institutions?
 Y N

If no, skip to question 27 (page 10). If yes, continue with question 10-26.

10. Please indicate the number of corrections cases your firm has handled within the last five years in each category for each of the following institutions:

| | Prisons (Male) | Prisons (Female) | Jails | Juvenile Facilities |
|--|---------------------------|-----------------------------|--------------|--------------------------------|
| a. Cases Challenging General Conditions of Confinement in an Institution or System | _____ | _____ | _____ | _____ |
| b. Cases Challenging Discreet Conditions and Practices | _____ | _____ | _____ | _____ |
| First Amendment involving inmates (such as censorship, religion, hair style) | _____ | _____ | _____ | _____ |

| | | | | |
|---|-------|-------|-------|-------|
| Disciplinary rules and procedures | _____ | _____ | _____ | _____ |
| Classification and other administrative hearings | _____ | _____ | _____ | _____ |
| Medical care | _____ | _____ | _____ | _____ |
| Guard brutality | _____ | _____ | _____ | _____ |
| AIDS issues | _____ | _____ | _____ | _____ |
| Programming (such as education, recreation or job training) | _____ | _____ | _____ | _____ |
| Other | _____ | _____ | _____ | _____ |
| (please indicate) | _____ | | | |

11. Please indicate the number of cases identified in question 10 seeking primarily injunctive relief and the number seeking primarily damages:

General conditions: _____ Damages

_____ Injunctions

Discrete conditions
and practice: _____ Damages

_____ Injunctions

12. Out of the cases identified in question 10, please indicate how many of the cases were brought as class actions:

_____ Cases challenging general conditions of confinement

_____ Cases challenging discrete conditions and practices

13. Has your firm ever represented inmates in corrections cases involving out-of-state institutions?

Y N

If so, please indicate how many out-of-state corrections cases your firm has handled. _____

14. Are there specific types of corrections cases that your firm prefers to handle? Y N

a. If yes, please indicate the types your firm prefers to handle:

_____ Cases challenging general conditions of confinement in an institution or system

_____ Cases challenging discrete conditions or practices (please identify subject preferences, if applicable)

_____ First Amendment cases

_____ Medical care cases

_____ Guard brutality cases

_____ AIDS cases

_____ Disciplinary rules and procedures

_____ Other (please specify) _____

_____ Damages cases

_____ Class actions

_____ Cases involving juvenile institutions

_____ Cases involving women's institutions

_____ Other (please describe) _____

b. If so, please indicate why your firm prefers these types of corrections cases:

15. Are there specific types of corrections cases that your firm prefers not to handle? Y N

a. If yes, please indicate the types of corrections cases your firm prefers not to handle:

_____ Cases challenging general conditions of confinement in an institution or system

_____ Cases challenging discrete conditions or practices (please identify subject preferences, if applicable)

_____ First Amendment cases

_____ Medical care cases

_____ Guard brutality cases

_____ AIDS cases

_____ Disciplinary rules and procedures

_____ Other (please specify) _____

_____ Damages cases

_____ Class actions

_____ Cases involving juvenile institutions

_____ Cases involving women's institutions

_____ Other (please describe) _____

b. If so, please tell us why your firm does not accept these types of corrections cases.

16. Please indicate the number of the firm's corrections cases that came from each of the following referral sources:

a. Court appointment _____

b. Referral by civil liberties or prisoners' rights organization

c. Referral by pro bono referral organization

d. Individual attorney interest _____

e. Direct client request _____

f. Other (please indicate how)

17. Please indicate the aggregate number of hours spent by legal staff in your firm on corrections litigation. (Please break out by partners, associates, and paralegals, if possible; if actual figures are not available, please estimate to the best of your ability.)

a. Partners' time _____

b. Associates' time _____

c. Paralegal time _____

18. Please indicate the number of lawyers at your firm involved in corrections litigation over the past five years

a. Partners _____

b. Associates _____

19. Does your firm work with other organizations, such as the National Prison Project, Youth Law Center, an ACLU affiliate, local prisoners rights advocacy groups, or other private firms on these cases? Y N

If yes, please name _____

If yes, would your firm handle these cases without the involvement of these organizations? Y N

Please explain _____

20. Does your firm pay for litigation expenses, e.g. expert fees, discovery, in these cases? Y N

21. Has your firm received outside funding to cover expenses associated with this litigation? Y N

a. If yes, please check the types of litigation expenses paid for by outside funding:

_____ Expert fees

_____ Discovery costs

_____ Other (please describe) _____

b. If yes, please indicate the funding sources

c. If yes, would the firm handle these cases without outside funding to cover expenses? Y N

22. Has your firm applied for attorney's fees in corrections cases? Y N

a. If so, have attorney's fees been awarded in these cases? Y N

b. If so, what does your firm do with attorney's fees received from corrections litigation?

_____ a. Reimburse firm for expenses

_____ b. Contribute the total award to general firm revenues

_____c. Reserve award for further public interest litigation by the firm

_____d. Donate to cooperating public interest organizations or other non-profit organizations

_____e. Other (please explain)

23. Please indicate other organizations in your firm's locale that represent inmates in corrections litigation.

24. Is your firm interested in continuing involvement in correctional litigation in the future? Y N

a. If yes, please indicate the types of corrections cases your firm would accept:

_____ Cases challenging general conditions of confinement in an institution or system

_____ Cases challenging discrete conditions or practices (please identify subject preferences, if applicable)

_____ First Amendment cases

_____ Medical care cases

_____ Guard brutality cases

_____ AIDS cases

_____ Disciplinary rules and procedures

_____ Other (please specify)_____

- _____ Damages cases
- _____ Class actions
- _____ Cases involving juvenile institutions only
- _____ Cases involving women's institutions only
- _____ Other (please describe)_____

b. If not, please indicate why your firm is not interested in continuing involvement in corrections cases:

- _____ Limited involvement in pro bono activity
- _____ Limited expertise
- _____ Preference for other pro bono work
- _____ Expense
- _____ Client conflicts
- _____ Political considerations
- _____ Location of corrections institutions
- _____ Dissatisfaction with the results of previous efforts
- _____ Limited possibility of recovering costs
- _____ Concern about malpractice
- _____ Other (please explain)_____
- _____
- _____

25. Under what circumstances, if any, would your firm consider increased involvement in corrections litigation? (Check all applicable circumstances)

- _____ Increased availability of back-up support, training, technical assistance
- _____ Reimbursement of expenses
- _____ Co-counselling relationship with expert organizations
- _____ Increased referrals or requests for assistance in corrections cases
- _____ Increased expressions of interest by firm attorneys
- _____ Expression of support for involvement in corrections litigation by the American Bar Association or state and local bar associations
- _____ Coverage of malpractice premiums in corrections cases
- _____ Other (please explain) _____
- _____
- _____

26. Does your firm engage in any non-litigation activities involving corrections institutions, such as lobbying, education or consulting? Y N

If so, please describe _____

The remaining questions apply only to firms that have not represented inmates in corrections cases.

27. If your firm has never represented inmates in cases concerning conditions and practices in correctional institutions, please indicate all reasons explaining the firm's non-involvement in these cases:

_____ Limited firm involvement in pro bono activity

- _____ Lack of perceived need
 - _____ No requests for representation in these cases
 - _____ Preference for other types of pro bono work
(please explain below)
 - _____ Inadequate lawyer interest
 - _____ Expense
 - _____ Size and complexity of cases
 - _____ Inadequate expertise
 - _____ Political considerations
 - _____ Conflicts of interest with existing clients
 - _____ Concern about malpractice premiums
 - _____ Logistical difficulties of representing inmates
(please explain below)
-
-

28. Under what circumstances, if any, would your firm consider representing inmates in cases involving conditions and practices in corrections institutions? (Check all applicable circumstances)

- _____ Increased availability of back-up support, training, technical assistance
- _____ Reimbursement of expenses
- _____ Co-counselling relationship with expert organizations
- _____ Increased referrals or requests for assistance in corrections cases
- _____ Increased expressions of interest by firm attorneys

_____ Expression of support for involvement in
corrections litigation by the American Bar
Association

_____ Other (please explain)_____

Thank you for your time. Please return the completed questionnaire to Professor Susan Sturm, University of Pennsylvania Law School, 3400 Chestnut Street, Philadelphia, PA 19104-6204 by August 15, 1991.

