# Navigating the Paradox of Prison Litigation

LESSONS FROM THE US

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EUROPEAN PRISON LITIGATION NETWORK

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## Navigating the Paradox of Prison Litigation: Lessons from the US

Prison litigation has become widely used as a tool to confront the unparalleled rates of mass incarceration in the US, which disproportionately impacts Black people. Indeed, "prison litigation has become a common and enduring feature of US prisons, even following the passage of the Prisoner Litigation Reform Act in 1996," which significantly limited the ability of courts to intervene in crowding cases.[1] This has, in turn, generated extensive scholarly debate on the topic, specifically on the actual impact of strategic litigation. The overall consensus of this debate is that prison reform litigation has had "an enormous impact on the US prison system".[2]

### Quantitative and Case Studies on the Impact of Prison Litigation

Studies have revealed that prison litigation in the US has brought about counterintuitive results to its aim of improving the material conditions of prisoners and ensuring that "state decision makers would embrace less costly, noncustodial alternatives" to incarceration when forced to "bear the cost of maintaining constitutional prisons".[3] Scholars who have examined the actual impact of prison litigation have revealed that litigation has facilitated mostly symbolic recognition of prisoner rights, and actually promoted the interests of the prison industrial complex more than it has improved the material conditions of prisoners.[4]

Case studies have focused mostly on the impact of the most popular and significant individual cases. The overall picture that emerges from these case studies is that prison reform litigation has had a huge impact on the US prison system, improving the prison system in areas ranging from prison health care, disciplinary practices, food service, and due process.[5] These case studies have also revealed that governors and legislatures pay lip service to prison reforms, but are recalcitrant when it comes to actually implementing those changes.[6] For instance, a study conducted by Boylan and Mocan in 2014, revealed that the prison reform litigation cases they examined had led to an expansion of the prison complex through facilitating higher prison operational and capital expenditures.[7]

However, these case studies have been limited almost exclusively to the largest and most famous cases and it is difficult to draw any conclusions about the overall impact of prison litigation from select samples. Additionally, the time lag between legal decisions and legislative action complicates the ability to assess the true effects of such litigation. The broader political landscape, characterised by conservative, 'tough-

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[1] Joshua Guetzkow and Eric Schoon, "If You Build It, They Will Fill It: The Consequences of Prison Overcrowding Litigation" (2015), Law & Society Review 49, no. 2, 402.
[2] *Guetzkow and Schoon* (n 1).
[3] Malcolm Feeley and Edward Rubin, "Prison Litigation and Bureaucratic Development" (1992), 17 Law and Social Inquiry 1, 375.
[4] See, for example, Heather Schoenfeld, "Mass Incarceration and the Paradox of Prison Conditions Litigation" (2010), 44 Law and Society Rev. 731; Joshua Guetzkow and Eric Schoon, "If You Build It, They Will Fill It: The Consequences of Prison Overcrowding Litigation" (2015), Law & Society Review 49, no. 2, 402.
[5] See, for example, Leo Carroll, Lawful Order: A Case Study of Correctional Crisis and Reform (New York: Garland Publishing, 1998); Ben Crouch and James Marquart, An Appeal to Justice: Litigated Reform of Texas Prisons (Austin, TX: Univ. of Texas Pr, 1989); John Dilulio, Courts, Corrections, and the Constitution: The Impact of Judicial Intervention on Prisons and Jails (New York: Oxford Univ. P, 1990); Malcolm Feeley and Edward Rubin, "Prison Litigation and Bureaucratic Development" (1992), 17 Law and Social Inquiry, 1; Steve Martin and Sheldon Ekland-Olson, Texas Prison Down (Austin, TX: T, 1987).; Heather Schoenfeld, "Mass Incarceration and the Paradox of Prison Conditions Litigation" (2010), 44 Law and Society Rev., 731; Larry Yackle, Reform and Regret: The Story of Federal Judicial Intervention in the Alabama Prison System (New York: Oxford Univ. Press, 1989).
[6] *Guetzkow and Schoon* (n 1).
[7] Richard Boylan and Naci Mocan, "Intended and Unintended Consequences of Prison Reform" (2014), 30 J. of Law, Economics and Organisation, 558-586.

on-crime' ideology, the war on drugs and the media sensationalisation of street crime,[8] further obscures the causal relationship between litigation and policy changes. Quantitative studies, in contrast, can reveal overall trends regarding the impact of prison litigation, "tuning out the random 'noise' inherent in individual cases".[9] Statistical controls can be implemented in quantitative studies for alternative factors that may have an impact on prison outcomes.

In 1996, Levitt presented a methodologically advanced attempt to explore the ramifications of litigation on prison overcrowding.[10] His research revealed that prison litigation typically led to a decrease in the escalation of incarceration rates during the initial two to three years post-judgment. This would indicate to reformers that their objectives had been met and that incarceration growth had been stunted. His study did not, however, control for crowding itself.

It was not until 2015 that a thorough quantitative analysis was conducted to evaluate the overall impact of prison litigation in the US.[11] This study, conducted by Guetzkow and Schoon, investigated the impact of overcrowding litigation on US prisons using data from 49 states between 1971 and 1996.[12] The study examines the impact of overcrowding litigation on five outcomes: prison admissions, releases, spending on prison capacity, prison crowding, and incarceration rates. The study examined three ways that state officials could have responded to litigation: by reducing prison admissions, increasing releases, and boosting spending on prison capacity. It also examines whether two secondary outcomes — namely, prison crowding and incarceration rates — were subsequently affected by correctional officials' response to litigation. The study controlled for the following factors: prison admissions rates, prison release rates, per capita state spending on capital outlay for corrections and incarceration rates.

The study found that overcrowding litigation did not lead to a decrease in prison overcrowding,[13] and instead resulted in increased prison funding and higher incarceration rates.[14] The study revealed that, overall, overcrowding litigation had no impact on its intended target, namely, prison crowding — not even indirectly through prison construction. The study found that "prison crowding itself [...] had no impact on prison admissions and releases", indicating that the movement of prisoners in and out of prisons remained unresponsive to the level of crowding within the facilities.[15] It further concluded that prison overcrowding litigation has not been followed by a reduction in prison admissions or an increase in release rates. It found that "spending on prison construction [would] increase in the first and second years after a court action to relieve overcrowding".[16] Strikingly, the study revealed that when a control was included for prison crowding, crowding litigation actions is shown to have *directly* facilitated a substantial growth in the incarceration rate.[17] As this growth in incarceration necessitates a corresponding expansion of prison capacity, overcrowding litigation has therefore indirectly also led to increased spending on prisons.[18] Ultimately, the data exposed that prison overcrowding litigation has led to higher rates of incarceration and enhanced the political and professional standing of the correctional profession.

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[8] *Guetzkow and Schoon* (n 1).
[9] ibid.
[10] Steven Levitt, "The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Legislation" (1996), 111 The Q.J. of Economics, 319-351.
[11] *Guetzkow and Schoon* (n 1).
[12] The study restricted the study to this time period because of the Prison Litigation Reform Act coming into force in 1996.
[13] *Guetzkow and Schoon* (n 1).
[14] ibid.
[15] ibid.
[16] ibid.
[17] A growth of 2.7 points, when a control for crowding is included.
[18] *Guetzkow and Schoon* (n 1).

Prison overcrowding litigation in the US is conducted based on the Eighth Amendment's protection against cruel and unusual punishment. As this is a broad provision, judges have been left with wide discretion in overcrowding cases and there has been significant ambiguity regarding the acceptable threshold of crowding and the methods to be devised to reduce it. This ambiguity carved room for correctional officials to exert their influence. Gradually, judges accepted correctional officials' own advice and standards regarding the acceptable level of crowding.[19] Adherence to a 'crowding standard' was accepted by courts as sufficient to demonstrate compliance with judgments in overcrowding cases, and the courts left full discretion to states as to the means to be employed for complying with crowding standards. In most of the prison overcrowding cases, it took several years after judgments had been handed down before state lawmakers took action. When they did take action, it was to build more prison capacity.

The findings of the study by Guetzkow and Schoon supported their hypothesis that state officials would be unlikely to respond to overcrowding litigation by adjusting admissions or release rates, but were likely to respond by increasing spending on prison capacity in line with their political interests and the professional interests of corrections officials. Maintaining crowded prisons would be in their interest, because this continuously provides support for their demands for more personnel, larger budgets, and stricter controls.

## Critical Analyses on the Impact of Prison Litigation

This phenomenon — whereby "organisations blunt the impact of lawsuits by shaping judicial conceptions of what counts as legal compliance in ways that are aligned with professional and organisational interests" — has been captured through the 'endogeneity of law' concept, coined by sociolegal scholar Lauren Edelman.[20] Guetzkow and Schoon apply this concept to prison litigation and show, in line with their findings, that the impact of prison litigation is likely to be mostly symbolic and in line with the interests of the prison industrial complex, rather than facilitating significant improvements in the material conditions of prisoners.

Critical race theorists and prison abolitionists in the US have further examined and grappled with this paradoxical effect of prison litigation. Critical Race Theory has highlighted that when civil rights activists mobilise legal systems to disrupt their disproportionate infliction of harm through the prison system, the State responds by transforming only enough to preserve and naturalise the status quo, thereby strengthening its own legitimacy.[21] As described by Turman Arnold, the law, in this way, has been "the greatest instrument of social stability because it recognizes every one of the yearnings of the underprivileged, and gives them a forum in which those yearnings can achieve official approval without involving any particular action which might joggle the existing pyramid of power."[22]

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[19] Malcolm Feeley and Van Swearingen, "The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications" (2004), 24 Pace Law Rev., 433-475: 449.

[20] Lauren Edelman, "Legal Environments and Organisational Governance: the Expansion of Due Process in the Workplace" (1990), 95 American J. of Sociology, 1401-1440; Lauren Edelman, Christopher Uggen, and Howard S. Erlanger, "The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth" (1999), 105 American J. of Sociology, 406-454.

[21] See e.g. Riva Siegel, "The Constitutionalization of Disparate Impact—Court-Centered and Popular Pathways" (2019), 106 Cal. L. Rev., 2001; Angela Harris, "Compassion and Critique" (2011), 1 Columbia Journal of Race and Law, 3, 326-352.

[22] Thurman Arnold, The Symbols of Government (1935) 34-35.

Prison and police abolitionists in the US have built on this understanding, and described this phenomenon through the concepts of 'positive reform'[23] and 'reformist-reform'.[24] Prison abolitionists have highlighted how prison litigation stimulates such reforms, generating 'symbolic compliance', which serves as 'window dressing' for expanding the strength, legitimacy and reach of the prison system.[25] In e.g. exposing how the State itself expressed its support for demands to defund the police in an attempt to tune out the reality that police budgets were being increased across the board,[26] abolitionists have revealed the dangers of accepting concessions from the state that are purely symbolic in nature. They have shed light on the risks that prison litigation can, in this way, be co-opted and "transformed into a non-threatening, pleasant appendix" to the prison complex.[27] Multiple guidelines have been developed by prison abolitionists for those engaging in prison litigation on identifying litigation tactics that minimise the risk of inadvertently reaffirming the legitimacy of the prison system and to maximise efforts towards implementing concrete and tangible improvements to the material conditions of prisoners.[28]

The lessons from prison litigators in the US must serve as caution for and guide counterparts in Europe. Their efforts reveal how crucial it is to continuously interrogate and uncover the actual impact of prison litigation, to counteract the ability of the prison system to conceal its material reality behind the guise of being 'human rights compliant'. In doing so, a litigation strategy can be constructed for "materially reduc[ing] violence or maldistribution without inadvertently expanding harmful systems in the name of reform".[29] In this way, legal frameworks can be invoked instrumentally to navigate the traps presented by positive reform, and tactics can be identified and improved upon for mitigating harms inflicted by carceral punishment.

[23] Thomas Mathiesen, *The Politics of Abolition Revisited* (Routledge 2016).
[24] Jon Schwarz, "Black Lives Matter Wants to End Police Brutality. History Suggests It Will Go Much Further" (INTERCEPT, 2020), https://theintercept.com/2020/06/27/black-lives-matter-police-brutality-history/, accessed 23 April 2023.
[25] Dean Spade, "Impossibility Now" (2014), https://www.youtube.com/watch?v=OU8D343qpdE, accessed 5 March 2022.
[26] Sarah Holder, Fola Akinnibi, and Christopher Cannon, "'We Have Not Defunded Anything': Big Cities Boost Police Budgets" (Bloomberg CityLab, 22 September 2020), https://www.bloomberg.com/graphics/2020-city-budget-police-defunding/, accessed 10 September 2023.
[27] *Mathiesen* (n 23).
[28] Marbre Stahly-Butts and Amna A. Akbar, "Reforms for Radicals? An Abolitionist Framework"; Critical Resistance, "Reformist Reforms vs. Abolitionist Steps to End Imprisonment" (2021), https://criticalresistance.org/wp-content/uploads/2021/08/CR_abolitioniststeps_antiexpansion_2021_eng.pdf, accessed 13 March 2024; Interrupting Criminalization, Project Nia & Critical Resistance, "So is this Actually an Abolitionist Proposal or Strategy? A collection of resources to aid in evaluation and reflection" (2022), https://static1.squarespace.com/static/5ee39ec764dbd7179cf1243c/t/630398e383d20c0139686f16/1661180144236/Abolition+Binder_Web+Version.pdf, accessed 13 March 2024.
[29] Angel E. Sanchez, "In Spite of Prison," in Developments in the Law — Prison Abolition (2019), 132 HARV. L. REV. 1650, 1652.