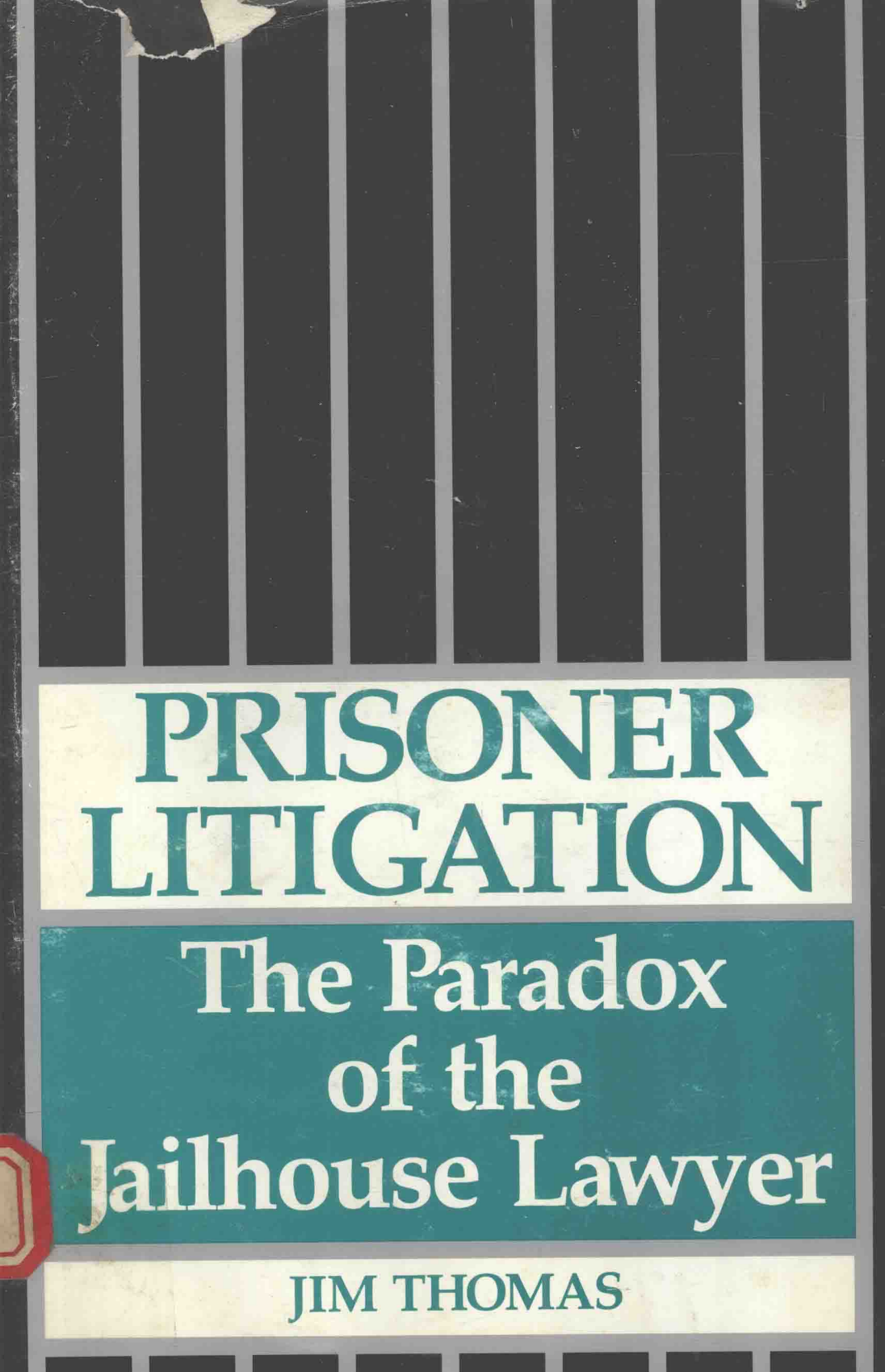

PRISONER LITIGATION

The Paradox of the Jailhouse Lawyer

JIM THOMAS

PRISONER LITIGATION

The Paradox of the Jailhouse Lawyer

Jim Thomas

Rowman & Littlefield
PUBLISHERS

ROWMAN & LITTLEFIELD

Published in the United States of America in 1988
by Rowman & Littlefield, Publishers
(a division of Littlefield, Adams & Company)
81 Adams Drive, Totowa, New Jersey 07512

Library of Congress Cataloging-in-Publication Data

Thomas, Jim, 1941–
Prisoner litigation : the paradox of the jailhouse lawyer / Jim Thomas.

Bibliography: p. 273
Includes index.
ISBN 0–8476–7477–0
1. Prisoners—Legal status, laws, etc.—United States. I. Title.
KF9731.T48 1988
344.73′0356—dc19
[347.304356] 87–19870
CIP

90 89 88
7 6 5 4 3 2 1

Printed in the United States of America

Acknowledgments

THE GENESIS OF THIS PROJECT WAS NONE OF MY DOING. I was content as a potential social theorist until Shubie Moore put me in prison, Ra Rabb Chaka introduced me to prison law, and Edmund Clemons, in his gentle way, planted and nurtured the notion of an ambitious project. It is not clear whether they should be condemned or thanked, but their role is acknowledged and their support has been unwavering. Mylon (Milo) Cross also had a lot to do with suggesting ideas and data sources. I don't see Shubie or Ed much, now that they've moved on to another phase of their life, but Ra and Milo have journeyed with me through the final chapter.

Acknowledgments are not necessarily self-indulgent. They are "thank yous" to those who consistently subordinated their own needs, often with some sacrifice, to assist in an endeavor not their own. Many friends, and even sympathetic critics, have contributed to this project in various ways. Elijah Baptist, Michael Clark, Robert Curtis, Doug Gates, Bob Johns, Johnnie Lane, Alex Neal, John Shannon, Reggie Smith, David Stribling, and many others helped me do prison time "on the installment plan." If I have omitted any names, it is an oversight, not a slight. Numerous jailhouse lawyers patiently shared their knowledge and experiences. Among them were Frank Alerte, Michael Antonelli, Michael Green, Richard Homans, Aaron Snowden, Artur (Rico) Stringer, Kenneth Thompson, Howard Williams, and many others who prefer anonymity. I am also grateful for the assistance of James Newsome and Joe Woods, two of the best jailhouse lawyers in the state, although Ahmad and Rico are also counted among the best. I am also heavily indebted to Ruthie Carbona, Rebecca Fuller, and Pat Wheeler. Most are back on the streets, some are not, but all remain committed to prison reform.

Federal court personnel were of immense help and provided useful off-the-record information. They prefer to remain anonymous. I owe a considerable debt to the Illinois Department of Corrections (IDOC) for allowing access to prisoners and for authorizing interviews to be tape-recorded. To my pleasant surprise, I found IDOC administrators and staff to be helpful and forthright, for which I am most appreciative. They cooperated by providing another perspective; hopefully, they are not disappointed.

Friends and colleagues active in the John Howard Association, the Illinois prison system's watchdog agency, especially Jeanette Musengo and Jerome Blakemore, shared their years of experience and helped obtain otherwise unobtainable data. Attorneys and legal researchers also kept their sense of humor while I pestered them with endless questions and usurped much time that they would otherwise use to advocate prisoner rights. Ruthanne DeWolfe, Lonna Radunski, and Jan Sussler were especially helpful. Theodore Eisenberg provided useful ideas and data, and his research on civil rights litigation has influenced much of my own thinking. Monica Hardesty's touch permeates the latter chapters. I also acknowledge the willingness of James McCafferty of the Administrative Office of the United States Courts to allow indirect release of computerized federal court data. Richard Doherty, Joni Hickman, Devin Keeler, Virginia Kroncke, Melissa Melton, David Moton, Kathy Harris, Sue Los, Norman Guzman, Valery Holloway, Clarissa Palermo, Brad Slavin, and George Wheetly also helped in their own individual ways.

Northern Illinois University provided release time, a sabbatical, summer funding, late afternoon classes, and other useful amenities. The computer staff at Northern Illinois University, luckily, takes pride in problem-solving, and this project tested their sense of humor, which they never lost. Rick Tarulis and Chris Wagner tolerated my late calls and kept things running. To John Austin, Anmarie Aylward, Jim Marquart, Harry Mika, Bill Minor, Bob Suchner, Francis Cullen, Pam Crawford, Chenko Caninovitch, Chris Vanderpool, and John Van Maanen I also owe a debt. The sociology department secretaries, Joanne Russell and Barb Rink, were invaluable in assuring that my departmental obligations did not suffer excessively during periods of overload. My students deserve more acknowledgment than can be given here; they tolerated eccentricities with relatively good humor. Several readers provided detailed suggestions and criticisms, especially Spencer Carr and Gabriele Strohschen. David Luckenbill's assistance in "moving cookies to a lower shelf" was also helpful. Rhonda Nirva devoted many hours in helping make the first chapters generally more readable and offered numerous suggestions before searching for an Arizona rainbow. Jennifer Findlay's warmth, humor, and chili smoothed many rough edges.

This project benefited from the late Ed Sagarin's intellectual critiques as well as his many active years as a prison reformer. He was supportive to his final hour. If Peter Manning's years of friendship and guidance have not produced the product they deserved, hopefully his sense of humor and subheads have. New beginnings occur in strange places. With Barbara, it has begun where the final chapter of this volume concludes.

Contents

Tables

1

Introduction: Prisoners, Litigation, and the Law

> Find out just what people will submit to, and you have found out the exact amount of injustice and wrong which will be imposed upon them; and these will continue till they are resisted. The limits of tyrants are prescribed by the endurance of those whom they oppress (Fredrick Douglass, 1857).
>
> But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of Constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country (Justice Byron White, *Wolff v. McDonnell*, 1974).

DIGGER BELIEVED THAT A MAN'S CELL WAS HIS CASTLE; in the summer heat especially, he preferred the comfort of jockey briefs to uncomfortable prison clothes. The problem was, his attire, or lack of it, made the female counsellor uncomfortable when she talked to him through the bars of his cell. She also disapproved of all the pictures of naked women pasted on his wall. She decided that he was some kind of "sex nut," and placed her conclusion in his prison file. There are few secrets from those well placed in the prison culture, and Digger soon learned of her "diagnosis," which would not only decrease his opportunities for rewards but could jeopardize his chances for transfer or release as well. In retaliation, he threatened a civil rights lawsuit, but a compromise was reached, and he was transferred to a more favorable environment. For Digger, law, or the threat of invoking it, was successful, and his experience typifies the many grievances that impel prisoners to turn to the courts to resolve problems.

THE ISSUES SIMPLY STATED

There are many social and legal issues underlying prisoner litigation, but they can be grouped under four broad categories.[1] The first issue revolves around the role of the federal courts in reviewing the constitu-

tionality of state activity and the tension between states' rights and federalism. Should states be relatively free from federal intervention, or should the federal government attempt to establish between states uniform procedures and behavior consistent with Constitutional norms? How far should federal courts go in intervening into the domain of state officials? Are expanded civil rights a consequence of "sociology majors on the bench?"

The second issue is the meaning of rights articulated in the Constitution. Are the definitions of individual liberty "built into" the literal language of the Constitution? Does (or should) the federal judiciary have the power to reinterpret the literal text of the document in a manner more in line with changing social conditions, attitudes, and norms? What were the "original intents" of the Framers? As one conference critic glibly argued, "Show me where in the Constitution it says that prisoners have the right to toilet paper!" Lacking an explicit court intent, so the logic runs, there is no reason to translate an abstract claim of rights into specific legal remedy.

The status of prisoners as legal subjects is the third issue. One argument holds that those who have been convicted of abusing the law should be restricted from further access to it in noncriminal cases until their social debt is paid by incarceration. The "civil death" doctrine, in which prisoners possess no more legal rights than a "dead man," long prevailed. As late as 1973, a few states clung to this doctrine, even though it had been ruled unconstitutional (e.g., *Delorme v. Pierce Freightlines Co.* 353 F.Supp. 258, 1973). What Constitutional rights, then, should prisoners possess? If they possess rights, how are they to be protected? By the courts, by the states, or by prison adminstrators?

The fourth issue centers on social ideology and the relationship between freedom and control, natural and positive law, the philosophy of justice and its implementation, and social change and social stability. How much freedom do we allow persons who have been deprived of freedom? How should legal change occur? What are the principles of justice to which we, as an "enlightened society," are bound, and how ought we express these principles? How far should we go in expanding prisoners' rights?

Each of these issues requires a social approach to the study of prisoner litigation. Above all, we must recognize that law is a form of social action, and just as law changes, so too does the manner in which it is employed by those seeking redress of real or imagined grievances.

PROLOGUE

Discussions of the world of prisoner litigation often resemble the tales of Marco Polo returning from the orient: there are fabulous descrip-

tions, incoherent tales, and lack of common words and experiences create disbelief, suspicion, and hostility. One too sympathetic toward the prisoner culture risks being ignored as a naive romantic; one too hostile is dismissed as insensitive to cultural nuances of meaning. One means of displaying the contours of the litigation landscape might be to invite others to participate in a guided tour, a travelogue. I, the tour guide, will lead us through the complex history by which prisoners' rights have evolved and display the changing topography of litigation trends. En route, we will visit some of the denizens of prisons, courts, and corrections and listen to their tales.

Lifting the haze obscuring the litigation scene requires a step-by-step journey in which we identify selected landmarks, primary points of interest, and chat a bit with key players in the litigation game. As with any journey, we cannot visit everything or everyone, but we can obtain a flavor of the culture and, with luck, come away with a stronger understanding of and appreciation for this alien world. Each chapter is a tour stop, and each stop will provide answers to questions, dispel misconceptions, and illuminate issues that are too often addressed with little fact or insight.

MAPPING THE TERRAIN

The social practices and relationships of law are not to be found in law books or case annals, and many of the conventional paradigms for interpreting these relationships are breaking down (e.g., Nelken, 1986). Understanding prisoners' use of law requires a grounding in the history, litigation trends and social processes that generate their litigation. Critics of prisoners' access to law, and they seem to be an overwhelming and strident majority, lack this grounding and view these suits as an abuse of the legal system. But as Engel has observed:

> Criticism of what is seen as an overuse of law and legal institutions often reveals less about the quantity of litigation at any given time than about the interests being asserted or protected through litigation and the kinds of individuals or groups involved in cases the courts are asked to resolve (Engel, 1984: 552).

The rights protected by criminal and civil law do not arise *de novo,* but are context bound and located in the social acts and attitudes of a given historical moment. Through their social activity, people create belief systems that define rights. They then make laws to protect them. Other people then attempt to scurry under the panoply of protections these laws have created. But law, in its precision, may not always recognize the rights of newcomers, and the struggle for rights begins anew (Roby, 1969).

My concern in this volume is civil rights, where these rights are located, how the law protects them, what access there is, how rights have broadened in recent decades, and how this broadening has occured. My window into this world is prisoner litigation, which raises all of these issues, though not with equal force. Our window holds a double prism. The first reflects the trends of prisoners' filings through the objective lens of filing data, the same data that critics use to dismiss the enterprise, to obtain a more accurate image than currently exists (Thomas, Harris, and Keeler, 1987). The second reflects the process of litigation as seen by those who have created it, primarily prisoners, in order to better understand the social and empirical context out of which the use of courts arises. Despite the discourse of revelation, the intent is interrogatory, and descriptions should be interpreted as questioning the social sources and political ideology of and resistance to our thinking about the evolution of rights in general and prisoners' rights in particular.

What began as a short day trip into the world of jailhouse lawyers assumed a dynamic of its own, and I lost control of the tour. What there was to see and understand required additional trips, extended visits, and fuller immersion into the historical location of prisoners' rights, litigation trends and patterns, judicial processes, prison existence, and the culture of the jailhouse lawyer. The story of the jailhouse lawyer cannot be told without first providing a massive prologue; this is the function of this work. As jailhouse lawyers told their story, dramatic discrepancies quickly appeared between their views and the views of their critics, discrepancies in the reasons for filing, the substantive merit of suits, the judicial outcomes, the methods of processing, and the environment and motivations of those litigating. Before their story could be told, a fundamental clarification of prisoner litigation first seemed necessary. Tracing the history of the development of rights, identifying distinctions in filing patterns, and describing the nature of suits, procedures of processing and environment from which suits emerge, furnishes the necessary preliminary framework. A separate story of the jailhouse lawyer will later be told.[2]

Who Cares?

Why, some have asked, should anybody care about prisoner litigation? One reason lies in our country's unique system of laws. The United States is the only country in the world that provides convicted prisoners with the right to petition *directly* to the judiciary to redress grievances concerning either their original conviction (habeas corpus) or complaints of treatment or conditions (civil rights). Other nations may allow indirect access to the courts through intermediaries such as lawyers or their equivalent, but none provide and protect a formal channel for

prisoners *themselves* to petition directly to the courts. None require the courts to provide a flexible and sympathetic interpretation of prisoner complaints, and none have ordered reasonable availability of resources to allow unfettered access to initiate complaints. Such direct access to law has had a dramatic impact on state and federal fiscal resources, prison administration, judicial proceedings, and prison conditions.[3] Despite the claims of critics and skeptics, these suits have had substantial impact on fiscal policies, prison administration, court operations, and prison social order. Prisoner litigation has also contributed to the development of individual liberty by expanding Constitutional protections of a variety of rights. Perhaps more than any other single mechanism, prisoner litigation has contributed to prison reform, and even when a suit is lost, litigation opens the windows of prisons just a bit wider to make their historically dark interiors just a bit more visible to those on the outside.

The Genesis of Litigation

The roots of prisoner litigation extend back to pre-Norman common law, but the contemporary beginnings are more recent. The Fourteenth Amendment and post-Civil War legislation provide the basis for both habeas corpus and civil rights litigation. These bases have been expanded by recent interpretations of individual rights and shaped by the civil rights and other activist movements in the 1960s. Black Muslims were particularly astute in recognizing these changes, and after protracted court battles, they won a series of political victories for religious recognition. Their successes, and even some failures, provided precedents that established the broader rights of prisoners.

Viewing the 1960s as the watershed of prisoners' rights, however, is misleading. Prisons in the United States have historically been personal fiefdoms, generally closed to outside inspection. In the 1950s, prison riots, changes in prison governance, and shifting definitions of humane treatment contributed to the translation of prisoner privileges into rights.[4] The 1950s were also the beginning of more active federal intervention into the affairs of states, and the Supreme Court began reviewing state practices alleged to violate federal or Constitutional principles. A decade of political, penal and social change in the 1950s thus eased the way for expansion of prisoner rights in the next decade. Together, prison changes, old law, and new judicial interpretations have given birth to a phenomenon that has generated considerable controversy among criminal justice practitioners, lawyers, and civil libertarians. In the past quarter century, state and federal prisoners have filed nearly a half-million suits in federal district courts, constituting a substantial portion of all federal litigation.

The Trouble with Prisons

Prisoners sue primarily because they object to the conditions of their confinement. Literature on prison life, overwhelming in its abundance, provides rich descriptions of the conditions faced by inmates. Since the eighteenth-century work of John Howard, descriptions of prison life in the United States by de Beaumont and de Toqueville (1970/1833), the mid-eighteenth-century revelations of the Prison Discipline Society of Boston (1972), and the later studies of Clemmer (1958) and Sykes (1958), analyses of prisoner social order and existence have revealed many of the problems prisoners and staff must confront daily. Among the most common contemporary problems include prisoner violence (Abbott, 1981; Colvin, 1981, 1982; Ekland-Olson, 1986; Granger, 1977; Marquart and Crouch, 1984; Sylvester et al., 1977; Useem, 1985), guard violence (Cohen and Taylor, 1972; Marquart, 1986a; Possley, 1981), psychological degradation (Cloward, 1960; DeWolfe and DeWolfe, 1979; Goffman, 1961; Menninger, 1978), sexual predation (Lockwood, 1980; Wooden and Parker, 1982), street gangs (Camp and Camp, 1985a; De Zutter, 1981; Jacobs, 1974a, 1977; Stastny and Tyrnauer, 1983), racial conflict (Carroll, 1974, 1977a, 1977b; Jacobs, 1982), unfair disciplinary procedures (Jacobs, 1983; Thomas, Aylward, Mika, and Blakemore, 1985), and general conditions (Braly, 1977; Cardozo-Freeman, 1982; Irwin, 1962, 1970; Thomas, 1984b). Some of these characteristics are inherent in the nature of prisons, but many are not, and are created by the arrogance, abuse, and indifference of correction officials.

Prisoners have responded to these problems in various ways. In the early nineteenth-century prisons, especially in Philadelphia's isolation model, psychological disintegration was one, albeit involuntary, response. In our contemporary prisons, "burn-out" still occurs in more subtle forms characterized often by heavy drug use, behavioral passivity, and psychological withdrawal. "Ghosting," or avoiding work or interaction with others, remaining unassigned to work details, and skipping meals is another way some prisoners cope with a hostile environment. Another form of response is actual or threatened physical retaliation. Several prisoners interviewed for this project expressed considerable pride in their use of violence against guards or other inmates as a means of dispute resolution. Still others "put on their mask," a frontstage persona of aloof indifference, to "skate through" their time. In Illinois prisons, most prisoners (estimated as high as 75 percent by some correctional officials) affiliate with street gangs as a means of obtaining resources and protection against the predations of others.[5]

Some prisoners, however, are neither passive nor violent. When confronted with extreme problems from either staff or other prisoners, they have their own way of retaliating. Sometimes their problems arise

from apparently minor incidents, such as maliciously being denied toilet paper by staff. At other times, the issue is quite serious, involving life-or-death matters of physical protection, health care, or guard violence. However, rather than unblock "information feedback loops" by pushing a guard off a four-level tier to initiate dialogue with the administration, a more peaceful and productive strategy is found. Whence comes the jailhouse lawyer.

Understanding Prisoner Litigation

Jailhouse law is a form of dispute resolution by which prisoners attempt to bring conditions of existence closer to their liking. Litigation alerts staff that guard complicity with street gangs is inappropriate, that ignoring potentially critical safety hazards may mean liability, and that ignoring pleas for help during a gang-rape are not to be tolerated. Litigation also creates and expands rights and expectations of prisoners during captivity, and although staff are often able to subvert these rights, their incremental expansion is undeniable (e.g., Jacobs, 1982). More simply, jailhouse law has become a means of using the legal system for the purpose for which it has been designed, that of social maintenance.[6] But for prisoners, social maintenance possesses a different meaning than for the public or for corrections' officials. As a consequence, critics see cynical manipulation of the law where prisoner advocates perceive peaceful conflict resolution.

Lawyers attempt to understand law by examining what is or has been adjudicated, the formal processes involved, or the cases that have emerged. However, these issues are meaningless when stripped from their social context. Litigation does not occur until there is, first, a dispute, and second, the recognition of law as a means of resolution. An understanding of prisoner litigation cannot be understood in isolation from such broader social factors as "justice," ideology, the changing role of the Constitution as the basis for acquiring or defending rights, the changing function of the state in implementing them or the litigants who make it happen. Hence, the organizing theme of this work is sociological. Discussions of case law have been omitted except where directly relevant.[7] Understanding prisoner litigation also requires an understanding of prison life, social control strategies, prison conditions and administration, civilian litigation, and the recent history of federal law. It is not possible to fully address all of these topics here, or even to treat them equally because of lack of available data and of the complexity of the issues. As if performing an "ethnographic biopsy," I have attempted to take a slice from the most accessible layers of the topic's body in order to study the origins and processes of prisoner litigation. Some topics are presented with broad brushstrokes; others, especially those

that have received scant attention elsewhere, are filled in with more detail.

One overriding question dominates discussions of prisoner litigation: is it really an apocalyptic "explosion" of "epidemic" proportions? Galanter (1983) has borrowed the term *hyperlexis* (from Manning, 1977) to challenge the belief that the United States is an excessively litigious society. This work focuses on one viewpoint of litigation, that of the prisoners, and expands upon Galanter's argument that litigation is not a form of "legal pollution" but arises from legitimate complaints endemic in the nation's prisons. The organizing principle of this work is that prisoner litigation is a form of resistance to the deprivations of prison life. It comes about because one group of people, prisoners, has invoked the law to stimulate another group of people, lawyers and court personnel, to respond to the injustices created by a third group, corrections' officials.

Conceptualizing Prisoner Litigation

The term "prisoner litigation" is ambiguous. It typically connotes civil rights complaints or habeas corpus suits filed by incarcerated persons.[8] In practice, however, prisoners' suits may be filed by lawyers, rather than by prisoners themselves, or by persons not incarcerated who are attempting to avoid prison. Further, suits classified in federal reports as "state prisoner litigation" may be filed by persons in county jails, by guardians of juveniles, by persons in nonprison facilities, such as mental health hospitals, or by private citizens. As a consequence, the term "prisoner litigation" encompasses a variety of complaints and disparate categories of persons who have a grievance against the state or federal criminal justice system.

The term "prisoner litigation" technically includes litigation filed in both state and federal courts. Conventional usage, however, tends to restrict the term to *federal* litigation, and this volume remains limited to federal filings. Most states have some protection against abuses of Constitutional rights of prisoners. When filing habeas corpus petitions, prisoners must normally first exhaust all state remedies prior to filing. When filing civil rights complaints, however, they may file in federal courts without first exhausting state remedies, and thus state courts are often bypassed for civil complaints.[9] This occurs because federal courts are perceived to be more sympathetic to civil rights, and because prisoners need not exhaust state remedies prior to filing a federal claim. Federal courts are also more powerful than state courts, so their decisions have more impact on society, prisons, and state law. This work emphasizes civil rights litigation. This is partly because they are the most common, the most dramatic, and the most interesting. But more impor-

tantly, civil rights complaints filed by state prisoners illustrate the transformations in the ideas and practices of rights, law, and society.

THE SOCIAL CONTEXT OF PRISONER LITIGATION

Distinctions between groups of legal subjects, those persons upon whom rights are conferred, are a function of the public grace, which at any given historical moment defines the substance of these changing values. Courts, as Fiss (1979) has cogently argued, exist not so much to resolve disputes, but to procedurally mediate and implement these values. The extension of rights to convicted offenders is an example of changing public values in which harsh codes guiding social response to and control of prisoners are breaking down. Courts have become one conduit for diverting changes from abstract ideas into social practice. Legal reforms have been triggered by the increased importance of civil society, by the increasing importance of individual rights, and by the willingness of individuals or groups to establish new case law that ultimately expands the rights of other groups as well. Other factors inducing legal changes include the subordination of punishment to external monitoring, the use of law as an instrument in social change, and the role of the state in protecting and expanding rights of citizens. Prisoner litigation has both benefited from and contributed to these changes as prisoners have used law to peacefully oppose what they perceive to be a denial of Constitutional protection.

One source of social change is social conflict. Those with power and rights wish to preserve them; those who lack power and rights wish to obtain them. Historically, many social groups have been systematically excluded from the full protection of rights to which they are perceived to be entitled. But as Robinson (1984: 10) reminds us, there has never been a social system in which masters had all the rights and slaves had none. The master cannot exist without the slave, and resistance to domination by the latter requires concessions or changes by the former.

As societies change, so too do the corresponding methods of maintaining social order. Durkheim observed that in so-called "primitive" societies, social order is ostensibly consensual and reflects dominant norms and beliefs. Consensual obligations are not as useful in providing guidelines for pluralistic societies, in which disagreements over definitions and rights may more easily arise. In societies with complex legals systems, social change contributes to changes in the content and application of law, as well as to the refinement of the definitions and applications of rights and who is to receive or be denied them. There often arises a tension between established rules that guide social behavior, such as norms, laws or values, and changing practices that seem to challenge or violate them. Prisoner litigation is one example of such a