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HEADLINE: By What Right Do Judges Run Prisons?

BYLINE: By David Schoenbrod and Ross Sandler

BODY:

The Second Circuit Court of Appeals, in an unusual move last February, convened en banc to hear argument on the constitutionality of the Prison Litigation Reform Act of 1996, a federal law requiring federal courts to end their supervision of state and local prisons unless required to correct current violations of prisoners' constitutional rights. Six months later, the judges still haven't issued their decision. At issue is the question of who should run state and local prisons. Put another way, will federal judges let elected officials govern?

As they deliberate, the judges would do well to read a new book by scholars Malcolm Feeley and Edward Rubin, "Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons" (Cambridge University Press). It is an eye-opening account of how federal judges have gone beyond enforcing the Constitution to impose their own policy preferences on state and local government. The authors, respected scholars who approve of judicial policy making, reveal a secret that has long been suspected: Judicial supervision of prisons cannot be squared with federalism, separation of powers or even traditional notions of the rule of law.

But never mind, they say. Such principles shouldn't keep federal judges from micromanaging prisons or other state and local institutions whenever the judges think they can do a better job. In other words, it's just fine for judges to usurp the jobs that the voters elected officials to do.

The case before the Second Circuit is a perfect example. It concerns the consent decree governing virtually every aspect of New York City's jails since the 1970s. The court-ordered regulations, now thicker than two Manhattan phone books, extend to amenities unknown to constitutional scholarship, such as sports television and the regular washing of prison windows. New York isn't an anomaly. Federal courts control state and local prisons in more than 30 states.

Messrs. Feeley and Rubin's research shows that the hidden aim of the lawyers and judges who established the prison reform movement in the 1960s was to impose their idea of what a model prison ought to be like: tightly bureaucratic and focused on rehabilitation. These are arguably worthy goals, but they are far different from the goals reformers claimed they had -- correcting violations of prisoners' constitutional rights.

The authors argue that these covert goals explain why the court-ordered remedies often legislated the most minute details of prison management (menus, cleaning methods, personnel qualifications) and why courts took jurisdiction over not just the worst prisons, but prisons in almost every state and territory. Along the way, the Constitution was replaced by the American Correctional Association, a private professional association, as the source of the standards that the judges imposed on elected state officials.

This is an amazing revelation; it is really a confession because lawyers and judges had always pretended that prison orders were derived from the "cruel and unusual punishment" clause of the Constitution (that is, real law) and that remedies were "only" to correct constitutional abuses. To the extent that the decrees are not to enforce the Constitution, by what right do federal judges run state prisons?

Messrs. Feeley and Rubin's account produces a logical dilemma, which is what they intend. Since the judicial decrees are, in their opinion, good, but run afoul of separation of powers, federalism and the rule of law, something has got to give. They resolve the dilemma in a startling way: They conclude that these doctrines are obsolete and should not prevent federal judges from imposing their ideas of good policy on prisons or any other institution of state and local government.

Their argument gets its emotional kick from the way they tell the story of the prison cases. They start with an account of the brutal conditions in some Southern prisons in the 1960s and go on to chart their improvement through judicial intervention. They make it seem like quibbling to question the scope of judicial authority.

But if federal judges can order increases in state spending just because they think it's a good idea, government can grow without check. Judges who go beyond remedying violations of rights and become policy makers violate the most fundamental of constitutional rights -- the right of voters to hold elected officials accountable for government policy.

Messrs. Feeley and Rubin argue that to improve governmental institutions, such as prisons, federal judges should make the decisions. Congress thought otherwise and passed the Prison Litigation Reform Act. The authors can hardly quibble since they prove that Congress got it right: Federal judges had gone off on a managerial excursion into remedies that exceeded constitutional boundaries.

The authors pose the right questions, however wrong their answers. The 11 judges of the Second Circuit ought to pick up the Feeley and Rubin book during these last days of summer. It would clear up whatever problems they're having in deciding the New York case.

Mr. Sandler and Mr. Schoenbrod are professors at New York Law School.

(See related letter: "Letters to the Editor: Judicial Remedies For Prisoners' Rights" -- WSJ September 9, 1998)

(See related letter: "Letters to the Editor: Sometimes, Prisons Need a Judge's Eye" -- WSJ September 16, 1998)

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