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The Wall Street Journal

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**HEADLINE:** In New York City, the Jails Still Belong to the Judges

**BYLINE:** By David Schoenbrod and Ross Sandler

**BODY:**

The Second Circuit Court of Appeals has just defied Congress's decision to bring to a close more than 20 years of federal court supervision of state and local prisons. Judge Guido Calabresi, writing on Aug. 26 for a three-judge panel, held that New York City jails should continue to be micromanaged by a federal decree dating back to 1978 even though the Prison Litigation Reform Act of 1996 mandates that such orders must terminate after two years unless the prisoners show that the prison violates federal law.

The 1996 legislation is based on the unimpeachable logic that elected officials answerable to the voters should manage prisons absent a violation of prisoners' constitutional rights. But Judge Calabresi apparently believes that decent prisons require active judicial oversight. Indeed, the fundamental issue raised by the Second Circuit's decision is whether federal judges will let elected officials govern.

Federal courts control state and local prisons in more than 30 states. Their orders have proved more durable than prison walls. In New York City, prisoner-rights attorneys sued in 1970s, and when Mayor Edward Koch took office in 1978, he chose to end the protracted litigation by compromise. Negotiations produced a court order entered into by the consent of the parties. The 51-page, single-spaced document had no boundaries. Amended more than 90 times, the consent decree is now thicker than two Manhattan phone books and controls virtually every aspect of the city jails housing 20,000 inmates.

It is a hodgepodge of serious remedies mixed with the wishes of those at the negotiating table: Only licensed barbers are allowed to cut hair, coffee already sugared may never be served at meals, Boraxo should be used to clean showers, the court-appointed jail monitor must be given a city car within one grade of the prison commissioner's.

The situation is much the same elsewhere in the country. Successive governors and mayors have complained that federal judges protect the ancient decrees governing prisons behind a barricade of judge-made rules that make it virtually impossible for states and cities to regain control.

Before Congress took action in 1996, elected officials could not get the courts to terminate a decree by showing that the prisons now comply with the Constitution; instead, they also had to show compliance with all of the bargains negotiated in the decree, even if those bargains -- such as requiring that prisoners' TVs get the Sports Channel via satellite -- weren't constitutionally required. It is almost impossible to prove this negative when the decrees and the prisons themselves are so complex. Of course, it is even tougher to get courts to modify decrees to accommodate changing circumstances.

So, to change prison policy, governors and mayors have been forced to beg permission from judges and plaintiffs' attorneys. New York City, for example, recently had to ask permission to reduce violence in a prison law library by putting it off limits to prisoners who had attacked other prisoners.

The city proposed delivering books to the violent prisoners in their cells. If it had acted without permission, the city would have been held in contempt for violating a provision of the 1978 decree requiring that all prisoners be allowed in the library. The prisoner-rights attorneys refused to consent. The judge decided that the violent prisoners should continue to go to the library for a five-week test. After 11 slashings and other violent episodes, he relented, but only after issuing an excruciatingly specific order on how to deliver books to the cells. And so it goes. The decrees keep getting more detailed, making it ever more difficult for cities and states to show that they have achieved the compliance needed to escape.

And then along came the Prison Litigation Reform Act. New York City, like other state and local governments, quickly asked the federal district court to terminate the 1978 decree. The judge did so, holding that the act was constitutional (although he expressed regret at giving up jurisdiction). The prisoner-rights attorneys appealed to the Second Circuit, where Judge Calabresi's panel ruled that even though the act may have stopped the federal courts from enforcing the decrees, the bargains negotiated in the decrees were deathless. They live on as "contracts" that state courts must enforce, the panel ruled.

According to the logic of the Second Circuit panel, mayors and governors in the 1970s contracted away their governments' authority to manage prisons. But this interpretation is disingenuous if only because an elected official can't enter into a contract that forever binds the hands of his successors. Such contracts are unenforceable because they undercut democracy. There are exceptions to this rule, but they are limited to necessities authorized by state constitutions such as contracting debt. In a democracy, officials cannot contract away the power of their successors without depriving voters of the power to change the course of government.

The Second Circuit panel confused the process leading up to a court decree with the decree itself. Virtually all decrees looking to change public policy involve some negotiation because it is efficient and judges often know little about managing public institutions. But that process does not literally create a contract. There is no contract that lives on if the decree is later modified or terminated.

The prisoner-rights attorneys had argued that the act's new rules cannot constitutionally apply to pre-existing decrees. But Congress clearly has the power to change the rules of judicial procedure, including those governing the termination of decrees, as two other courts of appeals have unanimously ruled.

In 1996, the Fourth Circuit, voiding a 1986 consent decree covering all of the prisons in South Carolina, held that prisoners had no vested property interest in the consent decree and that Congress indisputably has the power to prescribe in what manner district courts could enforce bargains and obligations "greater than that required by federal law." This year the Eighth Circuit similarly found the act constitutional and told the district court to decide whether Iowa qualified to have the 1984 consent decree covering the Iowa State Prison at Fort Madison terminated.

Yesterday, the city asked the full Second Circuit to overrule the panel's antidemocratic ruling. In any event, the issue is headed toward the Supreme Court. This week alone briefs in prison cases are due in the Ninth and Eleventh Circuits and oral arguments will be heard in First and Seventh Circuits. When the Supreme Court considers the act, it should, in upholding it, remind federal judges that representative democracy is part of the Constitution they swore to uphold.

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

(See related letter: "Letters to the Editor: Who Will Manage New York's Jails? -- WSJ Sept. 30, 1997)

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