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Address
William Wayne Justice[a]

THE ORIGINS OF RUIZ v. ESTELLE

On March 21, 1990, the Honorable William Wayne Justice, as Herman Phleger Visiting Professor of Law, delivered a speech to the Stanford community on the origins of Ruiz v. Estelle, *the case in which Judge Justice, after exercising unusual initiative in ordering consolidation of prisoner complaints into a class action, finding counsel for the plaintiff class, and ordering the U.S. Justice Department to appear as amicus curiae, held that state penitentiary treatment and conditions in Texas were unconstitutionally cruel. The* Stanford Law Review *is pleased to reprint the text of Judge Justice's remarks.*

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I would like to take up two issues in my remarks today. The first may be termed historical. I will begin by briefly setting out the sequence of events that led to the initiation of the class action on behalf of prisoners incarcerated in Texas prisons in the case of *Ruiz v. Estelle.*[1] In most class action litigation, of course, the plaintiffs provide the impetus for maintaining the proceeding as a class action. In contrast, the decision in *Ruiz* to classify and consolidate the representative petitions that became the basis on which the case was litigated was my own.

The remainder of my remarks are an attempt to analyze and explain why it seemed necessary for the court to exercise its own initiative to bring about this consolidation. I wish to emphasize at the outset, however, that my desire to explain the court's conduct in *Ruiz* does not amount to an apology. I am much less interested in searching out precedents, in the traditional legal sense of that term, than I am in elaborating some broader analytical or theoretical scheme for making sense of the court's response to the hundreds of ill-drafted, handwritten prisoner's petitions that poured into the clerk's office in the Eastern District of Texas. I believe it is important to elaborate this broader means of understanding *Ruiz* because the problem the Texas prison case posed for our judicial system-specifically, how our courts can provide meaningful access to legal institutions for the most disadvantaged members of our society-is one of the most important and intractable issues that face judges, policymakers, and concerned lawyers of this generation. And there is no reason to expect the issue to become less important or less intractable during your careers in the law.

***2** For me, the *Ruiz* litigation began before I went on the bench, when I was United States Attorney for the Eastern District of Texas. At that time, I would occasionally attend hearings on prisoner petitions held by my predecessor, the Honorable Joe W. Sheehy.

At this point, I should make clear that most units of the Texas Department of Corrections (TDC) are in the Southern District of Texas. The Beto, Coffield, and Eastham units, however, are situated within the Eastern District, in Anderson and Houston counties. For a good many years, prisoners in those units had been filing suits, primarily on individual bases, protesting the conditions of their confinement. Judge Sheehy had developed a rather summary form of hearing to deal with these cases.

The procedure, which I observed on several occasions, was as follows: The plaintiff would be sworn, and Judge Sheehy would ask him to tell his story. The prisoner would then give, to the best of his ability, a narrative account of the incident or incidents that had led him to file his complaint. Frequently this narrative would be difficult to follow, since most prisoners were, as prisoners are now, poorly educated, with only a rudimentary acquaintance with the English language.

The defendant state official would then have the opportunity to cross-examine the prisoner-plaintiff. Unlike the plaintiffs in these hearings, the defendants were always represented by counsel; as state officials, they would have the services of an assistant attorney general of the State of Texas.

Next, Judge Sheehy would ask the plaintiff if he had any evidence, other than his own testimony, to present to the court. Plaintiffs may have had such evidence from time to time, but I never saw any presented at the hearings I attended. Defendants, on the other hand, usually would produce both witnesses and documentary evidence to bolster their accounts.

After the witnesses for the defense were examined, the plaintiff typically would attempt some halting cross-examination. This was more likely to be "backchat" and denial, rather than recognizable cross-examination. At the conclusion of the defendant's presentation, Judge Sheehy would ask the plaintiff if he had any rebuttal evidence to present. Invariably, the plaintiff would not. Judge Sheehy would then dismiss the plaintiff's complaint from the bench.

I was struck at the time by the summary nature of these proceedings, but I want to emphasize that I did not then find anything in them to be a denial of due process. Nor, on the basis of what I heard in those hearings, did I have any sense of wrongdoing on the part of TDC. My attitude toward TDC at that time was probably similar to that of most Texans: I thought that the system was efficient, and while occasional problems common to all large organizations might exist, no grave, systemic difficulties existed.

Since, as I have said, I did not find any failure of due process in the procedure Judge Sheehy had worked out, I adopted his approach when I went on the bench. However, the process appeared quite different to me as participant than it had when I was merely an observer. The message was ***3** brought home forcibly to me that prisoners who had no legal representation simply could not effectively present their grievances. *Pro se* prisoners, like other *pro se* litigants, had great difficulty in framing any kind of pleading, and knew nothing of the Federal Rules of Civil Procedure or the Federal Rules of Evidence. Their status as prisoners further exacerbated some of their difficulties. It would have been difficult, if not impossible, for them to engage in any discovery, had they even known how to do so.

Occasionally, I was tempted to try to get counsel for these prisoners, but to do so would have been very difficult. I could not order lawyers to represent them, and since at that time neither 42 U.S.C. § 1988[2] nor the Equal Access to Justice Act[3] was on the books, the prospect that an attorney would receive any fee for services rendered in such a case was extremely dim.

I noted that the procedural problems of these cases were likely to produce occasional substantive injustices as well. Despite their unartful expression, plaintiffs would occasionally say some things which had the ring of truth. Since my father had been a county district attorney and a criminal defense lawyer, and since I had been both a criminal defense lawyer and a prosecutor, I had been around jails since I was a boy. Having represented more than a few thieves, bootleggers, rapists, and murderers, I was not disposed to regard as the gospel truth everything a miscreant told me, even-and perhaps particularly-if he said it under oath. However, since my experience also encompassed any number of sheriffs, policemen, and jailers, I was not likely to be wholly credulous as to claims made by peace officers, either. I have been lied to and I have been told the truth, and I think that I can usually tell the difference. Therefore, I was greatly troubled when I found myself, as I sometimes did, dismissing prisoner suits that sounded credible. However, given the inept presentations and lack of documentary evidence in these cases, ruling in these prisoners' favor clearly would have been courting reversal.

I was more than troubled by this state of affairs; I was offended by it. Given the fact that TDC was always represented by counsel, while prisoners had to appear *pro se*, and given the consequences that inevitably followed, one side of a controversy was routinely going unheard. This, it seemed, and still seems, did not accord with the goals and aspirations of our adversarial system of justice.

I made some initial, and very minor, attempts to correct the balance in these proceedings by, in effect, cross-examining the state's witnesses myself. This had little effect on the outcome of the cases, but apparently a fairly large effect on my reputation among prisoners. As William Bennett Turner pointed out in an article on prisoner suits in the *Harvard Law Review*, "The 'liberal' decisions and reputations of individual judges appear to encourage ***4** prisoner suits."[4] This was borne out in my case, for I began to receive what amounted to bushel baskets of letters from prisoners, detailing their complaints. (These letters were individually composed, and *not* the result of an organized letterwriting campaign. Having been the object of such campaigns launched from both within and without the prison walls, I have learned to recognize them.)

As I read through these baskets of correspondence, I developed a strong suspicion that vast wrongs were being systematically perpetrated on the prisoners, and I began to wonder whether such wrongs could be addressed in a judicial forum.

At about this time, I suppose as a result of the reputation for judicial activism I was acquiring, I was invited to address a seminar being conducted at Southern Methodist University (SMU) on prisons and prison reform. I made a brief speech outlining the problems I had encountered with habeas petitions and § 1983 complaints and recommending the development of some method for attorney appointment in these cases. One of the other speakers at the seminar was William Bennett Turner, whom I have already mentioned. Mr. Turner was already deeply involved in institutional reform litigation through his work for the NAACP Legal Defense Fund. Mr. Turner's presentation made an excellent impression on me.

After outlining my feelings about the inadequacy of the process available in these cases at the SMU seminar, I decided that I wanted to see at least one case where the plaintiffs were adequately represented. Accordingly, I directed my law clerks to inventory the complaints we had received, and to determine which type of complaints arose most frequently.

The complaints fell into four main areas. The first problem we could identify was brutality. Many of the petitions alleged harsh and violent behavior on the part of wardens, guards, staff, and convict overseers who were called "building tenders." The building tenders, who became one of the central issues in the *Ruiz* litigation, were convicts-frequently of the most brutal sort-whom the prison officials informally vested with all manner of supervisory and disciplinary powers, and who exercised that power through fear, physical assault, and the use of weapons tacitly or expressly approved.[5]

A second area about which many prisoners filed complaints was the lack of medical care available to TDC prisoners. TDC's medical care was woefully insufficient in both its staffing and its facilities. Ill-trained TDC and inmate staff had to deal with most routine medical problems, making judgments, prescribing treatments, and in extreme cases, even performing minor surgery that doctors ought to have done.[6]

The third major area of controversy was the grotesque overcrowding of many of the units, a condition that grew worse over time. In many cases, ***5** two or three-in extreme cases, even five-prisoners were being housed in cells designed for single occupancy. This overcrowding resulted in unsanitary conditions, great stress for the prisoners, tension, and many assaults.[7] The prisoners were being subjected to the same crowding experiment ethologists have performed on the common gray rat, *Rattus norwegicus*, and the experiment was having the same results.

The fourth topic of complaint was summary discipline. Prison officials allegedly were meting out various penalties to prisoners either without any disciplinary hearings or with hearings bereft of any semblance of due process.[8]

After my law clerks identified these four major categories in the prisoner complaints, I directed them to find a representative plaintiff for each kind of claim presented. One of the plaintiffs selected was David Ruiz. (It later developed that TDC had, in a manner of speaking, preselected David Ruiz as a plaintiff, when in November 1971, he was one of the writ-writers placed in what was called the "eight-hoe squad" at the Wynne Unit. Considering the fact that the creation of the eight-hoe squad concentrated in one place the most experienced jailhouse lawyers in the Texas prison system, it may be questioned how prudently the TDC officials who created it had acted.[9])

Once the cases were sorted out, they were ordered consolidated for trial. I then tried to get in touch with William Bennett Turner at his office at the Inc. Fund in San Francisco, but it developed that he was in Katmandu, Nepal, on a mountaineering holiday. When Mr. Turner returned from his Himalayan excursion, I was able to get hold of him; he agreed to represent the plaintiffs and thereupon filed an amended complaint in the consolidated civil action styled *Ruiz v. Estelle.*[10]

As a result of his preliminary investigation of the case, Mr. Turner determined that it ought to be maintained as a class action. Accordingly, he filed a motion for class certification, the class to consist of all present and prospective TDC prisoners. After an exceedingly short hearing, I granted the motion.[11]

Given Mr. Turner's experience and the resources on which he could draw, the prisoners in this action clearly would be far better represented than any I had heard heretofore. However, there was still a great disparity between the resources for discovery and investigation available to the plaintiff class and those available to the TDC.

I attended the Fifth Circuit Judicial Conference each year, where I always ***6** met with my friend, Judge Frank M. Johnson, Jr. Judge Johnson had already spent several years dealing with the Alabama prison litigation, which also centered on the issue of overcrowding.[12] We began to compare our prison cases, and Judge Johnson told me that I would be well-advised to involve the United States in the litigation. I asked him how he had accomplished that in the Alabama case, and he told me that he had ordered the Department of Justice to appear as amicus curiae.

I asked Judge Johnson to provide me with a copy of the order he had entered, and using it as a model-or, as we call it in East Texas, a "go-by"-I issued the same kind of order in *Ruiz.*[13] The order gave the United States all the discovery powers of a party to the litigation. The Department lawyers were apparently astonished at what they found after investigation-sufficiently astonished that the United States filed a motion to intervene as a party plaintiff.[14]

The appearance of the United States as amicus had already so disturbed the balance of forces as to cause TDC some unease. But when the United States, with all the resources at its disposal, moved to intervene, it is fair to say that the State of Texas began to raise hell. The state petitioned the Fifth Circuit for a writ of mandamus to set aside my order granting the intervention. The writ was denied,[15] and the state thereupon petitioned the United States Supreme Court for certiorari. Certiorari was denied, with three justices dissenting.[16] In a somewhat unusual manner, the dissenting justices filed a rather blistering opinion written by then-Justice Rehnquist, questioning the authority of a district judge to do what I, and Judge Johnson before me, had done.[17] To obviate the concerns the Rehnquist dissent raised, Senator Edward Kennedy drafted a specific statute granting such authority to the district court.[18]

These, from my perspective, are the origins of the *Ruiz* litigation. I have no hesitation in accepting that what I did can properly be called judicial activism. I was surely not passive. No one told me to consolidate those cases. No one filed a motion for an attorney. I simply wanted to know what was going on. To borrow a phrase from my colleague on the Seventh Circuit, Judge Posner (who borrowed it from Colonel North's attorney, Brendan Sullivan), I was not a potted plant.[19]

Having made these historical observations, I will turn to the questions ***7** they raise. To be blunt, does a court have the authority to do the things I did? In a professedly adversarial court system, to what extent can a judge wield inquisitorial powers?

These questions derive their force in large measure from the traditional way in which we understand our legal system to operate. As Professor Owen Fiss has outlined that understanding, the typical lawsuit involves two antagonistic parties of roughly equal strength who become embroiled in a dispute and who then turn to a third party, a stranger to them and their dispute, asking the stranger to resolve the quarrel.[20] The impartiality of the judge is symbolized, as Professors Judith Resnik and Dennis Curtis have noted in their study of the iconography of justice, by the blindfold that the goddess of justice traditionally wears.[21] Our legal culture has instilled in us a very powerful conviction that the judge must act without fear or favor, showing no preference for either side.

Americans tend to assume that an impartial judge must be a passive judge, to whom the case is brought and before whom the case is constructed by the parties. The court-particularly a federal district court-has relatively little discretion in deciding whether to hear a case. If the court does not have either personal or subject matter jurisdiction, it may not hear the case. If it has both, the court has scant ability to refuse the case. Chief Justice Marshall put the point plainly in *Cohens v. Virginia*:

> The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given.[22]

Professor Abram Chayes adumbrates the duties of the judge in the traditional model. The judge is bound, according to

Professor Chayes, "to decide only those issues identified by the parties, in accordance with the rules established by the appellate courts, or, ... the legislature."[23] The judge, in the traditional model, is also not to assume the role of an investigator, but to remain passive. He or she is conceived to have "little or no responsibility for the factual aspects of the case or for shaping and organizing the litigation for trial."[24]

We live in a judicial world that the traditional model cannot always account for-a world of special masters and of bankrupting fines which would have seemed strange to Chief Justice Marshall (although both are judicial ***8** responses to Andrew Jackson's alleged reaction to *Worcester v. Georgia*[25]). Though the increasing prevalence of institutional reform litigation has eroded the hegemony of the model, it continues to inform most of our thinking about judges. For this reason, it is a very serious matter when political officials contend, as they frequently have done in the course of such institutional reform litigation, that the judiciary has stacked the deck against them. Such assertions, if credited, would deeply injure the reputation of the judges in the eyes of all serious persons.

However, the traditional conception of the lawsuit is deficient in several important respects. First, our legal culture is prone to conflate and confuse two independent issues-the issue of arriving at substantively correct decisions and the issue of adequate procedural structure. For this reason, the procedural structure that most assume is the ordinary way in which courts operate is inadequate as a means of making sense of the operation of a court in proceedings in which the parties are not in at least roughly equal positions, or in proceedings in which the remedy is complex and requires continual judicial superintendence long after the judgment is entered.

We can better analyze the conflation, and indeed the confusion, of procedural structure and the necessity of a fair hearing for all parties if we consider the difference between our insistence on a passive judiciary and the approaches of other Western judicial systems. Judicial neutrality is a goal of most, if not all, such systems. Judicial passivity is not. Within the American judicial system, the powers of a federal judge to examine witnesses and otherwise engage directly the proceedings are broader than the powers of many state court trial judges. Moreover, an English trial judge, who also sits within the confines of the Anglo-American adversarial system, has powers to comment on evidence that are breathtaking in their expansiveness, at least if the highly entertaining "Rumpole" stories by John Mortimer, Q.C., are to be given any credence.[26] The *juge d'instruction* of the inquisitorial Continental systems has yet more authority to engage, and ordinarily does engage, in the investigation of matters which come before him. Nevertheless, in all these cases the judge is charged with a duty to be an impartial, neutral arbiter.

More important problems with the traditional model become visible, however, where the model's assumptions about the parties or the kinds of remedies necessary to fix things no longer hold. These are the types of problems with the traditional model that Professors Fiss[27] and Chayes[28] discuss. I want to distinguish here the procedural difficulties I encountered at the outset of the *Ruiz* litigation from those which developed later on in the course of the case. In the remedial phase of the case, I noted all the ***9** problems with institutional reform litigation which Professors Fiss and Chayes have detailed. I know all too well the difficulties that a court encounters in enforcing orders that compel the reform of an entrenched bureaucracy, and the ways in which those encounters with official intransigence transform the functions of the judge. But those are not the problems I faced at the outset of the case. If I was an activist judge in the initial phases of the case, that activism really came from a straightforward commitment to the traditional goals of adjudication, in a situation in which the necessary balance of forces that underlies the traditional concept of adjudication did not exist.

Far more important than our commitment to the image of the passive judge is our commitment to the idea that the judge's job in the case before him is to get the right answer. Thus, in *Greenholtz v. Nebraska Penal Inmates*, the United States Supreme Court held that "[t]he function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions."[29] Another way of saying this, in Professor Herbert Wechsler's words, is that the duty of the judge is "to decide the litigated case and to decide it in accordance with the law ...."[30] Whether you call it avoiding the risk of erroneous decisions, deciding the litigated case, doing substantive justice to the parties, or simply getting to the truth, a judge has a duty to get right answers.

It was, however, difficult if not impossible for me-as it would have been for any judge-to reconcile my duty to decide cases on their merits and to get to the truth of the matters asserted in the courtroom, with the ordinary procedural strictures under which judges routinely operate. If I had continued with the routine I had adopted from Judge Sheehy, I would have spent the rest of my judicial career presiding over hearings that had the trappings of due process, but that were void of meaning.

That, I think, would not have fulfilled the requirements of due process. And I draw some consolation from the thought that such hearings would not have received much support from the leading process-oriented critic of institutional reform litigation, the late Professor Lon Fuller of Harvard. While I do not agree with all of Professor Fuller's analysis in his essay on "The Forms and Limits of Adjudication," I do agree with the "one simple proposition" from which he starts:

> [T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor. Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself.[31]

***10** It seems clear, if we take Fuller's simple proposition seriously, that a minimal requirement for the judicial process to be legitimate is that both sides have an opportunity to be heard. Yet it would be ludicrous to contend that there was any real participation by the prisoners in the hearings Judge Sheehy and I held prior to the *Ruiz* case. The prisoners were not gagged, nor were they prevented from speaking. But the bare possibility of their presenting "proofs and reasoned arguments" did not afford them a means for doing so. The prisoners had, as I have said before, no earthly idea of how to present their contentions in a legally significant way. To allow them to present their grievances in a halting and semi-literate fashion may have offered them some formal right of participation, but that participation would have been, and indeed was, a nullity. Hence, as Professor Fuller puts it, untutored participation would have "destroy[ed] the integrity of adjudication itself."[32]

Because one of the parties was deprived of effective participation in such hearings, I was unable to perform the central duty of a judge. I could not have decided those cases on their merits. The facts might well have been as the petitioners alleged, and the law on their side. But absent a coherent presentation of the facts and the law, I could not have so found. This defect was not accidental or adventitious. The judicial process was systematically malfunctioning.

The central proposition of process-based theorists like Fuller and Wechsler is that the judicial process, when properly functioning and adhered to by judges, is a means to assure correct legal results. This suggests, contrariwise, that a process that ceaselessly generates results of dubious merit must itself have some serious internal defect. My fellow Texan, Professor Charles Black, made essentially this point in his celebrated response to Professor Wechsler's neutral principles argument. He asked how we would respond to a legal argument that tried to square the fourteenth amendment with the realities of segregation, and he then suggested that the only reasonable response was laughter.[33] There is, after all, a world which exists independently of the way courts see it. And if courts cannot see that world correctly, then the judges need new pairs of glasses.

Think of it this way. If systematic violations of the eighth amendment rights of prisoners were occurring, how could I remain passive and still become aware of those constitutional violations? When asked that way, the question refocuses the way you conceive of constitutional government. You cease to ask whether the passive role is being maintained or neutral principles adhered to. Instead, you begin to ask whether a system of government that might permit systematic violations of constitutionally guaranteed rights to go unnoticed and unaddressed is, in reality, constitutional. The answer to that question is plainly no. Hence, any judge who develops a strong suspicion, ***11** as I did, that the integrity of the judicial process-that is, its capacity for generating decisions that reflect the legal and factual merits of the cases before it-has been violated, is obliged to do something to move the process back onto track.

In *Ruiz*, I was faced with three choices. First, I could have continued to hear large numbers of prisoner petitions for the rest of my judicial career with full knowledge that such petitions were destined to fail. Second, I personally could have attempted to right the balance in the hearings I was conducting. Professor Fuller addresses the main problem with that alternative when he tries to imagine what an arbiter would have to do without lawyers as advocates:

> [T]he arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving-in analysis, patience and creative power. When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.[34]

Finally, I could find some means of classifying and consolidating the complaints and seeking out an attorney with the resources to present the prisoners' case adequately.

The first choice would have been wearisome, absurd, and a violation of my duty as I understood it. The second would have transformed me from judge to advocate, a transformation which would not only have been unseemly, but which also would have violated the integrity of the court.

It was not my business to be an advocate. But it was emphatically my business to find an advocate, because the truth could not have been ascertained without one. This concern with enabling the inarticulate to tell their stories is the central theme of what is called the "due process revolution," but the concern is older than the Warren Court. It can be found in the opinion of the court in *Powell v. Alabama*,[35] the Scottsboro Boys case, written by that redoubtable conservative, Justice Sutherland:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law .... He requires the guiding hand of counsel at every step in the proceedings against him.... If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[36]

The right to appointed counsel has, of course, progressed by fits and starts, from capital cases in *Powell* to felony cases in *Gideon v. Wainwright*[37] ***12** to all criminal cases involving imprisonment in *Argersinger v. Hamlin.*[38] The contours of the right in civil cases are uncertain, thanks to the Supreme Court's ruling in *Lassiter v. Department of Social Services.*[39] But the general applicability, and indeed necessity, of the right to appointed counsel in *Ruiz* was clear.

Due process of law does not require that all those who feel aggrieved be able to get what they want from a court. But it does require that when such a person comes to court with a potentially cognizable claim, he be given a chance to say what he wants. Often enough, as any lawyer knows, the right to say what one wants, to get the ear of the court, is itself what a complainant most desires. The right to be heard, whether one's conditions be exalted or lowly, is a right the courts have a duty to vindicate. It was to vindicate that right, and to get at the truth about the conditions of some of the lowliest offscourings of our society, that I helped bring *Ruiz v. Estelle* to birth.

Footnotes

[a] Judge, United States District Court, Eastern District of Texas.

[1] 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part, vacated in part,* 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1982).

[2] Pub. L. No. 96-481, tit. II, § 205(c), 94 Stat. 2330 (1980) (codified at 42 U.S.C. § 1988 (1982)).

[3] Pub. L. No. 96-481, tit. II, §§ 201-208, 94 Stat. 2321, 2325-30 (1980) (codified as amended at 5 U.S.C. § 504 (1988), 15 U.S.C. § 634(b) (1988), 28 U.S.C. § 2412 (1988), and 42 U.S.C. § 1988 (1982)).

4 William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts,* 92 HARV. L. REV. 610, 631 (1979).

5 *See* Ruiz v. Estelle, 503 F. Supp. at 1294-1303 (discussing staff and building tender brutality in Texas prisons).

6 *See id.* at 1307-28 (discussing Texas prison health care).

7 *See id.* at 1277-85 (discussing crowding in TDC facilities).

8 *See generally id.* at 1346-56 (discussing TDC disciplinary procedures).

9 The "eight-hoe squad" was a punitive work detail of prisoners who were assigned to labor in the prison unit's fields using implements such as hoes and shovels. For a discussion of the Wynne unit's squad, see STEVEN J. MARTIN & SHELDON EKLUND-OLSON, TEXAS PRISONS: THE WALLS CAME TUMBLING DOWN 50-58 (1987). *See also Ruiz,* 503 F. Supp. at 1367-70 (discussing official harassment of litigious prisoners).

10 No. H-78-987 (S.D. Tex. Dec. 12, 1974).

11 Ruiz v. Estelle, No. H-78-987 (S.D. Tex. Dec. 12, 1974) (Dk. No. 40) (order certifying that action may be maintained as class action).

12 *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978).

13 Ruiz v. Estelle, No. H-78-987 (S.D. Tex. Apr. 12, 1974) (Dk. No. 36) (ordering consolidation of cases and United States to appear as amicus curiae).

[14] Motion of United States to Intervene, Ruiz v. Estelle, No. H-78-987 (S.D. Tex. Dec. 6, 1974).

[15] *In re* Estelle, 516 F.2d 480 (5th Cir. 1975), *cert. denied sub nom.* Estelle v. Justice, 426 U.S. 925 (1976).

[16] Estelle v. Justice, 426 U.S. 925 (1976).

[17] *Id.*

[18] Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified at 42 U.S.C. § 1997(c) (1988)).

[19] Richard A. Posner, *What am I? A Potted Plant?,* NEW REPUBLIC, Sept. 28, 1987, at 23.

[20] Owen M. Fiss, *The Supreme Court 1978 Term-Foreword: The Forms of Justice,* 93 HARV. L. REV. 1, 17 (1979).

[21] Dennis E. Curtis & Judith Resnik, *Images of Justice,* 96 YALE L.J. 1727, 1727-28 (1987).

[22] 19 U.S. (6 Wheat.) 264, 404 (1821).

[23] Abram Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1286 (1976).

[24] *Id.*

[25] 31 U.S. (6 Pet.) 315 (1832). In response to the Court's holding that Georgia had no legislative authority over Cherokee Nation lands, Jackson allegedly remarked: "John Marshall has made his decision. Now let him enforce it." GERALD GUNTHER, CONSTITUTIONAL LAW 25 (11th ed. 1985).

[26] *See, e.g.*, JOHN MORTIMER, THE TRIALS OF RUMPOLE (1979).

[27] *See* Fiss, *supra* note 20.

[28] *See* Chayes, *supra* note 23.

[29] 442 U.S. 1, 13 (1979).

[30] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 6 (1959).

[31] Lon L. Fuller, *The Forms and Limits of Adjudication,* 92 HARV. L. REV. 353, 363 (1978).

[32] *Id.*

[33] Charles Black, Jr., *The Lawfulness of the Segregation Decisions,* 69 YALE L.J. 421, 424 (1960).

[34] Fuller, *supra* note 31, at 382-83.

[35] 287 U.S. 45 (1932).

[36] *Id.* at 68-69.

[37] 372 U.S. 335 (1963).

[38] 407 U.S. 25 (1972).

[39] 452 U.S. 18 (1980).

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