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## Rights and Remedy

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# BOOK REVIEW

## Right and Remedy

REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM. By Larry W. Yackle.\* New York: Oxford University Press, 1989. Pp. xii, 322. \$35.00.

*Reviewed by Barry Friedman†*

### I. INTRODUCTION

I came to Alabama in 1982, to interview for a position as a visiting professor at the University of Alabama School of Law. A large group of the faculty took me to lunch that day. I did not understand until much later that the conversation at lunch was an important part of the interview. The group moved from one topic of discussion to another, until we lighted on an area of the law in which I was willing to take and defend a position. That topic proved to be federal habeas corpus jurisdiction, and it only made sense that the chief devil's advocate was Larry Yackle. Yackle is one of the foremost commentators on habeas corpus, and it is little coincidence that his first book—*Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System*—is his account of the prison litigation in Alabama.<sup>1</sup>

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† Associate Professor of Law, Vanderbilt University. B.A., University of Chicago, 1978; J.D., Georgetown University, 1982. I would like to thank Jim Ely, Don Hall, Jason Johnston, Ralph Knowles, Sue Palmer, Bob Rasmussen, Debbie Reichle, Jim Ruggeri, Gerry Spann, Julian Wright, and Nick Zeppos for helpful comments on earlier drafts of this Book Review. Debbie Reichle and Jim Ruggeri deserve extra thanks for research assistance. Finally, I appreciate the interest and efforts of the editors and staff of the *Vanderbilt Law Review*, who disrupted their regular editorial schedule and put in long hours to get this review into print.

1. See L. YACKLE, *REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM* (1989) [hereinafter *REFORM AND REGRET*]. Yackle is Professor of Law at Boston University School of Law. My visiting appointment at Alabama was a function in part of Yackle's decision to visit at Boston University that year. Yackle's works in the area of habeas

I returned to Alabama in August of that year to take up my faculty position. My first night in Alabama I was invited to dinner at the associate dean's house. During dinner the dean's husband talked at some length about the civil rights and prisoner litigation in which he was involved. I recall interrupting at one point in the conversation to ask whether I could spend some time observing those matters. I was told that in Alabama one did not come to observe, but I was welcome to participate if I so chose. I did, and thus learned about civil rights litigation at the side of one of the great lawyers I have known, a moving force in the Alabama prison litigation, Ralph Knowles.

Although I do not know for certain, it undoubtedly was an encounter of this nature that put Larry Yackle in the position to tell his insider's story of the Alabama prison litigation. Yackle writes as an observer, with a certain amount of distance and neutrality. Yet he tells us from the outset that his role was more than that. He "advised" the prisoners' lawyers on legal issues, he acted as legal advisor to a team of psychologists charged with classifying inmates, and on behalf of the American Civil Liberties Union of Alabama, he argued before the Alabama Supreme Court challenging the state attorney general's interpretation of state sentencing laws.<sup>2</sup> But primarily—and perhaps most importantly—Yackle monitored the prison cases "for a decade—in conversations over dinner, strategy sessions in lawyers' offices and, occasionally, formal proceedings in court."<sup>3</sup>

From this vantage point, Yackle offers us a story of, in his words, "a struggle for social reform."<sup>4</sup> For over a decade a team of lawyers worked to change the nature of Alabama's penal system. *Reform and Regret* is Yackle's story of that struggle, told in meticulous detail, perceptively, and with the insight that comes only from being on the inside.

*Reform and Regret*, however, is much more than a story about the prison litigation. It is a story of how the State of Alabama—or at least

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corpus include his excellent treatise, see L. YACKLE, *POSTCONVICTION REMEDIES* (1981 & Supp. 1988), as well as several articles, see Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985); Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609 (1983); Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393 (1983). There was more than a little irony in my first meeting with Yackle, and our discussion of habeas corpus. My first piece of scholarship also was in the area of federal habeas corpus jurisdiction, see Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988), and I remain indebted to Larry Yackle for his wise counsel regarding that piece, and my subsequent scholarship in the field of federal jurisdiction.

2. See *REFORM AND REGRET*, *supra* note 1, at v-vi.

3. *Id.* at v.

4. *Id.* For another personal, valuable account of the prison litigation, see Knowles, *A Lawyer Looks Back at 16 Years with Case: Monitoring Committee on Prisons in Alabama Folds; Court Gives Up Jurisdiction*, J. NAT'L PRISON PROJECT, Summer 1989, at 1.

many of its public institutions—was run for a generation. It is a story of how one judge, and ranks of committed lawyers and public citizens, could use the courts to make policy in a state where elected officials lacked the courage or foresight to make difficult decisions. It is a story of when courts turn from dispute resolution to governance.<sup>5</sup>

Scholars have been fascinated with, and preoccupied by, the concept of “public law” litigation for the last ten to fifteen years.<sup>6</sup> Although defined in different ways by each commentator, public law litigation generally is seen as a departure from the “traditional” model of litigation, in which judges are passive, neutral decision makers, resolving discrete disputes brought to them by individual parties.<sup>7</sup> Public law litigation bears little relation to this traditional model. Judges are proactive, disputes are about far-ranging policy matters, and the parties generally are large classes—not uncommonly a class of individuals versus the government.<sup>8</sup>

The difference that ultimately proved telling between “traditional” and “public law” litigation, however, was in the nature of the decrees issued and the process of enforcing those decrees. The decree generally ends the contest in traditional litigation: money damages are preferred over equitable relief, and satisfaction of the judgment commonly is a one-time affair.<sup>9</sup> Just the opposite is true in public law litigation: issuance of the decree likely begins a stage in the litigation at least as long

5. At least with regard to penal reform, the story is not unique to Alabama. Litigation on behalf of prisoners, not majoritarian politics, has been the primary means of improving conditions in many of the Nation's prisons. See, e.g., *Grubbs v. Bradley*, 552 F. Supp. 1052 (M.D. Tenn. 1982) (appointing a special master to remedy the unconstitutional conditions in Tennessee's prison system); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970) (placing the Arkansas penitentiary system under court review), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

6. There is an extensive literature on the subject of public law litigation, and its attendant difficulties. Some of the more important works include: Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982) [hereinafter Chayes, *Public Law Litigation*]; Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter Chayes, *The Role of the Judge*]; Diver, *The Judge As Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978); Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

7. See Chayes, *The Role of the Judge*, *supra* note 6, at 1285-88; Resnik, *supra* note 6, at 380-86.

8. See Chayes, *The Role of the Judge*, *supra* note 6, at 1284; Resnik, *supra* note 6, at 377-78.

9. See REFORM AND REGRET, *supra* note 1, at 107 (noting that “[i]n a more traditional lawsuit, such an order would have been the end, or nearly the end, of the litigation”); Chayes, *The Role of the Judge*, *supra* note 6, at 1287 (asserting that “compensatory money damages was the usual form of relief” and that “[p]rospective relief was highly exceptional”); cf. Fiss, *supra* note 6, at 17 (stating that traditional litigation is triadic, with an impassive umpire whose function is to observe what is right and declare that right be done).

if not longer than the trial that preceded it. Equitable remedies are favored over money damages. Relief is wide ranging, typically requiring effort by many layers of government. Implementation frequently intimately involves judges—usually federal judges—in the day-to-day operations of state government.<sup>10</sup>

Yackle's book comes at a particularly auspicious time, because in two cases this Term the Supreme Court will address the breadth of remedial power available to federal judges in public law litigation. In *United States v. City of Yonkers*<sup>11</sup> a federal district court held individual City Council members and the City in contempt, and imposed potentially bankrupting fines, for failing to implement a consent decree requiring construction of low income housing in Yonkers, New York. In *Jenkins v. Missouri*<sup>12</sup> the federal district court actually raised local taxes in order to fund a wide-ranging school desegregation plan. Both cases present the question of how a federal judge, faced with violations of constitutional rights, may assure a remedy to persons whose rights were violated when the remedy requires significant change in the way a state or local government does business.

*Reform and Regret* is the story of individuals grappling with these questions, not as a matter of constitutional law, but as a matter of day-to-day practical governance. The Alabama prison litigation is, as Yackle recognizes, a fitting vehicle to examine the question of a federal court's remedial power. These cases, and others like them in the State of Alabama, were the paradigm for those commentators enchanted by, or troubled by, "public law" litigation in the early years.<sup>13</sup> It is only proper

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10. See Chayes, *The Role of the Judge*, *supra* note 6, at 1298 (arguing that a decree in public law litigation "differs in almost every relevant characteristic from relief in the traditional model of adjudication, not the least in that it is the centerpiece" (emphasis in original)); see also Chayes, *Public Law Litigation*, *supra* note 6, at 46 (stating that the decree establishes "an ongoing regime governing the institution that is the real target of the lawsuit"); Fiss, *supra* note 6, at 27-28 (asserting that in public law litigation, the remedial phase "has a beginning, maybe a middle, but no end"); Nagel, *supra* note 6, at 661-64 (summarizing the broad use of the federal courts' equitable powers and arguing against its constitutionality).

11. *United States v. Yonkers*, 856 F.2d 444 (2d Cir. 1988), *rev'd sub nom. Spallone v. United States*, 58 U.S.L.W. 4103 (U.S. Jan. 10, 1990). The United States Supreme Court decided the *Yonkers* case as this Book Review was nearing completion. A closely divided Court overturned sanctions against the City Council members, holding essentially that until sanctions against the City itself proved insufficient to achieve compliance, sanctions against individual City Council members were inappropriate. See *Yonkers*, 58 U.S.L.W. at 4108. Previously the Court had refused to stay the judgment of the Second Circuit that upheld sanctions against the City. See *Spallone v. United States*, 109 S. Ct. 14 (1988).

12. 672 F. Supp. 400 (W.D. Mo. 1987), *aff'd in part, rev'd in part*, 855 F.2d 1295 (8th Cir. 1988), *cert. granted in part*, 109 S. Ct. 1930 (1989).

13. Many of the commentaries on public law litigation referred to the Alabama cases. See, e.g., Diver, *supra* note 6, at 51 n.46; Nagel, *supra* note 6, at 661. In addition, Alabama prison litigation was the focal point of at least one important article. See Robbins & Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision*

to return to those cases ten or more years later, to see where the experiment has led.

What Yackle teaches us is that politics, not law, defines the breadth of a federal judge's remedial power. What Yackle purports to describe is litigation—a lawsuit—in which plaintiffs seek a remedy for constitutional violations by the State. But what Yackle knows, and is astute in presenting, is that the Alabama prison litigation was not a typical lawsuit. Rather, what Yackle observed for over a decade was the “real government of Alabama” at work.<sup>14</sup> And what the real government could accomplish ultimately was measured, not by legal principles, but by politics.

## II. THE REAL GOVERNMENT OF ALABAMA

### A. *The Policy Problem*

The Alabama penal institutions were in deplorable condition.<sup>15</sup> Yackle's description of life in the prisons is bound to be disconcerting to anyone of average sensibilities. Prisons were overcrowded to the point of bursting.<sup>16</sup> Beds were so close one could not walk between them, and prisoners slept on the floors, in showers, in halls, sometimes with their faces near overflowing toilets.<sup>17</sup> The institutions were filthy and overrun with vermin.<sup>18</sup> Prisoners often had little or no hygiene products, or utensils with which to eat.<sup>19</sup> Violence was rampant: prisoners were sexually abused, wounded, or killed on a regular basis, and even the guards would not enter the dormitories at night.<sup>20</sup> These were

*of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893 (1977); see also Resnik, *supra* note 6, at 386 (developing a model of public law litigation based on a “thinly fictionalized amalgam” of several cases including Judge Johnson's mental hospital litigation).

14. The idea for my play on the “real government of Alabama” comes from the frequent reference in the national media to Judge Frank M. Johnson, Jr., who presided over the prison cases, as the “real governor of Alabama.” See Brill, *The Real Governor of Alabama*, NEW YORK, Apr. 26, 1976, at 37; *The Real Governor*, TIME, Jan. 26, 1976, at 65; see also REFORM AND REGRET, *supra* note 1, at 15-16.

15. See, e.g., *Pugh v. Locke*, 406 F. Supp. 318, 322-28 (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).

16. REFORM AND REGRET, *supra* note 1, at 65, 84, 90-91; see also *Pugh*, 406 F. Supp. at 322-23.

17. REFORM AND REGRET, *supra* note 1, at 87; see also *Pugh*, 406 F. Supp. at 323.

18. REFORM AND REGRET, *supra* note 1, at 87; see also *Pugh*, 406 F. Supp. at 323.

19. REFORM AND REGRET, *supra* note 1, at 87; see also *Pugh*, 406 F. Supp. at 323.

20. REFORM AND REGRET, *supra* note 1, at 45-46, 80-83; see also *Pugh*, 406 F. Supp. at 324-25. One of the most gripping tales at trial was of a young, “mentally-retarded” inmate who was raped on his first day in prison, beaten by inmates, and threatened with hanging. The inmate informed an assistant warden of the rape:

[Question]: Did you ever talk to the assistant warden out there about this?

[Answer]: Yes, sir . . . He made a sarcastic question to me. He asked me did they get a little

human warehouses, where convicted prisoners were locked up for the period provided by law and forgotten.

Although filed as discrete lawsuits, *Pugh v. Locke*<sup>21</sup> and *James v. Wallace*<sup>22</sup> became the vehicles for systemwide penal reform in Alabama.<sup>23</sup> The judge handpicked the lawyers to handle the cases. The lawyers understood the judge would welcome expansion of the individual complaints into a far-reaching examination of the conditions in Alabama prisons.<sup>24</sup> Pugh's lawyer convinced him to drop his money damages claim and to turn it into a class action.<sup>25</sup> From the start the attorneys assembled public interest groups willing to lend support, gathered experts to bolster their cases, and studied legal theories calculated not simply to win their individual clients' cases, but to provide the basis for wide-ranging relief on behalf of all prisoners against the State of Alabama. Ultimately, then, *Pugh* and *James*—along with the predecessor case *Newman v. State*—were but references to policy projects designed to improve the conditions in Alabama's prisons.<sup>26</sup>

pussy . . . . I didn't know what else to say to him but yes. And then he said there is nothing I can do . . . .

REFORM AND REGRET, *supra* note 1, at 83.

21. 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).

22. *James v. Wallace*, 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).

23. The two cases that ultimately became the prison litigation were filed by inmates. "The complaint in *Pugh*, hammered out on an old prison typewriter, described an assault at the hands of other prisoners, not state authorities." REFORM AND REGRET, *supra* note 1, at 51. Yet Pugh blamed prison officials, and sought not only money damages, but an injunction establishing standards for inmate treatment. *See id.*; *see also Pugh*, 406 F. Supp. at 321-22. James was the son of a black sharecropper, in and out of prison much of his life. He filed a complaint challenging the prison system's inadequate medical treatment and rehabilitation efforts. *See* REFORM AND REGRET, *supra* note 1, at 54; *see also James*, 406 F. Supp. at 322.

24. This expansion was not unprecedented for a case before Judge Johnson. *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975), a case challenging the lack of medical care in the prisons, began similarly. *See* REFORM AND REGRET, *supra* note 1, at 30-31.

25. REFORM AND REGRET, *supra* note 1, at 51-52.

26. *Newman* was directed at the quality of medical care in the institutions. *Id.* at 40. *Pugh* was a version of the "right to protection" cases. Pugh's lawyers argued that the right to protection included a right to be free from any punishment beyond detention simpliciter. Thus, cellblocks must be maintained in a manner to ensure they are free from violence. *Id.* at 53-54. *James* was the most ambitious of the three cases: although the lawyers rejected as unlikely to succeed a strategy that asserted a "right to rehabilitation," they did argue the State could not maintain prisons in a manner that "dehabilitated" prisoners trying to rehabilitate themselves. The *James* complaint alleged that the conditions in the Alabama penitentiaries constituted cruel and unusual punishment in violation of the eighth amendment, and that to remedy the violation the State not only must reduce overcrowding and remedy intolerable conditions in the prisons, but must provide basic educational, vocational, and other beneficial programs for the prisoners. *Id.* at 55-59.

### B. The "Governor"

Frank M. Johnson, Jr. had been on the federal district bench for almost twenty years at the time he presided over the prison cases. In that time he had desegregated Alabama's schools and numerous of its public institutions, and had heard most of the key civil rights cases in the State.<sup>27</sup> Nor were the prisons Johnson's first attempt at institutional reform. In *Wyatt v. Stickney*<sup>28</sup> Johnson undertook to reform the State's mental institutions. In *Newman*<sup>29</sup> he addressed the question of prison medical care.

Johnson was not one to avoid taking on responsibility. His bold decisions on many fronts, especially civil rights, had made him for a time a pariah in his home state while catapulting him to national fame. As Yackle tells us early on, "More than one observer asked rhetorically whether Johnson was not the 'real governor' of Alabama."<sup>30</sup> Indeed, it is unlikely the prison cases would have become vehicles for institutional change had they not been heard by Johnson.<sup>31</sup>

Moreover, Johnson was not unaware of the role he consistently was called upon to play in Alabama government. As he frequently recounted, Johnson felt action on his part was demanded by the "Alabama Punting Syndrome," in which state officials became the subject of judicial decrees only because of their unwillingness to take responsibility upon themselves.<sup>32</sup> Thus, Johnson saw himself as filling a vacuum in

27. See, e.g., *Wyatt v. Stickney*, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972) (reforming Alabama's mental institutions), *enforcing* 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), *aff'd in part, remanded in part, decision reserved in part sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965) (prohibiting interference with the Selma-to-Montgomery "Freedom March"); *Lee v. Macon County Bd. of Educ.*, 221 F. Supp. 297 (M.D. Ala. 1963) (desegregating Macon County, Alabama schools), *supplemented by* 221 F. Supp. 743 (M.D. Ala. 1964); *United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961) (instigating voting rights reform), *aff'd*, 304 F.2d 583 (5th Cir.), *aff'd*, 371 U.S. 37 (1962); *United States v. U.S. Klans, Knights of Ku Klux Klan, Inc.*, 194 F. Supp. 897 (M.D. Ala. 1961) (enjoining interference with the "freedom rides"). Yackle says it best: "Frank Johnson was no ordinary judge." REFORM AND REGRET, *supra* note 1, at 14. There is a wealth of literature about Judge Johnson, much of it cited by Yackle. Two of my favorite books about Judge Johnson are T. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA (1981) and R. KENNEDY, JUDGE FRANK JOHNSON, JR., A BIOGRAPHY (1978).

28. 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *enforcing* 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), *aff'd in part, remanded in part, decision reserved in part sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

29. *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); see *supra* note 24.

30. REFORM AND REGRET, *supra* note 1, at 15; see *supra* note 14.

31. See REFORM AND REGRET, *supra* note 1, at 60-61 (showing that the National Prison Project joined the prison cases in part because the identity of the judge showed promise for wide-ranging reform); see also *infra* Part II(C) (describing the actions Johnson took in appointing lawyers and defining the scope of litigation).

32. Yackle reports that Judge Johnson drew the phrase "Alabama Punting Syndrome" from



leadership.

Despite the obviousness of his activist role, Johnson held a more modest view of his own work. Johnson claimed all his civil rights decisions were "easy," and that he just applied the law as he found it.<sup>33</sup> Yet Yackle tells us at one point that "[Johnson] had ample evidence from which to make findings of fact, but he lacked judicial precedents on which to rest his legal conclusion that the facts established a constitutional violation."<sup>34</sup> Moreover, Johnson often tried to implement his decrees not through forceful judicial command, but by returning matters to state officials in the hope they would recognize their responsibility, thus avoiding the over-intrusive exercise of judicial power.<sup>35</sup> There is, therefore, a certain divergence between Johnson's deeds and his view of those deeds, a divergence one wishes Yackle had pursued more vigorously.

The solution likely lies in the fact that Johnson had a keen political sense, perhaps the keenest in Alabama. He knew well his font of authority rested in the Constitution, but he knew equally well that without state cooperation he could not get the job done. Thus, he proceeded by measure, scaling back goals to require only what was attainable, and disclaiming responsibility for anything but what was foisted upon him by his oath of office and abandoned by others. All the while he maintained that he merely was enforcing the Constitution's clear requirements.

### C. *The Cabinet*

One of the most telling pieces of evidence of Johnson's skill at governance was the people he chose to pursue prison reform with him. Johnson called in lawyers of the highest calibre and dedication. He assembled people he trusted to move the prison matter in the direction of

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the "growing literature on [Johnson's] work." See REFORM AND REGRET, *supra* note 1, at 16; see also McCormack, *The Expansion of Federal Question Jurisdiction and the Prisoner Complaint Caseload*, 1975 WIS. L. REV. 523, 536 (referring to the Alabama Federal Intervention Syndrome). Johnson has referred to the concept in a number of pieces he has written concerning public law litigation and the role of the judiciary. See, e.g., Johnson, *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271 (1981); Johnson, *In Defense of Judicial Activism*, 28 EMORY L.J. 901 (1979); Johnson, *The Alabama Punting Syndrome*, JUDGE'S J., Spring 1979, at 4, 6 [hereinafter Johnson, *The Alabama Punting Syndrome*].

33. REFORM AND REGRET, *supra* note 1, at 16.

34. *Id.* at 38. Johnson essentially found violations of constitutional rights based on the facts, despite the absence of precedents to support his decision. Thus, the cases perhaps were "easy" on the facts, but Johnson's work nonetheless was pathbreaking.

35. *Id.* at 17-18; see also Johnson, *The Alabama Punting Syndrome*, *supra* note 32. Judge Johnson has stated that he would have been happy to give the responsibility back to the elected officials and "look[s] forward to the day when all state officials willingly accept the responsibility to protect those basic human rights on which we agreed 200 years ago." *Id.* at 54.

reform. Moreover, he drew upon people of stature in the community, hoping they could, by example, convince others of the need for prison reform.

A few examples suffice. To represent Pugh, Johnson chose Robert Segall, a former law clerk and a lawyer at a prestigious firm.<sup>36</sup> For James, Johnson appointed George Peach Taylor, a professor at the University of Alabama, and a political moderate, who nonetheless possessed extensive civil rights experience.<sup>37</sup> Perhaps the most interesting appointment Johnson made was the amicus assignment he gave Ira DeMent. DeMent was the United States Attorney for the Middle District of Alabama.<sup>38</sup> One of Johnson's frequent tactics was to appoint the United States as amicus or intervenor in a large scale litigation, thus gaining the resources of the United States government. While Yackle recognizes the novelty of this approach, he explains, "[T]hese [Justice Department] lawyers did not represent adversaries . . . at all; they appeared for the United States which, in Johnson's mind, meant they represented the public interest."<sup>39</sup>

These players drew in more staff and assistance. The ACLU's National Prison Project and its director, Al Bronstein, pledged its resources.<sup>40</sup> The Alabama ACLU and its director, Steve Suitts, joined in.<sup>41</sup> Ralph Knowles, a prominent Tuscaloosa attorney, and later associate director of the prison project, coordinated much of the litigation.<sup>42</sup> Experts were drafted from numerous places, including the University of Alabama's Center for Correctional Psychology.<sup>43</sup>

In short, this litigation was no ordinary adversary contest. It was a broadside attack on a faltering state institution. Johnson—the chief executive—recognized the problem and the gravity of correcting it. He thus turned to the best "staff" he could assemble and instructed them to proceed.

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36. REFORM AND REGRET, *supra* note 1, at 51.

37. *Id.* at 54. Taylor was one of the founders of Birmingham's Young Men's Business Club, which formed during the Birmingham boycott in 1963, and ultimately negotiated a settlement with Dr. Martin Luther King, Jr. *Id.*

38. REFORM AND REGRET, *supra* note 1, at 23; *see also id.* at 69-70 (discussing DeMent's involvement in the litigation).

39. *Id.* at 42.

40. The National Prison Project and the United States ultimately were appointed amici curiae by the court, with all the rights and privileges of parties. *Id.* at 64, 268 n.23.

41. *Id.* at 55-56, 58-60.

42. *See generally id.* at 58-78. John Carroll, formerly Director of the Southern Poverty Law Center, and now a United States Magistrate in Montgomery, Alabama, also did "yeoman service" on behalf of the plaintiffs. Knowles, *supra* note 4, at 5 n.12; *see also* REFORM AND REGRET, *supra* note 1, at 178, 208-20, 228-36, 244-52.

43. REFORM AND REGRET, *supra* note 1, at 73.

### D. Making Public Policy

#### 1. The "Governor" Sets the Tone

Disagreement existed among the "staff" as to what the State's penal policy should be. Some felt that all they could hope to achieve was to clean up conditions in the prisons. Others hoped for a full-scale assault on penal policy, particularly the policy of warehousing convicts. There was also a debate at the cabinet level about whether to press for a policy that included a genuine "right to rehabilitation."<sup>44</sup>

The "Governor" early on made his views clear for the litigation.<sup>45</sup> He would not interfere with basic penal policy. Any such change in policy would be up to other state officials. Rather, the goal of this process would be assuring "minimal decency" in prison conditions.<sup>46</sup> Johnson, however, did agree to pursue a "self-rehabilitation" approach—if staff could demonstrate that prison conditions needed changing to permit prisoners to move along their own rehabilitation, those changes might be implemented.<sup>47</sup>

#### 2. Assembling Data

In ordinary litigation, both sides conduct discovery, developing their own cases and learning of the other side's proof. By Yackle's telling, this case developed quite differently. Plaintiffs' lawyers did all of the things lawyers generally would do to ready themselves for trial, which also happened to be what a good administrative staff would do in developing public policy. They made a record of the problems. They retained experts to determine which solutions were required. They consulted national guidelines and standards from other jurisdictions. They found witnesses with sympathetic, indeed startling, stories.<sup>48</sup>

The State's lawyers, by Yackle's accounts, did almost nothing. They responded to plaintiffs' requests. They even stipulated to much of the plaintiffs' case. But they did not interview the plaintiffs' experts, nor does it appear they did much in the way of developing their own case.<sup>49</sup>

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44. On the issue of whether to pursue a "right to rehabilitation" claim, see *id.* at 55-61.

45. In response to a motion to dismiss filed by the State, Judge Johnson issued an order denying the motion and explaining which claims he felt the plaintiffs could prove. *Id.* at 62-63. "This opinion, Johnson's first in either *Pugh* or *James*, was essentially a blueprint. [Matthew] Myers [of the Prison Project] put it succinctly: 'As we all agreed, Johnson has provided us with a basic outline which we would be wise to follow.' That is precisely what the judge intended." *Id.* at 62.

46. *Id.* at 62.

47. *Id.* at 63.

48. For a discussion of discovery and trial preparation, see *id.* at 71-78.

49. *Id.* at 71, 77-78; see also *id.* at 61 (noting that "[a]s the lawyers for the prisoners were

State officials, the lawyers' ostensible clients, were more active. They played their case to the media, and in a manner not always inconsistent with the policy approach being developed by the plaintiffs' lawyers. State officials began to develop the theme that would become central to the problem: the legislature failed to provide enough money to run the prisons properly. State officials knew they had an alarming problem but believed it was the result of underfunding, not poor administration.<sup>50</sup>

### 3. Presenting the Evidence

Rather than a harsh adversary testing, trial also proved more consistent with presentation of the gathered information to the chief executive for ultimate decision. Many of the facts were stipulated. The plaintiffs' fact witnesses told gripping tales of the horrible conditions, violence, and sexual abuse in the prisons. Plaintiffs' experts critiqued the Alabama prisons, making the case that Alabama fell far short of decent conditions by whatever standard one used.<sup>51</sup>

### 4. Policy Decision

At the close of the plaintiffs' case, the State began to present its own witnesses. When it became clear that even the State's witnesses were assisting the plaintiffs' case, however, the State reached a dramatic decision: counsel for the State stood up in court and conceded that the conditions in the prisons violated constitutional norms.<sup>52</sup> Thus, on the evidence gathered by staff, the only issue was the extent of the relief to be accorded, or, stated differently, the manner in which the State would begin to rehabilitate its penal system.<sup>53</sup>

What followed was a decree of great detail, specifying exactly what the conditions of confinement would be in the Alabama prisons. Labeled "Minimum Constitutional Standards for Inmates of Alabama Penal System," this document was a blueprint for designing, modifying, and operating prisons. The order specified, among many other things: cell size, standards for cleanliness, the provision of certain personal hy-

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organizing, the defense crept along seemingly without appreciation for what plaintiffs' counsel were planning").

50. See *id.* at 64-67 (describing the state officials' response to the litigation).

51. For a description of the trial proceedings, see *id.* at 79-92.

52. For a discussion of the State's concession, see *id.* at 92-94.

53. From the bench, or shortly after trial, Johnson made several decisions that required some immediate action. He ordered the doghouse—the punishment cells at Draper Correctional Center—closed immediately. The next day, in a joint order with another federal judge also hearing prison matters, Alabama was told not to accept any additional prisoners into the system until the population had been reduced to design capacity. *Id.* at 94-95.

giene products, and the serving of a specific number of meals selected from a menu prepared by a licensed dietician. The order set inmate and staff levels, and in one particular deemed key by the prisoners' lawyers and experts, ordered the defendants to contract with the University of Alabama Department of Correctional Psychology to develop jointly a plan for classifying inmates. Finally, the order provided specific dates for compliance.<sup>54</sup>

Johnson's decree in the prison cases received great attention from commentators, and it is regrettable Yackle did not spend more time discussing it. For one thing, the order was a departure from Johnson's usual executive style. In cases of this nature Johnson ordinarily proceeded by a two-step process, first giving the defendants time to develop standards to comply with the constitutional ruling, and then drafting his own specific standards if the defendant failed to do a satisfactory job.<sup>55</sup> Johnson jumped right to this second step in the prison cases.

What is even more interesting about the decree, however, is that despite Johnson's stated decision not to disturb fundamental penal policy and only to specify conditions of confinement, the actual impact of his order may have had just the opposite effect. As Yackle acknowledges, the impact of the order was tremendous: estimates were that compliance would cost millions of dollars.<sup>56</sup> Yet the impact of this financial burden was such that the State indeed might have to change penal policy—not as a result of a direct judicial order to do so, but as a consequence of Johnson's ostensibly more limited order to reduce population and improve conditions. Although the cost of the order, and its potential for altering penal policy, surface consistently throughout the remainder of the book, Yackle never treats this issue directly.

Once the order was handed down, policy was set. Although the order was just the beginning, and implementation was a rocky road ahead, the standards established in the order endured as policy until the end, when it became clear everyone had lost the heart or energy to try any longer to enforce them.

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54. For a full reporting of the order, see *Pugh v. Locke*, 406 F. Supp. 318, 331-32 (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). Yackle's discussion of the order appears in *REFORM AND REGRET*, *supra* note 1, at 100-07. The plaintiffs' lawyers hoped classification would reveal that many prisoners did not require incarceration in the traditional prison environment.

55. *REFORM AND REGRET*, *supra* note 1, at 16-18.

56. Defense counsel suggested that "whopping sums of money" would be necessary. *Id.* at 105.

*E. Implementing Public Policy*

## 1. The Administrative Agencies

One of the intractable problems in public law litigation is implementation of the decree. Implementation in cases such as the prison litigation poses particular difficulty because of the elaborate nature of the relief required. The court and the parties must search for an enforcement mechanism calculated to ensure compliance with the decree.

Johnson's choice of a means of implementation underscored the "governance" nature of the prison litigation. The prison lawyers asked the court to appoint a compliance master, or, in the alternative, a receiver. The State maintained its officials were competent to perform the task. Johnson "steered an independent course,"<sup>57</sup> relying on "administrative agencies" to superintend the prison system.

Primary enforcement responsibility was vested in a Human Rights Commission (HRC).<sup>58</sup> Establishment of such commissions was a familiar tactic employed by Johnson. Prominent citizens from around the State composed the HRC; the chair was Rod Nachman, a former president of the Alabama Bar. The hope for the HRC was that its prominent membership could "galvanize" state support for the political work of reforming the prisons.<sup>59</sup> In part this hope proved true, for long after the HRC was disbanded, Nachman continued to play a key role in prison reform.<sup>60</sup>

At a later point in the litigation, Johnson's choice of agencies<sup>61</sup> to monitor implementation ran into difficulty with the appellate courts.<sup>62</sup> Rebuke by the Fifth Circuit Court of Appeals, however, did not lead Johnson to more traditional means of implementation. If anything, what followed was even more novel and politically savvy. At some point after the Fifth Circuit rendered its decision on the HRC, Alabama had

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57. *Id.* at 103.

58. *Id.* at 103-04.

59. *Id.* at 110-11.

60. As counsel to Governor Fob James, Nachman led the negotiations that resulted in formation of the Implementation Committee, which later monitored prison compliance. *Id.* at 227-37; see *infra* note 64 and accompanying text.

61. The other agency was the University of Alabama's Department of Correctional Psychology. The Department was charged with developing a system for the classification of inmates. Ultimately, the Department took primary responsibility for this task. See REFORM AND REGRET, *supra* note 1, at 138-61.

62. The Fifth Circuit determined on appeal that the HRC was an impermissible intrusion into the governance of the State. See *Newman v. Alabama*, 559 F.2d 283, 288-90 (5th Cir. 1977), *rev'd in part sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978). By the time of the appeal friction between the State and the University of Alabama's Department of Correctional Psychology, and challenges to the latter's authority, had reached an intolerable level, but the Department largely was done with its work anyway and no longer was working the prisons. See REFORM AND REGRET, *supra* note 1, at 162-63.

a new governor, Fob James. James asked Johnson to appoint him as "receiver" for the prisons, thereby divesting the Department of Corrections of responsibility. Johnson acceded, but only after James stated explicitly that the prisons were not in compliance with the original order, and that James would do all he could to bring them into compliance.<sup>63</sup> Moreover, Johnson required that the leaders of each house of the legislature and the attorney general join in signing the statement. When he received these assurances, Johnson appointed James as receiver, thus attempting to assure compliance through "regular" political processes.<sup>64</sup>

## 2. Mired in Bureaucracy

In three agonizing chapters Yackle tells of the political maneuvering and legal skirmishing that constituted an attempt to enforce the prison decree.<sup>65</sup> Commissioners came and went. Prison officials resented the intrusion of monitoring agencies. The legislature took the occasional step of assisting compliance, such as altering the "good time" credit law, but refused to allocate what the system really needed, an infusion of funds.<sup>66</sup> The only time money was allocated it was to build new prisons, a strategy that could not hope to succeed.<sup>67</sup> Meanwhile, politicians at the top of Alabama's political organization complained about pampering prisoners, even while their subordinates recognized the prison system was in serious trouble.<sup>68</sup>

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63. REFORM AND REGRET, *supra* note 1, at 182.

64. *Id.* at 182-83. Even this arrangement proved temporary: at the end of James's term he chose not to run again and was succeeded by George Wallace. Once again, however, an agency was formed to monitor compliance. This time it was an Implementation Committee, with four members appointed by the two parties to the litigation. *Id.* at 227-37. Most remarkably, one of the plaintiffs' lawyers, Ralph Knowles, sat on the committee in order to monitor compliance. *See id.* at 237-38 (noting that "Ralph Knowles[] would turn a legal arabesque," moving from "indefatigable advocate for prison inmates . . . into an arm of the federal court"). It was this "agency" that remained in charge of ensuring compliance until the litigation was terminated.

65. The three chapters aptly are entitled "Intransigence," "Recalcitrance," and "D  j   Vu." *See id.* at 108-86.

66. Even as the legislature passed legislation calculated to help the prison situation, it also passed legislation that exacerbated the situation, such as Alabama's Habitual Felony Offender Act, ALA. CODE    13A-5-9 (1975).

67. As a practical matter it is unlikely that a strategy based on building new prisons can succeed. Prison populations are outgrowing society's ability to build enough prisons to contain them. This dilemma is a national problem currently faced by my own state. *See Progress Comes Slowly on State's Prison Problem*, *Tennessean*, Dec. 29, 1989, at 10A, col. 1 (editorial describing state's request to double-cell prisoners because it cannot find space to house burgeoning population); *U.S. Marshals Meeting to Discuss the Overcrowding in Prisons*, *N.Y. Times*, Jan. 5, 1990, at 12, col. 1 (nat'l ed.) (reporting that the federal prison population is expected to double in the next five years). As a matter of construction, prisons probably could be built quickly enough to contain prison populations: the problem is taxpayer approval of the funds to do so.

68. George Wallace, Johnson's nemesis, accused Judge Johnson of prescribing a "hotel atmo-

In general, scant improvement was made.<sup>69</sup> Johnson's order forbade accepting additional prisoners from the jails until the population of the prison system was reduced to "design capacity." Insufficient strides were made in this direction, and prisoners backed up into the jails. Johnson refused to certify a class action on behalf of all jail prisoners, but individual actions on behalf of various jail populations led to orders limiting the capacity of those jails. Running Alabama's penal system became a giant game of shuttling inmates from one facility to another across the State, wherever there was available space.<sup>70</sup>

In the absence of a legislature willing to consider either a change in fundamental penal policy or funding necessary to improve Alabama's prisons, only one tactic seemed to hold any promise for bringing the system into compliance. That tactic was early release of the less-dangerous prisoners from the system to make room for the burgeoning population of the jails. Matters became so bad in the prisons that even the Commissioner and Board of Corrections privately were willing to agree to a release, on one condition: that Johnson order the release, sparing them the political heat.<sup>71</sup>

Johnson demurred in the strongest of terms. " 'Mr. Knowles,' he said firmly, 'I just want to make one thing clear. It will be a long time before this court will order the release of duly convicted felons from prisons in the State of Alabama.' "<sup>72</sup> Johnson's reasons for this stance are unclear, and this matter, regrettably, is one Yackle did not pursue. At any rate, it was a key moment in the implementation stage, because it left the prisoners' lawyers no choice but to go back to court in a formal adversarial hearing—years after the original order—to prove non-compliance and seek further relief.

This compliance hearing was part and parcel of a process that essentially brought the administration of the prison system to a point of "disintegration," although unfortunately it did little to improve condi-

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sphere and catering service" for prisoners, see REFORM AND REGRET, *supra* note 1, at 105, and said he would rather discuss "the victims in their graves sleeping closer together than the prisoners," see *id.* at 122. See generally *id.* at 104-07 (reporting the rhetoric about pampering prisoners). As for prison officials understanding that the system was in trouble, see *id.* at 177 (noting that the Commissioner conceded noncompliance and acknowledged that the system could not be brought into compliance without funding); *id.* at 175 (stating that the Commissioner and corrections board agreed to the release of prisoners if the judge ordered it, because "there [was] no other solution").

69. Some advances were made, but many of these quickly were lost. For example, the Department of Correctional Psychology managed to get all the prisoners classified, a large step toward sane management of the prisons. *Id.* at 161. A year after the Department was forced to withdraw from the prisons, however, any evidence of its presence was lost. *Id.* at 165.

70. For a discussion of the overcrowding backlog in the jails, see *id.* at 171-75.

71. *Id.* at 175.

72. *Id.* at 176.



tions in the prisons.<sup>73</sup> The prisoners' lawyers proved and Judge Johnson acknowledged, that after years gone by the situation in the prisons was "still critical."<sup>74</sup> What was less clear was what could be done to solve the problem.

Two events of tremendous significance during the course of compliance overshadowed the otherwise intractable problem of what to do next. One—alluded to earlier—was that Fob James became governor and entered into the agreement to be appointed receiver. Perhaps most important, however, Frank Johnson was appointed to the Fifth Circuit Court of Appeals. Johnson's last order in the prison case was the denial of a motion by prisoners' counsel to remove James as receiver. The prison cases now would move to other hands.<sup>75</sup>

#### *F. The New Administration and an End to Reform*

Judge Robert Varner was in many ways the antithesis of Frank Johnson. While Johnson was sympathetic to the claims of prisoners and anxious to achieve reform, Varner was hostile to civil rights plaintiffs generally. Yackle's assessment is that had Varner, rather than Johnson, been on the bench when the original case was heard, "it is most unlikely that . . . [the lawyers] would have developed their cases into major class actions for the purpose of thoroughgoing reform . . . ."<sup>76</sup>

In what is one of the most telling parts of Yackle's story, however, Varner—from a much more traditional view of judging than that of Johnson—did the one thing Johnson would not. Faced with widespread noncompliance, and believing fault rested with the legislature for failing to provide funds, Varner did what he believed was necessary to force the legislature's hand. He began the release of prisoners from the system.<sup>77</sup> Moreover, he held the prison commissioner and state attorney general in contempt and imposed large fines.<sup>78</sup>

Had Johnson done the same at an earlier stage in the litigation it is anyone's guess what would have happened. By 1981, however, it was too late in the day for such a tactic to succeed. Varner set off a political firestorm in Alabama.<sup>79</sup> The appellate courts (reflecting the views of a new Supreme Court, and a conservative United States Department of Justice, which no longer was assisting the prisoners' lawyers) lost heart.

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73. *Id.* at 181 (concluding that "[t]he administration of the Alabama prison system was now disintegrated").

74. *Id.* at 178.

75. *Id.* at 185-86.

76. *Id.* at 187.

77. *Id.* at 198-200.

78. *Id.* at 245-47.

79. *See id.* at 212-13.

First they criticized the release and said Varner should use more traditional remedies such as contempt.<sup>80</sup> Then when Varner did so, the court of appeals overturned the contempt order as well.<sup>81</sup> In essence, Varner was left without tools to enforce the original decree.

Impetus toward ending the prison litigation might have come from the United States Supreme Court, or from a perception by the court of appeals as to the Supreme Court's direction. Traditionally, Supreme Court decisions always counseled deference to state officials in running prisons.<sup>82</sup> Nonetheless, the Court plainly was troubled by the "deplorable" conditions in many of the Nation's prisons, including Alabama's, and the Court displayed some sympathy with developing constitutional guidelines for prisons during this period.<sup>83</sup> Later decisions, however, suggested a possible change in direction as deference to state officials again became the Court's primary standard.<sup>84</sup>

This change in direction by the Court ultimately put the skids on the Alabama prison litigation. Based on what the court of appeals perceived to be changed standards, it held contempt sanctions in the Alabama prison cases to be inappropriate. Rather, Varner's task was to consider whether the original decree required modification in light of recent Supreme Court decisions, in order to determine whether Johnson had not gone too far.<sup>85</sup>

Simultaneously, Alabama hired a new Commissioner, who took seriously the job of obtaining compliance with "new" constitutional standards. Several new prisons were built. Conditions did improve.<sup>86</sup>

After remand to Varner following the striking of his contempt sanctions, it seemed everyone knew reform was over.<sup>87</sup> There still was

80. See *id.* at 220-21; see also *Newman v. Alabama*, 683 F.2d 1312 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983).

81. REFORM AND REGRET, *supra* note 1, at 248-49; see *Newman v. Graddick*, 740 F.2d 1513 (11th Cir. 1984).

82. See *Procunier v. Martinez*, 416 U.S. 396, 404 (1974) (arguing that "[t]raditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration"), *overruled on other grounds*, *Thornburgh v. Abbott*, 109 S. Ct. 1874 (1989).

83. See *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (affirming the responsibility of the courts to scrutinize claims of cruel and unusual punishment, finding some older prisons in "deplorable" and "sordid" conditions, and citing *Pugh*); *Hutto v. Finney*, 437 U.S. 678 (1978) (affirming attorney's fees for prisoners' attorneys in Arkansas prison litigation and reciting particulars underlying its conclusion that prisoners in Arkansas endured "cruel and unusual" punishment); *Martinez*, 416 U.S. at 405 (noting that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims").

84. See *Rhodes*, 452 U.S. at 352 (upholding double-celling of inmates in an Ohio prison and espousing a policy of deference to state officials); *Bell v. Wolfish*, 441 U.S. 520 (1979) (upholding a variety of practices in a New York pretrial detention center and deferring to state officials).

85. See *Newman v. Graddick*, 740 F.2d 1513, 1571 (11th Cir. 1984).

86. See REFORM AND REGRET, *supra* note 1, at 24-43.

87. See *id.* at 249 (concluding that "[t]he fate of the *Pugh* and *James* cases was now

bickering over compliance, and the Implementation Committee stayed in business for several more years. Within three months of the court of appeals' decision, however, the parties would "recommend" to the court that *Pugh* and *Locke* be dismissed. Compliance was deemed "sufficient," though there would be no statement that the prisons met constitutional standards or measured up to the original decree.<sup>88</sup>

Several factors thus contributed to bringing the litigation to an end. Exhaustion in the face of continued political hostility certainly played a part. Minimal conditions did improve. More importantly, though, Varner was stripped of his remedy. Or perhaps the right just changed.

### III. THE POLITICS OF REMEDIES

A fundamental tenet of Anglo-American jurisprudence is that if there is a right, and the right is violated, the law will accord a remedy. If citation is needed, *Marbury v. Madison*<sup>89</sup> will suffice. Among its many other holdings, *Marbury* stands for the proposition that "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."<sup>90</sup>

Yackle tells a story of a reform effort in which the right apparently was not disputed, but the remedy nonetheless was not forthcoming.<sup>91</sup> At a time when the scope of federal judicial remedial authority is a matter of some controversy, Yackle's story affords a unique insight into the relationship between rights and remedies. By examining the tale Yackle recounts, we learn what he apparently perceives: remedying rights is not as simple as the frequent invocation of our fundamental tenet would lead one to believe. *Marbury's* analysis of rights and remedies affords a paradigm for examination of the problem.

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sealed").

88. *Id.* at 250. For a description of the ultimate end of the litigation, including conclusion of the Implementation Committee's work, see Knowles, *supra* note 4.

89. 5 U.S. (1 Cranch) 137 (1803). For a comprehensive discussion of *Marbury*, see Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1.

90. *Marbury*, 5 U.S. (1 Cranch) at 163; see also Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989); Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665 (1987).

Concededly, the law displays a certain ambivalence toward this "fundamental tenet." Relief often is denied in cases in which a right ostensibly exists because of some doctrine such as sovereign immunity. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409 (1976).

91. The remedy was not barred by any doctrine that traditionally might have proven problematic, such as standing or sovereign immunity.

A. *Was There a Right That Was Violated?*

Whether the prisoners' rights were violated is a question not necessarily easy to answer. The right proffered was the eighth amendment's prohibition against cruel and unusual punishment. Whether treatment is "cruel and unusual" is a determination "necessarily imprecise and indefinite."<sup>92</sup> More than with many rights, determination of whether a punishment is cruel and unusual involves an evaluation of contemporary standards as to what comports with fundamental decency and human dignity.<sup>93</sup>

Yackle describes the conditions in the prisons as "shocking" and "debilitating."<sup>94</sup> By most accounts they were. Reading of prison conditions is unpleasant enough: for most of us, living under such conditions would be unthinkable.

But most of us are not required to live in prisons. Prisons are populated by those who have flaunted society's rules and thus have subjected themselves to punishment. Although most of us could not conceive of living under the conditions Yackle describes, the question is whether the conditions constituted unacceptable punishment. This question was the one put to Judge Johnson.<sup>95</sup>

Fortunately, Johnson's task of resolving this question was made somewhat easier because once confronted with the facts, the State's representatives felt they could do nothing but concede that a right had been violated.<sup>96</sup> Indeed, this theme is persistent in Yackle's book: time after time state officials responsible for the prisons themselves proclaimed conditions in the prisons unacceptable.<sup>97</sup> It is of course true these very same officials were leery of abdicating control over the prisons to a federal court. But in a certain sense even federal judicial intervention was welcome, for it held out the only hope for providing prison officials with the resources they believed were necessary to run the prisons.<sup>98</sup>

Was there a right that was violated? Yackle seems certain a violation occurred. Judge Johnson so held. The State apparently agreed; it conceded the point and later signed a consent decree agreeing to rem-

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92. *Rhodes v. Chapman*, 452 U.S. 337, 361 (1981); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

93. *McCleskey v. Kemp*, 481 U.S. 279, 299-300 (1987); *Furman v. Georgia*, 408 U.S. 238, 282 (1972).

94. See *REFORM AND REGRET*, *supra* note 1, at v.

95. *Accord Rhodes*, 452 U.S. at 347 (stating that "[c]onditions [of confinement] must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment").

96. *REFORM AND REGRET*, *supra* note 1, at 93-94 (conceding at trial that "[a]t this point the Board of Corrections and Attorney General's office feels that a totality case has been made out").

97. *Id.* at 65-67, 93, 118.

98. *Id.* at 65, 175.

edy the conditions. For the moment then, let us assume a right was violated.

*B. Was There a Remedy to Which the Prisoners Were Entitled?*

Still tracking *Marbury*, two issues must be addressed. First, what was the nature of the relief applied for, and second, what was the power of the court?

1. The Nature of the Relief

Johnson entered a sweeping decree. Commentators, even those supportive of public law litigation generally and reform of Alabama's prisons in particular, have been critical of the decree's breadth and attention to detail.<sup>99</sup> After all, how necessary is a licensed dietician to assuring prison conditions do not constitute cruel and unusual punishment? Must an inmate have toothpaste? A toilet that flushes from within the cell? Sixty, as opposed to fifty-five square feet?

In a sense Johnson was vulnerable on this point. *Pugh* and *Locke* represented a departure from his usual way of doing business, which would have been to give the state the first opportunity to shape the decree. Then, if the state failed Johnson would have specified what was necessary.<sup>100</sup> In this case Johnson moved right from the State's concession to fashioning the relief he believed appropriate.

On the other hand, there was nothing constitutionally inappropriate about what Johnson did. The State of Alabama conceded that it was the "totality" of the conditions that constituted the constitutional violation, and it was the totality of those conditions that Johnson addressed. Moreover—and again—the State as much as endorsed Johnson's remedy when it signed the consent decree.<sup>101</sup>

2. The Power of the Court

This analysis brings us to the nub of the problem. If anything, Yackle's story is about power. Yackle identifies as one of the most significant "milestones" in the prison litigation the shift of the case from Judge Johnson to Judge Varner. As Yackle portrays it, the two men represented two completely different approaches to the problem of enforcement: Johnson, the politician, relied on threats of coercion, negotiation, and compromise to see the decree was enforced; Varner relied

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99. See Robbins & Buser, *supra* note 13, at 917. "In assessing *Pugh's* minimum standards, it is immediately apparent that many lack specific constitutional foundation. Even as a policy matter, the efficacy of the measures proposed is not clear." *Id.*

100. See *supra* note 55 and accompanying text.

101. See *supra* text accompanying notes 96-98.

instead on the more traditional tools of a judge.

*a. The Power of Law*

The termination of the prison litigation under the aegis of Judge Varner demonstrates the limits of law. Despite the misgivings of prisoners' counsel about Varner, mirrored by Yackle, Judge Varner aggressively took on the task of enforcing Johnson's decree. Varner may not have agreed with the relief granted, and may never have granted that relief himself, but he took seriously the esteem of the judiciary: to have a judicial decree and be unable to enforce it would be an unpardonable state of affairs.<sup>102</sup> Thus, Varner employed the tools of a judge to ensure enforcement.

When enforcement was not forthcoming after hearings, negotiations, and judicial prodding, Varner drew upon his equitable power to begin a release of prisoners deemed nondangerous and bring the prison population within compliance limits. If population could not be brought under control, the decree generally had no chance of implementation. Moreover, Varner himself was savvy enough to recognize that releasing the prisoners was the best way to generate political heat in the legislature to obtain the resources necessary for implementation.<sup>103</sup>

Although the release of prisoners created a public uproar, and ultimately may have succeeded in moving the legislature to action, the use of this tool failed because the judiciary itself lost heart. When the release issue was appealed to the Eleventh Circuit, that court held release was an invalid use of the district court's equity power. Rather, the court of appeals held that the district judge must instead use "traditional" equity tools, such as contempt, with its concomitants of fines and imprisonment.<sup>104</sup>

102. At one of the compliance hearings before him, Judge Varner said:

My problem is this: If a Judge orders something that can't be done he is making the Court look bad. I have already done that in this case. I don't want it to look any worse than it has gotten . . . . I have got people before me here today who are nearly all in contempt of court now . . . .

. . . .

. . . I have a duty to protect anybody whose constitutional rights are violated.

REFORM AND REGRET, *supra* note 1, at 211.

103. *Id.* at 206. Varner's sense of how to prod legislative action, and his use of traditional judicial techniques toward this end, demonstrates that the law-politics dichotomy is inaccurate to a certain extent, and is useful only to paint two paradigmatic models. Dichotomies in general are useful only in this way. One of the great shortcomings of legal analysis is confusing the usefulness of a dichotomy to describe and analyze an idealized problem with the use of dichotomies as descriptive of reality.

104. *Newman v. Alabama*, 683 F.2d 1312 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983). There was nothing legally compelling about Judge Tjoflat's opinion for the Eleventh Circuit. It lacked citation to any precedent in support of its holding that contempt was the only permissible

At this point Judge Varner was left with no arrows in his quiver outside the "traditional" sanctions of fines and imprisonment for contempt. After another period of recalcitrance, Judge Varner finally fired these arrows. He held both Alabama's attorney general and prison commissioner in contempt. Steep fines were imposed, based upon the number of prisoners held over design capacity each day.<sup>105</sup>

Again it is difficult to say if this use of traditional remedies would have succeeded, for again the appellate court backed down. The court of appeals held that the commissioner could not be fined because he exercised due diligence and did all he could to cut the prison population.<sup>106</sup> Contempt against the attorney general also was inappropriate, because he lacked authority to release prisoners,<sup>107</sup> although the court suggested he might be susceptible to a fine because he had acted in a manner calculated to thwart compliance with the judicial decree.<sup>108</sup> Even in that case, however, fines were improper. Because the Supreme Court had in the interim between the original decree and the contempt proceeding handed down decisions on the issue of the constitutional "totality" of prison conditions,<sup>109</sup> contempt was inappropriate without a new hearing below as to whether conditions in the Alabama prisons met those standards set by the Supreme Court.<sup>110</sup>

This reversal of sanctions was the final straw. It became clear to lawyers on both sides, and to the judge, that the Eleventh Circuit was

sanction and ignored citation to case law that might have justified such broad relief as releasing prisoners. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 737-38 (1974); *Swann v. Board of Educ.*, 402 U.S. 1, 15-16 (1971); *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 300 (1955). Indeed, the Eleventh Circuit's decision on relief itself may have been motivated more by a sense of politics than law, the very same political sense that led Judge Johnson to refrain in the first instance from releasing prisoners.

105. See *supra* notes 77-81 and accompanying text.

106. See *Newman v. Graddick*, 740 F.2d 1513, 1525 (11th Cir. 1984).

107. *Id.* at 1528.

108. *Id.* at 1528-29.

109. See *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Bell v. Wolfish*, 441 U.S. 520 (1979).

110. See *Graddick*, 740 F.2d at 1520-21; see also REFORM AND REGRET, *supra* note 1, at 220-21. Again, it is unclear why the Eleventh Circuit held as it did. First, there was nothing legally compelling about the Eleventh Circuit's decision that the standards in *Rhodes* and *Bell* should govern rather than the original decree. Although an injunction may be voided if standards change after it is put in effect, it also is acceptable to hold parties to their agreement as embodied in a consent decree. The Second Circuit so held in *Yonkers*, see *United States v. City of Yonkers*, 856 F.2d 444, 454-55 (2d Cir. 1988), *rev'd on other grounds sub nom. Spallone v. United States*, 58 U.S.L.W. 4103 (U.S. Jan. 10, 1990), and on that issue the Supreme Court denied certiorari, see *Yonkers*, 109 S. Ct. 1339 (1989). Second, *Rhodes* and *Bell* did not necessarily have any impact on the Alabama case—*Bell* was about conditions of confinement for as yet unconvicted prisoners, and *Rhodes* was only about double-bunking in a prison that was almost a model of acceptable conditions. Indeed, the *Rhodes* court cited Alabama as an example of intolerable conditions in some prisons, in contrast to the conditions in the Ohio prison at issue in *Rhodes*. See *Rhodes*, 452 U.S. at 352 n.17. Thus, *Rhodes* could have been read as justifying widespread relief to remedy conditions in Alabama's prisons.

unprepared to put its weight behind enforcement of the original decree. No one had the energy to start from the beginning under new standards. The litigation was settled, essentially confirming the constitutionality of conditions as they then stood.<sup>111</sup>

Although Yackle is unclear why everyone lost heart, reading between the lines of his story suggests why enforcement of the original decree by traditional legal tools was bound to fail. Fundamentally changing the nature of an institution such as a state's prisons is hefty work. It requires changes in policy and administration, as well as enormous resources. A court simply cannot fulfill all of these roles.

Implementing wide-ranging government policy typically requires three branches of government acting in concert; a court, at best, generally can be only two. This lesson is the one Yackle offers of the prison litigation. A court can be a court, of course. And, a court can act as an executive, wresting control from elected officials and decreeing policy. But implementing the kind of changes suggested by Johnson's decree required vast amounts of money, and for that a legislature is needed. It is next to impossible for a court to be a legislature.<sup>112</sup>

It was money, ultimately, that seems to have foiled implementation of the original decree. Yackle continually points to the lack of resources as standing in the way of significant change.<sup>113</sup> It is not impossible for a court to obtain the necessary resources to fund sweeping change, but it requires an exercise of judicial authority as likely to provoke a constitutional crisis as succeed.

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111. REFORM AND REGRET, *supra* note 1, at 249-50.

112. When a court commands not only judicial power and executive power, but also the power of the purse, one might argue there is an unconstitutional violation of the doctrine of separation of powers. See Frug, *supra* note 6, at 733; Nagel, *supra* note 6, at 710-11. In *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988), *cert. granted in part*, 109 S. Ct. 1930 (1989), the Eighth Circuit rejected such a separation of powers argument, holding that separation of powers was a doctrine limiting only the authority of courts vis a vis the national government, not the authority of courts over state governments. See *Jenkins*, 855 F.2d at 1310. With regard to state governments, federalism and comity were the limiting principles, *see id.* at 1310, and neither barred the order issued in that case, *see id.* at 1313 (stating that because of the supremacy clause, "state law limitations cannot hinder a district court from remedying constitutional violations").

Combination of the functions of all three branches of government in one body is not unknown at the federal level. Administrative agencies frequently combine all three functions. The constitutionality of administrative agencies nonetheless is preserved, at least in part, by subsequent federal judicial review, generally in the appellate courts. See *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 852-54 (1986) (upholding jurisdiction of CFTC over common-law counterclaims because CFTC orders are subject to judicial review); *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir.) (Leventhal, J., concurring) (upholding a broad delegation to the agency "because there is court review to assure that the agency exercises the delegated power within statutory limits"), *cert. denied*, 426 U.S. 941 (1976). The same, however, holds true of the orders of a federal district court.

113. See, e.g., REFORM AND REGRET, *supra* note 1, at vi, 91-92, 108.



This Term, in *Jenkins v. Missouri*<sup>114</sup> the Supreme Court will address the specific question of whether a court may usurp the legislative function of coming up with funds to implement constitutional remedies. Should the Supreme Court hold that a court never may order an increase of taxes or exercise similar authority to obtain funding, Yackle's book suggests that much public law litigation—at least under a model of traditional enforcement—will be in jeopardy.<sup>115</sup> Should the Court hold that this tool generally is available, the Court runs the risk that state authorities simply might not comply, and that courts will be confronted with a federal executive reluctant to enforce those federal judicial decrees.

*b. Reprise: Was There a Right?*

In any event, sufficient funds were not forthcoming in *Pugh* and *James*, and the decision of the courts not to push the matter further spelled the end of that litigation. Yackle does not give us his opinion of whether conditions in the prisons at the time the cases were settled met the dictates of the Supreme Court's *Rhodes* decision. One gets the impression, however, that although progress was made over the course of a decade—and not insubstantial progress at that—in the end the judicial enforcement mechanism fell short. The prisoners did not get what once a court said rightfully was theirs.

The shortfall between right and remedy necessarily is difficult to assess, however, because all parties to the prison litigation—including the courts—apparently engaged in the age-old tactic of declaring victory and withdrawing from the field. The judicial perspective on this tactic is most important. Judge Varner recognized early on the embarrassment of maintaining judicial decrees that could not be enforced.<sup>116</sup> The Eleventh Circuit apparently also was clever enough not to leave the judicial system in the position of ordering relief it could not enforce. Rather, in the face of a decree that was proving unenforceable—a right

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114. 855 F.2d 1295 (8th Cir. 1988), *cert. granted in part*, 109 S. Ct. 1930 (1989).

115. Should the Supreme Court hold that federal courts are without any authority to raise funds to implement judicial remedial orders, one is faced with the question whether decisions finding rights violations and ordering remedies do not become impermissible advisory opinions. See generally P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65-72 (3d ed. 1988). The Court simply may choose the course of the Eighth Circuit in *Jenkins*, holding that a court may impose a remedy, but requiring that the state determine how to implement the remedy, including making any necessary decision about how to raise funds. The court may not order an increase in taxes, but may use "traditional" remedies, such as contempt, to ensure compliance with its order. See *Jenkins*, 855 F.2d at 1315-16. Difficulty arises, however, because the body generally responsible for raising funds also is generally outside the contempt authority of the federal court. See *Tenney v. Brandhove*, 341 U.S. 367 (1951).

116. See *supra* note 102.

that could not be remedied—the Eleventh Circuit did the only thing it could to avoid judicial humiliation. It modified the right.<sup>117</sup> Having lowered expectations with respect to what the Constitution guaranteed, it then was possible to agree the judiciary had provided everything to which the prisoners were entitled.<sup>118</sup>

Perhaps then it is meaningless to talk of rights without considering remedies. What good, after all, is a right if it is unenforceable? Rather than discussing the right as the measure of the remedy, which is the “traditional” way of doing things, Yackle’s story of the prison litigation suggests that just the opposite equally is true: the ability to implement a remedy is itself the measure of the right. If there is no remedy, there is no right at all.

c. *Finale: The Power of Politics*

This conclusion, however, sounds a pessimistic ring, and Yackle’s book need not be read in this fashion. Indeed, Yackle strives to make this point from the outset. His is, to be sure, a tale of Regret, but it also has an optimistic message: it is as well a tale of Reform.

What Yackle teaches is that there is another way of doing business separate and apart from the traditional judicial method of enforcement that invites confrontation and irreconcilable conflict. The alternative method was Judge Johnson’s way. That method is politics.

Johnson is a judge, but a judge with an astute political sense. He began his project with a realistic assessment of the possibility of change, and never seems to have abandoned it. He moved the prison litigation along always with an eye on what was politically feasible. He accomplished what he could and did not seem to worry about what he could not.

Judge Johnson’s treatment of the judicial decree might be the best example of this attitude. Varner saw the decree in the traditional light. Judicial decrees were edicts from on high that had to be enforced.<sup>119</sup> Modification of a decree was possible, but modification was the exception, not the rule. Johnson, on the other hand, was flexible. At best the decree was a guideline, an aspiration. No one doubted for a moment

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117. See *Newman v. Graddick*, 740 F.2d 1513, 1520-21 (11th Cir. 1984). This result essentially was the effect of the Eleventh Circuit holding that contempt was improper unless the district court reassessed the decree in light of *Rhodes*. Given the very good argument that *Rhodes* had little or nothing to do with conditions in the Alabama prisons, see *supra* note 110, the Eleventh Circuit’s decision easily can be interpreted as reassessing the extent of the prisoners’ rights.

118. This consequence was the ultimate result of the Alabama prison litigation. Although the settlement decree did not specify that the State was in compliance with the original decree, it did indicate the State’s efforts were “sufficient” to recommend an end to the litigation. See *supra* notes 87-88 and accompanying text.

119. See *supra* note 102 and accompanying text.

that Johnson meant what he decreed and would strive to enforce it, but at the same time, Johnson was willing to modify the decree in the face of good faith enforcement efforts.<sup>120</sup>

For Johnson, keeping the ball rolling was everything. The decree and its implementation were not an end so much as they were a means—a means of reforming an institution Johnson believed was in dire need of reform.

It is impossible to say what ultimately would have happened if Varner had not replaced Johnson. After all, Johnson bowed out just as Fob James took over as receiver. It is possible Johnson ultimately would have proceeded no further than Varner, that outside forces would have brought the litigation to a halt. One suspects, however, that Johnson's political sense would have kept him from permitting matters to come to a head. Instead, the litigation would have inched along, reforming the prisons bit by bit.

Of course, the measure of success in politics is different than that of traditional legal remedies. Traditional legal remedies set milestones and compliance is expected. Shortfalls spell failure. In politics, on the other hand, everything is a product of compromise. Progress is progress, and one is prepared to settle for half a loaf.

### C. *Encore: Marbury v. Madison*

Under the traditional model of the law of remedies, a court determines whether a right has been violated. If so, the court decrees a remedy. A civilized society expects no less than that government should be accountable when it violates the rights of its citizens.

This model is a nice one, but Yackle's story makes clear it is an idealized one, at least in the realm of public law litigation. Once the rights at stake are recognized as broad based, and the violations as systemic, the problem of remedying those violated rights becomes inseparable from the realm of politics. In politics, however, absolute accomplishment of original goals is rare, if not unheard of.

There is no reason, however, that this model—this traditional model—need be recognized as the only correct one. Rather, public law litigation may be seen as political, with courts achieving what their authority permits. If citation is needed, *Marbury* will suffice. Every law student knows—though perhaps too quickly forgets—the ending of the *Marbury* story: that William Marbury's rights were sacrificed on the altar of politics. Marshall maintained Marbury had a right to his com-

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120. See, e.g., REFORM AND REGRET, *supra* note 1, at 130-31 (discussing Johnson's willingness to amend the cell-size requirement "if only the sixty-foot requirement stood in the way of a bargain that would end the attorney general's resistance").

mission. But John Marshall knew full well that requiring delivery of the commission was a remedy he could not hope to enforce.<sup>121</sup> Seizing the moment, then, Marshall took the case as an opportunity to accomplish what he could, which in retrospect was far more than awarding William Marbury his commission. It was in this tradition that Judge Johnson operated, and it is this tradition that Yackle describes so well.

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121. There is an interesting question of whether the Supreme Court was the only court that could have afforded Marbury the relief he requested. See Amar, *supra* note 90, at 461 n.90. Amar argues that mandamus would not be available from state or circuit courts under the later holding in *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821). The subsequent decision in *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 615-26 (1838), "softens" *Marbury's* blow, however, by making circuit courts of the District of Columbia available for such mandamus actions. Amar, *supra* note 90, at 461 n.90.

There is an equally interesting question of whether Justice Marshall's decision in *Marbury* stands up against prior Supreme Court decisions. See Bloch & Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 Wis. L. Rev. 301, 322-27 (suggesting prior decisions of the Supreme Court might have permitted issuance of the writ). The answer to this latter question, while interesting in an academic sense, surely would not have made a difference in *Marbury's* case. The brilliance of *Marbury* is Chief Justice Marshall's understanding that he could not help Marbury, but he could take advantage of the situation to enhance the role of the judiciary.

