

MASS INCARCERATION: A LEGAL DILEMMA OF PRISONERS' CIVIL LAWSUITS

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On September 25, 1789, the United States' First Congress proposed twelve amendments to the Constitution that attempted to compensate for the arguments most frequently advanced against it, including the need to clearly define the individual and natural rights of citizens in relation to the federal government. After the ratification process, what ultimately became the sixth amendment was approved by three-fourths of state legislators and read: "In all criminal prosecutions, the accused shall enjoy the right [...] to have the assistance of counsel for his defense." While originally designed to ensure fair and just trials involving criminals, this amendment does not apply to civil cases. Because the legal claims filed by incarcerated inmates are civil by nature, they lack the constitutional guarantee to a lawyer. Even before inmates are legally permitted to file a lawsuit in court, however, they must first exhaust all the administrative remedies in their prison's internal grievance system.

Accordingly, with the unprecedented incarceration rates combined with the documented history of hostile relationships between prison guards and prisoners, the number of inmates engaging with grievance systems and federal and state courts has increased since the 1970s and earlier. Focusing on New York's Internal Grievance Program and the court cases *Lowrance v. Achtyl* and *Brown v. Mewar and Tapp* makes clear that inmates face structural legal dilemmas such as complicated grievance procedures and unfavorably high standards and burdens of proof. Moreover, these litigious inmates additionally encounter non-structural challenges that further exacerbate their legal disadvantages. These include the prisoner and guard relationship, the social role of the inmate within the prison, the pattern of pro se, and the reality of likely recidivism.

Yet these barriers are intensified even more given not only the established tensions between guards and inmates, but also the unprecedented number of people in prison today. As documented by studies¹ conducted by Gresham M. Sykes, Erving Goffman, Donald Clemmer², and others, prisons are spaces where interactions between correctional officers and prisoners often conflict and are marked by feelings of anxiety, suspicion, and defensiveness. Moreover, there are more prisoners now than ever given the onset of mass incarceration.

For Garland, two features define mass imprisonment. The first is the sheer rate and number of people incarcerated. Compared to European and Scandinavian countries, America's imprisonment rate is six to ten times higher (Garland 2001: 1). Accordingly, the legal dilemma for the prisoner takes on particular significance in this moment where, for the first time in United States history, more than one in every one hundred adults are confined in a jail or prison (Pew Center on the States 2008: 1). Stated another way, for most of the twentieth century, America's imprisonment rate consistently oscillated around an average of 110 imprisoned for every 100,000 people. Today's imprisonment rate, however, is over 680 per 100,000—including the number of inmates in local jails (Garland 2001: 1). In Bruce Western's analysis, the marked increase in incarceration began during the 1970s as politicians vowed to become tough on crime and "abandoned the rehabilitative ideals etched in the law of criminal sentencing and opted for mandatory prison terms, the abolition of parole, and long sentences for felons on their second

¹ According to Loïc Wacquant: "With the jettisoning of the philosophy of rehabilitation and the turnaround towards the criminalization of poverty as a queer form of social policy aimed at containment of the lower classes and stigmatized ethnic groups, the doors of penitentiaries were gradually closed to social researchers and severe restrictions were imposed on the diffusion of inmate writings—which all but dried up with the extinction of government support by the time Reagan renewed his tenure at the White House" (Wacquant 2002: 384). In other words, prison ethnographies have seen a decline due to the increasingly restricted access researchers have to prisons and prisoners that has coincided and paralleled the rise of incarceration populations in the 1970s and 1980s. Unlike other European nations, as the United States adopted the framework of a penal state, prison sociology has declined due to decreased research funding from government agencies and foundations, the restrictiveness of Human Subjects Committees at universities, the long-term and intensive nature of the fieldwork, and more.

² In addition, K.C. Carceral's study also provides prison-written accounts from an inmate's perspective.

and third convictions” (Western 2006: 2). With new sentencing guidelines attached to drug offenses and other factors, prison populations began to spike, leading to a sevenfold increase in the number of federal and state prisons between 1970 and 2003 (Western 2006: 3).

Garland’s second defining characteristic is the social concentration of imprisonment’s effects: “Imprisonment becomes mass imprisonment when it ceases to be the incarceration of individual offenders and becomes the systematic imprisonment of whole groups of the population” (Garland 2001: 1). Referencing Mauer and Huling (1995), Garland states: “1 in 3 black men aged 20 to 29 years of age is currently in penal custody or under penal supervision” (Garland 2001: 2). Incarceration has become part of the socialization process for young black, urban males in the United States. Thus mass imprisonment and the structural and non-structural legal burdens inmates face is an extraordinary phenomenon that not only affects more people in the United States now more than ever, but is also concentrated and targeted at certain subpopulations of the demographic. Because these people are inmates, they may be subject to increased negative treatment in their interactions with prison guards. Given the high recidivism rates and the increased number of people directly affected by the American penal system, these consequences of mass incarceration take on greater importance.

I. Tensions Within Prisons

The tensions between inmates and guards are well established. These conflicts are exacerbated by three factors: the prison setting, the guards, and ultimately the inmates themselves. The intersections and interactions of these three variables produce an environment saturated with mistrust, frustration, and oftentimes, violence.

a. Prison Environment

The circumstances and restrictions of prisons often escalate conflicts. In Sykes' mid-twentieth century study of a New Jersey maximum-security prison, he attempted to understand the meaning of prison by studying it as a "society within a society" (Sykes 2007: xii). Suggestive of the unique environment that forms within a prison, Sykes argued that prison can be an objectifying and dehumanizing experience for the prisoner. Within the prison walls, a different social system takes shape that "pursues an odd combination of confinement, internal order, self-maintenance, punishment, and reformation, all within a framework of means sharply limited by law, public opinion, and the attitudes of the custodians themselves" (Sykes 2007: xxxiii). Prison environments not only reflect public discourse and the laws passed by politicians often far away from these prisons, but they embody often contradictory and competing ideals of rehabilitation, correction, and punishment which interact to create prison policies that can be unclear, frustrating, and perceived as unfair.³ Significantly, most prisons simply look and feel like institutions: "When we examine the physical structure of at the prison the most striking feature is, perhaps, its drabness" (Sykes 2007: 7). The dreariness and coldness that prison spaces emit can contribute to their general mood and atmosphere, making the time spent there feel even more destructive and despairing.

b. Difficulties for Prison Guards

In addition to the prison environment, a second factor that affects tensions is the difficulties that guards face—making them more likely to engage in conflict and intervene in prisoners and their grievances. For example, it is often easy to overlook the reality that the correctional officer position is an occupation that people perform in order to make a livelihood.

³ In general, however, it is important to note that policies, standards, and interactions vary from prison to prison and may reflect different approaches to questions such as the purpose of confinement, how internal order will be maintained, what standard of living should be maintained, how far should the prison go in supporting prisoners (i.e. labor and wages), and what steps should be taken to ensure custody.

As Pratt implied, prison work as a career option is relatively more attractive and is perceived more positively in Scandinavian countries than in the United States and most other modern societies (Pratt 2008: 121). Either way, this economic factor encourages these guards not only to execute their responsibilities, but to do them well: “Their continued employment is tied up with the successful performance of custody and if society is not sure of the priority to be attached to the tasks assigned the prison, the overriding importance of custody is perfectly clear to the officials” (Sykes 2007: 18). With the financial incentive tied to enforcing the prison’s rules and regulations, many guards are in fact simply fulfilling the responsibilities of their job in keeping prisoners constrained.

Furthermore, a risk factor exacerbates the difficulties of prison officials. Many of these inmates are dangerous, with criminal and sometimes violent histories. It is the guard’s responsibility to prevent these offenders from escaping from prison: “It is true that there are a few prisoners who can clearly be labeled ‘security risks’—men so intransigent in their dislike of imprisonment that no plot is too daring, no risk too great, if the goal is freedom” (Sykes 2007: 20). But it is for the exact reason that not all prisoners will try to escape or cause other disruptions at the slightest opportunity that makes it difficult to control the prison population as a whole. Because different prisoners require varying degrees of surveillance and attention, prison officials must stretch their resources not only to provide general security in the prison, but also to scrutinize a select few in particular.

Even though guards most focus on individual prisoners, they still must maintain tight security and enforcement as public uproar over escapes from prisons encourage heightened precautions. As Sykes contends, given public reactions to any sort of disturbance in prisons such as escapes or riots, the guards must maintain order at all costs. But paradoxically, the greater the

enforcement, the more likely and easily prisoners are to disrupt it. In other words, the rules that prisoners break and the conditions of life that they protest are against the very order that guards seek to increasingly enforce: “The custodians’ task of maintaining order within the prison is exacerbated by the conditions of life which it is their duty to impose on their captives. The prison official, then, is caught up in a vicious circle where he must suppress the very activity he helps cause” (Sykes 2007: 22). Accordingly, as prison officials demand adherence to extensive regulations particular to prisons alone, many officials overlook their role in the interactions and simply view prisoners as violent or immoral (Sykes 2007: 22).

From an inmate’s perspective, many agree with Sykes’ argument that the punishment guards assign can potentially encourage misbehavior. In Clemmer’s study, a prisoner recounted: “I know that the memory of one night spent in them and the ‘throw-‘em-in-the-hole’ policy of this and other administrations has embittered me as no other prison experience has ever done” (Clemmer 1940: 181). With regulations and punishments becoming increasingly harsh as prison officials are pressured to maintain order and control, prisoners become even more resentful. Carceral agrees: “Most prison guards, however, are so confident in their formal possession of power that they do not care about a prisoner’s perceptions of fairness” (Carceral 2005: 170). According to inmates, because prison officials are secure in their absolute authority, they are more likely to engage in potentially unfair interactions—presumably increasing the probability that inmates “act out.” Carceral continues to describe: “Thus, dealing with guards can be very frustrating for prisoners and many of them can end up feeling very angry. However, any expression of those feelings greatly reduces the chances that the prisoners will get what they want” (Carceral 2005: 201). In other words, the more prisoners voice their concerns and raise

issues with prison officials, the more likely they are ultimately sanctioned and the less likely they are to be appeased.

c. Difficulties for Inmates

Inmates themselves also face difficulties exacerbated by the prison environment and the prison guards, which can escalate tensions and affect the structural and legal barriers for inmates filing lawsuits. For example, according to Carceral, a former inmate who was involved in the prison system for over twenty years, the power dynamics in prison are a source of contention:

The major difference between the prisoners and guards, in this respect, is that the power granted a guard immediately becomes an opportunity for meeting their own internal needs for power—guards do not need to create a new informal hierarchy to meet those needs. Instead, their power is formal and transmitted to them by the prison structure and culture (Carceral 2005: 169).

Accordingly, prison officials not only seek power to satisfy themselves internally, but they do so legally and illegally. As guards develop a sense of superiority, this power dynamic becomes an even greater concern when they act upon it in cruel, brutal, and dishonest ways. In many instances, the use of force by correctional officers is legal and justified in order to, for instance, subdue an uncooperative and potentially dangerous inmate. However, prisoners like Carceral believe that guards do not reflect on the meanings and consequences of their actions in and of themselves and therefore, are more likely to engage in unwarranted and harsh behavior. When guards act, they mainly take into account such things as pleasing a supervisor, indirectly supporting another guard, and other actions that support the needs of the prison and society (Carceral 2005: 169). Many prisoners perceive the power dynamic as unfair since one group has complete control while the other has absolutely none. Furthermore, because guards recognize their positions of authority, they often disregard what prisoners believe is fair or not. Whether or

not these dynamics actually exist, at least some inmates believe that they do and consequently, some inmates act according to the idea that prisons are unfair and unjust.

And while some officers' actions are legal or otherwise go unpunished, there are also several documented cases of prison guards engaging in illegal behavior. To highlight a few, in August 2009 the Department of Justice announced that former Texas Correctional Officer (CO) Eugene Morris was found guilty of contributing a false statement to a federal civil rights investigation. In his official incident report, he attributed an inmate's fractured skull and brain injuries to the inmate unintentionally hitting the floor during a struggle between them. However, it was later revealed that CO Morris actually caused the injuries by kicking the inmate in the head as he lay on the floor with his hands behind his back (Department of Justice 2009). A similar case occurred in Atlanta in June 2010 with CO Benjamin Montgomery for assaulting an inmate and then writing a false incident report. In this case, CO Montgomery "physically assaulted an inmate without legal justification and thereby violated the inmate's constitutional right to be free from cruel and unusual punishment" (Department of Justice 2010). Further, he followed up his behavior by writing an incident report accusing the inmate of making aggressive movements towards him (Department of Justice 2010). Finally, a former New York correctional officer named Ronald Hancock Jr. engaged in the same illegal behavior. After assaulting and using force even though the inmate was handcuffed and under the control of other officers, CO Hancock wrote a false incident report and denied his conduct to a federal investigation (Department of Justice 2011). These incidents indicate that the abuse of power by correctional officers is not uncommon, and with these types of interactions in the minds of both guards and inmates, tension is sure to be heightened.

This power struggle over control can have a psychological effect on inmates as well. Calling the prisoner's world an "atomized world," Clemmer describes how prisoners undergo a process of stress and frustration where they lose a sense of autonomy and rights (Clemmer 1940: 297). Because these inmates are supposed to be criminals who have broken laws, many guards and non-inmates believe that prisoners have forfeited many of their rights: "He is, after all, it is said, a man who is supposed to be undergoing punishment and it is argued that a permissive or supportive atmosphere for the prisoner—demanded on the grounds of reformation or humanitarianism—must be forfeited for more important concerns" (Sykes 2007: 25). Because the prisoner must ask permission for anything he does, his self-image can be severely damaged. Moreover, even when inmates ask for help or permission, Carceral observed: "Getting staff to do things was next to impossible. They would continually say: Submit a request slip. Men submitted request slip after request slip to the property room. However, no one even looked at them" (Carceral 2005: 21). Carceral also recalls the shared sentiment among prisoners that many staff took their property. Again, whether or not this was the case, what matters is that the inmates perceived and believed this. For the prisoner, all he expects from the prison is recreation, property, mail, phones, laundry, and food (Carceral 2005: 30). Yet as Carceral contends, these six basic functions were often left unfulfilled, which angered inmates yet only created more tension and fewer privileges as the anger was expressed.

In addition to power and control, inmates experience sexual frustration. Given the lack of heterosexual relationships, combined with other sources of restraint, inmates are pushed towards their limit: "Yet as important as frustration in the sexual sphere may be in physiological terms, the psychological problems created by the lack of heterosexual relationships can be even more serious" (Sykes 2007: 71). With anxieties and competition over masculinity, violence can erupt

over assertions of manhood. Moreover, non-consensual and unprotected anal sex have been documented to show higher rates of disease transmission such as HIV (Fazel and Baillargeon 2011). According to Rucker Johnson and Steven Raphael's study that incorporated the time lag for the incubation period of HIV/AIDS, racial differences in incarceration can account for between 70 and 100 percent of the black-white differentials in AIDS infection rates for men, a percentage that is even higher for women (Johnson and Raphael 2009). In other words, high incarceration rates among black males can explain a large portion of the racial disparity in AIDS infection among men and women.

Though there are several other avenues through which prisons can negatively affect those that inhabit them, they all tend to lead towards marginalization and negative outcomes inside and outside of prison: "Studies demonstrate how the prison boom negatively affects prisoners and ex-convicts, families, communities, state priorities, civic participation, and patterns of racial and class inequality" (Page 2011: 738). With stigmatization potentially inhibiting labor and family prospects, inmates, while in prison, are defined by their formal dispossession of things ranging from power to material goods, and to other forms of recognition and confirmation.

d. Interaction between prison environment, guards, and inmates

Given the interaction between the prison environment, guards, and inmates, prisons become a space of conflict: "In any event, it seems clear that the custodians are bound to their captives in a relationship of conflict rather than compelled acquiescence, despite the custodians' theoretical supremacy" (Sykes 2007: 46). While it is probably not the case that guards have personal grudges against inmates in general and are intentionally trying to make their lives difficult, the nature of their relationship to prisoners makes their interactions tense. A 1990-1991 analysis by Elihu Rosenblatt called the Prison Discipline Study, in which he distributed national

questionnaires to prison administrators, guards, prisoners, and prisoners' visitors and families, for example, provided strong evidence for the occurrence of presumably unwarranted violence by correctional officers. Receiving 650 responses from forty-one states, the study's results indicated that about one hundred respondents had witnessed beatings after a prisoner had been restrained with handcuffs or steel shackles. About forty had seen officers "body slam" prisoners after being handcuffed, and many others reported incidents of "hidden violence" such as the pairing up of known enemies in the same housing unit (Rosenblatt 1996: 94). While the number of respondents does not necessarily confirm that there exists any sort of consistency to the number of beatings, at the very least their accounts do point to the existence of unnecessary violence towards prisoners in general.

Many of these violent exchanges occur when guards attempt to elicit compliance from inmates. However, inmates do not necessarily have any sense of duty to obey: "In the prison power must be based on something other than internalized morality and the custodians find themselves confronting men who must be forced, bribed, or cajoled into compliance" (Sykes 2007: 47). Because prison officials have the power to issue, administer, and enforce orders, they have complete dominance. Accordingly, prisons become total institutions that regulate and critique every segment of a prisoner's life (Goffman 1961: 38). Consequently, even staying out of trouble and avoiding confrontation will likely be a challenge for the prisoner.

II. Structural Legal Dilemma

With the dramatic rise in the United States prison population, more people are experiencing imprisonment. With the influx of inmate civil lawsuits since the 1970s, Congress and states have responded by implementing various structural and de facto barriers in order to filter these lawsuits. Focusing on New York and two cases studies makes clear that even though

more inmates now than ever experience hostile relationships with guards, there has been a simultaneous increase in the level of difficulty for an inmate to bring a case to court. Further, inmates face other structural challenges such as the exhaustion of administrative remedies and the high burden of proof.

a. Background

Given the prominence of guard versus prisoner tension and the fact that in absolute numbers there are more prisoners in recent time than ever, more inmate lawsuits against correctional officers than in previous decades are likely. Unlike other people, inmates are in the unique position of having each thing they do—from waking up in the morning to eating and recreational activities to sleeping at night—regulated by the prison and therefore, under the responsibility of the state. Accordingly, any grievance and lawsuit for any inconsistency or perceived wrongdoing is against the state. In *Preiser v. Rodriguez*, the court described:

The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State (*Preiser v. Rodriguez*).

This translates into a large number of prisoner lawsuits against the state. In 1995, for example, inmates filed nearly 40,000 new federal civil lawsuits, representing nineteen percent of the federal civil docket—a non-negligible portion (Schlanger 2003: 1558). Moreover, in 1995 inmates filed federal civil lawsuits thirty-five times more often than non-inmates, who sue at a rate of .7 per 1000 people compared to 25 per 1000 inmates.

In September of that same year, Senator Orin Hatch—the Chair of the Senate Judiciary Committee—introduced the Prison Litigation Reform Act (PLRA) in response to record inmate litigation and described its purpose: “This landmark legislation will help bring relief to a civil

justice system overburdened by frivolous prisoner lawsuits. Jailhouse lawyers with little else to do are tying our courts in knots with an endless flood of frivolous litigation” (Schlanger 2003: 1565). In 1996, the PLRA was passed and since then, it has increased the burdens placed on inmates to file lawsuits: “The statute drastically altered the corrections litigation environment, imposing filing fees on even indigent inmates, requiring them to exhaust administrative remedies prior to filing lawsuits, and limiting their damages and attorneys’ fees” (Schlanger 2003: 1559). According to Schlanger’s calculations, in 1970 there were 6.3 civil rights filings in federal district court per 1000 inmates. Steadily increasing, the rate peaked at 29.3 per 1000 inmates in 1981 and went to 23.2 per 1000 inmates in 1996 before its dramatic drop in 1997 to 15.0 per 1000 inmates and its subsequent decline in the following years (Schlanger 2003: 1583). However, Schlanger argues that instead of an actual decline in the number of cases, these inmate complaints simply went from federal district courts to being tried in federal habeas and state courts. Whether this shift is the case or not, however, it is clear that inmate lawsuits are still at least two times as frequent today as they were during the 1970s.

b. New York

The flood of inmate complaints can be seen, for example, specifically in New York where the Department of Correctional Services (DOCS) has implemented a three-tier grievance system to filter out frivolous and baseless claims before proceeding to an actual lawsuit. In *Porter et al v. Ronald Nussle* (2002), the court described:

Congress enacted 42 USCS 1997e(a)--which precluded the bringing of any action with respect to prison conditions under 42 USCS 1983, or any other federal law, by a state prisoner confined in any jail, prison, or other correctional facility until available administrative remedies were exhausted--to reduce the quantity and improve the quality of prisoner suits (Porter et al v. Ronald Nussle).

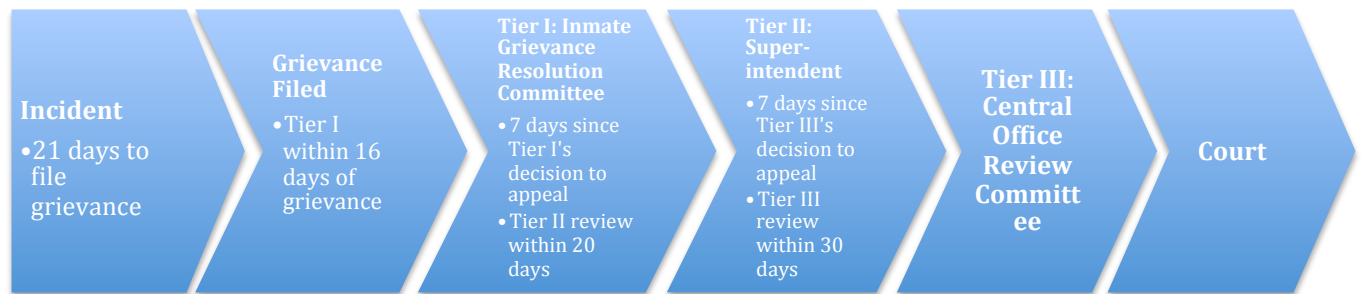
By establishing internal processes, Congress encouraged prisons to address complaints in order to (1) Potentially improve prison administration and satisfy the inmate, (2) Filter out frivolous claims, and (3) Clarify some of the main issues in the grievance in preparation for the possibility of it going to court. Moreover, the court in *Porter et al v. Ronald Nussle*, re-confirmed that inmates must exhaust all administrative remedies prior to filing a lawsuit:

In an opinion by Ginsburg, J., expressing the unanimous view of the court, it was held that 1997e(a)'s exhaustion requirement applied to all inmate suits seeking redress for prison circumstances or occurrences, whether the suits involved general circumstances or particular episodes, and whether the suits alleged excessive force or some other wrong (*Porter et al v. Ronald Nussle*).

But what does exhaustion of all administrative remedies actually entail? First, a grievance is defined by the New York Codes Rules and Regulations (NYCRR) as “a complaint, filed with an Inmate Grievance Program clerk, about the substance or application of any written or unwritten policy, regulation, procedure or rule of the Department of Correctional Services or any of its program units, or the lack of a policy, regulation, procedure or rule” (7 NYCRR § 701.2). In other words, a grievance represents a complaint about policy or procedure within the prison or otherwise the lack of a certain regulation. A specific form must be filled out, as “a letter addressed to facility or central office staff is not a grievance” (7 NYCRR § 701.2). As seen in *Figure 1: New York Inmate Grievance Program Time Frame*, the three-tiered Inmate Grievance Program (IGP) is comprised of elected peers and appointed staff in the Inmate Grievance Resolution Committee (IGRC), the Superintendent, and finally the Central Office Review Committee (CORC) which is acting on the behalf of the commissioner (7 NYCRR § 701.1). However, even before going to this process, an inmate is expected to attempt to resolve the issue independently and failure to do so, may result in the dismissal or closing of a grievance (7 NYCRR § 701.3). Moreover, these grievances must be independently put forth effectively

prohibiting class actions. If the inmate was not personally affected by the issue, then that is a sufficient ground to dismiss the grievance as well (7 NYCRR § 701.3). Significantly, such a grievance must be filed within twenty-one calendar days of the alleged incident and failure to do so, may again result in the closing of the complaint (7 NYCRR § 701.5). As *Figure 1* illustrates, there are several deadlines and time frames that grieving inmates must remember and keep straight.

Figure 1: New York Inmate Grievance Program Time Frame



Within this grievance system, consequently, clear structural barriers increase the difficulty an inmate has in filing a grievance. Mainly, there are several opportunities in each stage for the complaint to be dismissed. Time frames become extremely important in filing a grievance as seen in *Figure 1*. If an inmate wanted to appeal the decision made by the Superintendent on the second tier, he must do so within seven calendar days after receipt of the Superintendent's response (7 NYCRR § 701.5). Distinctions between calendar and business days as well as the differing deadlines for each step in the process become critical. Also important is the responsibility of the inmate to state all claims right from his first grievance report. If the case does travel through the IGP and reaches the courts, bringing up a particular claim not stated in the original grievance is enough for courts to dismiss the claim considering all

administrative remedies have not been exhausted. Moreover, inmates are legally not permitted to bring cases to court before filing a complaint and appeal each of the three tiers—a process that can be time consuming and daunting. According to Schlanger, this exhaustion requirement “has emerged as the highest hurdle the [PLRA] statute presents to individual inmate plaintiffs” (Schlanger 2003: 1649). The PLRA imposes no specific constraints on the structure of different states’ grievance procedures. Accordingly, states may maintain various deadlines of inconsistent length and require several layers of review, all of which suing inmates must go through before filing a suit in court. Grievance systems vary from state to state which can become confusing to recidivist inmates who have been incarcerated in many states. Something as simple as sending a grievance to the wrong recipient or completing the wrong form may well disqualify an inmate’s claim, no matter how meritorious it is. Thus, while the three-tiered grievance system does filter out cases with weaker claims to prevent the courts from being overwhelmed, it can not only represent a structural barrier and deterrence against people from filing claims, but it can also lead to inmates’ claims being dismissed for reasons other than the weakness of the claim itself.

The difficulty and fear experienced by prisoners to express grievances come from several places. For example, prison guards may deter prisoners from bringing charges. According to Sykes, rather than trying to change the captives’ emotional and intellectual allegiance, “the task of reform does not consist primarily of an ideological or psychological struggle in which an attempt is made to change the inmates’ beliefs, attitudes, and goals. Instead, it consists largely of a battle for compliance” (Sykes 2007: 38). In other words, the prison official is most interested in achieving the prisoner’s cooperation. Subsequently, prison administration would likely increase controls on an inmate who recently had a violent exchange with an officer or experienced other grievous grounds, in order to compel compliance. In essence, the prisoner

becomes a double rule-breaker. First, “the prior deviance of the prisoner is a rationalization for using such extreme measures to avoid any events which would excite public indignation” (Sykes 2007: 33). Second, the prisoner broke another regulation while in prison, thus justifying even harsher sanctions in the eyes of prison officials.

Resulting in such punishments as solitary confinement, prisoners who have experienced grievous situations may also encounter direct interference when filing the actual grievance. Because “most staff believe that prisoners can’t dupe them” (Carceral 2005: 102), prison guards feel justified in their responses to uncooperative inmates. In Rosenblatt’s Prison Discipline Study, the results indicated that jailhouse lawyers are not only the most singled-out group of inmates, but that solitary confinement was the most common discipline strategy used against them as well:

Hundreds of respondents commented that the internal justice system in all prisons is arbitrary, biased, and inconsistent, thus generating constant grounds for administrative and legal challenges. Respondents observed that because of this, guards and administrators have a standard practice of ‘singling out jailhouse lawyers’ for discipline in retaliation for challenging the status quo (Rosenblatt 1996: 92).

Undoubtedly, this focus on litigious inmates can cause a fear of retaliation among prisoners including those with strong cases. In addition to many prisons lacking legal education programs, prisoner litigants often risk having their grievances and legal papers intercepted, read, confiscated, and destroyed by prison officials or even other prisoners.

In *Higgs v. Carver and Wolfe* (2002), for instance, plaintiff and inmate Higgs got into an altercation with another inmate and subsequently filed a grievance against staff after his request for a hearing was denied and was ultimately kept in lockdown for thirty-four days. According to the court: “A pretrial detainee cannot be placed in segregation as a punishment for a disciplinary infraction without notice and an opportunity to be heard; due process requires no less” (*Higgs v.*

Carver and Wolfe). However, if the inmate was placed in segregation due to managerial reasons (i.e. overcrowding), then no process is required. In *Higgs*, the court of appeals ruled:

Unfortunately we cannot determine from the record whether Higgs was placed in lockdown segregation for preventive purposes or as punishment. The statement of the jail authorities that we quoted is the only evidence, apart from the unexplained length of his detention; there is no evidence on why 34 days rather than 24 or 44. And the statement is ambiguous; its wording is equally consistent with a punitive purpose and with a preventive purpose. The case must be remanded for further proceedings on this question (*Higgs v. Carver and Wolfe*).

In other words, it is unclear whether or not Higgs was placed under lockdown as a punishment and retaliation for filing his lawsuit or for a legitimate reason. While the previous court had dismissed this claim, the court of appeals remanded the case because it was definitely possible that Higgs was placed in confinement for punitive, and therefore unlawful, reasons.⁴

c. Case Study: Lowrance v. Achtyl

Even if these grievances reach the court system, inmates undergo another lengthy battle, which can be exacerbated without the counsel of a lawyer and having the high burden of proof. For instance, in *Jory Lowrance v. S. Achtyl, et al* (1994), the New York Second Circuit of Appeals discussed the precedents and standards for a Section 1983 deprivation of rights claim. On August 11, 1991, inmate Jory Lawrance (also known as Shamsid-Deen) brought hot sauce to the mess hall, exchanged food with another inmate, and then used the hot sauce on his food. This action violated a rule issued on February 1989, a change that was supposed to be posted in each housing unit and mess hall. After refusing to give the hot sauce to Correctional Officer Achtyl, who observed Shamsid-Deen apply it to his food, the officer placed the inmate in administrative confinement and wrote a misbehavior report charging Shamsid-Deen with “disobeying a direct order, bringing food items into the mess hall, and failing to comply with seating and servicing policies” (*Lowrance v. Achtyl*). During the first disciplinary hearing for

⁴ This case is still currently active.

this case, the presiding official dismissed the charges stating that the rule was not distributed and therefore, Shamsid-Deen was unaware of it. Accordingly, Shamsid-Deen filed a Section 1983 suit asserting “(1) Achtyl had filed the misbehavior report in retaliation for Shamsid-Deen’s previous filing of grievances regarding the special diet program, and (2) the defendants had violated Shamsid-Deen’s due process rights by placing him in administrative segregation awaiting the disciplinary hearing” (Lowrance v. Achtyl).

The court ruled, however, that because the misbehavior report could have been filed for proper as well as improper grounds, then the argument could be made for the former, and Shamsid-Deen’s lawsuit should be dismissed:

The magistrate judge concluded, therefore, that Shamsid-Deen had established, at best, that Achtyl’s misbehavior report had been motivated by both proper and improper reasons. The magistrate judge then determined, however, citing *Sher*, 739 F.2d at 82, that because the report would have been issued on proper grounds alone, there had been no constitutional violation (Lowrance v. Achtyl).

The judge’s reasoning behind this ruling was that because the incident occurred in a mess hall setting, it “arguably created at least the potential for disruption of the order and security of the prison, regardless of Achtyl’s motivation for demanding that Shamsid-Deen give him the hot sauce” (Lowrance v. Achtyl). Because Shamsid-Deen’s refusal to give Achtyl the hot sauce created a security threat, Shamsid-Deen’s administrative confinement was not groundless and did not violate his due process.

d. Case Study: Brown v. Mewar and Tapp

Some inmate lawsuits do not include correctional officers, but rather other officials within the prison system. Yet prisoners who file lawsuits against these authorities are still at a legal disadvantage. For example, in *James Brown v. DDS Manesh Mewar and DA Nancy Tapp* (2011), pro se inmate Brown filed an eighth amendment claim in the United States Western

District Court against his dentist and dentist assistant for cruel and unusual punishment as a result of denied dental care and for failing to put the inmate's name on the call-out list to be taken to the dental office. As a result, Brown was unable to eat because of his abscessed tooth. As in all lawsuits brought by inmates, Brown first had to exhaust all administrative remedies. In legally proving that the defendants were deliberately indifferent to Brown's serious medical needs, he had to satisfy two elements to determine whether the medical failure to act "could result in further significant injury or the unnecessary and wanton infliction of pain" (Brown v. Mewar and Tapp). The first element is the objective component which measures the severity of the alleged deprivation:

With regard to an alleged Eighth Amendment deliberate indifference claim based on a denial of dental treatment, the Second Circuit has held that although dental conditions "may be of varying severity," where the denial of dental treatment for a dental condition causes great pain for at least six months, the inability to properly chew, deterioration of additional teeth, resulting in the need to extract teeth, the condition is sufficiently serious as to be one of urgency (Brown v. Mewar and Tapp).

Accordingly, the standard for a medically severe condition is one marked by urgency and one that may produce "death, degeneration, or extreme pain" (Brown v. Mewar and Tapp). For the second element, the inmate must show that the medical person was deliberately indifferent: "Further, culpable intent requires the inmate establish both that a prison official 'has knowledge that an inmate faces a substantial risk of serious harm and he disregards that risk by failing to take reasonable measures to abate the harm'" (Brown v. Mewar and Tapp). In other words, inadvertent failures to provide medical care or prescribing a course of treatment that the inmate disagrees with are insufficient grounds to establish an eighth amendment claim.⁵

e. Trends from case studies

⁵ This case is still currently active.

In using these two examples as case studies, certain patterns in relation to an inmate's interactions with the legal system become evident. For one, *Lowrance v. Achtyl* juxtaposes the difficulty in bringing a case against the trivialness of the original incident that can propel a grievance to reach court. The fact that the dispute of the case originated from an everyday action and over the exchange of a bottle of hot sauce indicates the tense and suspicious nature of prison environments. While the inmate may have believed that his administrative confinement was unfair, the correctional officer was likely concerned for his security and that of the prison when the inmate disobeyed the order. The fact that both parties believed they were justified in their actions and sentiments in handling the case is suggestive of the division between inmates and guards and the reality that their relationship is often marked by anxiety and frustration. Even though the dispute over the bottle of hot sauce can be a common, daily exchange, the fact that it was in a prison setting forced the interaction to take on greater significance.

Moreover, both these cases demonstrate some of the legal burdens that suing inmates encounter. In *Lowrance v. Achtyl*, the court ruled in favor of the defendants based on the tenuous chance that Achtyl wrote the misbehavior report for legitimate purposes. The court recognized that while Achtyl could have acted on legal and illegal grounds, the fact that the possibility to act on permissible grounds existed meant that the "tie-breaker" went to the defendants. Yet looking at the case from this angle may be problematic because not only did Shamsid-Deen already go through administrative confinement for something that may or may not have been legal, but this precedent may be widely interpreted and applied by correctional officers. In other words, as long as there is a possibility that an officer's actions were legal, then they are given freer range to engage in behavior towards inmates that occupy the borderline between legal and illegal.

In *Brown v. Mewar and Tapp*, the multi-pronged burden of proof undoubtedly represented a large legal hurdle for Brown to win the case. Given the high standard for a “serious medical need” and the burden to prove that the medical personnel purposefully ignored treating the inmate, it can become even more difficult for these inmates to win cases given their lack of legal counsel and their necessarily limited resources as prisoners. Given that the grievance process and legal battle can continue for years, filing a grievance and following up on a claim can also become a physical and mental strain.

III. Non-Structural Factors Exacerbating Prisoners’ Legal Disadvantages

In addition to structural barriers, other factors may exacerbate the legal disadvantages that suing inmates encounter. These include the prisoner and guard relationship, the role of the prisoner, being pro se, and the increased and continuously high recidivism rates.

a. Prisoner and guard relationship

Because prisoners are the ones who lack power and authority within the inmate-guard dynamic, they are even more legally disadvantaged. In these cases, where inmates are the plaintiffs and various prison officials are the defendants, the burden of proof is on the inmates. However, because inmates are the ones in the subservient position while prison guards possess absolute authority, there is an extra burden, in addition to the legal burden, that gets placed on the less powerful group. If the inmate loses the case, which seems more likely given their secondary positions and subsequent fewer resources, they return to jail and continue to be in the same building as the officials they sued and may continue to interact with them. Significantly, the inmate returns to a prison environment where he is back in the control of prison officials. In other words, because of the unique circumstances of these cases, prisoners who file lawsuits may continue to come across those the lawsuits were filed against, which becomes important

considering prison officials have complete power. Accordingly, the prisoner may potentially suffer multiple losses—from the court case, to returning to prison, to potentially overt or subconscious special attention from prison guards.

b. Role of prisoner

Different prisoners have different roles in the eyes of prison guards and depending on which role the prisoner has, he may be treated differently by either the guards or other inmates. According to Clemmer, there exist social hierarchies and group formation within prisons. Some inmates are leaders of groups and prison authorities treat these individuals in a certain way: “Authorities in the penitentiary do not officially recognize any inmates as leaders. They are aware, of course, that certain personalities have leadership qualities and this knowledge is of value in executive dealings” (Clemmer 1940: 134). Though different scholars have different classification systems, for Clemmer, there exists the complete clique man who “is one of a group of three or more men who are all very close friends” (Clemmer 1940: 118) versus the complete solidarity man who “keeps almost constantly to himself and shares nothing with other inmates” (Clemmer 1940: 118). Other roles include the group man (Clemmer 1940: 118), the semi-solitary man (Clemmer 1940: 118), punks (Sykes 2007: 96), fags (Sykes 2007: 96), wolves (Sykes 2007: 97), ball buster (Sykes 2007: 100), and more. Accordingly, prison guards treat inmates differently depending on their roles within the prison social system and hierarchy. Moreover, if an inmate were to file a lawsuit against a guard, it is likely that the differential treatment, either positive or negative, would increase.

c. Pro se

Another factor exacerbating the probability of losing for the prisoner is the fact that most are pro se—proceed to trial without the counsel and guidance of licensed lawyers. For one,

lawyers generally litigate better than non-lawyers. In addition, however, inmates are not allowed to conduct many informal investigations such as interviewing most witnesses and engaging in an effective discovery because they either lack legal skills or because judges and prisons refuse to share information with prisoners. Moreover, representing oneself in court often unfolds unfavorably:

On liability, a convicted criminal is not in a good position to be arguing about a guard's mental culpability, and on damages, inmates—like any other pro se personal injury plaintiffs—have the nearly impossible task of simultaneously conducting effective litigation and trying to demonstrate to the court or jury just how devastating their injury was (Schlanger 2003: 1612).

Without the legal counsel and guidance of an attorney, many inmates struggle within the court system. Another challenge is the reality that while most defendants have access to lawyers and other resources and can therefore predict with some sort of certainty their likelihood of success, many pro se plaintiffs who are complete strangers to the law are unable to estimate the value and merits of their case.

Alarming, these problems are exacerbated as the number of inmates that are forced to litigate pro se increases. In a 2001 *New York Times* article by Alan Feuer, he describes how in New York's federal courts, nearly one of every five civil suits were pro se (Feurer 2001).

However, because most courts do not keep statistics about pro se litigation, many are only able to say that this is a growing concern from experience. As New York's deputy chief administrative judge for justice initiatives Judge Juanita Bing Newton observed:

From what we've seen, the numbers of people representing themselves in court have been increasing in the city, the state and the country at a significant rate. While there is a small group of people who proceed without counsel because they hate lawyers or think they can actually do it alone, the biggest problem is a lack of funds. Most people just don't have enough money (Feurer 2001).

In other words, there are simply not enough resources provided by the state or other sources to providing proper legal counsel to everyone. This reality becomes particularly important for

inmates since “most pro se litigants are small-time civil plaintiffs [...]. They are inmates griping about prison dentists” (Feurer 2001). Because many of these cases involve small-time civil plaintiffs, they can be viewed as less serious and are even more likely to be dismissed—especially given recent budget cuts: “Indeed, while criminal cases will continue, even constitutional guarantees for a speedy trial could be put to the test, meaning potential dismissals of less serious charges” (McKinley 2011). In California, for instance, there has been a \$350 million reduction in the 2011-2012 funding for its judicial system—the largest cutback in its history (McKinley 2011). With these reductions, there can be delays in cases, understaffed courthouses and clerks, and other changes that can increase the lifespan of cases and aggravate frustration and other issues. With increased cutbacks, even less funding will be available for public interest lawyers that can provide counsel to civil suits. Moreover, as a recent editorial dated August 2011 in the *New York Times* stated: “Research shows that litigants representing themselves often fare less well than those with lawyers. This “justice gap” falls heavily on the poor, particularly in overburdened state courts” (“Addressing the Justice Gap”). Without the guidance of a lawyer, the knowledge of not only the law but also the procedures and standard practices of the judicial system, litigious inmates are necessarily at a disadvantage.

d. Recidivism

Given the unprecedented levels of incarceration, the increased and continued prominence of recidivism has become even more relevant when discussing mass incarceration. As Clemmer suggested, to the extent that mass incarceration exists as a phenomenon, recidivism is the main problem. Bringing with them the attitudes and culture of various prisons, recidivists are the cyclical offenders who continue to pose threats to the community and the prison (Clemmer 1940: 55). Now more than ever, however, there are more people in prison and accordingly, more

people that return. Since the steep rise in incarceration starting in approximately 1973, recidivism rates have stabilized at about 40% from 1994 to 2007⁶ (Pew Center on the States 2011: 2). For New York, the recidivism rate has remained constant since 1999 at around the national average of 39.9 percent (Pew Center on the States 2011: 11). Given the increases in prison populations, there has presumably been a parallel rise in inmate lawsuits. This trend is suggested by not only the increased number of pro se court cases, but also the Department of Correctional Services' purpose in implementing the three-tiered Inmate Grievance Program in response to overburdened courts. As a result, there are presumably more people with valid complaints and grievances. Yet as budgets are cut and as cases increase, fewer prisoners are receiving legal counsel—disadvantaging them and causing them to return to prisons as people who now suffer from multiple losses.

IV. Counter-Arguments

a. New York's decreasing prison population

In focusing on New York, some may point to the recent improvements made by the state in terms of violent crime and incarceration rates: “Between 1997 and 2007, New York experienced both the greatest decrease in violent crime and, simultaneously, the greatest decrease in prison population and incarceration rate of any state in the country” (Pew Center on the States 2009: 21). Even though New York's prison population and rate have both decreased, however, it is important to remember that not only has the recidivism rate been constant, but prison populations and rates are still several times higher in New York currently than during the pre-1970s. Even though there may be fewer people in prison relative to recent years, it is interesting that the recidivism rate has remained the same—an issue that still needs to be confronted.

Moreover, while New York has closed prisons and decreased its prison population, it still needs

⁶ This statistic excludes California.

to shrink the number of inmates even more, especially compared to the fraction of inmates housed in its prisons in previous decades.

b. Lawyers' pre-screening

Others contend that because the lawyers that are assigned to inmates filing lawsuits select only the strongest cases to pursue, there exists a selection bias. In other words, they contend that there are more pro se inmates because most of the cases are frivolous and therefore, lawyers that are available to help these inmates do not select them to litigate. However, this argument is misleading since lawyers can only screen the cases they are aware of and not all inmates have access to lawyers to “shop their cases.” Generally, inmates are not able inform lawyers of their cases because “prisoners are so disproportionately located in nonmetropolitan areas and because incarcerated people can’t just go around looking for, or even calling lawyers, even if they can figure out whom to ask” (Schlanger 2003: 1613).

Second, it was for the very reason to reduce frivolous lawsuits that Congress called for grievance programs in prisons across the nation. If an inmate’s complaint passed through all three tiers of New York’s IGP and is brought to court, it is likely that there exists some legitimate claim(s). Moreover, the fact that in several instances, pro se inmates win cases suggests that either (1) There is still a shortage of lawyers to litigate “strong cases,” or (2) The differentiation between a “strong case” and a “weak case” does not actually reflect the chances of the case’s success. If pro se inmates can win some of their cases, then the fact that they were pro se and presumably had a “strong case” suggests that there are not enough lawyers to pursue all of these strong cases. Alternatively, the reality that pro se inmates win several cases could also imply that what lawyers view and dichotomize as strong versus weak or frivolous cases were either inaccurate or they do not actually play as decisive of a role in the legal outcome of

the case. Either way, however, they both suggest that more lawyers are needed to help counsel these pro se inmates. Though it is not necessarily true that having a lawyer guarantees a positive decision for the inmate, it at the very least takes away certain difficulties in bringing and arguing a case, which increases the chances of a favorable outcome.

c. Courts' leniency towards pro se litigants

Finally, some lawyers defending prison officials may accurately point to the fact that judges have a legal precedence to loosely and favorably interpret the motions, arguments, and other legal actions of pro se litigants. Accordingly, they contend that this sympathetic stance by the courts help negate some of the barriers and difficulties encountered by these inmates. However, there are several issues with this line of reasoning and defense. First, because pro se litigants do not have the experience, knowledge, and familiarity of the legal system that lawyers do, they are necessarily at a disadvantage. Because of this, it appears that pro se parties *should* receive some flexibility on behalf of the judge. Second, this favorable approach towards pro se litigants is only true to a very certain extent. Paraphrasing New York Westchester County surrogate judge Justice Anthony A. Scarpino Jr., Joel Stashenko stated in a 2011 article in the *New York Law Journal*: “There is a strong temptation for judges to give special guidance to pro se litigants, though judges are bound to remain unbiased” (Stashenko 2001). Moreover, Scarpino said: “[Pro se litigants] are expected to appear before us and maintain the same level of representation as competent counsel, which is pretty ludicrous” (Stashenko 2001). In other words, while it is true that judges are more lenient towards pro se litigants, it is true only to an extent. Ultimately, pro se litigants also must abide by the rules and regulations set forth by the legal code—not matter how disadvantaged they are.

V. Recommendations

How are we to confront and compensate for this legal dilemma? First, it is important to recognize that current prison growth is not driven primarily by a parallel increase in crime. Instead, it is largely due to political policies: “Rather, it flows principally from a wave of policy choices that are sending more lawbreakers to prison and, through popular ‘three-strikes’ measures and other sentencing enhancements, keeping them there longer” (Pew Center on the States 2008: 1). In a recent August 2011 *New York Times* editorial titled “Addressing the Justice Gap,” the author suggested a system to help alleviate the number of pro se cases. Due to the economic recession, the article argues it has been increasingly difficult for many recent-graduating lawyers to find employment. Accordingly, these lawyers should be trained and put in a pool for low-income individuals to have access to:

With the economic downturn, only around two-thirds of law school graduates in 2010 got jobs for which a law degree is required, the lowest rate since 1996. That leaves the other third — close to 15,000 lawyers — who, with financial support from government and the legal profession, could be using their legal expertise to help some of those who need representation (“Addressing the Justice Gap”).

Though the source of the resources and the question of resource allocation are not specifically addressed in the proposal, this model remains useful as something to consider. Having these young lawyers available to prisoners may even coincide with Congress’ original intention with the PLRA: to filter out frivolous lawsuits. By providing legal counsel to inmates seeking to file lawsuits, these lawyers represent a more useful screening system that confronts many of the root problems in prison litigation. In other words, rather than imposing structural barriers or complex grievance systems that deter inmates from filing grievances, offering legal counsel will provide inmates with information about the strength of their case, whether it is frivolous, and most importantly, whether it is worth pursuing. Moreover, the article suggests that state bar associations can even further encourage pro bono services by requiring lawyers to report the

number of pro bono hours they have completed for certain periods of time. Other suggestions include law schools incorporating public advocacy into their curriculums and extending loan forgiveness programs for students who pursue careers in public interest law.

In a more real-life and specific example of how to alleviate the pro se problem, Chief Judge of the State of New York and Chief Judge of the Court of Appeal Jonathan Lippman has proposed a \$25 million increase to the \$200 million New York already spends each year for programs providing legal aid to low-income people. According to his plan, this program would continue to expand each year, hoping to reach upwards to \$300 million by 2015 (“A Practical Push for Civil Legal Services”). Realizing that 2.3 million people a year are unable to afford legal representation, Judge Lippman created a task force which concluded that providing lawyers to these low-income people would be more cost-efficient for New York by, for example, attracting more federal benefits. Assigning more lawyers would also increase efficiency in the courtrooms allowing cases to move more smoothly through the system (Glaberson 2010). This piece of legislation, which would greatly expand current legal services to many low-income and pro se litigants, is still being decided in the New York State Assembly.

Finally, many of these legal issues surrounding pro se inmates can be avoided if there were fewer people in prison in the first place. In order to help achieve this, the first step must be to fundamentally and meaningfully change the script and public narrative surrounding the role of prisoners in society. According to Joshua Page: “However, to create meaningful, lasting policy change capable of keeping crime down without locking up millions of people, lawmakers and other leaders have to insist publicly that such change is necessary, possible, and desirable” (Page 2011: 764). Not only do the relations and perceptions between the public and prisons need change, but also that between inmates and guards. To facilitate this, there should be meetings

held within the Inmate Liaison Committees (ILC) in prisons to review policies and standards as well as concerns. Composed of inmates, prison officials, and other members associated with the prison, ILCs need to facilitate communication and re-establish the connection between the different groups. Ensuring that rules and regulations are applied consistently is also integral to assuaging inmate grievances.

Thus given the documented tense relationship between inmates and guards where the latter group is completely dominant over the former, inmates filing lawsuits are at a legal disadvantage for structural and non-structural reasons including the reality that they are the less powerful group, have to go through the grievance system, have the burden of proof, and are often pro se. Considering the effects of mass incarceration and the general increase in incarceration rates, there are simply more people experiencing this legal dilemma, especially given the parallel high recidivism rates. While on any day from 1925 to 1975 about a hundred Americans out of a hundred thousand were in prison, now almost seven hundred Americans out of every one hundred thousand are. Consequently, this absolute increase in prisoners and people generally tied to the judicial system necessarily becomes worthy of scrutiny. Because these issues affect more people than ever, we must consider and deliberate these difficulties from a legal and social justice perspective.

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