such disbelief in "big-city jurors" and such fear in even the victims of crime.

Despite its defects, *Tempered Zeal* is worth the attention of students of the criminal justice system. Its ultimate message, like Jerome Skolnick's a quarter-century ago, is that police are caught between conflicting demands, but Uviller and Skolnick disagree on what those demands are. For Uviller, the public demands both "effective anticrime activity and restraint," with cops "out in the streets as a visible deterrent force as well as a crime-solving and criminal-apprehension battalion, while at the same time . . . law bound [and] rule observant." Skolnick, by contrast, found little evidence that the citizenry wanted "restraint" at all, and instead depicted the police as caught in a "conflict between the democratic ideology of work and the legal philosophy of a democracy."[14] Both perspectives are illuminating, and still more light is needed. Perhaps the greatest service Professor Uviller's book can perform would be to stimulate others to follow in his footsteps.

COURTS, CORRECTIONS AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS.[1] Edited by John J. DiIulio, Jr.[2] New York, N.Y.: The Oxford University Press. 1990. pp. xii, 338. $32.50.

Elizabeth Alexander[3]

I doubt that any lawyer can practice in the field of prison law, whether on behalf of prisoners or on behalf of correctional officials, and not be a legal realist. Whatever the situation in less polarized

14. Skolnick, *Justice Without Trial* at 235 (cited in note 5).

1. This collection consists of the following essays: Malcolm M. Feeley and Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature*; John J. DiIulio, Jr., *The Old Regime and the* Ruiz *Revolution*; Sheldon Ekland-Olson and Steve J. Martin, Ruiz: *A Struggle Over Legitimacy*; Ben M. Crouch and James W. Marquart, Ruiz: *Intervention and Emergent Order in Texas Prisons*; Bradley S. Chilton and Susette M. Talarico, *Politics and Constitutional Interpretation in Prison Reform Litigation: The Case of* Guthrie v. Evans; Ted S. Storey, *When Intervention Works*; Edward E. Rhine, *The Rule of Law, Disciplinary Practices, and Rahway State Prison*; Bert Unseem, Crain: *Nonreformist Prison Reform*; Robert C. Bradley, *Judicial Appointment and Judicial Intervention*; Clair A. Cripe, *Courts, Corrections, and the Constitution: A Practitioner's View*; and John J. DiIulio, Jr., *Conclusion: What Judges Can Do to Improve Prisons and Jails*.

2. Associate Professor of Politics and Public Affairs, Princeton University.

3. Associate Director for Litigation, National Prison Project of the American Civil Liberties Union Foundation.

fields of law, the boundary between law and politics in prison conditions law is so thin that it often disappears from view. Accordingly, one can reliably forecast how a reviewer will respond to a book about litigation concerning prison conditions of confinement. I litigate prison conditions on behalf of prisoners, and I am predictably critical of *Courts, Corrections, and the Constitution: The Impact of Judicial Intervention on Prisons and Jails.*

Although a range of political viewpoints is represented in this collection of essays, the center of gravity is to the right. Indeed, the editor suggests, in an awkward and back-handed passage, that a moral case can be made that "some or all prisoners simply do not deserve safe and humane living conditions."[4]

Arguing, even if briefly and tangentially, that perhaps prisoners simply don't deserve constitutionally mandated conditions certainly shifts the terrain of battle. Presumably DiIulio does not pursue this idea because, at least stated so baldly, it is still beyond the pale for conservatives. More typically, conservatives, including conservative justices of the Burger and Rehnquist Courts, have not quarrelled with the concept that even prisoners do not forfeit the Bill of Rights. Rather, the conservative agenda on prisons has been to endorse the principle of judicial protection of basic constitutional rights for prisoners in the abstract, while establishing criteria for judicial intervention that, in practice, make it difficult to prove a constitutional violation or to engage the necessary legal tools to carry out reform.

DiIulio's major theme, consistent with that of most conservatives, is not to quarrel with the basic legitimacy of judicial intervention in prisons but to argue for cautious and circumscribed remedies. The major focus of this argument, which includes two other essays, is the Texas prison litigation commonly known as *Ruiz v. Estelle.*[5]

Certain facets of *Ruiz* are not in dispute. The case, which involved the entire Texas prison system, is the largest totality of conditions prison case ever litigated. Few dispute that, prior to *Ruiz*, medical care in the system was shockingly bad, discipline and physical conditions were brutal, and selected prisoners, known as building tenders, kept order among other prisoners. In addition, there is agreement that at some point after the *Ruiz* litigation began, a wave

4. The collection of essays is poorly proofread and at times awkwardly written. Some of the clumsy writing seems to result from a poor translation of political science academese. See particularly Bradley, *Judicial Appointment and Judicial Intervention: The Issuance of Structural Reform Decrees in Correctional Litigation.*

5. *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), aff'd in part and rev'd in part, 679 F.2d 1115 (5th Cir. 1982), mod., 688 F.2d 266 (5th Cir. 1982).

of violence, including dozens of prisoner-on-prisoner homicides, swept the system. Finally, there is general agreement that the Texas system today provides physical conditions and medical care in the mainstream of corrections practice and that it is among the safest of prison systems.

DiIulio relies on thin evidence in blaming Federal District Judge William Wayne Justice for the intervening years of violence. The debate over *Ruiz* has been under way for years, and a full discussion of the issue is obviously beyond the scope of this review. But DiIulio does little to advance the conservatives' position. DiIulio's sharpest attacks on Judge Justice are based on the judge's failure to tour the Texas system personally and on his supposed bias against the system. At least the second of these concerns is exaggerated, however. It is undisputed that Texas state officials lied repeatedly to Judge Justice; indeed, the centerpiece of the State's defense of the building tender system was to deny its existence. It is hard to imagine a federal judge who would not develop certain lasting perceptions about state officials who engaged in such behavior. Rather, as Sheldon Ekland-Olson and Steve J. Martin demonstrate in their essay "*Ruiz*: A Struggle Over Legitimacy," the wave of violence set in motion during the *Ruiz* years resulted from the failure of high-level staff in the Texas Department of Corrections to accept the legitimacy of the federal court's ruling. The staff refused to implement the court-ordered reforms, such as hiring enough correctional officers to keep order. With the dismantling of the building tender system, the result was a power vacuum that made tragedy inevitable.

One point that Ekland-Olson and Martin do not explicitly make to rebut DiIulio's argument appears inadvertently in DiIulio's own essay. DiIulio notes that a new director of corrections arrived in 1985, and, "within months, the homicide rate shriveled to nearly zero." In other words, control of the homicide rate occurred when a change in leadership remedied the power vacuum—not when the court changed its orders. Given the fact that DiIulio identifies a change in staff policy as marking the end of the violence, one can afford to be skeptical of the claim that staff were previously helpless to prevent the bloodbath.

In addition to the trilogy of essays on *Ruiz*, Bradley S. Chilton and Susette M. Talarico depict the Georgia prison litigation as a success, and Ted S. Storey paints a similar picture of the New York jail litigation. Bert Unseem argues that the West Virginia prison litigation, which atypically proceeded in state court, destabilized the prison system because the state court did not enforce its orders; un-

successful judicial reform was, in the short run, "more destabilizing than no reform at all." It is certainly possible that the lack of any back-up for the court order contributed to instability in the prison system, but the essay makes little attempt to marshal evidence to support the assertion.

Perhaps the best reasoned of the conservative pieces is the essay by Malcolm Feeley and Roger Hanson, "The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature." Although the writers explicitly side with the conservative critics of structural litigation, they are refreshingly candid in emphasizing that "both sides of the debate generally proceed by a selective use and interpretation of relevant data." Their suggestion that the impact of structural litigation be disaggregated into the impact on the structure of institutions, the impact on policies, and the impact on the delivery of services is a useful one.

Finally, the oddest essay is Robert C. Bradley's attempt to determine whether federal judges can be distinguished in their approach to structural litigation in prisons on the basis of the political party of the judge's appointing president. No practitioner in the field of prison law needs a Lexis study to answer this question. Bradley nonetheless concludes that the party of the judge's appointing president does not influence the likelihood that the judge will enter an order for structural reform in a prison case.

Bradley examined decisions published in *Federal Supplement* in the 1970s and found that seventy-nine "Democratic" judges published eighty decisions in favor of prisoners and sixty-five "Republican" judges published thirty-five such decisions out of a total of 328 published prison decisions.[6] Bradley rejects the hypothesis that Republican and Democratic district judges differ ideologically because approximately sixty percent of the decisions favorable to prisoners by both sets of judges contained orders modifying prison policy. Bradley defines structural litigation as litigation challenging prison policy. This is an odd definition; generally structural institutional litigation refers to challenges to basic conditions, including physical conditions of confinement and staffing of institutions. While successful structural litigation entails policy changes, court-ordered policy changes do not necessarily constitute structural relief.

A warning signal that Bradley's definition of structural litiga-

6. The fact that prisoners won so few of the published cases during the great flowering of prison litigation in the 1970s is significant in itself. Clair Cripe, who defended prisoner rights cases on behalf of the Bureau of Prisons, argues in his essay that cases won by prisoners are more likely to be published than cases in which prisoners lose. This seems correct. But the fact that the percentage of cases won by prisoners is so low in itself suggests that the federal courts have not run amok in pursuing unnecessary interference with prison systems.

tion may not measure anything very significant is that Bradley does not comment upon the fact that judges appointed by Democratic presidents decided in favor of prisoners almost twice as frequently as judges appointed by Republicans. Again, no prison litigator would be surprised by these data. Moreover, it is hard to argue that the cases in which prisoners are successful but the relief does not meet Bradley's definition for structural relief are less revealing about the ideological predilections of the judge. Among the cases excluded from Bradley's definition are those in which the prisoner claimed that the unconstitutional act of a staff member was not in accordance with official policy. The prototypical case of this sort is a suit for damages claiming that prison guards beat the prisoner. In such cases, and many others not involving a challenge to official policy, the issue comes down to the credibility of staff and the prisoner. The willingness of a federal judge to find the prisoner plaintiff rather than staff credible is at least as important a measure of ideological stance as is the willingness of a federal judge to strike down an official policy under any circumstances. If Bradley had employed a more sophisticated classification scheme, his study might have contributed to an understanding of the role of judicial ideology in prison litigation. Unfortunately, the study he has produced does not do so.

The debate over structural litigation in prisons is an important one. It deserves better than this book.