Overcoming the Absurd: Prisoner Litigation as Primitive Rebellion*

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Are those who use law in attempts to change the conditions of social existence rebels, revolutionaries, or merely ineffective idealists? Drawing upon themes from existential literature and our past research on prisons, we address this question by looking at one category of active litigants, prison jailhouse lawyers (JHLs). Exiled and powerless, prisoners have relatively few ways to resist either the control or the conditions imposed upon them by their state keepers. JHLs, however, actively resist prison staff and authority. We argue that JHL activity constitutes a form of rebellion and conclude that jailhouse lawyers may be best understood as primitive rebels.

A theme central to the literature of existentialism is that when the conditions of life seem to preclude meaningful and efficacious action, one must find meaning and humanity in resistance, in effect, in saying "no" (Camus, 1956:13). To acquiesce to the deadening contradictions and meaninglessness of an absurd existence is to mirror the tragedy of Joseph K. in Kafka's (1972) *The Trial:* a victim unable to act yet unable to say "no." In this paper, we draw on these existentialist themes to examine the circumstances and actions of one category of prisoners who use the law as a weapon against the absurdity of their lives in prison. Based on our past research on these "jailhouse lawyers" (JHLs; see Milovanovic, 1987; Thomas, 1988, 1989), we argue that although not revolutionaries who bring fundamental social change, these prisoners are like Hobsbawn's (1969) primitive rebels who, through their resistance, confront and help to hold at bay their own and other prisoners' complete oppression. Our discussion proceeds from the premise that social existence can be read like any other text and that the concept of "the absurd" provides one useful exegetic tool for interpretation.

Our data and observations come from our experiences in prison research and from work with prisoner litigants since 1980. These data include several thousand pages of interviews with prisoners, jailhouse lawyers, and other litigants; data from court records and case summaries; and documents from prisoners, corrections institutions, and courts. For a detailed summary of our perspective, methods of data collection, and background, see Milovanovic (1987) and Thomas (1988). All quotes of prisoners are verbatim, taken from transcribed interviews in Illinois maximum security prisons between 1982 and 1987.

Absurdity, Existence, and Prisons

The characterization of modern life as "absurd" is found throughout a body of literature produced and/or influenced by existentialist philosophy. Among the most well-known and often cited works are Brecht's Galy Gay (*A Man's a Man,* 1964), Kafka's *The Trial* (1972), Sartre's *No Exit* (1955), and the general corpus of works of Albee, Adamov, Beckett, Ionesco, Jarry, and others who have written in what is broadly called the "theater of the absurd" (see Esslin,

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1961). Borrowing from Esslin (1961:xix), by absurd we mean a condition of existence out of harmony with reason, a set of circumstances devoid of ostensible purpose that makes behavioral choices futile. An absurd existence is one in which we are unable to discover the meaning and significance of our social world. Activity rooted in reflexivity, self-affirmation, collective development, and social praxis (or world transformative activity), are, as a consequence, impossible.

Existentialist literature depicts the individual as faced with the dilemma of choosing between acquiescence and constraint, on the one hand, and resistance and freedom, on the other. By acquiescing, however, one embraces and promotes one's own further domination. Resistance, choosing to act while offering an avenue of escape from absurdity, comes at the price of embracing the understanding that, in Goodwin's (1971:832) words, such *"action will resolve nothing"* (emphasis in original). The unhappy irony, of course, is that only through such action can one live with more rather than less freedom. Yet, when individuals confront absurdity through resistance, they may give meaning both to their existence and their actions by creating dissonance (Goodwin, 1971:843), regardless of whether they are successful in ultimately altering their conditions.

Following Goodwin (1971), we suggest that confronting absurd institutional conditions also may be a way of rejecting the status quo and altering existing definitions of power and authority. Our research has made us deeply familiar with one such absurd institutional setting, the prison. As Fairchild (1977:313) has observed:

> The inmate is faced with certain dilemmas in his relation with those in positions of authority over him. He continues to exist in an atmosphere of subjection, at best paternalistic, at worst repressive and arbitrary. The best way for him to achieve his goal of getting out as soon as possible remains conformity and passiveness on his part toward the prison system. He is expected, however, to stress self-determination and individual responsibility as a rehabilitative goal.

Prison life may be seen as an allegorical analogue to other forms of social existence in which the potential to act is obstructed and social actors remain powerless relative to their potential to engage and transcend their circumstances. Choices suppressed or pacified lead only to organizationally determined identities; one becomes what the environment dictates. The debilitating conditions that reduce autonomy and personal freedom, coupled with a hostile and often violent ambience, do not provide significant opportunity for self-expressions that deviate from the desired norms of staff or other prisoners. Prisons illustrate an absurd environment that smothers the psyche and the will to act meaningfully, by conventional standards.

Resistance, Prisoner Litigation, and the Jailhouse Lawyer

Within the prison environment, however, there exist some ways to mediate absurdity with reason. Using threats and/or violence is one way, but such a strategy seems, inevitably, to bring punishment and greater oppression and dehumanization. Another way, litigation, seems to offer an occasionally effective way of acting meaningfully and rationally in what is experienced as a chaotic environment. One prisoner who had pursued litigation expressed the appreciation of not using violence due to its consequences:

> We don't want to be locked up [placed in lockdown status]. We don't want everybody locked up. We don't want them shutting down the schools. We don't want them stopin' us from going out getting a couple hours of fresh air, we don't want to be left in our cells when it's 90 or 100 degrees in our cells. We don't want that. So guys will come and sit and talk about those types of problems (interview, JHL).

When the problems cannot be readily resolved through interpersonal means or institutional

channels, and if it appears that a Constitutional issue is at stake, then the law or threat of its use may be invoked. From our observations of and interviews with prisoners who have turned to JHLs with their problems, law is viewed as a resource to act against various conditions of their and other prisoners' lives. This provides one way prisoners can attempt to overcome the powerlessness of their position to challenge behaviors and policies that make little sense to them and seem capricious and unjust.

In the past two decades, state prisoners have increasingly turned to federal courts in attempts to resolve private troubles in public forums. This is called prisoner litigation. Critics of prisoner litigation contend that prisoners sue primarily because they are either unwilling to accept their conviction or because they wish only to hassle their keepers by "abusing the law" (Thomas et al., 1987). However, prisoners who challenge policies or conditions to which they object do so for a variety of reasons, many of them certainly as honorable as those of their litigious civilian counterparts.

There seem to be two types of prisoner litigants (see Milovanovic, 1988a). First are those who file a single suit during their entire incarceration and who generally require the assistance of others to do it. Between 1980 and 1986, Thomas (1989) found in his study of 3,350 prisoner petitions filed in Illinois that nearly three quarters (71%) of all litigants filed only one suit but accounted for only half (49%) of all litigation. Second are those who make a prison career out of law. We call these specialists jailhouse lawyers.

We here are concerned with the more common kind of prisoner litigants who use the law not only on their own behalf but, more commonly, also to help others decide whether a complaint is adjudicable, identify the relevant legal and substantive issues, and shape the case narratives into what are judged to be the most persuasive stories. The most talented JHLs attempt to link a particular issue that affects only a single inmate to one that may ultimately affect broader prison policies. These JHLs also serve as gatekeepers between prisoners and the federal courts by weeding out suits that do not possess legal merit from those that do.

The jailhouse lawyer of interest here, then, is a prisoner knowledgeable in law who helps other prisoners shape or translate the personal troubles and problems of prison life into legal issues and claims. These legal claims are diverse and can include preincarceration problems with landlords or employers, family problems involving divorce and child custody, or postconviction complaints. However, JHLs most often assist inmates with grievances against the keepers.

Models of Understanding Litigation in the Prison

Explanations of behavior within a prison culture typically proceed from one of three general models. Conventional researchers have tended to examine prisoner behavior as the consequence of either a set of norms or values imported into the prison from the streets (the "importation" model) or as a reaction to the deprivation of prison conditions (the "functional" or "deprivation" model). Irwin (1970), for example, has argued that prisoners' roles are largely a recreation of roles brought in from the streets. Still others theorize that prisoners possess a Marxian "revolutionary consciousness" that guides their conduct in prison.

The Importation Model

We find the importation model unsatisfactory to help us understand the relationship between prison culture and litigation because the tendency to litigate seems to emerge independent of previous experiences or behaviors on the streets, and we see behavioral variation among JHLs differing by educational levels, racial composition, political sophistication, crimes committed, and world outlooks. Further, neither the legal skills nor the predilec-

tion to litigate are characteristics, skills, or values learned in the streets. Our data indicate that legal expertise or enthusiasm for the law are simply not traits imported from the outside. We can identify only one instance of an active JHL importing formal legal skills into an institution and using those skills to oppose conditions. This person, however, knowing that incarceration was inevitable, delayed trial long enough to obtain a law degree in order to pursue litigation while in prison. Other lawyers have been incarcerated, but these, to our knowledge, did little to challenge prison conditions and they used their skills, if at all, to fight their own convictions or to exchange services with other inmates in cases unrelated to civil rights actions.

The Deprivation Model

The deprivation model seems equally unsatisfactory (see Irwin, 1970) in that even though litigation may be seen as a response to debilitating conditions (Thomas, 1988), and new forms of debilitation may arise as old ones are eliminated, the choice to litigate instead of pursuing other—often less productive—courses of action cannot be explained by deprivation alone. There are numerous alternatives to litigation as a response to deprivation: fighting, predatory behavior, drug use, gang activity, withdrawal to fantasy or incessant television viewing, obsessive confrontation with guards, body building, avaricious reading, or other activities—some highly productive, others not.

Why some prisoners become JHLs instead of engaging in other forms of behavior is difficult to determine. Although there is equal structural access to courts, not all prisoners possess the requisite skills or temperament. However, two characteristics seem shared by all JHLS: an aggressive intellectual capacity, and a desire to "fight back." One JHL described how he became involved in litigation work:

> I was forced into it. But everybody who's got a lot of time isn't forced into it. Some people die, some people shrink from it, because it's a burden, and you come out of the ghetto or you come out of the suburbs—it don't make no difference—it's difficult to get off into those law books, mountains of law books, read all them mountains of cases, and see all day the insanity and madness there, it's difficult. It's overwhelming. It'll burn you up. And it burns up some of the best lawyers. I was forced to fight, I've been pushed into a corner (interview, JHL).

It would seem, then, that deprivation alone is not sufficient to trigger the impetus to resist. The deprivation view also glosses over the complexity of the prison culture by attributing more homogeneity to it than is actually found. While we recognize the role deprivation plays in shaping prison culture, we do not find it a particularly helpful concept in illuminating the meaning of litigation as a form of accommodation to prison existence.

Revolutionary Consciousness

Finally, the Marxian "revolutionary" view also seems inadequate because there is no evidence that JHLs, in the main, possess a "revolutionary consciousness." In fact, most suits are neither initially motivated by nor developed with any consistent or explicit political agenda (Thomas, 1988:117-19; Milovanovic, 1988a). The past decade has clearly belied the belief that prisoner activists have become a "class for itself." This view does little more than romanticize prisoners without adding to our understanding of either the nature or meaning of litigation.

Contrary to some of the radical writings by both academics and prisoners in the 1960s and early 1970s, prisons, with rare exceptions, are simply not fertile breeding grounds for raising political consciousness. As Pallas and Barber (1980), Fitzgerald (1977), Jackson (1970), Wald (1980), and numerous others have argued, however, there was, among some prisoners in the 1970s, an inchoate revolutionary consciousness. Yet despite their visibility and theoret-

ical sophistication, radical prisoners were a minority, and it is unclear how widespread their support was among the general prison populace. For a less sanguine and thoughtful variant of this position, see Fairchild (1977), who attempts to empirically examine the politicizing processes inside prisons. The rhetoric, and even a rudimentary understanding, of a radical analysis may exist, but this does not translate into a "class for itself." Although some individual JHLs may possess considerable legal and theoretical sophistication, en masse most are oriented toward resolving the mundane problems of the prison world.

An Existential View

In many ways, prisoner litigants resemble the protagonists in existential literature—both the winners and losers—in that they are surrounded by mysterious forces that threaten to overwhelm them, yet they do not readily acquiesce. In this light, prisoner litigation may be seen as a form of overcoming, of actively dealing with irrationality, of attempting to make sense of senselessness, and of yearning to be human in an inhumane environment. One JHL described the typical frustration that led him to the law as a means of resisting. After describing and documenting a series of perceived no-win situations created by staff, he concluded:

> This leads to total madness. It's like being put into a cage and having them poke at you constantly. You don't have to do nothing, just because you're in that position, in that cage, they throw your water at you and throw your meat at you, and sit back and laugh at you, and constantly watch you, and poke sticks at you. And you have no recourse. You can't run nowhere, you can't hide nowhere, you can't even beg [the guards] . . . (interview, JHL).

It seems, then, that it is not so much the function of prisons as "houses of punishment" that impels resistance, but the way staff, through interaction with prisoners, generate animosity:

> And [staff behaviors are] wrong. Because you can't do this to human beings and expect them to accept it and lay down and play dead, because 80 percent of the people in this institution are here because they're violent. The other 20 percent shouldn't be here (interview, JHL).

One universally perceived method of harassing prisoners is through disciplinary proceedings in which privileges may be lost and the length of time incarcerated increased by loss of "good time":

> An officer can make it virtually impossible for you not to go to G-house, to segregation. An officer, male or female, can come in here and make it so difficult for you to vent your hostility, because they treat you as though you are the lowest form of life on earth (interview, JHL).

In fact, disciplinary proceedings against prisoners reveal many of the absurd characteristics of prison life, and disciplinary hearings constitute about 11 percent of prisoners' civil rights suits in the federal courts (Thomas et al., 1988). For example, a guard may command an inmate to obey an order that seems to have no legitimate basis in existing rules, such as standing in a given spot waiting for the officer to return. The inmate asks, "Why?" The guard replies, "Because I said so!" After an hour, the inmate leaves to perform assigned tasks and is later disciplined for not remaining. "Why was I disciplined?" asks the inmate. The guard replies, "Because you violated the rules." Or the inmate may wait, and when the guard returns after nearly an hour, he disciplines the inmate for not reporting to a work assignment. The guard reasons that, considering the delay, the inmate should have realized that the guard would not return as planned.

These examples, drawn from prison disciplinary documents and from our disciplinary hearings observations, illustrate the catch-22 situation of rule-following. To obey the rule and remain risks punishment for not being on, for example, a work assignment. To leave and

avoid possible punishment for other rule violations risks punishment for "disobeying a direct order," which is a rule violation. Thomas et al. (1988) provide other examples of the double-binding dilemmas that prison rules often present.

This escalating merry-go-round of absurdity has one clear end: The inmate is given a disciplinary ticket and later unsuccessfully attempts to explain this absurdity to a disciplinary committee. The explanation ("I was told to stay, but the guard never came back") ultimately indicates guilt, and punishment for "rule infraction" follows. The absurdity of both the situation and the consequences remains. For the JHL, however, the matter does not end here.

Using the Law to Mediate Absurdity

Despite arguments to the contrary (Landau, 1984), the evidence suggests that law is quite effective in challenging the prisons' absurdities (Mika and Thomas, 1988). This, however, must be tempered with several caveats. First, one must be chary of romanticizing the legal practitioner lest litigation behavior be falsely elevated to the status of political activism. Law, despite its utility, does not engender dramatic structural changes.[1] Hence, changes in prison conditions brought about by litigation are, at best, modest. Second, some critics correctly suggest that even reform occurring through litigation may increase coercive control by strengthening legitimate prior practices or by masking existing illicit ones under the "color of law" (Brakel, 1987; Mandel, 1986). Examples include legal reforms of sentencing that have shifted discretionary power of release from the judicial to the correctional realm (Bigman, 1979; Jacobs, 1983a) and the irony of legal reform of disciplinary proceedings that seem to have enhanced, rather than curtailed, staff's coercive power (Thomas et al., 1988). Finally, the dual character of law as both emancipatory and repressive means that, even if changes occur, the authority of prison administrators is preserved, albeit in a different form or by a new discourse.

However, one set of truths does not obviate others. Recognizing litigation as an act of existential rebellion allows us to understand litigation as a dialectical process that creates and mediates the contradictions of prison power, culture, existence, and transcendence. Litigation may mediate absurdity in several ways.

Litigation as Self-Help

There is some evidence that prisoner litigation may be a form of what Irwin (1980:16) has called gleaning, or using the prison experience and resources for self-improvement. In a related context, Black (1983) has suggested that crime may be conceptualized as grievance-expression. In an ironic twist, those who formerly expressed a grievance in ways defined as socially unacceptable now have learned new and acceptable means by which to express dissatisfaction. One JHL attempted to withdraw from a street gang as a way of avoiding problems, but was soon faced with other problems that drove him to law:

> I knew I couldn't be in this gang, because it was hurting me [physically] and I'm not into pain under any circumstances whatsoever. So, I started going over to the library a lot, playing around with the typewriters that was for the public population usage; also, I started having small conflicts with the correctional officer. I didn't like the way they treated me, so I started writing complaints on them concerning their action towards me (interview, JHL).

1. One helpful reader suggested that we underestimate the impact of law in generating structural changes. We agree that especially civil rights law has had a profound societal impact; we are less convinced that law was the primary independent variable in these changes. The point is well taken, however, and it is not our intent to devalue the role of law in social change but, instead, to be cautious in the extent to which it, in and of itself, creates fundamental structural change.

The transition from a passive recipient to whom things "just happen" to a more conscious actor attempting to take control over the immediate life-world can take many forms, and entry into the world of law is just one. In this way, litigation can become a newly-learned skill for exerting a growing "personhood." Moreover, these skills and ways of thinking increase the probability and the facility of saying no. Once the utility of law is recognized as a force in solving personal disputes, its role in helping others is also soon perceived. For example, JHLs seem to pass through a "save the world" phase in which they begin to feel that law is a means of changing prison conditions (Thomas, 1988:210-11).

In sum, JHLs identify the primal emotions of desperation, anger, and the will to resist as the reasons to explain their attraction to law (Thomas, 1988:201). For them, law becomes a form of self-help to overcome the problems they face in prison when there is no alternative means to secure relief. For some, these emotions may have emerged during their trials, where they perceived themselves to be judicial victims—not in the determination of guilt, but in the pre-trial or sentencing process. For others, treatment by staff prompted a desire for retaliation. For all, the acquisition of literacy and analytic skills, coupled with functional knowledge of judicial processes and practices, became a path to personal salvation.

Litigation as Efficacious

There is a view among critics of litigation that it is frivolous, and only the exceptional suit entails any grievance of substance (Anderson, 1986; Burt, 1985; Federal Judicial Center, 1980; Reed, 1980). Hence, litigation is seen not as rebellion, but as abuse of the courts by those already "proven" to be antisocial. "Frivolousness," however, is embedded in a variety of social meanings and is not value-neutral. As a legal term, it means lacking in judicial merit. But, the legal use is often translated into the lay meaning of "worthless," and a suit that is not adjudicable then becomes, in the lay view, one that totally lacks substance. There is considerable evidence that prisoners, in the main, file neither excessively nor frivolously (Thomas, 1989). Even if there is no adjudicable remedy or relief, there is usually a substantive problem over which the plaintiff sues. The problem may seem trivial (deprivation of toilet paper) or severe (held a year past formal release date) but, to the prisoner, it is not frivolous.

DiIulio (1987) has provided a powerful argument that there is no "prison crisis," but rather an "administration crisis." In DiIulio's view, problems impelling litigation, violence, fiscal crisis, recidivism, and other factors commonly associated with a "failing system" can be traced directly back to incompetent administrators, which he sees as the norm, not the exception. Although we believe that prison problems can not be fully understood without analysis of broader social relations, we find much of merit in Dilulio's argument. Prisoners sue to redress a wrong, and these wrongs tend to exist because of the actions of staff or administrators. The act of challenging a decision, policy, or condition defined as unacceptable thus becomes an act of rebellion in that it resists the "what is" and attempts, through action, to change it into something more to the prisoner's liking. Examples of such changes can include reducing staff harassment, increasing security of vulnerable inmates from predatory attacks by other inmates, increased access to showers, health care, or prison programs, reducing overcrowding, changing "catch-22" rules, or making minor, but more humane, changes in facilities (for example, improved lighting, sanitation, or general ambience).

Litigation as Negation

Litigation, or even its threat, can often curtail perceived staff abuse of power. A suit signifies that a monologic or asymmetrical power relation is momentarily replaced by a dialogic and more symmetrical state of affairs, albeit a formal one (see Blum, 1974; Bakhtin, 1981).

Whether a suit is substantively won or lost, the act of filing the suit *requires* a formal response from prison officials. Presumably, even abusive staff and insensitive administrators would prefer to avoid additional paper work, visibility, and hassle, especially at the behest of prisoners. By challenging the expression of power, the conditions it engenders, and its extreme uses by power holders, such litigation can negate at least some of the deleterious conditions of the prison conditions (see Palmer, 1985).

Litigation as the Subversion of Hierarchy

Critics correctly claim that prisoner litigation does little to change the structure of hierarchical power arrangements (Mandel, 1986). However, it does not follow that there has been no impact of litigation on the exercise of power in prisons (Jacobs, 1983a:54-60). An act of rebellion begins with a refusal to accept the existing structure of power. Prisoners' suits challenge the prison staff's power. When, for example, the administration of Cook County jail refused to allow inmates to possess hardcover books because they were potential weapons, a suit overturned the policy (*Jackson v. Elrod et al.*, 86-C-1817, N.D. Ill. 1986). When the isolation, lack of health care, and living conditions in Menard's condemned unit became unbearable, a federal decision alleviated at least some of the problems (*Lightfoot et al. v. Walker et al.*, 486 F. Supp. 504, 1980). When staff refused to properly deliver an inmate's legitimate mail, a law suit corrected the problem for that inmate (*Woods v. Aldworth* , 84-C-7745, N.D. Ill. 1984).

These examples seem relatively trivial, but they typify inmate civil rights complaints. They also symbolize acts of resistance and refusal to cooperate with and reaffirm the power of officials to control existence. In such cases, law mediates domination by staff power, and although it does little to rearrange or redistribute power, litigation imposes constraints on the ability of staff to exercise it. Resistance, then, may not necessarily change the power hierarchy, but it can rearrange the use of power within it (although, see *Holt v. Sarver*, 300 F.Supp 825 [E.D. Ark. 1969]; *Ruiz v. Estelle*, 650 f.2d 555 [fth Cir. 1981] in Arkansas and Texas).

Litigation as "Victory"

If the popular view that prisoners rarely win their cases is true, it would seem to follow that prisoners are not effective rebels. But we do not accept the argument that to be a legitimate rebel one must "win." Nor do we find convincing evidence that prisoners rarely win. Of course, what counts as a victory for one person may be perceived as a defeat by another. The conventional method of scorekeeping simply calculates the number of cases won and lost by prisoners, a method that, for several reasons, we find unsatisfactory.

First, the measure of success must be determined, at least in part, by whether the suit curtailed or corrected the objectionable behavior. A prisoner who sues staff for $1 million for an improper conviction in a disciplinary hearing may have the case dismissed without any formal judicial action taken, but may nonetheless have the improper conviction expunged from the record and any lost goodtime restored. A prisoner who is injured because of staff's recklessness may opt to settle for remedial action or token damage awards out of court. Official records record these as "victories" for state defendants (Thomas, 1989), even though the prisoner's challenge has resulted in a consequential form of resistance.

Second, although prisoners are rarely awarded all that they request in a suit, we reject the general conclusion that they lose in the legal forum. In a study of 2,900 cases in Illinois's northern federal district, Mika and Thomas (1988) found that while about 38 percent of prisoners' complaints are dismissed on pleading, about 62 percent of those surviving result in a "victory" of some kind. The outcomes, usually settled out of court, may result in token damage awards, but more often they are in the form of rectification of the original problem, modification of prison policies, or discouragement of objectionable staff behavior toward the

plaintiff. We must caution that, unless a complaint challenges a policy or specific conditions that affect others, the impact of most suits is limited to a single individual.

Third, as one experienced JHL argued, "Just the doin' of it, we win!" In this view, litigation can provide a symbolic victory to the extent that, even if the case is lost, it makes staff aware that they may be accountable for future actions. Milovanovic (1988a) suggests that one objective indicator of the effectiveness of JHLs might be how much legal "action" has been mobilized (see also Black, 1976). In this view, an inmate returning to court for redress, appeal, suppression hearings, or other action, can be seen as attaining some symbolic gain to the extent that they continue to keep their issue before the courts. Similarly, in civil rights cases, litigants usually gain at least temporary respite from the objectionable action even prior to case termination.

The Political Value of Jailhouse Law

What then is the political value of jailhouse law and the action of the JHLs? The answer to this question lies in how one views the role of law in social change (Milovanovic, 1988a). While conceding the lack of a consistent collective political consciousness, we see prisoners' litigation as social praxis, specifically, in affirming the act of saying no. Even while reinforcing the ideology of the rule of law, prisoners simultaneously subvert the expression, if not the structure, of certain existing power arrangements in the prison. The problem is not that law is ineffective, but that the effectiveness of law is misdirected. As Klare (1979:132) has written in defending "law-making as praxis,"

> My argument is that we can conceive law-making as, *in theory,* a form of expressive social practice in which the community participates in shaping the moral, allocative, and adjudicatory texture of social life, but that in class society, this process is alienated. In history, law-making becomes a mode of domination, not freedom, because of its *repressive* function (emphasis in the original).

The utility of jailhouse law as social praxis, then, is not unqualified. Both its content and its form of expression recreate and sustain the broader class and other power arrangements that lead to unnecessary social domination. As Klare (1979:135) has suggested, the exercise tends to promote the instrumental pursuit of client or self-interest at the expense of "political lawyering."

But objections to viewing the JHL as a rebel, although sometimes cogent, tend to neglect the subtleties of the meaning of litigation as both a means of change and as a form of existential negation. Rebellion defines the relationship of an act to its context, not its consequence nor its motive. Rebellion begins when one moves from passive acquiescence to active resistance against forces that threaten to dominate or overwhelm. Sometimes resistance is carefully planned and implemented, as occurs in social movements or in such individual acts of defiance as refusal to pay taxes or terrorism. Other times, rebellion is more subtle, as occurs when people reject the authority of the state by exceeding the speed limit or refusing to wear seat belts. A prison rebel is not a revolutionary:

> "Revolutionary" action is defiant action that seeks to change the prison structure or its relation to the external environment in a fundamental way. The most important factor associated with revolutionary action is identification with defiant counter communities (Useem and Kimball, 1987:106).

A primitive rebel, then, is one who has learned to say "no" and intentionally resists authority, but has not yet developed a consciousness capable of translating action into a consistent critical theory or systematic ideologically informed assault. While there are, of course, exceptions, those few JHLs who possess exceptional skills in political analysis and attempt to link their legal actions to broader issues are not the norm.

The litigation of the JHL may be viewed as an existential response to repression. Where

most conventional social theory tends to look for "laws" or "processes," and too often ignores the meanings by which the concepts underlying research are shaped and defined, existential literature evokes a theoretical imagery of action-taking in which individuals confront their environment, even if the confrontation appears futile.

We do not impute to JHLs an explicit existential consciousness, and do not suggest that they are necessarily striving toward authenticity as a coherent philosophical or political act. We are concerned with the more general issue of understanding resistance as a way of creating meaning through social action. In the case of litigation, self-awareness is connected to social formation to the extent that "saying no" symbolizes a rejection of the status quo. When negation is coupled with social action (in this case, legal struggle), there occurs the potential for an accommodation between the resisters and those resisted. It is this dialectical tension between those who impose meanings and those who challenge them that imbues prisoner litigation with its capacity for existential rebellion.

Discussion

By conceptualizing litigation as more an existential than a political act, one that may be viewed as a continuum ranging from extreme individualism to sophisticated political action, we have attempted to reframe the meaning of activist law and applied our analysis to one category of litigant. At one end are those who acquiesce. At the other stand those who resist. In prisons, these are jailhouse lawyers. But, the JHL is a "doer," not an ideologist; a reformer, not an articulator of system-generated repression. He is a person who has come to understand how to respond to absurdity with existing tools, but has not developed the broader political or social understanding to use those tools to address the meaning and embeddedness of existence. The efforts of the JHL lie somewhere between conscious and reflective behavior and what Kosik (1976:39) has called procuring, or mundane social activity:

> The individual moves about in a *ready made system of devices and implements,* procures them as they in turn procure him, and has long ago "lost" any awareness of this world being a product of man. . . . Procuring is praxis in its *phenomenally alienated form* which does not point to the *genesis* of the human world (the world of people and of human culture, of a culture that humanizes nature) but rather expresses the praxis of everyday manipulation, with man employed in a system of *ready made* "things," i.e., implements. In this system of implements, man himself becomes an object of manipulation (emphasis in original).

The JHL has gone beyond simple procuring but does not yet act in a way consistent with a fully-aware political consciousness. The action remains at the intermediate level of resisting institutional absurdity, but does not yet, and perhaps cannot, transcend it.

If Lukacs (1971:199) was correct in his assertion that "Whether an action is functionally right or wrong is decided ultimately by the evolution of proletarian class consciousness," then prisoner litigation may be "politically incorrect." But this seems too uncharitable because social change, as a historical process, occurs in many cases with successive acts of saying no. Precisely when an act becomes transformed from mundane practice to rebellious praxis is an empirical question, and the effects of an act may not be visible until some future date.[2]

Of itself, this may not lead to fundamental social change but, in the dialectic of social struggle, neither do fundamental changes occur through the efforts of any single social group. Social change arises from social action, and a group "in itself" can contribute to the creation of circumstances that can help it congeal in a group "for itself," as has occurred with such groups

2. An example of an apparently spontaneous act that symbolized a resistance movement occurred when Rosa Parks refused to give up her bus seat to a white male in Montgomery, Alabama. Some have identified her refusal as the birth of the civil rights movement.

as feminists, blacks, and gays. Obviously, reforms are only a partial victory, but they function to exacerbate other conditions, and the dialectic of struggle continues.

Our argument suggests several questions for research. First, it suggests the need to reconceptualize the meaning of JHL activity in particular and the role of legal activists in general. Rather than view legal struggle by examining its consequences, we should also examine the meanings of the use of law in the context of "saying no." Second, existentially oriented research gives attention to institutional and other social arrangements that constrain both behavior and consciousness. Especially in total institutions, the often contradictory structure promotes double-bind, no-win situations, and inconsistent practices that must be continually negotiated and managed. Third, consistent with Marxian and conflict theory, this research reminds us, as Goodwin (1971) has cogently argued, that people may seek dissonance as much as consonance. Dissonance offers not only an instrumental means of potential resistance, but provides as well a source of meaning to an otherwise meaningless existence. Fourth, given our contention that JHLs are primitive rebels, one crucial research task requires, as Fairchild (1977) suggests, identifying the relationship between the correctional experience and social and political empowerment. More simply, what factors impel some prisoners to resist while others acquiesce? Under what conditions does simple rebellion become transformed into explicit political action? Finally, this research shifts attention from the alleged "pathological" or abusive motives of litigants to the meanings litigation has for those who pursue it for themselves and others who share their situation. This suggests that litigation should be interpreted diagnostically as reflecting the pathology of the deeper institutional structures that impel resistance while simultaneously offering the means for challenge.

These symbolic meanings of this prison litigation lead us to view the JHL as a primitive rebel. By refocusing attention on the existential conditions of resistance, we cautiously temper the contentions of some, such as Foucault (1979), who impute excessive unilateral power to those in charge of discipline. A position informed by the existentialist tradition recognizes the mediating, yet often ironic and futile, capacity of human beings:

> It is essentially a struggle against great odds to allow the individual to realize his *existential freedom* and to feel his capacity to influence his future and to participate in the decisions which affect him (Fairchild, 1977:316; emphasis in original).

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