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This Issue in Brief

Public Policy and Sentencing Reform: The Politics of Corrections.—Author Peter J. Benekos focuses on the politicalization of corrections and presents a public policy critique of correctional reform. As fear of crime and victimization have generated retributive rhetoric and get-tough crime control policies, the consequences of these policies—high incarceration rates and prison crowding—have now become their own public policy issues with critical implications for corrections. A review of one state's legislative reform efforts suggests that sentencing policies can be proposed with the get-tough rhetoric but are ostensibly more responsive to correctional needs, i.e., overcrowding and cost, than to the issues of crime, criminals, or crime control.

The Costliest Punishment—A Corrections Administrator Contemplates the Death Penalty.—According to author Paul W. Keve, the United States—going contrary to the general trend among nations—is maintaining its death penalty, with growing numbers of prisoners on its death rows, while at the same time showing a general reluctance actually to execute. Meanwhile, the public is mostly unaware that maintenance of the death penalty is far more costly than use of life imprisonment and has no proven deterrent effect. The author cautions that the interest in expediting executions by limiting appeals must be resisted because even with all the presumed safeguards, there are still repeated instances of wrongful convictions. He adds that the death penalty as respectful of the feelings of victim families is a defective concept because it actually puts families through prolonged anguish with the years of appeals and successive execution dates.

The Refocused Probation Home Visit: A Subtle But Revolutionary Change.—Home visits have historically been used in the control/law enforcement function of probation work, as well as in the treatment/service function. However, the current state of probation—dramatically affected by burgeoning caseloads, increased numbers of "difficult" clients, and emerging issues of officer safety—has made it necessary to rethink the concept of home visits. Now, many agencies are limiting home visits to high risk cases and using such visits solely for control—an approach which may be consistent with a shift in probation practice towards a law enforcement orientation. In an article reprinted from the *Journal of Contemporary Criminal Justice*, author Charles Lindner looks at the

CONTENTS

Featured in "LOOKING AT THE LAW"...

"Revocation of Community Supervision: What the Courts Have Made of Congress' Ambiguous Language and Policies"

- Revocation of Probation
- Mandatory Revocation for Possession of Drugs
- Imposition of Supervised Release After Revocation

When Courts Find Jail and Prison Overcrowding Unconstitutional

By Richard B. Cole and Jack E. Call*

Until the 1960's, courts maintained a "hands-off" policy toward the administration of correctional institutions. Judges frequently stated the need to show deference to the expertise of correction officials. As late as 1974, the Supreme Court stated:

> Traditionally, federal courts have adopted a hands off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. . . . Suffice it to say that the problems in prisons are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of the government. For all of these reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.[1]

Notwithstanding this strong affirmation of a limited judicial role, the Court warned later in the same opinion that:

> . . . a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.[2]

Indeed, by the time the Supreme Court wrote these words, Federal courts were already deeply enmeshed in dealing with unconstitutional conditions in jails and prisons.

Whereas earlier cases challenging conditions in prisons had been brought by individual prisoners seeking writs of habeas corpus for specific wrongs, cases were now brought under 42 U.S.C. sec. 1983, part of the Civil Rights Act of 1871, under which persons in state institutions may sue individuals working in the institutions who have, in the course of their state employment, deprived them of Federal constitutional rights. The statute authorizes not only money damages, but allows courts to order officials to take (or refrain from taking) actions which relate to constitutional violations.[3] Also, plaintiffs more often brought their suits as class actions, representing all other prisoners in a facility who were affected the same way. Thus, courts were confronted with attacks on entire institutions or systems, shifting the focus from individual deprivations.[4]

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Complaints were brought regarding all phases of jail and prison life, including medical services, heating, sanitation, mail handling, rehabilitation programs, brutality, violence, and overcrowding. Federal district courts frequently found unconstitutional conditions and issued comprehensive remedial decrees to correct them. The 1970's saw courts essentially take over prison systems in Arkansas, Alabama, Texas, and elsewhere. The cases often focused on old, outdated, and deteriorating facilities. Many of the judges expressed extreme consternation with the horrible conditions they found.[5]

In 1979 and 1981, the United States Supreme Court for the first time examined cases which directly involved overcrowding. *Bell* v. *Wolfish* dealt with pretrial detainees, and *Rhodes* v. *Chapman* dealt with convicted prisoners. Both focused on new facilities which had faced severe overcrowding problems shortly after opening. Lower courts found the overcrowded conditions to be unconstitutional, but, in both cases, the Supreme Court reversed. The cases conveyed a clear message that a slowdown was in order in judicial intervention. The opinions reaffirmed that these were problems best left to prison administrators.[6]

This paper focuses on remedies—on how the courts deal with overcrowding, once it is found to be unconstitutional. There is a body of literature on how and why courts conclude that overcrowding is unconstitutional.[7] There is a growing body of literature on the effectiveness and the after-effects of particular remedial decrees, such as recent books on the *Ruiz* case in Texas.[8] However, little attention has been devoted to the range of remedies used by courts and how they fashion those remedies.

This paper will deal with those remedies which have been used in the 49 reported jail and prison overcrowding cases since *Wolfish* and *Chapman* in 1979.[9] They are the only two Supreme Court cases dealing with overcrowding—and they clearly indicated that a different approach was in order. Thus, they establish a logical beginning point.

The Remedies

Population Ceilings

The remedy most often used by courts (26 cases) is to set a ceiling on the population of a jail or prison. In setting a maximum population limit, courts often consider the design capacity, expert testimony, and standards set by organizations such as the American

Corrections Association, as well as information garnered from personal visits to the facilities. Based on all these factors, judges set limits designed to ensure that overcrowding does not reach the "cruel and unusual" level. Usually the courts set an absolute limit for the facility or for parts of the facility. In other cases, limits are set unit-by-unit, or even cell-by-cell.[10] Occasionally the ceiling is expressed in relation to a standard, such as one and one-half times the design capacity.[11] Recognizing that a ceiling substantially below the current population (but placed in immediate effect) could result in large numbers of criminals being released at once, courts often order a phased reduction with intermediate caps enroute to the desired maximum population.[12] Sometimes these orders are accompanied by a release order to bring about quicker compliance. Courts have coupled release orders with a threat that the court will do the releasing if prison officials do not.[13]

Courts differ in their views of the intrusiveness of the population cap remedy. In *Barry*, the Court of Appeals for the District of Columbia considered a challenge to a population cap set on the correctional facility at Occoquan, Virginia. The district court had held that the overcrowding in that facility had exacerbated the effects of numerous deficiencies which violated the Constitution. The appellate court felt the district court had used ". . . a last resort remedy as a first step." Reminding the district court that a remedy must fit the violation and must be remedial in nature, the court of appeals sent the case back to the district court indicating that it should identify each specific unconstitutional condition and order *them* remedied. The courts should not take such a substantial step as setting population caps until state officials default on their obligation to remedy constitutional wrongs. The court of appeals felt that "it would have been difficult for the district court to fashion a remedy that more fundamentally implicates the tensions between the prerogatives of local authorities and the demands of the Constitution."[14]

The Second Circuit Court of Appeals seems to agree. In deciding *not* to adopt a mandatory ceiling, a district court in New York stated: "The Second Circuit has expressed its disapproval of a district court setting an absolute population cap as a remedy for overcrowding because of the inflexibility of such a remedy."[15]

On remand in the *Barry* case, however, the District Court for the District of Columbia took a quite different view of the situation. Finding that the conditions still existed at the prison, the court felt that the court of appeals had pushed it into the details of prison administration—just what *Wolfish* had warned against! The court then ordered the defendants to submit a written report in 60 days detailing how they anticipated correcting constitutional violations in the areas of sanitation, bathroom facilities, fire safety, health care, and staffing. Reviewing (and either approving or disapproving) this report would certainly draw the court into consideration of many of the details of running the prison—rather than just setting a limit and, in effect, telling the prison officials to use their expertise and allocate their resources in the manner they best see fit to reach the population ceiling.

A Federal district court in Oregon appears to agree with its sister court in the District of Columbia. When ordering a reduction in phases (500 prisoners in 3 months and another 250 in the next 3 months), the court stated that "[t]he order will not direct the state to adopt any particular methods to achieve this goal."[16] Thus, while many courts order ceilings on populations of jails or prisons, they differ in their views on just how intrusive this remedy is and whether it complies with the philosophy of least intrusion into the domain of prison administrators.

Cells: Occupancy and Sizes

A common response among prison administrators to the overcrowding problem has been to house two (or more) confinees in a cell originally designed for one. In the *Chapman* case, the Supreme Court dealt with whether this practice is cruel and unusual punishment. *Chapman* presented the problem starkly, since it dealt with a new facility which had already been overrun quickly by the burgeoning prison population. The Supreme Court found that double-celling (often called double-bunking) was not unconstitutional per se. Nonetheless, courts have frequently found the practice to be unconstitutional in particular cases. When they do, the remedy is fashioned in a number of ways.

Lareau dealt with the Hartford Community Correctional Center, a modern facility designed for 360 inmates (pretrial detainees and convicted offenders) but housing around 550. Prisoners were double-bunked in cells of 60-65 square feet. The court banned double-bunking of detainees for more than 15 days or convicted offenders for more than 30. In deciding whether some double-bunking may be allowed, other courts take into account the type of prisoner (length of sentence, violent nature of the crime), length of stay, square footage per inmate, and amount of time spent outside the cell. In *Balla*, the court set different requirements in different parts of the prison based on the type of inmates housed in each part, the length of their stay, square footage per inmate, and amount of time spent outside the cell. In *Cody*, the South Dakota State Penitentiary was ordered not to double-bunk prisoners without first screening for communicable

disease and not to double-bunk protective custody inmates at all. In *Dawson*, the court disallowed double-bunking in 35-square-foot cells and limited occupancy for juveniles to two inmates per cell.

Rather than the number of occupants per cell, many courts focus on minimum cell sizes (or minimum space requirements for each prisoner.) In *Martino*, a district court in Oregon ordered a county jail to provide at least 70 square feet of space per inmate, unless the hours spent per day in each cell were decreased. In *Feliciano I*, the district court ordered at least 35 square feet per inmate in individual cells and ordered that plans for new facilities include 55 square feet in dormitories or 70 square feet per inmate in individual cells. Federal courts seem to be "reality-based" in ordering cell size requirements, in that the orders are tailored to at least allow for compliance within the existing facility. In one state case, by contrast, the West Virginia Penitentiary was ordered to meet minimum space requirements which required the state to increase existing cell size or engage in extensive renovation bordering on new construction.[17]

Removal of State Prisoners From Local Jails

One of the "spillover" effects of court-ordered population caps involving state prisons is that those prisons either slow down or stop their acceptance of sentenced prisoners from local jails. It is common for local facilities to house pretrial detainees and, often, prisoners with sentences of less than a year. However, when an inmate is convicted for a longer period and is ready for transfer to the state facility, the state facility may not be able to take any more prisoners without itself violating a population cap. The result is that the local facility becomes overcrowded, and the inmates challenge the constitutionality of their confinement. Occasionally, if the litigation involving the state institution is still going on, the court will consolidate the cases and try to work out the problems in tandem. In *Carter*, the court had both the local and state facilities represented in the case before it. The court ordered both parties to submit plans and eventually ordered the state to begin a phased program of removal of its sentenced inmates from the county facility.

Whether or not both parties are joined in the same case, courts do not hesitate to take the same type of remedial action in these cases that they do in others. While sympathizing with the plight of these overcrowded and underfunded local jails, courts nonetheless state that they must deal with the conditions before them. If those conditions do not pass constitutional muster, the courts will order that they be brought into line, notwithstanding the best efforts of local administrators and the fact that the fault really lies with the state institution.[18]

Closing the Institution

"Old Max shall be closed."[19] With these dramatic words, a Federal district court in Colorado ordered the closure of the Colorado State Penitentiary. The court allowed the defendants to obtain relief from the order if they came up with a plan within 45 days to remedy the unconstitutional conditions. On appeal, the court of appeals ordered a reconsideration based on developments in the construction of other facilities (money appropriated and building under way) and in light of the "present state of conditions."[20] The district court held a new hearing and concluded that the facilities remained unfit for occupancy and left that portion of the order intact.[21]

The case of *Wecht I* began in 1976. After years of problems with compliance with "reams of opinions and orders," the court concluded that "[i]t has become increasingly clear that the Jail cannot be brought into the 20th century, let alone the 21st. . . . This Court has no choice other than to order that the Jail be closed." The court ordered that no prisoners were to be housed in the 102-year-old facility after June 30, 1990 (which gave the county about 18 months to comply).[22] In 1988, the district court of Puerto Rico ordered the closing of a jail.[23] A district court in Tennessee ordered one building, a workhouse, closed.[24]

In spite of these four examples of courts willing to take this drastic step, the more common attitude was expressed by a Federal district court in Pennsylvania when it concluded that "we might very well order that SCIP [State Correctional Institution at Pittsburgh] be closed immediately; it is an overcrowded, unsanitary, and understaffed fire trap. We are painfully aware, however, and take judicial notice, that there is nowhere else in the Commonwealth to house these inmates."[25]

Fines

Occasionally a court will couple the threat of a fine for noncompliance with a population cap or other order. Often this threat will come after a period of noncompliance, either in connection with a contempt citation or coupled with a directive. Sometimes courts set a fine of a certain amount for every prisoner above a cap, or they will order a facility to release all inmates in excess of a cap and charge a fine per releasee.

In *Fambro*, the court outlined a step-by-step procedure. The first step was to set a population cap and then use contempt citations if the cap was not honored. Over 5 years of imposing fines for excess inmates had resulted in "potential fines . . . accruing for a period of years at between $10,000 and $40,000 per day"—but without solving the problem. The court moved on to set a weekly mechanism for release of prisoners. Each Friday the sheriff was to release prisoners who had

been in for 120 days or more, releasing misdemeanants first, then felons (with those who had been in the longest getting out first), until the total population was reduced to 1,616. In *Palmigiano*, a district court in Rhode Island, following 11 years of problems in gaining compliance with a court-ordered population reduction, imposed fines of $50 per day for each detainee over 250 in a jail. In *Albro*, the court set ranges: $1,000 for each day that the county facility had 213-217 occupants; $2,000 if the number reached between 218-222, etc., up to $10,000.

The most egregious fine case was *Feliciano I*, in which the court imposed a fine of $50 per excess inmate per day. The amount of the fine would increase by $10 per day in each successive month up to $130 per day. Although the projected fines totaled $3,510,000, the imposition of these stiff penalties was upheld by the court of appeals.

Undoubtedly, the most unusual case involving fines was *Tate*. In that case, the court had ordered the state to allow no more than 30 state inmates to be housed in the Jefferson County Jail. When the state consistently failed to abide by this order, the court ordered the state to pay the county jail $100 per day per state inmate over the 30-inmate limit, to pay each inmate in the jail $25 per day per state inmate over the limit, and to pay $25 to each state inmate housed in the jail for more than 30 days.

Other Construction

When courts are considering what remedy to impose, they are often working against a backdrop of construction which has been either proposed or actually begun. To what extent should courts incorporate within the scope of a remedial decree other construction which is ongoing or which it thinks should be undertaken? In *Wecht I*, the court ordered the county to come up with a plan for new construction with a projected date to have the new facility in place. A more typical response to dealing with new construction was articulated by the district court for Kansas in *Reece*:

> This Court has no reservoir of funds nor any suggested method of raising funds for the construction of a minimally sufficient jail. The Court has no architects, engineers, or general contractors standing by. Even if this Court could order a new jail built, it would not do so. A decision such as that is to be made by the political process, not by judicial fiat.[26]

Courts have included in their remedial decrees that, if construction is undertaken, they want to be part of the planning process. In *French*, the defendants were instructed to consult with the court before converting other buildings into housing units. In *Martino*, the court ordered that it be advised of all renovations.

Combinations

The typical remedial decree will often combine the above types of remedies. The decree may combine cell size limitations with threatened fines. It may combine a population cap with a release order to get down to it, backed up by a threat of fines (or a court-determined release priority) for noncompliance.

Retained Jurisdiction

One of the hallmarks of the remedial decrees involving jails and prisons (as well as other state institutions) is that the courts retain jurisdiction over the implementation of the decrees.[27] In the traditional model of a court case, the involvement of a court ends when it issues its decision, thereby resolving the dispute before it. However, through a variety of devices, courts issuing remedial decrees remain active in the case far beyond the date when they find conditions to be unconstitutional and order them corrected. In short, they become actively involved in administering the remedy.

This is not a completely new role for courts. In cases involving divorce, bankruptcy, administration of decedents' estates, and trust administration, courts have retained jurisdiction over cases, performing administrative functions. Commentators suggest that courts are only doing in the remedial decree area what they have traditionally done when the circumstances called for it.[28] However, a major difference in prison remedial decree cases is that courts are administering functions of another branch of government, often at a different level of government. Orders to government institutions involve the court in questions of bureaucratic administration and finance (with which they may be particularly ill-suited to deal). Additionally, because of the breadth of some of the orders, the length of time implementation lasts, and the interplay between different branches of government, the cases attract much more media attention than the usual case where courts retain jurisdiction.

One of the most common ingredients of a remedial decree is the appointment of a special master. Federal Rule of Civil Procedure 53 describes and authorizes this device in Federal cases. However, the rule seems to contemplate that this is an exceptional device to be used mainly to assist a judge in fact-finding.[29] This has not limited their use in Federal prison overcrowding cases, where 11 courts have used special masters (or monitors).

Special masters are assigned typical duties—to hold hearings, collect evidence, and report back to the judge with findings of fact. However, they have also been given authority to make recommendations, to make decisions on a day-to-day basis, to review proposals by the parties, and, essentially, to administer the prison. A notable exception to this practice is the decision in *Feliciano I*, in which the district court in Puerto Rico declined to appoint a special master because it was of

the opinion that "the Commonwealth must learn to run their own prisons."[30] In *West*, the court threatened the appointment of a special master for noncompliance. After ordering a population reduction in the Las Vegas Metropolitan Police Department Jails, and giving the defendants 6 months to comply, the court stated:

> The defendants are warned, however, that if the population reduction does not proceed with "all deliberate speed," this Court will not hesitate at any time to provide by subsequent order the specific manner in which the population cap shall be reached and maintained and appoint a special master at the defendant's expense to enforce this Court's order in that regard.[31]

Courts also appoint monitors, primarily to report back to them on the progress of the defendants in implementing the remedial decree. Another device for monitoring compliance is a required progress report from the defendants on a monthly (or longer) basis. Finally, defendants are often required to return to court with plans for carrying out the decree of the court. These plans may cover release of prisoners, structural changes in the facility, or other construction. Whatever device is chosen by a court (special master, monitors, progress reports, or implementation plans), one thing is certain—the court will be heavily involved in administering the decree, often for many years.

Fashioning the Remedies

Having considered the range of remedies courts use in these cases, it would be helpful to consider how they seem to arrive at the appropriate remedy in a particular case.

The Record

In reaching a determination that overcrowding is unconstitutional, courts amass large records of evidence concerning the institutions. Court opinions routinely run 30-50 pages in length, detailing the dimensions of cells and other spaces, prison practices, expert testimony, personal observations, standards of professional groups, design capacities, etc. Obviously, the court must first turn to this record to begin to shape a remedy to "fix" the wrongs it has identified as being constitutional in stature.

Specific Factors

Remedies which entail making structural changes in buildings, constructing new facilities, moving inmates around within existing facilities, closing jails or prisons, and paying fines all involve the expenditure of funds. How do the courts react when the evidence at trial shows that prison administrators have done all they can within their resources, but the result has been unconstitutional conditions? Should a court consider the costs of the remedy it imposes? Most courts considering this question have responded in the negative. For example, the District Court of South Dakota in *Cody* concluded that, while it was aware of the financial restraints which had faced corrections officials in that case, as well as the good will shown by those officials, such factors did not constitute a defense. The court explained that "[i]f the state wishes to hold inmates in institutions, it must provide the funds to maintain the inmates in a constitutional manner. These considerations properly are weighed by the legislature and prison administration rather than a court."[32] In *French*, the court indicated that while lack of funds may explain the existence of violations, it did not excuse them. And in *Hutchings*, the court held that "a claim that financial restrictions have prevented improvements in jail conditions is not a defense to constitutional violations."[33]

A somewhat different view was expressed in *Toussaint*: "[T]he Court must consider the cost of compliance and the effects of relief upon prison security. . . . If the state has taken *bona fide* steps to alleviate poor prison conditions, courts should defer to the policy choices the state has made when shaping its remedy."[34]

While the court in *Toussaint* was also concerned about the effect of its order on security, other courts disagree. In *Lareau*, the court clearly placed the blame on the state if dangerous prisoners had to be released under its decree. "In view of the options available to the State to remedy conditions found unconstitutional by the court—options clearly within the reach of State officials—the responsibility for the release into the community of any potentially dangerous inmates rests squarely on the shoulders of the state officials whose actions, inaction or abdication of public trust lead to any such release."[35] Courts generally do not consider whether carrying out their orders will be inconvenient for the state. They do often take note of construction which is proposed, funded, or begun, in deciding how to shape the remedy. Usually the court will conclude that, the new construction notwithstanding, the unconstitutional conditions in the facility being challenged in court cannot simply continue until the new construction has been completed.

Relief Requested by Plaintiff

In a traditional civil suit, once the plaintiff prevails on the merits of the case, he must next prove damages to correspond with the relief requested when the suit was filed. Thus, it might be assumed that courts would rely on (or at least strongly consider) the relief requested by plaintiffs in institutional litigation as well. However, in most cases it is not possible to tell whether the plaintiff has been specific in the request for relief. In their opinions, courts refer to the plaintiffs as having requested "injunctive relief," "declaratory and

injunctive relief," or "such equitable relief as is appropriate." In *French*, the plaintiffs sought to enjoin the defendants "from further violations."[36]

Even where the plaintiffs are most specific, courts generally do not adopt plaintiffs' requested relief, even as the starting point in designing the remedy. In *Fisher*, the plaintiffs had requested a population cap on the New York City Correctional Institution for Men, a prohibition on double-bunking in particular parts of the facility, and an order to build or annex 400 additional cells. The court, finding that the defendants had made extraordinary efforts to meet constitutional standards, preferred to leave it to the parties to confer and recommend a plan. The court eventually adopted most of the defendants' proposal.

The Role of the Parties

Frequently, the parties will themselves work out the remedy through the mechanism of a consent decree.[37] When the parties agree on what remedial steps should be taken, they formalize an agreement and present it to the court. If the court accepts the agreement, it will adopt it as a consent decree, bringing the imprimatur of the court—and its enforcement powers—to bear. Sometimes the parties reach this agreement prior to the court making findings that conditions are unconstitutional; in other words, they settle the case. In other instances, the consent decree will be the result of agreement after the court has found unconstitutional overcrowding. In either situation, the court will still play an active role in approving the agreement, in issuing the consent decree, and in monitoring the implementation phase. Nevertheless, the parties are the "prime movers" in fashioning the remedy in a consent decree case.

Where the court determines the overcrowding is unconstitutional and a consent decree does not come about at the initiative of the parties, to what extent will the parties help to shape the remedy adopted by the court? A finding that conditions in a facility are unconstitutional is a significant one which may entail substantial expenditures by defendants to remedy, not to mention the political costs of having their institution labeled as imposing "cruel and unusual punishment" on their inmates. With an impact this substantial, one might expect the courts to at least give the defendant the consideration of some input into the way the price will be paid and the defects remedied.

In their opinions, the courts usually pay obeisance to the principle of deferring to the expertise of the prison administrator-defendants in deciding on and carrying out the mechanism to correct the deficiencies. They commonly talk of "letting the parties work it out."

In *Ruiz I*, the court gave the parties an opportunity to attempt to reach an agreement and present it to the court. If the parties could not agree within a reasonable time, they were to submit separate proposals to the court. In fact, the parties did reach agreement on most of the issues.

Out of the 49 published cases since *Wolfish* in which the court ruled in favor of the inmate-plaintiffs, the court invited the input of the defendants (and often the plaintiffs) in nearly half (21). In actual practice, however, the apparent "deference" to prison administrators may be illusory in many of these cases. By the time the court has described in minute detail what the conditions are, whether they pass constitutional muster, and, if not, how they fail to measure up, the discretion which the defendant has in crafting the proposed remedy is often quite circumscribed. If a court has determined that, given the existing size of cells in a prison, double-bunking is unconstitutional, there will not be much room to maneuver or creatively design a remedy for that deficiency—double-bunking must stop! In *Tillery*, the court, seeking to avoid "judicial incursions into the day-to-day administration of penal institutions," gave the defendants 3 months to come up with a plan. The court provided what it termed "Constitutional guideposts"— which covered what constituted adequate cells, numbers of inmates, staffing, and the elimination of double-celling. And in *Feliciano I*, the court in Puerto Rico invited both sides to submit plans, but provided detailed instructions which included minimum cell sizes in the existing facility as well as a planned facility. Of course, the defendants can propose time periods to comply, and perhaps recommend phases of compliance to soften the blow, but the substance of the decision often has been largely determined by the court.

In many cases the court does not request input from the parties on fashioning the decree. One factor may be the perceived lack of good faith of the defendants. During the trial on the merits of whether conditions are unconstitutional, courts form strong opinions of the defendants' good faith in trying to run a facility which meets constitutional standards. Where the courts doubt the good faith of the defendants, they say so. One court cited the defendants' "historical failure to comply with the constitution."[38] Another court stated that "the County's interest in not providing more prison space is obvious."[39] Where a court feels that the defendants are acting in good faith (in running the facility or in trying to remedy the constitutional defects), it is more likely to seek their assistance in the remedy phase of the trial. Because state officials had demonstrated a "willingness to take steps to correct this problem," the court in *Canterino* decided to allow the state to devise its own compliance action.

Whereas it has been seen that good faith on the part of the defendants will not avoid a finding that overcrowding is unconstitutional and must be remedied, evidence of such good faith may be advantageous to the defendants in gaining them an opportunity to participate in the remedy-fashioning process.

It would seem to be in the interest of the defendants to participate in the process of designing the remedy. In addition to the opportunity to use their expertise to help ensure that the actions they are directed to perform are professionally sound, they may be able to reduce the inconvenience and the "discomfort factor" which inevitably would accompany any court-ordered remedial actions. Further, there are many who feel that, in reality, the interests of the defendants often end up aligned with those of the plaintiffs in cases of this type.[40] The existence of a court order which requires substantial funding is a "big stick" for corrections officials to use to obtain funds which they might not otherwise be able to obtain. Corrections officials, just like the plaintiffs, want facilities that are modern, adequate, secure, and well supplied with services. Thus, while at first glance it would seem that the defendants would want to participate mainly to control and minimize the impact of the remedial decree, in fact they may additionally see the decree as a device to be used in their own interest—and the stronger it is, the better it will be for obtaining resources.[41]

Appellate Court Treatment of Remedy Issues

Remedies imposed by trial courts were supported by courts of appeals in a majority of cases. Twenty-one cases were decided on appeal.[42] In 12 of those cases, the remedy imposed by the district court was upheld.[43] (In a 13th case, the court of appeals imposed a remedy the trial court had declined to impose.) In 3 of these 13 cases, the appellate court devoted very little or no discussion to the remedy issue.[44]

In several of these cases in which the lower court remedy was upheld on appeal, there was an interesting common theme.[45] Corrections authorities argued (usually among other things) that the lower court remedy should not be enforced because the government could not comply with either a population cap or an order that all inmates be provided a minimum amount of space. The government essentially argued that it could not comply because inmate populations had grown much more rapidly than expected, and the government lacked the resources to provide other housing for this sudden influx of inmates. The appellate courts responded that the government had been aware of the increasing inmate population problem for quite some time and had done nothing about it or that the failure to do anything about the problem was not so much a lack of resources as a lack of political will. And in another case, *Badgley*, the Second Circuit Court of Appeals overturned a district court's refusal to hold a county in contempt of court for its persistent noncompliance with a population cap established by a consent decree. The district court had found that it was impossible for the county to comply, but the court of appeals, citing the county's "abysmal" record of compliance, concluded that the county's lack of compliance resulted from "political difficulties rather than physical impossibilities."[46]

The Fourth Circuit Court of Appeals, in *Plyler*, took a quite different approach to this issue. The South Carolina Department of Corrections and a group of inmates entered into a consent decree in which South Carolina, which was in the process of building some new prisons, agreed not to double-cell any new cells of less than 100 square feet. At the time of the agreement, South Carolina anticipated a prison population growth of 30-50 inmates per month between 1985 and 1990. Instead it averaged a growth rate of 74 inmates per month in 1985 and 84 per month in 1986. The consent decree had anticipated that inmate growth projections might be inaccurate and stipulated that in that eventuality "the Court shall order immediate relief, which may include population reductions, release or transfer of prisoners . . . or other appropriate relief."[47]

Under the circumstances, the district court concluded that modification of the consent decree provision that prohibited double-celling of cells of less than 100 square feet was not "other appropriate relief." The Fourth Circuit disagreed, holding that "the district court clearly erred in assessing the degree of potential harm to inmates [if the provision was modified] as contrasted with the risks to the public [if the provision was not modified] and it abused its discretion in denying the current request for modification."[48]

In addition to *Plyler*, there were seven other cases that did not support lower court remedies.[49] In three of these cases, the court of appeals reversed the finding of the district court that the overcrowded conditions were unconstitutional, thereby making the remedy issue moot.[50] In the four remaining cases, the courts of appeals were quite anxious that the district courts impose the least intrusive remedy possible. In *Ruiz IV*, for example, the Fifth Circuit Court of Appeals overturned a district court's ban on double-celling, indicating that "[d]irecting state officials to achieve specific results should suffice; how they will achieve those results must be left to them unless and until it can be demonstrated judicial intervention is necessary."[51] And, as discussed earlier in this article, in *Barry II*, the D.C. Court of Appeals, in a 2-1 decision, viewed a population cap as "a last resort remedy" which "was much too blunt an instrument in view of the court's

specific findings of 'deficiencies' which the District of Columbia was ordered to correct."[52] The court of appeals felt that a specific remedy for the cause of each deficiency would have been more consistent with Supreme Court decisions.

The appellate cases do not provide a clear pattern that will permit one to predict with confidence the likely reaction of these courts to remedies imposed by district courts. Of course, there is some chance that the central finding of unconstitutional conditions will itself be reversed, as happened in three cases here. But, if that did not happen, the appellate courts were more likely than not to leave the lower court's remedy undisturbed.

The Future

Three developments have implications for the continued use of the remedies described earlier. In many of the cases, there is a notion that the remedial decree is intended to deal with an existing institution until new construction (often ongoing) is completed. The implication is that the completion of this construction will alleviate the unconstitutional overcrowding. Much of this construction should be complete or nearly so. Although there is evidence that where space is available it will be filled, perhaps the construction will allow the housing of more inmates without crossing the line from being full (or crowded) to unconstitutionally overcrowded.

A second development is that courts seem to be exasperated with their often long and ineffective involvement in the remedy phases of these cases. This could lead to initial remedial decrees which are more intrusive than in the past and less willingness to allow the parties to assist in fashioning the remedy. In *Twelve John Does,* the court reviewed its 1982 decree and denied a motion by the defendants to modify it. "The sorry record of dereliction amassed by the District, its lack of creativity in fashioning ways to reduce overcrowding and its relentless recalcitrance suggest that the district court would be justified in reassessing what sanctions will finally guarantee the District's compliance."[53] Similar sentiments were expressed by the district court in Rhode Island after 11 years of superintending a case there: "[T]his Court has finally, regretfully, reached the end of its Job-like patience with the state's inability, over more than a decade, to accomplish the agreed upon changes within established time frames."[54] A district court judge in Pennsylvania indicated that "[h]aving spent the last 13 years dealing with the Allegheny County Jail, we are not inclined to want to supervise SCIP [State Correctional Institution at Pittsburgh] for the next 13 years."[55] These observations and sentences could lead to earlier adoption of harsher remedies and less concern with consulting the parties for recommendations on what should be done.

A final development with portents for the future is a case recently decided by the Supreme Court which upheld the right of a district court to order a tax increase needed to finance court-ordered desegregation.[56] While it was not a prison case, the implied approval of substantial court involvement in remedying constitutional wrongs and the actual approval of the exercise of broad remedial powers are equally applicable to prison overcrowding cases. In fact, in his dissent, Justice Kennedy recognizes that the reasoning of the case would apply equally to prison conditions cases.

Lessons Learned

From the above discussion, corrections officials should be aware that there is a wide variety of remedial measures they may face if a court decides that their facility is unconstitutionally overcrowded. Thus, the result in a particular case is difficult to predict. What is apparent from the cases discussed in this article is that when correctional facilities lose overcrowding cases, the remedy imposed by the courts often makes life considerably more difficult for these facilities. Thus, it would be in the interest of these facilities to do what they can to maximize their ability to influence the remedy imposed.

Toward this end, officials should be diligent in showing at trial that they have tried, in good faith, to do the best they could given the resource constraints under which they have acted. Establishing good faith should increase the chances that the court will seek their input on what the remedy should be.[57] Additionally, officials should be ready with a plan (and be ready to negotiate) for bringing their facility into compliance. The presentation of a well-thought-out and reasonable plan may allow the correctional officials to correct the deficiencies in the manner and at the pace they deem most professionally appropriate.

NOTES

[1]*Procunier,* p. 405.

[2]Id., p. 406.

[3]Todd R. Clear and George F. Cole, *American Corrections* (2nd ed.). Pacific Grove, CA: Brooks/Cole Publishing Co., 1990, p. 477.

[4]Phillip J. Cooper, *Hard Judicial Choices.* New York: Oxford University Press, 1988, pp. 15, 16, 209. Where the plaintiffs were pretrial detainees, they alleged that their 14th amendment rights were violated. Due process of law requires that they not be punished prior to a trial and conviction of alleged offenses. If prisoners could establish that the conditions of their pretrial confinement constituted punishment, a constitutional violation had been demonstrated. Where the plaintiffs were sentenced prisoners, they alleged

that their eighth amendment rights were violated in that the prison conditions constituted cruel and unusual punishment.

[5]For example, in *Sarver*, the judge likened a sentence to the Arkansas Penitentiary to "a banishment from civilized society to a dark and evil world completely alien to the free world . . ." (p. 381).

[6]Whether lower courts have followed the Supreme Court's admonitions is another story altogether. In Jack E. Call, "Recent Case Law on Overcrowded Conditions of Confinement," *Federal Probation*, September 1983, p. 23, and "Lower Court Treatment of Jail and Prison Overcrowding Cases: A Second Look," *Federal Probation*, June 1988, p. 34, the author concludes that the Supreme Court's expressed desire for judicial restraint has had little apparent effect on lower court handling of these cases.

[7]*Id.*

[8]Steve J. Martin and Harry M. Whittington, *The Walls Came Tumbling Down*. Austin: Texas Monthly Press, 1987, and Ben M. Crouch and James W. Marquart, *An Appeal to Justice: Litigated Reform of Texas Prisons*. Austin: University of Texas Press, 1989.

[9]Where one case resulted in more than one district court opinion within a short period of time, it was still counted as one case. There are also many unreported decisions in these cases, as repeated hearings dealt with repetitive disagreements between parties during administration of the court-ordered remedies. There are almost certainly a number of cases which are not reported at all.

[10]*Reece.*

[11]*Ruiz I.*

[12]In *Hendricks*, the court ordered a cap of 1,750 prisoners to be met by December 31, 1982, and a cap of 1,615 to be met by December 31, 1983.

[13]*Gross.*

[14]Pp. 842-43.

[15]*Albro*, p. 1287.

[16]*Capps*, p. 802.

[17]*Crain*

[18]*Gross*

[19]*Ramos I*, p. 169.

[20]*Ramos II.*

[21]*Ramos III.*

[22]*Wecht I*, p. 1147.

[23]*Feliciano II.*

[24]*Jackson.*

[25]*Tillery*, p. 1259.

[26]P. 1306.

[27]One commentator refers to these cases as "litigation without end." Roger A. Hanson, "Contending Perspectives on Federal Court Efforts to Reform State Institutions," 59 U. Colo. L. Rev. 289, 291 (1988).

[28]Eisenberg and Yeazell, "The Ordinary and Extraordinary in Institutional Litigation," 93 Harv. L. Rev. 465 (1980), and Ralph Cavanagh and Austin Sarat, "Thinking About Courts: Toward a Jurisprudence of Judicial Competence," 14 Law and Society Review 371, 402 (1980).

[29]Horowitz, "Decreeing Organizational Change," pp. 1272-76. While "special master" is the appropriate label, courts place different labels on the role and assign duties far beyond fact-finding to various levels of oversight and reporting. "Such court-appointed agents have been identified by a plethora of titles: 'receiver,' 'Master,' 'Special Master,' 'master hearing officer,' 'monitor,' 'human rights committee,' 'Ombudsman,' and others." *Ruiz III*, p. 1161.

[30]P. 40.

[31]P. 1006.

[32]P. 1062.

[33]P. 1276.

[34]P. 1388.

[35]P. 1196.

[36]P. 926.

[37]It is in this area that published cases are most likely to be unrepresentative of the universe of overcrowding cases. It seems likely that most cases resulting in consent decrees will not raise a legal issue later that will result in a published opinion resolving such an issue.

[38]P. 461.

[39]*Wecht I*, p. 1278.

[40]Horowitz, "Decreeing Organizational Change," pp. 1294-95.

[41]The only case found where the defendants wanted to thrust the responsibility for fashioning the remedy entirely onto the shoulders of the court was in *Lareau*. The reaction of the court was clear in its response to the *defendants*: "The court declines the invitation—surprisingly made by the defendants—that it devise a comprehensive plan to provide the mechanism whereby the Commissioner could administer such an order." (p. 1196)

[42]*Ramos II*; *Ruiz II, III, IV*; *Lareau II*; *Smith II*; *DiBuono*; *Wellman*; *Toussaint II*; *French II*; *Badgley*; *Cody II*; *Barry II*; *Plyler*; *Twelve John Does I* and *II*; *Balla II*; *Wecht III*; *Feliciano II*; *Crain*; *Clark*: *Mallery*; *Richardson*; *Wilson.*

[43]*Lareau II*; *Wellman*; *Toussaint II*; *French II*; *12 John Does II*; *Balla II*; *Wecht III*; *Feliciano II.* The ninth case is *Badgley.*

[44]*Wellman*; *Toussaint II*; *French II.*

[45]*Twelve John Does II*; *Balla II*; *Wecht III*; *Feliciano II.*

[46]P. 37.

[47]P. 211.

[48]*Id.*, p. 212.

[49]*Smith II*; *DiBuono*; *Cody II*; *Ramos II*; *Ruiz Cases*; *Barry II*; *Wilson.*

[50]*Smith II*; *DiBuono*; *Cody II.*

[51]*Ruiz IV.*

[52]*Barry II*, p. 842.

[53]P. 295.

[54]*Palmigiano*, p. 1182.

[55]*Tillery*, p. 1309.

[56]*Jenkins*.

[57]In *Wilson* v. *Seiter*, 49 CrL 2263 (1991), the Supreme Court held that plaintiffs cannot succeed in cases alleging unconstitutional conditions of confinement unless they are able to demonstrate that government officials were deliberately indifferent to those conditions. Of course, it is possible (and probably likely) that "deliberate indifference" will be interpreted in such a way that courts will conclude that officials be both deliberately indifferent and acting in good faith. In addition, it is unclear whose behavior is to be examined in determining whether there has been deliberate indifference. Are the courts to look only at the behavior of corrections officials or all government officials, including legislators? If the behavior of all government officials is examined, then clearly corrections officials could be seen as acting in good faith, even though their prison or jail is found to be in violation of the Constitution. If only the behavior of corrections officials is to be examined, then it would appear that the dissenters in *Wilson* are correct in stating that after this case the conditions of a prison or jail may not be found in violation of the Constitution if a legislative body has failed to appropriate sufficient funds to operate the facility in accordance with the Constitution.

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