THE NEW JERSEY JAIL CRISIS: THE JUDICIAL EXPERIENCE*

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The first prison in the United States was built in 1782. Started by the Philadelphia Quakers, the Walnut Street Penitentiary was intended as a reform over the earlier system of corporal punishment. Instead of being beaten, branded, or otherwise physically punished, the convicted criminal was simply deprived of his liberty. At the Walnut Street Penitentiary, this meant the prisoner was placed in solitary confinement for the duration of his sentence. All outside communication was cut off. Silence was strictly enforced. The prisoner was left alone with his Bible and his conscience.

Within several years of its inception, the Walnut Street mode of punishment came under sharp attack. It was denounced as a failure because crime continued to flourish. Moreover, prisoner penance was costly; certainly more expensive than the methods of corporal punishment previously employed. Finally, and perhaps most ironically, imprisonment was charged with being a cruel punishment. Critics contended that the conditions of confinement—the constant solitude and the complete silence—drove prisoners insane.[1]

An earlier version of this article was presented to Rutgers School of Law—Newark on March 5, 1991 as the Ninth Annual Chief Justice Joseph Weintraub Lecture. Begun in 1982, the Chief Justice Joseph Weintraub Lecture Series was established by the Law School Alumni Association in honor of the late Chief Justice of the New Jersey Supreme Court.

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I wish to acknowledge the substantial assistance rendered by my devoted law clerk, Sandra L. Cobden.

1. *See* B. McKelvey, American Prisons: A History of Good Intentions ch. 2 (1977); New York State Special Comm. on Attica, Attica: The Official Report of the New York State Special Commission on Attica 6-8 (1972). Charles Dickens was one of the Penitentiary's critics. In a letter written after a visit there, he explained:

> The system here is rigid, strict, and hopeless *solitary confinement*. I believe it, in its effects, to be cruel and wrong. In its intentions, I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what they are doing . . . . I hold this slow

Despite its many detractors, the use of imprisonment as a penalty for crime continued, and even thrived. Criticism prompted reform, not abandonment of the system. As a result, new "modern" prisons were built. Larger, "trained" staffs were employed. New strategies for punishing, curing, or simply isolating the prisoner were implemented. In short, the prison system expanded at a rapid rate.[2]

Today, the United States incarcerates 426 individuals per 100,000 which is the highest known incarceration rate in the world.[3] In other terms, there are over one million people in jails, prisons, and detention centers across the nation, double the number of ten years ago.[4] New Jersey's experience reflects the nationwide trend. "Since 1978, the adult prison population in New Jersey has more than tripled, the probation population has more than doubled, and the budget of the Department of Corrections has grown by more than 500%."[5] This explosion of prisoners, however, cannot wholly be attributed to a concurrent increase in the crime rate.[6] In New Jersey, for example, the number of crimes per 100,000 people increased by 6% over the last fifteen years while the incarceration rate increased by more than 200%.[7] Instead, such unprecedented growth must, in large part, be attributed to various policy choices and legislative changes which have resulted in many prisoners receiving longer sentences, often in

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> and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body; and because its ghastly signs are not so palpable to the eye . . . and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay.

AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 18-19 (1971) (quoting C. DICKENS, PICTURES FROM ITALY AND AMERICAN NOTES 283 (London 1867)).

2. For a history of prison reform, see B. MCKELVEY, *supra* note 1; D. ROTHMAN, CONSCIENCE AND CONVENIENCE 43-158 (1980).

3. M. MAUER, AMERICANS BEHIND BARS: A COMPARISON OF INTERNATIONAL RATES OF INCARCERATION 3 (The Sentencing Project Jan. 1991). South Africa has the second highest known rate with 333 individuals incarcerated per 100,000 and the Soviet Union has the third with 268 individuals incarcerated per 100,000. *Id.*

4. *Id.* at 4.

5. GOVERNOR'S MANAGEMENT REVIEW COMM'N., CORRECTIONS IN NEW JERSEY: CHOOSING THE FUTURE 1 (Oct. 19, 1990) [hereinafter CORRECTIONS IN NEW JERSEY].

6. *See* Glazer, *Crime and Punishment: A Tenuous Link*, 2 CONG. Q. EDITORIAL RES. REP. 586, 594-95 (Oct. 20, 1989); J. IRWIN & J. AUSTIN, IT'S ABOUT TIME: SOLVING AMERICA'S PRISON CROWDING CRISIS 8-9 (National Council on Crime and Delinquency 1988); M. MAUER, *supra* note 3, at 6-8.

7. *See* CORRECTIONS IN NEW JERSEY, *supra* note 5, at 21; Hoff, *Mandatory Sentencing for Drugs Questioned*, N.Y. Times, Feb. 24, 1991, § 12 (N.J. Weekly), at 1, col. 6.

conjunction with mandatory minimum terms.[8]

Unfortunately, this dramatic rise in the prison population has created overcrowded prisons and, in turn, overburdened prison systems. When too many people are clamoring for too few resources and too many people are contained in too small an area, the system begins to break down. As a result, those dependent on the system begin to suffer. In today's society, we will take away someone's liberty and call it punishment. If we add to that punishment, however, by taking away sustaining services such as adequate food, basic medical care, or any semblance of security, we call it cruel and unusual punishment.

Within the last twenty-five years, prisoners have increasingly turned to federal courts for protection against deplorable conditions of confinement.[9] Where it has been warranted, we have responded, often by ordering extensive injunctive relief. In 1990, forty-one states plus the District of Columbia, Puerto Rico, and the Virgin Islands had some portion of their state prison facilities under court supervision, the overwhelming majority for conditions relating to overcrowding.[10] Like many other states, New Jersey simply does not have enough prison beds, much less cells,

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8. On the federal level, such legislative initiatives include the new sentencing guidelines and harsher drug laws. Together, these changes are expected to result in a 119% increase in the federal prison population from 1987 to 1997. *See* M. MAUER, *supra* note 3, at 7-8.

In New Jersey, these initiatives include: 1) the 1979 Code of Criminal Justice which generally provided for lengthier sentences than did its predecessor, *see* N.J. STAT. ANN. §§ 2C:1-1 through 2C:98-4; 2 FINAL REPORT OF THE N.J. CRIM. L. REVISION COMM. § 2C:43-6 Commentary at 316-18 (Oct. 1971); 2) the Parole Act of 1979 which initially increased the terms of imprisonment for certain prisoners, *see generally* N.J. STAT. ANN. § 30:4-123.45-.69 (West 1981 & Supp. 1990); 3) the Graves Act of 1982 and its later amendments, both of which set mandatory minimum sentences for those convicted of crimes involving guns, *see* N.J. STAT. ANN. § 2C:43-6(c) (West Supp. 1991); 4) the Capital Sentence Law of 1985 which set a mandatory minimum sentence of 30 years for those convicted of murder, *see* N.J. STAT. ANN. § 2C:11-3(b) (West Supp. 1991); 5) the Parole Violators Enhancement Act of 1986 which required sentences for parole violations to be served consecutively to any new term imposed, *see* N.J. STAT. ANN. § 2C:44-5(c) (West Supp. 1991); and 6) the Comprehensive Drug Reform Act of 1987, the purpose of which is "to provide for the strict punishment, deterrence and incapacitation of the most culpable and dangerous drug offenders." *See* N.J. STAT. ANN. § 2C:35-1 through 36A-1; CORRECTIONS IN NEW JERSEY, *supra* note 5, at 21-23.

9. For a collection of these cases, see Rhodes v. Chapman, 452 U.S. 337, 353 n.1 (1981) (Brennan, J., concurring).

10. THE NATIONAL PRISON PROJECT OF THE ACLU FOUNDATION, STATUS REPORT: THE COURTS AND PRISONS 1 (Jan. 1, 1990) [hereinafter STATUS REPORT]; *see also* THE NATIONAL PRISON PROJECT OF THE ACLU FOUNDATION, QUARTERLY REPORT (Dec. 31, 1990) [hereinafter QUARTERLY REPORT] (summarizing current litigation and other projects in which this organization is involved).

to accommodate all of its prisoners. Despite an unprecedented expansion of the state prison system funded by six prison construction bonds between 1976 and 1979, the shortage of prison beds is expected to exceed 7,500 by January 1, 1992.[11] Nevertheless, no New Jersey prison has yet been the subject of a court order[12] in large part because each year, beginning in 1981, the governor has declared the state prisons overcrowded and authorized the Commissioner of Corrections to transfer the overflow of state prisoners to the county jails.[13] Not surprisingly, most of the county facilities became overcrowded and most have, at one time or another, been under court supervision.[14] I have handled five of

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11. CORRECTIONS IN NEW JERSEY, *supra* note 5, at 9, 12-15.

In 1982, Governor Kean reported: "It is clear . . . that our best projection of required bed spaces as of January 1, 1988 is 14,990, an incredible increase of almost 8,000 additional beds over the State correctional system capacity today." *See* OFFICE OF THE GOVERNOR, PRISON OVERCROWDING: A PLAN OF ACTION 5 (Apr. 1982). Unfortunately, this prediction was woefully shortsighted. By 1988, the state prison population totalled 16,896. By June 30, 1990, the population stood at 20,438 and it is still increasing. *See* CORRECTIONS IN NEW JERSEY, *supra* note 5, at 8. The cost of housing these prisoners is enormous. Constructing one medium security prison cell costs approximately $75,000. Operating a prison after it has been constructed costs an additional $23,000 per prisoner per year. Given these costs and the need for rapid expansion of the state prison system, it is not surprising that the New Jersey Department of Corrections' budget has increased from $92 million in fiscal year 1980 to almost $599 million in fiscal year 1991, a 551% increase. *Id.* at 9.

12. One complaint has recently been filed alleging numerous unconstitutional conditions of confinement at the Northern State Prison in Newark, New Jersey. *See* Hairston v. Fauver, Civil Action No. 90-1850 (D.N.J. 1990). No decision has been reached on the merits of petitioners' allegations as of September 1991.

13. *See* Exec. Order No. 106 (Byrne), 1981 N.J. Laws 2411. It states in pertinent part:

> 1. I declare that a state of emergency exists in the various State and County penal and correctional facilities . . . .
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> . . . .
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> 5. The Commissioner [of Corrections] may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether owned by the State, a County, or any political subdivision of this State, or any other person, for the confinement of inmates confined in the State and/or County penal or correctional institutions.
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> . . . .
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> 8. I further order that the authority of the Commissioner to designate the place of confinement of any inmate may be exercised when deemed appropriate by the Commissioner regardless of whether said inmate has been sentenced or is being held in pretrial detention, except that only persons sentenced to a prison or committed to the custody of the Commissioner may be confined in a State Prison.

Id. This Order has been continuously renewed upon its expiration. *See, e.g.*, Exec. Order No. 24 (Florio), 23 N.J. REG. 335 (1991).

14. STATUS REPORT, *supra* note 10, at 4.

these cases.[15]

Of course, the widespread involvement of federal courts in prison reform has provoked great controversy. Critics have claimed that we, the members of the federal judiciary, have overstepped our authority and trespassed in areas best left to other branches of the federal government and to the states. Some have claimed our interpretation of constitutional rights has been too broad, others that our relief has been too far-reaching. In short, they have argued that we have meddled where we do not belong, with institutions we cannot properly understand, causing consequences we did not foresee.[16] I disagree. In this Article, I will explain the basis for my opinion.

I do not intend to engage in a theoretical discussion of federalism, comity, or the historical roots of injunctive relief. These topics have been thoroughly analyzed elsewhere.[17] Instead, I would like to begin by explaining the history of federal district court involvement in prison reform.[18] As Justice Brennan has said,

> No one familiar with the litigation in this area could suggest that the courts have been overeager to usurp the task of running prisons . . . . And certainly, no one could suppose that the courts have ordered creation of "comfortable prisons,". . . on the model of country clubs. To the contrary, "the soul-chilling inhumanity of conditions in American prisons has been thrust

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15. I have handled the following jail conditions of confinement litigation:

Union County Jail Inmates v. Scanlon, Civil Action No. 81-863; Camden County Jail Inmates v. Parker, Civil Action No. 82-1942; Essex County Inmates v. Collier, Civil Action No. 82-1945; United States v. City of Newark v. County of Essex, Civil Action No., 84-433; Essex County Jail Annex Inmates v. Amato, Civil Action No. 87-871; Monmouth County Correctional Institution Inmates v. Lanzaro, Civil Action No. 82-1924; Brown v. McDowell, Civil Action No. 87-1142 (Bergen County).

16. For articles critical of federal district courts' use of remedial injunction in cases involving prisons as well as other public institutions, see, e.g., Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791, 813-29 (1976); Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 88-106 (1979); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978). For thoughtful rebuttals, see Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Rudenstine, *Institutional Injunctions*, 4 CARDOZO L. REV. 611 (1983).

17. *See supra* note 16; Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Rudenstine, *Judicially Ordered Social Reform: Neofederalism and Neonationalism and the Debate Over Political Structure*, 59 S. CAL. L. REV. 449 (1986).

18. For a particularly enlightening article concerning my colleague Judge Frank M. Johnson's experience with institutional litigation, see Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903 (1976).

upon the judicial conscience."[19]

I will then examine the Supreme Court's response to prison conditions of confinement cases and highlight how the Court's opinions shaped—and limited—the district courts' involvement in later ones. Finally, I will describe several of my jail cases. Essentially, I hope to put the reader in my seat by demonstrating what I saw, enumerating the available options and describing why I made the choices I did. In the end, the reader will be the judge and I hope to have convinced you of this fundamental point: As long as there are unconstitutional conditions of confinement in our prisons, jails, and detention centers, federal courts must respond.

I. A Historical Review

It was not until the late 1960's that federal district courts began to examine the conditions of confinement which existed in many of our nation's prisons. Although I am neither a social historian nor a political scientist, I would attribute the timing of the courts' involvement to a coalescence of four separate developments. First, there was the development of an expansive definition of cruel and unusual punishment prohibited by the eighth amendment.[20] In 1958, Chief Justice Warren, writing for the majority in *Trop v. Dulles*,[21] described the scope of the amendment

19. Rhodes v. Chapman, 452 U.S. 337, 354 (1981) (Brennan, J., concurring) (quoting Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 684 (D. Mass. 1973)).

20. For a chronological review of the development of the eighth amendment, see Wilkerson v. Utah, 99 U.S. 130 (1878) (the first case to directly address the meaning of the eighth amendment as including "punishments of torture . . . and all others in the same line of unnecessary cruelty"); *In re* Kemmler, 136 U.S. 436, 447 (1890) (new forms of penalties such as electrocution are unusual but not cruel if they are intended as a humane reform of the old modes of punishment); O'Neil v. Vermont, 144 U.S. 323 (1892) (the dissenting justices argued that the eighth amendment should expand to encompass the concept of excessiveness); Weems v. United States, 217 U.S. 349, 365-67 (1910) (the majority expanded its interpretation of the amendment to prohibit excessive penalties); Francis v. Resweber, 329 U.S. 459, 464 (1947) (accidents, even if harmful to a prisoner, are not cruel and unusual punishment); Trop v. Dulles, 356 U.S. 86, 101 (1958) (amendment redefined to conform with contemporary standards of decency); Gregg v. Georgia, 428 U.S. 153, 169-73 (1976) (plurality opinion) (reaffirmed flexiblity of eighth amendment to conform with contemporary standards of decency); *see also* Furman v. Georgia, 408 U.S. 238, 258-69, 316-28 (concurring opinions of Brennan and Marshall, JJ., respectively) (summarizing development of eighth amendment doctrine); Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839 (1969) (comparing the original British and contemporary American meanings of the prohibition).

21. 356 U.S. 86 (1958).

as follows: "The Court [has] recognized . . . that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[22] Although the Supreme Court has often been deeply divided over what these evolving standards of decency permit, it has nevertheless retained this definition.[23] Second, there was the growing willingness of the district courts after *Brown v. Board of Education*[24] to grant broad injunctive relief against various public institutions.[25] Third, there was a concurrent movement outside the courts to reform prisons. This reform movement in part reflected a shift in goals from punishment to rehabilitation.[26] By the late 1970's even the terminology of confinement had changed: prisons became correctional institutions; guards, correction officers; and prisoners, inmates. Fourth, and finally, prisoners began bringing cases alleging cruel and unusual conditions of confinement to federal courts.[27]

The Arkansas prison system was the first to come under federal judicial scrutiny. Until the middle 1960's, it had been a point of state pride that the prison system was essentially self-supporting and at times even profitable. Such pride began to falter, however, when it became clear at what cost the system was maintained. Beginning in 1965, prisoners instituted a series of actions in the district court challenging the constitutionality of various practices occurring within the system. Quickly prohibited were the long-standing practices of whipping prisoners with a large leather strap[28] and using the "Tucker Telephone" to distribute electric

22. *Id.* at 100-01.

23. For two recent examples of the Supreme Court's internal debate over the meaning of "evolving standards of decency," see Stanford v. Kentucky, 492 U.S. 361 (1989) (regarding the imposition of capital punishment on individuals for a crime committed at age 16 or 17); Penry v. Lynaugh, 492 U.S. 302 (1989) (regarding the imposition of capital punishment on mentally disabled individuals).

24. 347 U.S. 483 (1954).

25. *But see* Eisenberg & Yeazell, *supra* note 16, at 491-94 (arguing that broad injunctive relief is neither new nor extraordinary).

26. For a concise history and critique of the rehabilitative model, see Rothman, *Behavior Modification in Total Institutions*, 5 THE HASTINGS CENTER REPORT 17-24 (Feb. 1975).

27. The importance of this final development cannot be emphasized enough—the federal courts will not and, indeed, cannot act until there is a case or controversy before them. *See* U.S. CONST. art. III, § 2.

28. *See* Talley v. Stephens, 247 F. Supp. 683, 689 (E.D. Ark. 1969).

shocks to various parts of a prisoner's body.[29] Although the district court did not initially prohibit all forms of corporal punishment, on appeal the Eighth Circuit finally did.[30]

Having succeeded in barring corporal punishment, the prisoners then turned to other conditions of their confinement. They challenged the lack of security in the dormitories, where no civilian guards were stationed and stabbings and rapes were common. They also challenged the overcrowded and unsanitary conditions of the isolation units in which four prisoners were routinely confined in a ten-by-eight-foot cell containing one, often broken, toilet and little else. Again, the court examined each of their claims, found the conditions unconstitutional, and ordered the state to provide relief.[31]

It was not until 1970, however, that the district court of Arkansas decided what would become the paradigm for all other prison conditions of confinement cases. *Holt v. Sarver*[32] ("*Holt II*") was a consolidation of eight class action suits challenging numerous policies and practices throughout the prison system. The testimony at trial once again presented the court with a litany of abuses, ranging from the merely disturbing to the utterly shocking. Prisoners described the system of security, called the "trusty system", which gave certain prisoners, designated trusty guards, the power of life and death over other prisoners. Not surprisingly, such power was often abused. In one instance, a trusty guard killed another prisoner "carelessly." In another, a trusty guard fired his rifle into a crowded barracks because the prisoners would not turn off the television when asked. The trusties also controlled prisoner access to the medical unit and other institutional facilities. More often than not, such access was permitted only if the prisoner paid a substantial bribe. The prisoners also described how the lack of civilian guards in the dormitories caused some inmates to be so afraid of sexual assaults and stabbings that they spent each night clinging to the bars at the front of the room. Conditions in the isolation units were not much better. Although no longer severely overcrowded, the units were still filthy. At one prison, the units were infested with rats; at another,

29. *See* Jackson v. Bishop, 268 F. Supp. 804, 815 (E.D. Ark. 1967), *vacated*, 404 F.2d 571 (8th Cir. 1968).

30. *See Jackson*, 404 F.2d at 579-80.

31. Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969) (*Holt I*).

32. 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 548 F.2d 740 (1977).

the food was routinely permitted to become cold and wet. Finally, throughout the prison system, few rehabilitation programs were available despite the fact that most of the prisoners were illiterate and unskilled.

Much of the testimony, and many of the issues, were simply elaborate reiterations of those previously heard by the court. What made *Holt II* unique was that the prisoner petitioners were not asking the court to review each challenged practice in isolation. Instead, they were asking the court to analyze them as part of an entire system, the constitutionality of which they challenged. Judge Henley agreed with this mode of analysis, explaining:

> It appears to the Court, however, that the concept of "cruel and unusual punishment" is not limited to instances in which a particular inmate is subjected to a punishment directed at him as an individual. In the Court's estimation, confinement itself within a given institution may amount to a cruel and unusual punishment prohibited by the Constitution where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people even though a particular inmate may never personally be subject to any disciplinary action.
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> The distinguishing aspects of Arkansas penitentiary life must be considered together. One cannot consider separately a trusty system, a system in which men are confined together in large numbers in open barracks, bad conditions in the isolation cells, or an absence of a meaningful program of rehabilitation. All of these exist in combination; each affects the other and when taken together, they have a cumulative impact on the inmates regardless of their status.[33]

Judging the constitutionality of the Arkansas prison system in light of the totality of conditions of confinement, Judge Henley had little difficulty declaring it in violation of the eighth amendment prohibition against cruel and unusual punishment. He was more hesitant, however, in formulating a remedy.

The court realized that it would take substantial commitments of both time and money to improve many of the conditions. The court also recognized its own lack of expertise in administering a prison system. Nevertheless, it set forth a series of priorities and

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33. *Id.* at 372-73.

guidelines. First, the trusties had to be stripped of their excessive power over other prisoners. Certain trusty positions such as gate guard and field guard needed to be eliminated as soon as possible. (The implication was, of course, that more civilian guards and other employees would need to be hired and trained.) Second, the dormitories would have to be broken down into smaller units and a better prisoner classification system[34] imposed so that prisoner safety was reasonably ensured. Finally, the isolation cells would have to be kept in better condition and the prisoners in isolation would have to be allowed to eat in the main dining room.

Numerous prison conditions of confinement cases followed *Holt II*. Using the same totality of conditions analysis, court after court uncovered evidence of system-wide breakdowns. For example, in *Gates v. Collier*,[35] Chief Judge Keady found that several factors contributed to the lack of prisoner safety in the Mississippi prison system. There was an insufficient number of civilian guards and an overreliance on prisoner "trusty guards." Although armed, the trusty guards were neither screened nor trained. Indeed, the evidence indicated that 35% of the trusty guards serving shortly before trial had not even been psychologically tested. Of those who had been tested, 40% were found to be retarded and 71% were found to have personality disorders. These factors, coupled with the lack of any prisoner classification system and dormitory-style housing, resulted in a significant number of prisoner assaults, rapes, and other indignities.[36]

In a 1972 case, *Newman v. Alabama*,[37] Judge Johnson used a series of individual examples to illustrate the gross and pervasive neglect of prisoners' medical needs in the Alabama prison system. Describing that a quadriplegic with maggot-infested wounds was left essentially unattended for the month before his death, and that another prisoner who was unable to eat was not provided with any form of intravenous nourishment for the three days before his death, Judge Johnson quite concisely pinpointed the cause. These examples, he said, "illustrate what can and does oc-

34. Most prisoner classification systems classify prisoners according to various criteria such as sex, physical condition, psychological condition and severity of offense. These classifications are then used to segregate the prisoners and to assist prison administrators in dealing with special needs.

35. 349 F. Supp. 881 (N.D. Miss. 1972).

36. *Id.* at 887-89.

37. 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

cur when too few reasonable men, functioning with too little supportive facilities, undertake what is, in effect, an impossible task."[38] Four years later, in 1976, Judge Johnson had the opportunity to examine the rest of the Alabama prison system.[39] He found severely overcrowded facilities that were woefully understaffed. The result was a prisoner classification system that had collapsed to the point where everyone—the old, the young, the weak and the strong—was assigned to the maximum security general population. To make the point more vividly, the result was a system which permitted a twenty-year-old prisoner, with the mind of a five-year-old, to be assigned to the maximum security general population where security was so inadequate that he was raped by a group of fellow prisoners on his first night, and practically strangled by two others during his second.[40]

These stories, repeated in endless variations across the country, prompted federal courts to order extensive injunctive relief. Staff-prisoner ratios were established. Meaningful classification systems were imposed. Limits were placed on the length of time a prisoner could spend in isolation and standards were set for the minimum conditions. The food, medical, and dental services were frequently overhauled and fire safety standards were ordered to be maintained. Repairs to what were often quite old facilities were ordered and, finally, since the breakdown of the prison system was often exacerbated by overcrowding, caps on the prisoner population or on the minimum amount of space allotted to each prisoner were usually set forth.[41]

Although several of these cases were appealed to the Supreme Court throughout the 1970's, the Court did not directly address the relationship between the eighth amendment and prison conditions of confinement until 1978 in *Hutto v. Finney*.[42] *Hutto* was essentially the last of the Arkansas prison litigation which began

38. *Id.* at 285.

39. Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (1977), *rev'd in part sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam).

40. *Id.* at 325.

41. For several good examples of the type of extensive remedy described here, see Ruiz v. Estelle, 679 F.2d 1115, 1172-73 (5th Cir. 1982), *amended in part, vacated in part, reh'g denied*, 688 F.2d 266 (5th Cir. 1982) (reprinting full text of district court order), *cert. denied*, 460 U.S. 1042 (1983); Palmigiano v. Garrahy, 443 F. Supp. 956, 986-90 (D.R.I. 1977); *Pugh*, 406 F. Supp. at 332-35; *Gates*, 349 F. Supp. at 898-905.

42. 437 U.S. 678 (1978).

earlier in *Holt I*.[43] At issue were two discrete aspects of the district court's remedial order. The State challenged both the district court's authority to order a maximum limit of thirty days of confinement in punitive isolation and its authority to award the prisoner petitioners attorney fees as a sanction for the State's failure to comply with the court's prior order. After reviewing the protracted procedural history of the Arkansas prison cases as well as the district court's findings regarding the continuing constitutional violations, the Supreme Court upheld completely the challenged aspects of the district court's order. It found the totality of conditions in the punitive isolation cells was not only unconstitutional but fully warranted the remedy imposed.[44] Further, given the State's prior failure to obey the district court's order, the Court held that the district court's award of attorney fees was an appropriate mechanism to encourage future compliance.

Hutto's importance, therefore, lay in its affirmation of district court involvement in the prison conditions of confinement cases

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43. The chronology of the Arkansas prison cases is as follows: Holt v. Sarver (*Holt I*), 300 F. Supp. 825 (E.D. Ark. 1969); Holt v. Sarver (*Holt II*), 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd and remanded*, 442 F.2d 304 (8th Cir. 1971); Holt v. Hutto (*Holt III*), 363 F. Supp. 194 (E.D. Ark. 1973), *rev'd and remanded sub nom.* Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974); Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark. 1976), *aff'd*, 548 F.2d 740 (8th Cir. 1977), *aff'd* 437 U.S. 678 (1978).

44. Specifically, the Court stated:

> The question before the trial court was whether past constitutional violations had been remedied. The court was entitled to consider the severity of those violations in assessing the constitutionality of conditions in the isolation cells. The court took note of the inmates' diet, the continued overcrowding, the rampant violence, the vandalized cells, and the "lack of professionalism and good judgment on the part of maximum security personnel." The length of time each inmate spent in isolation was simply one consideration among many. We find no error in the court's conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment.
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> In fashioning a remedy, the District Court had ample authority to go beyond earlier orders and to address each element contributing to the violation. The District Court had given the Department repeated opportunities to remedy the cruel and unusual conditions in the isolation cells. If petitioners had fully complied with the court's earlier orders, the present time limit might well have been unnecessary. But taking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance.

Hutto, 437 U.S. at 687 (citations and footnote omitted).

Nevertheless, Justice Scalia, writing for the Court, recently claimed *Hutto* did not involve, and hence, the Court did not pass upon, the question of whether the prison conditions of confinement remedied by the district court constituted cruel and unusual punishment. *See* Wilson v. Seiter, 111 S. Ct. 2321 (1991); *see also infra* text accompanying notes 47-49.

and its tacit approval of the totality of conditions mode of analysis and the use of broad injunctive remedies. By the late 1970's and early 1980's, however, the Supreme Court began to set limits on the power of federal courts to correct conditions of confinement. It imposed these limits by heightening the deference afforded to prison practices and thereby narrowing the scope of what could be considered unconstitutional conditions of confinement.

The initial step in this process, *Bell v. Wolfish*,[45] differs from all of the cases I have discussed thus far because the petitioners were not prisoners asserting their eighth amendment rights, but were instead pretrial detainees asserting their due process rights. As such, they could not be subject to any form of punishment, much less cruel and unusual punishment.

The petitioners in *Wolfish* challenged numerous institutional practices, including: 1) "double-bunking" of two detainees in a room designed only for one; 2) prohibiting detainees from receiving hardcover books not mailed by a publisher, book club, or book store; 3) prohibiting detainees from receiving food or personal items from outside the institution; 4) requiring detainees to undergo body-cavity searches following contact visits with anyone from outside the institution; and 5) prohibiting detainees from observing unannounced searches of their living spaces. All of these practices, they claimed, constituted punishment. Holding that detainees' due process rights entitled them to be free of conditions of confinement not justified by a compelling necessity, the district court and circuit court agreed. Upon appeal, the Supreme Court reversed.

Not every discomfort or disability imposed during pretrial detention, the Court cautioned, was punishment in a constitutional sense. Rather, punishment must be defined in accordance with—and hence limited by—the needs of the institution. Since courts lack the expertise to adequately gauge institutional needs, a deferential standard should be employed when judging institutional practices. As then Associate Justice Rehnquist explained:

> [T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible to easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that

45. 441 U.S. 520 (1979).

> in their judgment are needed to preserve internal order and discipline and to maintain institutional security. "Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."[46]

Applying this deferential standard to the facts before it, the Court declared each of the challenged practices to be constitutional. None were shown to be an exaggerated response to the institution's needs, nor was any intent to punish demonstrated. While acknowledging that these practices may be uncomfortable for the detainees, the Court ruled that they were constitutional.

In *Rhodes v. Chapman*,[47] the Court elaborated on the themes developed in *Wolfish*. *Rhodes* involved a relatively new maximum security facility in southern Ohio. Severe overcrowding resulted in cells designed for one prisoner routinely housing two. Nevertheless, the Court found that the overcrowding did not result in other deprivations. Adequate food, medical care, and sanitation were provided. Although the overcrowding did marginally diminish work and educational opportunities, the Court found that deprivations of these desirable aids to rehabilitation were not punishments. Given these circumstances, the Court again warned against stepping into the prison administrator's shoes. State legislators and prison officials are the appropriate bodies to determine how to administer a better prison. Courts must limit themselves to determining only if the prison operates in a constitutional manner. This standard is minimal: "Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment."[48] In *Rhodes*, the Court held that these minimal standards had been easily met.

In its most recent attempt to address the tension between prisoners' eighth amendment rights and the institutional needs of prisons, the Supreme Court not only clarified the standard set forth in *Rhodes*, but also added a new requirement to the analy-

46. *Id.* at 547-48 (citations omitted) (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).

47. 452 U.S. 337 (1981).

48. *Id.* at 347.

sis. The petitioner in *Wilson v. Seiter*[49] challenged a number of conditions at the Ohio state facility where he was confined. Overcrowding, inadequate prisoner classification, unsanitary dining and kitchen facilities, and a deteriorating physical plant when viewed collectively, he contended, created unconstitutional conditions of confinement. The Court never reached the merits of his complaint, but instead remanded the case to the Sixth Circuit with instructions regarding a new and more precise standard to be employed. Although the Court acknowledged that not every condition in and of itself need violate the eighth amendment for conditions in combination with one another to do so, it cautioned that *Rhodes* required these conditions to "have a mutally enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise" before they constitute cruel and unusual punishment.[50]

The Court, however, did not end its discussion there. *Rhodes*, it claimed, had set forth only the objective component of an eighth amendment claim. In addition to proving that conditions—singularly or in combination—created unconstitutional conditions of confinement, prisoners must also establish that prison officials acted with culpable intent by permitting such conditions to exist. More specifically, the Court held that a prisoner must prove that prison officials acted with deliberate indifference to his needs. Although the United States, which had intervened on behalf of the petitioner, argued that such a subjective intent requirement would possibly permit prison officials to successfully avoid responsibility for objectively cruel and unusual conditions of confinement by claiming a lack of funds despite good-faith efforts to obtain them, the Court was unmoved. "Even if that were so," the Court explained, "it is hard to understand how it could control the meaning of 'cruel and unusual punishment' in the eighth amendment. An intent requirement is either implicit in the word 'punishment' or it is not; it cannot be alternately required and ignored as policy considerations might dictate."[51]

Wilson is a recent decision and, therefore, it is too early to know how the standard it embodies will be applied in individual cases. Two points, however, remain clear. Federal courts do have

49. 111 S. Ct. 2321 (1991).

50. *Id.* at 2327.

51. *Id.* at 2326.

a role in reviewing prison conditions of confinement. The parameters of this role, however, are limited.

II. New Jersey Jail Cases

Having outlined the history of federal court involvement in prison reform and, more particularly, having noted the limitations imposed by the Supreme Court on such involvement, I would now like to define, discuss, and defend the role of the district court during the 1980's and, perhaps, in the 1990's.[52] The boundaries of this role, I believe, are best established through a discussion of the practical aspects of a conditions of confinement case: how it starts, how the court responds, and how the reforms are chosen and enforced. Of the five jail cases I have handled, I will focus on three. Each one illustrates a different feature of the district court's role. For example, the Union County jail litigation, the first case I will discuss, illuminates the limits of the court's power. At the same time, however, it indicates just how variable such limits are. By contrast, the Essex County jail litigation emphasizes the court's supervisory power. In the Essex cases, all of the complaints were resolved via consent judgments. I simply ensured the enforcement of those judgments. Finally, the Monmouth County litigation, which is the last case I will discuss, most clearly reflects the court's traditional role as adjudicator.

A. *Union County Jail Litigation*

The Union County litigation[53] has a unique history. It began in March, 1981, as a result of a class action complaint filed by numerous prisoners and pretrial detainees confined in the Union County Jail. They alleged that the Union County facility was so overcrowded that the totality of conditions violated the detainees' right to be free from punishment and the prisoners' right to be free from cruel and unusual punishment. In response, the County admitted many of the overcrowded conditions and filed a third party complaint against the New Jersey Commissioner of Corrections which attributed any unconstitutional conditions at the Jail to the Commissioner's failure to remove sentenced state prison-

52. The forthcoming discussion is based primarily upon recollections of the cases by myself and my special masters. Where I make specific references to public documents, however, I have tried to provide a corresponding citation.

53. Union County Jail Inmates v. Scanlon, Civil Action No. 81-863 (D.N.J. 1981).

ers. Shortly thereafter, the State formalized what had been a de facto policy. As previously explained, Governor Byrne signed Executive Order 106,[54] thereby declaring state prisons overcrowded and authorizing the Commissioner to house state prisoners in county facilities beyond the fifteen-day period permitted under state law. By early fall, the petitioners and the County had reached a settlement which, among other provisions, set a maximum population capacity for the Jail. Relying on this court-ordered settlement, the County next sought a permanent injunction against the State, requiring it to immediately withdraw all sentenced state prisoners from the Jail. In response, the State moved to vacate the consent judgment on the grounds that the County lacked the authority to enter into it because of Governor Byrne's Executive Order. Since the issue of the Executive Order's constitutionality was before the New Jersey Supreme Court at that time, I stayed the hearing on both the County's order to show cause and the State's motion to vacate. On January 6, 1982, the New Jersey Supreme Court unanimously held that the Executive Order was a valid exercise of the Governor's power under the Civil Defense and Disaster Control Law.[55] Following this decision, both parties renewed their motions, and the petitioners moved to hold the County in contempt of the consent judgement. After hearing oral argument, it became clear to me that conditions at the Union County Jail were sufficiently serious to warrant further examination. For this reason, I denied the State's motion to vacate, deferred consideration of the other motions, and appointed a Special Master[56] to investigate the totality of conditions and report back to me.

Within a month, the Special Master issued his report and recommendations.[57] To no one's surprise, he found the Jail severely overcrowded. Originally designed for one person each, the 218 general population cells measured only thirty-nine square feet, approximately twenty-two of which were taken up by a single bed

54. *See supra* note 13.

55. Worthington v. Fauver, 88 N.J. 183, 440 A.2d 1128 (1982).

56. The first Special Master I appointed in this case was former New Jersey Supreme Court Justice Worrall F. Mountain. When he retired, I appointed former New Jersey Supreme Court Justice Sidney M. Schreiber. I am extremely grateful to both for their dedicated work on this case.

57. For a summary of the Special Master's Report, see Union County Jail Inmates v. Scanlon, 537 F. Supp. 993 (D.N.J. 1982), *rev'd sub nom.* Union County Jail Inmates v. Di Buono, 713 F.2d 984 (3d Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984).

and a combination toilet/sink fixture. Nevertheless, these cells were routinely used to house two people. Since each cell contained only one bed, the second cellmate was required to sleep on a mattress placed next to the toilet. This significantly reduced the available night space for each person and, for practical purposes, eliminated all floor space. Available daytime space was not significantly greater. Most of the men's and all of the women's recreation area had been converted into dormitories. When the population was at its peak, the laundry room and law library were similarly utilized. Therefore, the only additional free space was the corridors in front of each tier of cells which were accessible between 6 a.m. and 10 p.m. Even assuming only one person per cell, the corridors only increased the available space by twenty-three to twenty-eight square feet per person.

Such severe overcrowding had other ramifications. The conversion of recreation areas into dormitories substantially reduced, if not eliminated, recreation time for both men and women. Access to the law library was similarly restricted. Visitation privileges were also affected. Prior to the overcrowded conditions, prisoners and detainees were permitted three visits a week, each lasting up to one-half hour. With overcrowding, the visits were limited to between five and ten minutes, and even then, not all prisoners and detainees could be accommodated. Although state law required that clean clothes be provided on a weekly basis and clean towels on a daily one, often this simply could not be accomplished. While not directly related to the overcrowding, medical screening of new prisoners and detainees was nonexistent. Finally, as a result of all these hardships, tensions among the prisoners and detainees increased and frequently escalated into violence.

The Special Master found that these conditions, considered together, impermissibly infringed on the pretrial detainees' due process right to be free from punishment. With respect to the sentenced prisoners, he found that the utilization of floor mattresses in either the general population cells or other parts of the jail constituted cruel and unusual punishment. Thus, he recommended that a maximum jail capacity be set which would require single cell occupancy and reconversion of the temporary dormitories into recreation areas. He also urged that the court order improved visitation privileges, increased recreation time, implementation of medical screening procedures and complete compliance

with the state law requiring the County to regularly distribute clean clothes and towels.

Neither the County nor the State objected to any of the Special Master's findings of fact. However, the State did object to a portion of his proposed remedy. It argued that the maximum population cap was not constitutionally required and that the County should be permitted to equip the general population cells with double-bunks, instead of limiting these cells to one person. I believe this argument missed the point. The general population cells were simply too small to constitutionally accommodate two people, regardless of where these people slept. I rejected the State's objections and adopted the Special Master's recommendations without modification.[58]

On appeal, the Third Circuit reversed my decision.[59] Relying heavily on *Wolfish*[60] and *Rhodes*,[61] it held that double-bunking was not an unreasonable or excessive response to the statewide prison overcrowding emergency. Although the Third Circuit conceded that the totality of conditions in the Union County Jail were substantially worse than those in the modern facilities described in *Wolfish* and *Rhodes*, it emphasized that double-bunking would eliminate the humiliating and unsanitary practice of having prisoners or detainees sleep next to the toilet. Double-bunking would also permit the recreation areas to be reconverted to their original uses. Finally, reassessing the space available in a jail it had never seen, the court claimed there was sufficient available rooms, even after double-bunking, to pass minimum constitutional standards. For these reasons, the court vacated those portions of my order which set a maximum population cap and required the State to remove sentenced prisoners after fifteen days.

Although I strongly disagree with the Third Circuit's decision, I absolutely have and will continue to abide by it. Whether it will serve as a lasting or only temporary setback for prison reform within the Third Circuit is still subject to debate. On the one hand, several developments indicate its ramifications might be limited. First, despite a decision which gave the County permis-

58. *See id.*

59. *See* Union County Jail Inmates v. Di Buono, 713 F.2d 984 (3d Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984).

60. 441 U.S. 520 (1979).

61. 452 U.S. 337 (1981).

sion to continue utilizing an old and overcrowded facility, the County was inspired to build a new one. (It has leased the old Jail to the federal government.) Second, although the petitioner's motion for rehearing was denied, it was denied over a scathing dissent.[62] Judge Gibbons, with whom Judges Higginbotham and Sloviter joined, condemned the panel's decision as a "grossly inhumane and indecent result."[63] Third, in the recent decision *Tillery v. Owens*,[64] another panel of the Third Circuit upheld a district court's order banning double-bunking. Although I find this decision difficult to square with *Union County*, I believe it is a step in the right direction.

On the other hand, the *Union County* decision appears, at least philosophically, to be in tune with the Supreme Court's recent trilogy of cases addressing prison conditions of confinement. It exhibits the substantial deference to the needs of jail officials which was so emphasized in *Rhodes*, *Wolfish*, and most recently, *Wilson v. Seiter*.[65] As a result, it casts a similarly jaundiced eye on the living conditions of both prisoners and pretrial detainees. Of course, it does not address the subjective intent requirement recently announced by the Supreme Court in *Wilson*. Indeed, the impact of the Court's new requirement is still unclear. In any event, the *Union County* decision, which arguably hinders prison reform, could be a harbinger of a slower rate of reform.

B. *Essex County Jail Litigation*

The Essex County litigation involved three jails: the Essex County Jail in Newark, the Green Street holding facilities, also in Newark, and the Essex County Jail Annex in Caldwell. Although the first lawsuit filed in the spring of 1982 involved only the Essex County Jail, by 1987 suits filed against the other two facilities brought all three within my jurisdiction. Overcrowding was the common denominator in each of these complaints. Increasing population levels had made all three facilities virtually uninhabitable. Interestingly, however, I never had to rule on the constitu-

62. Union County Jail Inmates v. DiBuono, 718 F.2d 1247, 1248 (3d Cir. 1983) (Gibbons, J., with whom Higginbotham and Sloviter, JJ., join, dissenting from the denial of rehearing).

63. *Id.* at 1258.

64. 907 F.2d 418 (3d Cir. 1990).

65. *See* Wilson v. Seiter, 111 S. Ct. 2321 (1991); Rhodes v. Chapman, 452 U.S. 337 (1981); Bell v. Wolfish, 441 U.S. 520 (1979).

tionality of conditions at any of the three facilities. Instead, I appointed very capable Special Masters[66] who were able to resolve all of the cases through consent decrees and to obtain compliance thereafter through supervision which continues today.

In 1982, when the first of the Essex County suits was filed,[67] the County Jail regularly housed approximately 250 sentenced state prisoners and 450 pretrial detainees, greatly exceeding its design capacity of approximately 594 people. Most of the Jail consisted of tiers of single cells in which the County housed those prisoners it considered most dangerous. Because of this special use, these cells were never overcrowded. To accommodate the remainder of the population, however, a large number of prisoners were housed in dormitories on the second floor of the Jail. Others slept in day rooms, on tables where meals would later be served, or on the floor. Often, these areas were so noisy and congested that they resembled a subway station at rush hour. The constant crush of people also meant that violence among the detainees and prisoners could easily be hidden from the view of the guards.

Overcrowding had other ramifications. The classification system had broken down to the point where it was almost meaningless. The most dangerous prisoners or detainees were placed in the single cell tiers, if space was available. Everyone else was put in the general population. Similarly, the overwhelming demands placed on the small medical staff resulted in little meaningful medical screening for incoming prisoners and detainees. The one gym in the building rarely could be used for recreation because there was simply no staff available to supervise such activities. Furthermore, when the population climbed to 800, the gym was converted to a dormitory. Supplies were also limited. Prisoners shared razors and many did not have toothbrushes.

Overcrowding and its ramifications, however, were not the Jail's only problems. The facility's physical condition was simply very poor. For instance, the plumbing was so corroded that water and sewage dripped from the ceilings in the dormitories, thereby short circuiting lighting fixtures and causing further infestation of

66. Over the course of this litigation I have been grateful for the very able assistance of several special masters including: John Degnan, formerly New Jersey Attorney General; Robert Del Tufo, presently New Jersey Attorney General; Sidney Reitman, Esq.; James R. Zazzalli, formerly New Jersey Attorney General and presently Chairperson of the State Commission of Investigations; and Bennet D. Zurofsky, Esq.

67. *See* Essex County Jail Inmates v. Collier, Civil Action No. 82-1945 (D.N.J. 1982).

a variety of pests. There was no smoke alarm or sprinkler system in the building and there was no evacuation plan or secure holding area in the event of an emergency. Food was prepared on the premises in an unsanitary kitchen. Finally, the special cells for prisoners with psychiatric problems were dark, padded, and without plumbing. Evidence indicated that prisoners in these cells had to urinate in paper cups and defecate on paper plates.

In short, conditions in the Essex County Jail fell far short of the most minimal standards of humane treatment for prisoners, much less for pretrial detainees. Through the assistance of the Special Master, the Public Advocate's Office of Inmate Advocacy, which represented the prisoner and detainee petitioners, was able to reach a settlement with Essex County and the State, both of which were parties to the suit. The settlement was embodied in the first consent judgment which was filed in October, 1982. Pursuant to the terms of this agreement, the State began to remove its prisoners and the population at the County Jail began to decline. The County began making some repairs, particularly to the plumbing, and improvement was effected in many areas as the population declined. It soon became apparent, however, that the improvements at the County Jail came at the expense of other parts of the jail system.

As part of its effort to meet the population cap in the first consent order, the County started accepting fewer prisoners from the City of Newark. These prisoners were, in turn, backed up in the various holding cells across the City that were intended, at most, for overnight use. The Green Street holding cells—named for their location in the basement of police headquarters on Green Street in Newark—consisted of fifty cells for men and eight for women. Although the facility was relatively new, it had been built without adequate fire safety, security, or shower facilities. To supplement the Green Street facility, each precinct house had a few tiers of cells, most of which were about seventy years old and in extreme disrepair. It had been the City's intention to stop using the precinct cells when the new cells were constructed at Green Street. Of course, overcrowding quickly defeated that good intention.

By 1984, when then Assistant Attorney General William Bradford Reynolds filed suit,[68] there was a terrible back-up of

68. *See* United States v. City of Newark v. County of Essex, Civil Action No. 84-433

prisoners in the Newark system. Green Street had been built to hold fifty male prisoners, one to a cell. Therefore, each cell, which was approximately sixty-five square feet, had one commode and one bench attached to the wall. The bench served as a bed and had one mattress. Instead of holding fifty detainees, the Green Street facility held around 200, meaning that most cells housed four people. At best, this meant that one slept on the bench, a second got the mattress, and two slept on the floor. Often, however, a dominant detainee would get both the bench and the mattress. There were no sheets, and fewer blankets than detainees. Often, blankets were not washed between detainees. The detainees themselves were not permitted to routinely shower or bathe. Although they were often held for two or more weeks awaiting admission to one of the County facilities, detainees were permitted to shower only upon arrival and departure. Food preparation and distribution was also inadequate. Aside from the poor quality and unsanitary distribution methods, jail officials made no effort to determine that each detainee actually received the food that was allocated to him. Indeed, testimony indicated that the stronger detainees often told the new or weak ones that "this is Ramadan[69] for you," meaning that they had to fast while others ate their food.

In many ways, the Green Street case presented the most interesting litigation of the three Essex cases. The federal government sued the City which in turn sued the County. Since the County was already in litigation with the Public Advocate's office as well as the New Jersey Department of Corrections over conditions at the County Jail, these agencies had a de facto presence in the settlement discussions. As with the other cases, there was really little disagreement among the involved parties over what the problems were and how they might be corrected. Everyone knew the conditions were dangerous for the staff as well as for the detainees. Nevertheless, it took a long series of negotiations as well as many days of hearings in front of the special masters before the Green Street litigation was settled.

One of the first improvements was the creation of a more efficient arraignment and initial processing system in the state

(D.N.J. 1984).

69. Ramadan is the ninth month of the Islamic calendar during which there is a daily fast from dawn until sundown.

courts. Although the state courts were not a party to the case, they undertook this action voluntarily to ease the crisis.[70] The County also agreed to accept the prisoners it was obligated to house under state law and to finance renovations at Green Street so that detainees could be constitutionally housed there for more than a few hours.

Reaching an agreement, however, was just the beginning of the solution. Two contempt applications were filed before compliance with the agreement was finally reached. Eventually, the population was reduced to an appropriate level. Fire safety and other improvements were also made such that constitutional conditions were attained for short-term confinement. Today, Green Street is the only one of the three Essex facilities where there is full compliance with my orders.

Once the County started removing detainees from the Green Street facility, its own jail population once again grew to unacceptable levels. This led not only to serious non-compliance with the County Jail Consent Judgment but also to overcrowding at the third Essex facility, the Jail Annex. Built toward the end of the nineteenth century with a "New Wing" added in the 1920's, the Annex suffered from age. Its design was unsafe by today's standards and much of its infrastructure was failing. For example, many of the sewage pipes were improperly attached to the drain pipes in the floor and sinks. As a result, sewage dripped in the vicinity of the food storage and preparation areas. The dining areas reeked with the pollutant's sickening stench. The infirmary resembled a Civil War facility and many of the housing areas were dark, damp, and poorly ventilated. The "New Wing" was the worst portion of the Annex. Indeed, conditions there deteriorated to a point where the County ultimately closed the wing, thereby eliminating almost 200 prison beds.

As was true at the County Jail, overcrowding both exacerbated and multiplied these problems. Although the County constructed some "Relocatable Confinement Facilities" which are essentially movable cells, there was still a shortage of beds. This problem became particularly acute after the "New Wing" was shut down. As a result, many prisoners and detainees were forced to sleep in corridors, vestibules, and other common areas. Proper sanitation, which would have been difficult to achieve even under normal cir-

70. Of course, I believe the threat of sanctions helped too.

cumstances, became nearly impossible. Medical care also suffered. In short, conditions which were already poor only worsened.

The Public Advocate's Office brought a number of contempt applications against the County for conditions at the County Jail and, in 1987, brought suit challenging the conditions at the Annex.[71] These contempt applications, as well as the Annex lawsuit, were finally settled by consent. Both sides seemed to have an incentive to negotiate. The County sought to delay or avoid the contempt sanctions they knew were probable if the contempt applications proceeded to trial and the Public Advocate's Office sought detailed agreements, codifying as much of jail administration as possible. The result was consent judgments that are far more detailed than anything I would have been able to order had I adjudicated the case and found the conditions unconstitutional.

In addition to the imposition of compliance deadlines and setting preestablished fines for noncompliance, these consent judgments require the implementation of numerous reforms. In particular, they set population caps at both the County Jail as well as the Annex and have resulted in the creation of a bail fund to release low-bail pretrial detainees when the caps are exceeded.[72] The bail bond program is a remedy I ordered most reluctantly and only after years of the County's continuing noncompliance with the population caps. Pretrial detainees bailed out by the program are checked more vigorously than other bailees. Although the State does not keep records from which it can be easily determined how many bailees are rearrested or fail to appear for trial, my Bail Administrators and myself believe that the recidivism and nonappearance rates have been relatively low.

The combination of the population caps and the bail fund program has also served as a catalyst for the County to agree to other significant reforms. The most recent consent judgment, executed in January 1990, required the County to spend more than twelve million dollars for numerous structural improvements, including the construction of approximately 400 new cells, the installation of two much needed elevators at the main jail, and the installa-

71. *See* Essex County Jail Annex v. Amato, Civil Action No. 87-871 (D.N.J. 1987).

72. Douglas Eakeley, who was later the First Assistant Attorney General of New Jersey, was my first Bail Fund Administrator. When he resigned to take his position at the Attorney General's Office, I appointed Micheal Cole, who was previously First Assistant Attorney General of New Jersey and Counsel to Governor Kean, to replace him. Both worked tirelessly on this project to ensure its fair administration.

tion of sprinklers, smoke alarms, and fire exits at both the County Jail and the Annex. The County has also agreed to upgrade the medical services and to hire more medical staff. In addition, it is beginning to implement a residential drug treatment program and is working with the Vera Institute to design a bail bond program where certain pretrial detainees would be released to an intensely supervised bail program.

The County has taken significant strides toward compliance with the consent judgments. These reforms, in turn, have greatly improved the quality of the conditions at the Essex County facilities. I hope that when the current construction is completed, the bail programs will no longer be necessary.

C. *The Monmouth County Litigation*

The Monmouth litigation[73] began in January, 1983, as a result of numerous complaints filed by both prisoners and pretrial detainees at the Monmouth County Correctional Institution ("MCCI"). These complaints, which were consolidated for trial, recited a familiar pattern of deficiencies, most of which resulted from the same core problem—overcrowding. MCCI was a relatively modern facility built to hold approximately 300 people. At the time the cases were consolidated, it was housing approximately twice that number. The results were not surprising. Prisoners and detainees were jammed into dormitory facilities and double and triple-bunked in cells designed for a single person. Even with these measures, large numbers of prisoners and detainees were forced to sleep on the floors of cells, hallways, anterooms, day rooms, and virtually every other location where bodies could be placed. Although mattresses were available for most people, some prisoners and detainees received only torn and tattered blankets.

As was true in the Essex County facilities, the severe overcrowding caused other problems. The classification system broke down to the point where it was virtually nonexistent. As a result, numerous assaults, rapes, and other indignities occurred. Suicide attempts, too many of which were successful, were not infrequent. Medical care also suffered; there were simply not enough doctors to properly examine all inmates who needed attention and the

73. Monmouth County Correctional Inst. Inmates v. Lanzaro, Civil Action No. 82-1924 (D.N.J. 1982).

nursing staff could not adequately provide twenty-four-hour care for those whose conditions warranted it. Medical supplies were in high demand, but often in short supply. Basic maintenance also lapsed. Light fixtures routinely went unrepaired. The plumbing and shower facilities often failed and rats, lice, and cockroaches abounded. In summary, the conditions of confinement at MCCI were horrendous.

Having appointed a Special Master[74] to investigate the petitioners' consolidated complaint, my next priority was to reduce the number of people sleeping on the floor in various parts of the facility. Although this would appear to have been a reasonable concern, in actuality it became a hotly contested issue because the County simply did not know how it could house all the prisoners and detainees within its control if the floor was not an option. Nevertheless, in the fall of 1983, I entered an interim order precluding any pretrial detainee from sleeping on the floor with or without a mattress for more than forty-eight hours. Similarly, prisoners were prohibited from sleeping on the floor for more than two weeks. The pressure of the litigation, particularly in light of my orders, also encouraged the State to begin removing some of the sentenced prisoners, thereby reducing the population and alleviating some of the stress on the other parts of the system.

Despite extensive negotiations, the parties were never able to reach a final agreement. Therefore, the Special Master concluded his evidentiary hearings and issued his report and recommendations. After reviewing his report and the evidence he had gathered, I ordered several remedial measures.[75] First, I prohibited any prisoner or detainee from sleeping on the floor without a mattress. Sleeping on the floor with a mattress was limited to extreme emergencies and, even then for only short periods of time. Second, I required that each prisoner and detainee be given one hour of meaningful recreation per day in an enlarged space away from their sleeping area except in the most inclement weather. Since there was no indoor recreation space available at that time, I also ordered the County to investigate how some could be cre-

74. My special master for the Moumouth case is James R. Zazzalli, formerly New Jersey Attorney General and presently Chairperson of the State Commission on Investigations. I am very grateful for his splendid efforts on behalf of this court.

75. *See* Monmouth County Correctional Inst. Inmates v. Lanzaro, 695 F. Supp. 759 (D.N.J. 1988), *amended and clarified*, 717 F. Supp. 268 (D.N.J. 1989).

ated. Third, I ordered the County to develop and implement a classification system that actually separated the violent prisoners or detainees from the less aggressive as well as one that separated sentenced prisoners from pretrial detainees. Fourth, I required the County to substantially increase the visiting opportunities for friends and families by expanding visiting hours and the number of available visitor booths. Fifth, I ordered an increase in the staffing levels of the doctors and nurses and an expansion of the medical services they provided. To make this order feasible, I also ordered an increase in their salaries. Sixth, I required the installation of smoke detectors and other life saving devices as well as improvements to the lighting fixtures, plumbing, and physical plant of the institution. Seventh, to ensure that the six prior remedies were possible, I set the maximum population capacity of the jail at 304.

As with the Essex cases, the litigation did not end with my final order. Instead, I retained jurisdiction and required the Special Master to make periodic reports on the County's progress in implementing my order. Although progress was steady, some problems occurred. In the fall of 1987, contempt proceedings were instituted. Petitioners accused the County of exceeding the court-ordered population limit which in turn adversely affected other parts of MCCI. Notwithstanding the substantial improvements which had been made, I considered this violation serious enough to warrant a prospective fine of $100 per day per prisoner or detainee over the population cap. The threat of sanctions appears to have been a sufficient motivation to reduce the population. No fines have ever been assessed, and both the County and the State have diligently endeavored to adhere to the population limit ever since.

Today, compliance has been substantially achieved. A new medical team was hired for the institution which has dramatically improved the delivery of medical services. Both prisoners and detainees are now given comprehensive medical screening upon entry into MCCI, and are also provided with extremely competent and qualified care throughout the course of their confinement.[76]

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76. In addition to the improvements to medical care that I have already mentioned, I later enjoined MCCI from requiring pregnant prisoners and pretrial detainees who seek abortions to acquire court-ordered release from confinement and obtain private medical care. Instead, I ordered MCCI to provide all necessary medical care relating to pregnancy, including pregnancy testing, counseling, and, when requested, abortions. *See* Monmouth

A state-of-the-art medical wing was built which easily accommodates the number of prisoners and detainees permitted under the revised population capacity. Additional nursing staff has been hired to ensure that twenty-four-hour coverage is provided. An effective inmate classification system has been implemented and visitation privileges have increased. Recreational opportunities have improved. A comprehensive renovation of the physical plant has also taken place.

In addition, the prod of federal litigation has resulted in some other welcome, but unexpected, improvements. The Union County Freeholders funded and built new state-of-the-art additions to MCCI to house an ever-expanding population. Although new prisoners and detainees quickly filled up the new spaces to a degree where double-bunking was required, no one has ever claimed that the conditions of confinement even remotely approached those which existed at the time the litigation commenced. As the population continues to grow, however, it appears that even more space will eventually be needed. Very recently, the County hired consultants to plan the construction a new jail. Although a new facility would double the amount of jail space presently available, with an estimated cost of $47,000,000, it will not be cheap. At present, the County has not decided whether it will proceed with this plan.

CONCLUSION

Fyodor Dostoevsky once observed that "[t]he degree of civilization in a society is revealed by entering its prisons."[77] I believe this is true, yet I recognize that federal courts can play only a limited role in improving our social standards. The boundaries of this role are captured best by Justice Powell's perceptive words: "[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."[78] Of course, how those constitutional guarantees are defined will de-

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County Correctional Institutional Inmates v. Lazaro, 643 F. Supp. 1217 (D.N.J. 1986).

77. F. DOSTOEVSKY, THE HOUSE OF THE DEAD 76 (C. Garnett trans. 1957).

78. Procunier v. Martinez, 416 U.S. 396, 405-06 (1973), *overruled by* Thornburgh v. Abbott, 490 U.S. 401, 411, 413-14 (1989).

pend on the continuing interplay between Supreme Court precedent and changing prison conditions of confinement. I do believe, however, that federal courts have a role in ensuring that these rights are met in our nation's prisons, jails, and detention centers.