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SETTLING THROUGH CONSENT DECREE IN PRISON REFORM LITIGATION: EXPLORING THE EFFECTS OF *RUFO V. INMATES OF SUFFOLK COUNTY JAIL*

INTRODUCTION

The 1954 United States Supreme Court ruling in *Brown v. Board of Education*¹ triggered an upsurge in institutional reform litigation.² In this type of litigation, parties sue the government or a public institution to obtain injunctive relief against continuing statutory or constitutional violations.³ The courts, however, have encountered problems and criticism in this area while effectuating change through judicially imposed remedies.⁴ In recent years, parties have turned to consent decrees⁵ as a means of resolving disputes against

¹ 347 U.S. 483 (1954).

² See *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 758 (1992).

³ Institutional reform litigation is also referred to as structural reform litigation and public law litigation. See Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1357 (1991). Examples of this type of litigation include prison reform, school desegregation, environmental conditions and electoral reapportionment. *Id.* For a general discussion of institutional reform litigation, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265.

⁴ See, e.g., Malcolm M. Feeley & Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature*, in COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS 12, 16–42 (John J. Dilulio, Jr. ed., 1990) (noting criticism of adjudicatory system in institutional reform litigation and need for alternative means of dispute resolution in this area); Sturm, *supra* note 2, at 1357, 1427–44 (noting that traditional adversarial methods are not adequate in public law litigation and suggesting an alternative model of remedial decision making that stresses a participatory process).

⁵ A consent decree represents a formal settlement between two parties that is approved by a judge. A consent decree is defined as follows:

[A] decree entered in an equity suit on consent of both parties; it is not properly a judicial sentence, but is in the nature of a solemn contract or agreement of the parties, made under the sanction of the court, and in effect an admission by them that the decree is a just determination of their rights upon the real facts of the case, if such facts had been proved. It binds only the consenting parties; and is not binding upon the court.

BLACK'S LAW DICTIONARY 411 (6th ed. 1990).

For a general discussion of consent decrees, see Symposium, *Consent Decrees: Practical Problems and Legal Dilemmas*, 1987 U. CHI. LEGAL F. 1 (discussing the hybrid nature of consent decrees as part contract and part judicial act); Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 729–37 (1986) (discussing structure and terms typically contained in a consent decree); Clark E. Walter, *Consent Decrees and the Judicial Function*, 20 CATH. U. L. REV. 312, 315–27 (1970) (discussing use and benefits

public institutions.⁶ Consent decrees allow parties to avoid the high cost and lengthy process of litigation by reaching a negotiated compromise embodied in the terms of the consent decree.⁷ Consent decrees conserve scarce judicial resources by promoting alternative means of dispute resolution.⁸ In addition, parties with expert knowledge in the area can tailor terms to their satisfaction in a way that a comparatively inexpert court could not.⁹

Consent decrees are especially prevalent in the area of prison reform litigation.¹⁰ Currently, over thirty states are operating penal facilities under consent decrees.¹¹ These decrees often impose affirmative obligations on prison administrators to maintain population caps and single-occupancy cells.¹² Although these decrees represent a bargained-for agreement between the parties that reflects contractual obligations, they are future-oriented orders that are overseen and enforced by a federal judge.¹³ With the rampant rise in

of consent decrees in antitrust litigation); Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 HARV. L. REV. 1314, 1316-24 (1959) (discussing the enforcement and judicial effect of consent decrees).

⁶ Settlement by consent decree occurs in many areas of institutional reform litigation. See Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1020-21 (1986) [hereinafter *Modification of Consent Decrees*] (noting that plaintiffs have employed consent decrees to resolve disputes over school desegregation, zoning, prison conditions, discriminatory civil service exams, special education programs, toxic waste litigation and public mental health institutions).

Settlement by consent decree is also widespread in areas other than institutional reform, such as securities and antitrust litigation. See Timothy Stolfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1102-03 (1986) (noting that in recent years over 70% of Justice Department antitrust cases and 90% of SEC cases were resolved by consent decrees); Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 HARV. L. REV. 1303, 1304-05 (1967) (noting that consent decrees in antitrust cases are resolved more efficiently than litigated cases).

⁷ See *Local 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 528 (1986); *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971); Amicus Curiae Brief of the Center for Dispute Settlement at 5, *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (No. 90-954).

⁸ Brief for United States as Amicus Curiae at 11, *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (No. 90-954).

⁹ *Kozlowski v. Coughlin*, 871 F.2d 241, 247 (2d Cir. 1989).

¹⁰ See LACY H. THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, NATIONAL PRISON CONDITIONS LITIGATION SURVEY 4-13 (1991) [hereinafter PRISON SURVEY]; THE NATIONAL PRISON PROJECT, STATUS REPORT: THE COURTS AND PRISONS 1 (1990) [hereinafter PRISON PROJECT].

¹¹ PRISON PROJECT, *supra* note 10, at 2.

¹² See PRISON SURVEY, *supra* note 10, at 6. The Survey reports that out of 47 states, 14 are under mandates that impose population caps, and 9 states have orders prohibiting double celling. *Id.*

¹³ *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 757 (1992). A claimant seeking relief from a consent decree must move for modification by filing a motion under rule

inmate population over the last ten years,¹⁴ prison administrators have found compliance with these decrees difficult and have frequently sought modification by appealing to the courts.¹⁵

The United States Supreme Court first enunciated the standard for modification of consent decrees in the 1932 case of *United States v. Swift & Co.*¹⁶ In *Swift*, the Court held that a party seeking modification must demonstrate "a clear showing of grievous wrong" in order to modify a consent decree.¹⁷ In subsequent decades, the Court avoided overruling *Swift* but drew from language of *Swift* that recognized the nature of a consent decree as part contract and part judicial act in order to grant modification in some cases.¹⁸ The Court also distinguished *Swift* on its facts to grant modification in other cases.¹⁹ Although the Supreme Court resisted overruling the strict *Swift* standard, many circuit courts moved away from *Swift* in recent years, adopting a more flexible standard for modification in the area of institutional reform litigation.²⁰ These courts justified the use of a more flexible standard by noting that the complex, future-oriented nature of these decrees often adversely affects the public interest as unforeseen impediments arise.²¹

60(b)(5) of the Federal Rules of Civil Procedure, which leaves the ultimate decision on modification up to the judge's equitable discretion. *Id.* Rule 60(b)(5) states in pertinent part, "the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for any of the following reasons . . . it is no longer equitable that the judgment should have prospective application." FED. R. CIV. P. 60.

¹⁴ As of January 1, 1991, 732,236 inmates were confined in state and federal prisons. CRIMINAL JUSTICE INSTITUTE, *THE CORRECTIONS YEARBOOK: INSTANT ANSWERS TO KEY QUESTIONS IN CORRECTIONS 1* (1991). This represents an increase of 8.7% over the previous year. *Id.*

¹⁵ See *Prison Survey*, *supra* note 10, at app. at B11. The Survey reports that eight states have sought modification of consent decrees in recent years. *Id.*; see also NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION* 13-14 (1990) (noting prison administrators' difficulty adhering to population caps).

¹⁶ 286 U.S. 106 (1932).

¹⁷ *Id.* at 119.

¹⁸ See *Local 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 519 (1986); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 (1975); *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971).

¹⁹ See *Board of Educ. v. Dowell*, 111 S. Ct. 630, 636-37 (1991); *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248-49 (1968).

²⁰ See, e.g., *Heath v. De Courcy*, 888 F.2d 1105, 1110 (6th Cir. 1989); *Badgely v. Santacrocce*, 853 F.2d 50, 53 (2d Cir. 1988); *Plyler v. Evatt*, 846 F.2d 208, 215 (4th Cir. 1988), *cert. denied*, 488 U.S. 897; *Newman v. Graddick*, 740 F.2d 1513, 1520 (11th Cir. 1984); *United States v. City of Chicago*, 663 F.2d 1354, 1359-60 (7th Cir. 1981) (en banc); *Philadelphia Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1120-21 (3d Cir. 1979).

²¹ See *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969 (2d Cir. 1983).

Consent decrees also raise federalism problems when a federal court is faced with the decision to either modify or enforce the provisions of these decrees against state governments.²² The Supreme Court has recently questioned the federal courts' continued enforcement of equitable decrees as a potential encroachment on state or local government autonomy in institutional reform litigation.²³ This problem is particularly acute in the area of prison reform litigation, where the Court has often recognized that federal courts must defer to local legislative and executive administrators to respect state sovereignty and the principle of separation of powers.²⁴ In light of the Court's recent trend toward cutting back on judicial oversight of prison affairs,²⁵ many states have addressed prison overcrowding themselves by exploring alternative sanctions to incarceration.²⁶

In the 1992 case of *Rufo v. Inmates of Suffolk County Jail*, the United States Supreme Court held that the *Swift* standard for modification of consent decrees does not apply in institutional reform litigation.²⁷ *Rufo* involved a consent decree signed in 1979 that required, among other things, single-occupancy cells at the Suffolk County Jail in Boston, Massachusetts.²⁸ The Suffolk County Sheriff sought modification of the decree due to an unexpected rise in inmate population, but the United States District Court for the District of Massachusetts refused modification, relying in large part on *Swift*.²⁹ The district court's decision was affirmed by the United States Court of Appeals for the First Circuit.³⁰ The United States Supreme Court granted certiorari to consider whether a more flexible standard for modification of consent decrees was appropriate in institutional reform litigation.³¹ The Court determined that the *Swift* standard was not appropriate in institutional reform litigation

²² See Alan Effron, Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 COLUM. L. REV. 1796, 1808-10 (1988).

²³ See *Dowell*, 111 S. Ct. at 637.

²⁴ See *Turner v. Safley*, 482 U.S. 78, 84-85 (1987); *Pell v. Procunier*, 417 U.S. 817, 827 (1974); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974).

²⁵ See Peter Keenan, *Constitutional Law: The Supreme Court's Recent Battle Against Judicial Oversight of Prison Affairs*, 1989 ANN. SURV. AM. L. 507, 507-08 (1991).

²⁶ See MORRIS & TONRY, *supra* note 15, at 48-69.

²⁷ 112 S. Ct. 748, 760 (1992).

²⁸ *Id.* at 755.

²⁹ See *Inmates of Suffolk County Jail v. Kearney*, 734 F. Supp. 561, 565 (D. Mass. 1990) (district court refused modification request under the *Swift* standard).

³⁰ *Inmates of Suffolk County Jail v. Kearney*, 915 F.2d 1557 (1st Cir. 1990).

³¹ *Rufo v. Inmates of Suffolk County Jail*, 111 S. Ct. 950 (1991).

because these decrees must be open to fine-tuning as changed circumstances unfold.³² The Court's new standard allows for modification if the movant can demonstrate that a change in operative law or factual circumstances has occurred that makes compliance onerous.³³ The Court cautioned, however, that the modification must be "suitably tailored" to the changed circumstances to ensure that the finality of the original agreement is preserved.³⁴

This Note will explore the problems courts have faced in institutional reform litigation when faced with requests for modification of consent decrees. In particular, the Note focuses on the *Rufo v. Inmates of Suffolk County Jail* decision and its potential effects on consent decrees in the context of prison reform litigation. Section I examines the evolution of the Supreme Court's consent decree modification doctrine leading up to the *Rufo* case.³⁵ Section I focuses specifically on the Court's consideration of the nature of consent decrees³⁶ as well as the federalism concerns that consent decrees have engendered over the years.³⁷ Section II discusses the development of a more flexible standard for consent decree modification among the circuit courts and notes inconsistencies that emerged among the circuits.³⁸ Section III focuses on the *Rufo* case itself and examines the new flexible standard that the Court adopted.³⁹ Section IV suggests that the Court's new standard will invite prison administrators nationwide to use the current prison overcrowding crisis as a justification for modification of consent decrees that impose population caps.⁴⁰ Section IV argues that this unfortunate trend toward allowing modification in the prison context threatens to undermine significant remedial changes parties have realized through consent decrees and endangers the continued utility of consent decrees as an important means of settlement.⁴¹ Section V focuses on the prison overcrowding problem in Massachusetts as a case study representative of what is occurring in most other states, and suggests that the legislature is largely responsible for the cur-

³² *Rufo*, 112 S. Ct. at 758.

³³ *See id.* at 760.

³⁴ *See id.* at 763.

³⁵ *See infra* notes 44-128 and accompanying text.

³⁶ *See infra* notes 44-102 and accompanying text.

³⁷ *See infra* notes 103-28 and accompanying text.

³⁸ *See infra* notes 129-69 and accompanying text.

³⁹ *See infra* notes 170-257 and accompanying text.

⁴⁰ *See infra* notes 263-85 and accompanying text.

⁴¹ *See infra* notes 286-94 and accompanying text.

rent crisis.⁴² To alleviate this crisis, and to ensure the utility of consent decrees as a means of settlement in the future, Section V concludes by urging that the Massachusetts legislature pass an important sentencing reform bill currently before it.⁴³

I. SUPREME COURT HISTORY: CONSENT DECREES

A. *Standards for Modification: The Swift Standard*

In 1932, the United States Supreme Court held in *United States v. Swift & Co.* that modification of consent decrees required a "clear showing of grievous wrong evoked by new and unforeseen conditions."⁴⁴ In *Swift*, an antitrust case, a group of meatpacking companies who faced dissolution and criminal proceedings entered into a consent decree in 1920 that enjoined them from maintaining a monopoly.⁴⁵ Specifically, the consent decree prohibited them from engaging in the sale and transport of certain food products.⁴⁶ Ten years later, the defendants sought modification of the decree to allow them to engage in the sale of these same food products.⁴⁷ The company argued that the decree had not only served its purpose, as they were no longer dominant forces in the industry, but had become "oppressive."⁴⁸

The Court, in an opinion by Justice Cardozo, denied their request for modification.⁴⁹ In so doing, Justice Cardozo expounded on the nature of a consent decree.⁵⁰ First, he noted an important distinction between decrees "that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative."⁵¹ Having made the distinction, Justice Cardozo then rejected the argument that either type of consent decree represents a contract.⁵² Although he noted that what was agreed upon should not be "lightly

⁴² See *infra* notes 295-307 and accompanying text.

⁴³ See *infra* notes 307-18 and accompanying text.

⁴⁴ 286 U.S. 106, 119 (1932).

⁴⁵ *Id.* at 110-11.

⁴⁶ *Id.* These food products included fish, vegetables, fruit and groceries. *Id.*

⁴⁷ *Id.* at 113.

⁴⁸ See *id.*

⁴⁹ *Id.* at 120.

⁵⁰ See *id.* at 114-15.

⁵¹ *Id.* at 114.

⁵² *Id.* at 115.

undone,"⁵³ he stated that a consent decree is to be treated as a judicial act that the Court has inherent power to revoke or modify if changing circumstances so dictate.⁵⁴ Justice Cardozo maintained that when a court interprets a consent decree, it should read the consent "as directed toward events as they then were" but noted that future revision should be granted if "necessary in adaption to events to be."⁵⁵

After determining the nature of a consent decree and establishing the Court's power to enforce it, Justice Cardozo elaborated on a court's role when faced with a request for modification.⁵⁶ He noted that changes occur in all businesses over time and cautioned against the temptation to "reverse under the guise of readjusting."⁵⁷ The court's inquiry, he noted, was whether the changes since the decree was entered have rendered the dangers the decree sought to prevent "attenuated to a shadow."⁵⁸ The *Swift* Court held that modification of a consent decree was only appropriate under a "clear showing of grievous wrong evoked by new and unforeseen conditions."⁵⁹

B. Supreme Court Developments Regarding Consent Decrees After Swift

In the years following *Swift*, the Court clarified what constitutes a "change in circumstance" that would allow for modification.⁶⁰ In the 1961 case of *System Federation No. 91 v. Wright*, the Court held that a subsequent change in the law that conflicts with the terms of a consent decree justifies modification.⁶¹ In *Wright*, a railroad union charged with violating the Railway Labor Act⁶² entered into a consent decree with nonunion employees that prohibited the establishment of a union shop, a restriction contained in the Railway Labor Act at that time.⁶³ Six years later, Congress amended the Railway Labor Act to permit the establishment of a union shop.⁶⁴ The union

⁵³ *Id.* at 120.

⁵⁴ *Id.* at 114.

⁵⁵ *Id.* at 115.

⁵⁶ *See id.* at 119.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *See System Fed'n No. 91 v. Wright*, 364 U.S. 642, 647 (1961).

⁶¹ *Id.* at 651.

⁶² 45 U.S.C. § 152 (1988).

⁶³ *Wright*, 364 U.S. 644-45.

⁶⁴ *Id.* at 644.

moved to modify the consent decree due to the change in law, but the district and circuit courts denied the request.⁶⁵

The Supreme Court reversed the lower court's decision, granting modification and citing *Swift* for the proposition that modification is proper if the claimant can show significant changes in law or fact have occurred that have rendered the consent decree "an instrument of wrong."⁶⁶ The Court held that in this case the Railway Act was the source of the consent decree, not the agreement of the parties, and because the law governing the decree had changed to conflict with the consent decree, the Court should grant modification.⁶⁷ The Court thus clarified *Swift* by noting that changed circumstances that may lead to modification include both changes in law and changes in fact.⁶⁸ The Court also noted that a change in law, as opposed to fact, was a particularly compelling reason to modify a consent decree.⁶⁹

C. Inconsistencies That Remained

In the years since *Swift*, the Supreme Court has ruled inconsistently in its treatment of both the nature and proper means of interpreting a consent decree when faced with requests to modify these decrees.⁷⁰ Despite Justice Cardozo's unwillingness to accept consent decrees as contracts, the Court has since recognized that "consent decrees are treated as contracts for some purposes but not for others."⁷¹ Consequently, in certain circumstances the Court has adopted a contractual approach to consent decrees that promotes the finality of these agreements and assures that the parties bar-

⁶⁵ *Id.* at 644-45.

⁶⁶ *Id.* at 647 (citing *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932)).

⁶⁷ *Id.* at 651.

⁶⁸ *Id.* at 647.

⁶⁹ *Id.* at 648.

⁷⁰ Compare *Chrysler Corp. v. United States*, 316 U.S. 556, 562 (1942) (test for modification is whether proposed modification would thwart overall purpose of consent decree) with *United States v. Armour Co.*, 402 U.S. 673, 681-82 (1971) (refusing to look at overall purpose of consent decree when considering modification).

Commentators have not responded favorably to the Court's inconsistent treatment of the nature of consent decrees. See, e.g., Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 300 (1988). In determining whether consent decrees should be interpreted as contracts or as judicial acts, Mengler states, "the Court has said nothing useful for the lower courts, unless one thinks providing a grab-bag of options is useful." *Id.*

⁷¹ *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 237 n.10 (1975).

gained-for agreements will remain undisturbed.⁷² On other occasions, however, the Court has eschewed the contractual model categorically by refusing to examine the parties' expectations and purposes for entering the decree.⁷³ An examination of two of the most recent Supreme Court cases concerning consent decrees demonstrates the Court's uncertainty about whether a reviewing court should conduct a contractual analysis by attempting to ascertain the purpose of a consent decree.⁷⁴

In the 1984 case of *Firefighters Local Union 1784 v. Stotts*,⁷⁵ for example, the Court held that the lower court committed reversible error by modifying a desegregation consent decree to permit layoffs of white firemen before black firemen when the layoffs of black firemen were appropriate under the applicable provisions of Title VII.⁷⁶ The Court gave two alternative reasons for rejecting the attempted modification.⁷⁷ First, it noted that the decree in *Stotts* provided for an affirmative action hiring plan but did not specify that recently hired blacks should have protection from layoffs under the city's seniority system.⁷⁸ The Court stated that modification was improper because the consent decree contained no mention of the appropriate seniority system.⁷⁹ The Court supported this conclusion by relying on an earlier case that strictly construed the terms of a consent decree.⁸⁰ Second, the Court stated that the district court could not enter a modification of the consent decree when the modification would be in conflict with Title VII.⁸¹ The Court reasoned that this conclusion was appropriate given its previous hold-

⁷² See *Local 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 521-22 (1986).

⁷³ *Wright*, 364 U.S. at 651 ("[P]arties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction.").

⁷⁴ Compare *Local 93*, 478 U.S. at 529 (Court looks to the purposes of the parties to determine whether consent decree should be modified) with *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574-76 (1984) (Court interprets consent decree literally without reference to the purposes of the parties).

⁷⁵ 467 U.S. 561 (1984).

⁷⁶ *Id.* at 583. The city laid off black firefighters under its seniority system. *Id.* at 566. The United States District Court for the Western District of Tennessee found that the layoffs were not adopted with the intent to discriminate on the basis of race. *Id.* at 577. The Court noted that Title VII protects seniority systems as long as they do not result in intentional discrimination. *Id.* Thus, the Court held that this seniority system was bona fide under Title VII. *Id.*

⁷⁷ See *id.* at 574-76.

⁷⁸ *Id.* at 575.

⁷⁹ *Id.*

⁸⁰ *Id.* at 574 (citing *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)).

⁸¹ *Id.* at 576-77 n.9.

ing in *Wright* that a consent decree should be modified when a change in law brought the terms of a decree into conflict with the statute pursuant to which the decree was entered.⁸²

Justice Blackmun's dissent in *Stotts* criticized the majority for its strict construction of the consent decree and its purpose.⁸³ Justice Blackmun noted that the parties negotiated the consent decree so that the district court judge would have the power to effectuate its purposes.⁸⁴ He described the future-oriented nature of these decrees, noting that they often rely on facts and assumptions that are subject to change.⁸⁵ Justice Blackmun concluded that it was unreasonable for the majority to restrict the purpose of the decree to its terms when the lower court was in the unique position to determine the parties' intent and the purposes that shaped the decree.⁸⁶

Two years later, in *Local 93 International Ass'n of Firefighters v. Cleveland*,⁸⁷ the Court articulated a different view of consent decrees, holding that a court is not barred from entering a consent decree that provides relief that the court could not order after trial under the applicable statutory provision of Title VII.⁸⁸ In *Local 93*, the Court approved a consent decree that required the use of quotas to combat racial discrimination in the Cleveland Fire Department, even though the applicable Title VII provision precluded the use of such quotas as a form of post-trial relief.⁸⁹ The union argued,

⁸² *Id.* Commentators have thus construed the Court's holding narrowly, to apply to interpreting the scope of consent decrees for modification purposes only when they adversely affect Title VII provisions. See *Modification of Consent Decrees*, *supra* note 6, at 1032 & n.79.

⁸³ 467 U.S. at 609 (Blackmun, J., dissenting).

⁸⁴ *Id.* (Blackmun, J., dissenting).

⁸⁵ See *id.* (Blackmun, J., dissenting). In this way, Blackmun was implicitly distinguishing from the situation in *Swift* and alluding to the words of Cardozo. See *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). In *Swift*, Justice Cardozo distinguished between consent decrees "that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative." *Id.*

⁸⁶ See *Stotts*, 467 U.S. at 609 (Blackmun, J., dissenting).

⁸⁷ 478 U.S. 501 (1986).

⁸⁸ *Id.* at 515.

⁸⁹ See *id.* at 513-15. The applicable Title VII provision is section 706(g), which states in pertinent part:

No order of the court shall require the admission or reinstatement of an individual as a member of the union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, sex, or national origin or in violation of section 2000e-3(a) of this title.

42 U.S.C. § 2000e-5(g) (1982).

relying on *Swift*, that a consent decree is a judicial order that cannot conflict with the plain language of Title VII.⁹⁰

The Court disagreed, favoring an interpretation of consent decrees which acknowledged that these decrees have a contractual aspect because they are often arrived at through extensive negotiations between the parties.⁹¹ In thus emphasizing the voluntary nature of a consent decree, the Court maintained that it is the agreement of the parties, rather than the underlying law, that creates the obligations contained in the decree.⁹² The Court also highlighted the importance of consent decrees as a means of settling disputes, thereby conserving judicial resources and avoiding the costs of litigation.⁹³

In his dissent Justice Rehnquist faulted the majority's contractual interpretation of consent decrees as inconsistent with the previous decisions of *Stotts* and *Wright*.⁹⁴ Justice Rehnquist insisted that the scope of a consent decree is not to be determined from the obligations of the parties, but rather from "the federal statute pursuant to which the decree is entered."⁹⁵ In viewing the consent decree as a judicial act, the dissent found it to be an order of the court that was in conflict with the plain language of Title VII.⁹⁶ Finally, the dissent noted its concern with the Court's inconsistent treatment of the nature and scope of consent decrees, contending that the Court in *Local 93* merely repeated dissenting arguments from *Stotts* that had not commanded a majority two years before.⁹⁷

Most recently, in the 1991 case of *Board of Education v. Dowell*,⁹⁸ the Supreme Court reaffirmed the approach taken in *Local 93* to interpreting decrees.⁹⁹ In *Dowell*, the Court held that modification of a desegregation decree was appropriate if the decree had accom-

⁹⁰ *Local 93*, 478 U.S. at 518. Note that if the Court treated the consent decree specifically as an "order," the decree would be in direct conflict with Title VII and, under *Stotts*, would be an improper use of the Court's equitable power. See *Stotts*, 467 U.S. 561, 576-77 n.9.

⁹¹ *Local 93*, 478 U.S. at 519, 521-22.

⁹² *Id.* at 522.

⁹³ See *id.* at 528. The Court has noted the important federal interest in settlement in other contexts. See *Evans v. Jeff D.*, 475 U.S. 717, 732-34 (1986) (noting benefits of settlement in civil rights litigation); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (noting federal interest in resolving disputes through alternative means).

⁹⁴ *Local 93*, 478 U.S. at 536-38 (Rehnquist, J., dissenting).

⁹⁵ *Id.* at 540 (Rehnquist, J., dissenting).

⁹⁶ See *id.* at 545 (Rehnquist, J., dissenting).

⁹⁷ *Id.* at 544 (Rehnquist, J., dissenting).

⁹⁸ 111 S. Ct. 630 (1991).

⁹⁹ See *id.* at 636-37.

plished its purpose.¹⁰⁰ The Court reversed the ruling of the United States Circuit Court of Appeals for the Tenth Circuit that had denied modification.¹⁰¹ Although *Dowell* involved a desegregation decree rather than a consent decree, the Court, in an opinion written by Chief Justice Rehnquist, expressed its willingness to distinguish *Swift* and to look beyond the terms of the decree itself to the purpose of the decree.¹⁰²

D. Federalism Problems with Consent Decrees in Institutional Reform Litigation

In *Dowell*, the Court also commented on the federal courts' equitable powers in granting injunctive relief against state or local governments.¹⁰³ The Court in *Dowell* cautioned that when remedying constitutional violations, federal court decrees must directly address the constitutional violation itself.¹⁰⁴ This requirement stems from the 1977 case of *Milliken v. Bradley*,¹⁰⁵ where the Court held that a federal court decree must be directed at eliminating a condition that violates the constitution or "flows from such a violation."¹⁰⁶ The petitioners in *Milliken* challenged a remedial order designed to cure constitutional violations; the order required the state to adopt certain educational programs as part of a desegregation plan.¹⁰⁷ The Court rejected the petitioners' argument that the remedial order exceeded constitutional requirements and upheld the decree.¹⁰⁸ The Court cautioned, however, that when courts find a constitutional violation, they must tailor the remedy to cure only that which violates the Constitution.¹⁰⁹ This requirement that federal courts limit injunctive decrees against state and local bodies

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 638.

¹⁰² *Id.* at 636-37.

¹⁰³ *See id.* at 637. The Court in *Dowell* reasoned that if the purpose of the desegregation decree was achieved, continuing the federal courts' jurisdiction would intrude on the discretion of local school authorities, thus implicating "[c]onsiderations based on the allocation of powers within our federal system." *Id.*

¹⁰⁴ *See id.*

¹⁰⁵ 433 U.S. 267 (1977).

¹⁰⁶ *Id.* at 282.

¹⁰⁷ *Id.* at 279.

¹⁰⁸ *Id.* at 291.

¹⁰⁹ *Id.* at 282. The Court said the remedy should be "tailored" to the violation to ensure that federal courts do not intrude on states' administration of their laws. *Id.* at 280-81. This concern is reflected in language nearly identical to *Milliken* in the 1992 case of *Rufo v. Inmates of Suffolk County Jail*. *See infra* note 239 and accompanying text.

to correcting specific constitutional violations reflects a concern that federal courts recognize the "special delicacy . . . to be preserved between federal equitable power and State administration of its own law."¹¹⁰

Moreover, when judging the constitutionality of confinement conditions in prisons, the Court has often warned that federal courts should defer to legislative and executive discretion.¹¹¹ The Court expressly noted this deference as an important factor in *Bell v. Wolfish*¹¹² and *Rhodes v. Chapman*,¹¹³ holding that double bunking of inmates is not a per se violation of either the Fifth Amendment or the Eighth Amendment of the Constitution.¹¹⁴ In both opinions, the Court emphasized that federal courts have a duty to protect the constitutional rights of inmates.¹¹⁵ The Court cautioned, however, that the proper inquiry must be limited to clear violations of the Constitution because "the wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government."¹¹⁶

Finally, in recent years, the Supreme Court has displayed a trend toward limiting judicial oversight of state prison affairs by

¹¹⁰ *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974)). For the purposes of this Note, "federalism" is broadly described as the intrusion of federal courts on the exercise of state power through the entry and enforcement of consent decrees. For a general background discussion of federal court intrusion on state power, see Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987). For a discussion of how consent decrees in federal courts pose potential intrusions on state power, see *Effron*, *supra* note 22, at 1808-20.

¹¹¹ See, e.g., *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989) ("judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management"); *Turner v. Safley*, 482 U.S. 78, 84-85 (1987) ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the legislative and executive branches of government."); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974) ("problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree").

¹¹² 441 U.S. 520, 541 (1979).

¹¹³ 452 U.S. 336, 347-48 (1981).

¹¹⁴ In *Bell*, the inmates argued that double bunking of pretrial detainees violated their Fifth Amendment right of due process of law. 441 U.S. at 530. The Court stated that the proper inquiry was whether confinement conditions constituted punishment of the detainees. *Id.* at 535. It held that although such a determination was fact-specific, double bunking was not per se unconstitutional. *Id.* at 542-43.

In *Rhodes*, decided two years later, inmates at an Ohio state maximum security prison contested double bunking of inmates as a violation of the Eighth Amendment. 452 U.S. at 339. The Court held that double bunking in this case was not a constitutional violation. *Id.* at 352.

¹¹⁵ See *Rhodes*, 452 U.S. at 352; *Bell*, 441 U.S. at 562.

¹¹⁶ *Bell*, 441 U.S. at 562.

the federal courts.¹¹⁷ This trend has prompted some states to confront the problem of prison overcrowding directly.¹¹⁸ A number of states have done so by reexamining and restructuring the organization of their criminal justice systems.¹¹⁹ Typically, these states have delegated control of their criminal justice systems to an independent commission.¹²⁰ A major goal of these commissions is to address the problem of prison overcrowding through sentencing reform.¹²¹ Specifically, the commissions have restructured the states' sentencing guidelines to maintain balance between the correction capacity and the sentencing practices.¹²² In addition, the commissions have alleviated prison overcrowding by establishing a range of intermediate sanctions, such as community penalty programs, as an alternative to incarceration.¹²³

In summary, the Supreme Court adhered to the strict standard for modification of consent decrees enunciated in *Swift* prior to *Rufo v. Inmates of Suffolk County Jail*.¹²⁴ Although certain changed circumstances, notably changes in substantive law, have justified modification, the Court has required the party moving for modification to demonstrate that the decree is inequitable.¹²⁵ The requirement that changed circumstances make the consent decree inequitable reflected the Court's view of the nature of consent decrees as judicial acts, despite its recognition that a consent decree has contractual aspects.¹²⁶ Finally, the Court's emphasis on federalism con-

¹¹⁷ See Keenan, *supra* note 25, at 507-08.

¹¹⁸ See Kathleen M. Bogan, *Constructing Felony Sentencing Guidelines in an Already Crowded State: Oregon Breaks New Ground*, 36 CRIME & DELINQ. 467, 469-75 (1990).

¹¹⁹ See, e.g., ANDREW VON HIRSCH ET AL., *THE SENTENCING COMMISSION AND ITS GUIDELINES* 18-26 (1987) (examining experience of six states that have reexamined the organization of their criminal justice system and the changes they have made).

¹²⁰ *Id.* at 16.

¹²¹ See Bogan, *supra* note 118, at 469.

¹²² See Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parent's Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines*, 75 MINN. L. REV. 727, 733 (1991).

¹²³ See, e.g., MORRIS & TONRY, *supra* note 15, at 40 (listing range of intermediate punishments, from fines and community service orders to incarceration).

¹²⁴ The Court did not specifically decline to follow *Swift* as the standard for modification of consent decrees in institutional reform litigation before *Rufo v. Inmates of Suffolk County Jail*. See *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 757-58 (1992).

¹²⁵ See, e.g., *System Fed'n No. 91 v. Wright*, 364 U.S. 642, 652 (1961) (court will grant modification when "a change in law or facts has made inequitable what was once equitable").

¹²⁶ See, e.g., *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932) (Court declares that consent decree is a "judicial act"). But see *Local 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 519, 522 (1986) (consent decrees "closely resemble contracts" because their terms are negotiated by the parties).

cerns signaled the need for more flexibility to modify consent decrees.¹²⁷ In institutional reform litigation cases, and particularly in prison reform litigation, the Court has demonstrated a trend toward limiting federal court involvement in state and local affairs to protect state sovereignty.¹²⁸

II. THE CIRCUIT COURT SEARCH FOR A PROPER STANDARD TO MODIFY CONSENT DECREES IN PRISON REFORM LITIGATION

A. *The Emergence of a More Flexible Standard*

In the years following *Swift*, lower courts faced with requests for modification of consent decrees employed a number of techniques to justify modification despite the rigidity of the *Swift* standard.¹²⁹ Common techniques included distinguishing *Swift* on its facts,¹³⁰ illustrating ambiguities in the language of *Swift*,¹³¹ and drawing from subsequent Supreme Court decisions that interpreted consent decrees broadly.¹³² Many of these decisions were prompted by an array of commentary among scholars proposing that the strict *Swift* standard should only apply to consent decrees between private parties and that a more flexible standard was necessary when public officials enter into consent decrees.¹³³

In the 1983 case of *New York State Ass'n for Retarded Children, Inc. v. Carey*,¹³⁴ the United States Court of Appeals for the Second Circuit recognized the need for a more flexible standard to modify consent decrees in institutional reform litigation.¹³⁵ The court held that modification was proper if the movant could show an unforeseen change in factual circumstances, that the movant had attempted good faith compliance with the decree, and that modification would not frustrate the original purpose of the decree.¹³⁶ In

¹²⁷ See Effron, *supra* note 22, at 1820.

¹²⁸ See John P. Dwyer, *Pendent Jurisdiction and the Eleventh Amendment*, 75 CAL. L. REV. 129, 135 (1987).

¹²⁹ See generally Jost, *supra* note 6, at 1113-15 & n.84 (listing cases that have deviated from *Swift* and techniques employed to do so).

¹³⁰ See SEC v. Warren, 583 F.2d 115, 120-21 (3d Cir. 1978).

¹³¹ See Nelson v. Collins, 659 F.2d 420, 423-24 (4th Cir. 1981) (en banc).

¹³² See King-Seeley Therinos Co. v. Aladdin Indus. Inc., 418 F.2d 31, 35 (2d Cir. 1969).

¹³³ See Chayes, *supra* note 3, at 1284; Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 63 (1979); Fiss, *supra* note 3, at 49; Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 436 (1977).

¹³⁴ 706 F.2d 956 (2d Cir. 1983).

¹³⁵ *Id.* at 970-71.

¹³⁶ *Id.* at 969-70.

Carey, the New York State Association for Retarded Children filed a class action suit in 1972 on behalf of mentally retarded children alleging unconstitutional conditions at an overcrowded state school for the mentally retarded.¹³⁷ The parties settled the lawsuit through a consent decree that specified procedures to reduce overcrowding at the facility and ensure constitutional conditions.¹³⁸ Specifically, these procedures included relocation of mentally retarded students to "community placement" facilities of fifteen beds or smaller.¹³⁹ In 1981, administrators at the facility argued that compliance with the decree was impossible due to the tight housing market in the city. They moved to modify a provision of the consent decree to permit relocation of students to larger facilities.¹⁴⁰

Although the United States District Court for the Eastern District of New York refused to allow modification, the Court of Appeals for the Second Circuit reversed that decision.¹⁴¹ Writing for the court, Judge Friendly reasoned that modification of consent decrees in institutional reform litigation demands more flexibility because, unlike the decrees in *Swift*, these are often complex, ongoing decrees that must be fine-tuned as unforeseen impediments arise.¹⁴² Additionally, Judge Friendly noted that unlike the situation in *Swift*, compliance with these decrees may have adverse effects on the public interest.¹⁴³ For these reasons, Judge Friendly concluded that judges should have more flexibility to respond to changed factual circumstances.¹⁴⁴

B. *The Flexible Standard Applied in Prison Reform Litigation*

In the decade after *Carey*, a growing number of circuit courts recognized the need for a flexible standard to modify consent decrees in prison reform litigation.¹⁴⁵ Government officials moving for

¹³⁷ *Id.* at 958.

¹³⁸ *Id.*

¹³⁹ *Id.* at 959.

¹⁴⁰ *Id.* at 960, 965. The city moved to modify the consent decree pursuant to FED. R. CIV. P. 60(b). *Id.* at 960.

¹⁴¹ *Id.* at 972.

¹⁴² *See id.* at 969-70.

¹⁴³ *See id.* at 969.

¹⁴⁴ *Id.* at 971.

¹⁴⁵ *See* *Heath v. De Courcy*, 888 F.2d 1105, 1110 (6th Cir. 1989); *Kozlowski v. Coughlin*, 871 F.2d 241, 247 (2d Cir. 1989); *Twelve John Does v. District of Columbia*, 861 F.2d 295, 297-98 (D.C. Cir. 1988); *Plyler v. Evatt*, 846 F.2d 208, 215 (4th Cir. 1988) *cert. denied*, 488 U.S. 897; *Newman v. Graddick*, 740 F.2d 1513, 1520 (11th Cir. 1984).

Two circuits have reorganized but not applied the flexible standard. *See* *Ruiz v. Lynaugh*,

modification have argued that adherence to consent decrees which set population caps and prohibit double celling is overly burdensome given a rapid rise in inmate population over the last decade.¹⁴⁶ The United States Department of Justice recently urged courts to exercise greater flexibility in modifying consent decrees in prison reform litigation because population in state prisons now averages 115 percent of designed capacity.¹⁴⁷ Prisoners contend, however, that an overly flexible standard would frustrate the purpose of settlement and undermine principles of finality, thereby threatening the use and effectiveness of consent decrees.¹⁴⁸ Circuit courts have attempted to craft a standard that adequately preserves the integrity of a consent decree while recognizing the need for flexibility in prison reform litigation.¹⁴⁹ Even among the circuit courts that have recognized a flexible standard, additional tensions exist; some circuits have further eased the restrictions on modification by focusing only on whether modification furthers the purpose of the decree.¹⁵⁰ Others have adhered to *Carey*, demanding an additional showing by the movant that the changed circumstances were unforeseen and that the movant had attempted good faith compliance with the decree.¹⁵¹

811 F.2d 856, 861-62 (5th Cir. 1987) (court recognizes flexible standard but reasons it is not necessary to adopt it because lower court did not abuse its discretion in reaching result under *Swift*); *Duran v. Elrod*, 760 F.2d 756, 758 (7th Cir. 1985) (court finds it unnecessary to adopt flexible standard because even under *Swift*, the lower court's decision not to grant modification must be reversed).

¹⁴⁶ See Sharon Lafraniere, *U.S. to Aid in Raising Limits on Inmates*, BOSTON GLOBE Jan. 16, 1992, at A8.

¹⁴⁷ *Id.*

¹⁴⁸ See Brief of Respondent at 19, *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (No. 90-954); Amicus Curiae Brief of the Center For Dispute Settlement at 28-31. Respondents also emphasize the strong federal interest in finality reflected in Supreme Court precedent. See *McClesky v. Zant*, 111 S. Ct. 1454, 1469 (1991). Overemphasizing finality by adhering strictly to the terms of a consent decree, however, would decrease settlement incentives on the part of prison administrators who would refuse if inexorably bound by terms that are potentially unachievable in future-oriented complex litigation. See *Philadelphia Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1120 (3d Cir. 1979).

¹⁴⁹ See *Heath v. De Courcy*, 888 F.2d 1105, 1110 (6th Cir. 1989) (courts must balance interest in preserving consent decrees against public interest in effective administration of prisons); *Kozłowski v. Coughlin*, 871 F.2d 241, 248 (2d Cir. 1989) (court must both preserve goals of decree and respond flexibly to changed circumstances).

¹⁵⁰ See, e.g., *Badgley v. Santacroce*, 853 F.2d 50, 53 (2d Cir. 1988) (in granting modification, court notes that guiding principle is whether modification furthers the purposes of original decree).

¹⁵¹ See, e.g., *Twelve John Does v. District of Columbia*, 861 F.2d 295, 298-300 (D.C. Cir. 1988) (in denying modification, court found changed circumstances were not unforeseen and that prison administrators did not attempt to comply in good faith with decree).

Some circuits adopted a standard for modification of consent decrees in prison reform litigation that is even more flexible than *Carey*.¹⁵² In the 1989 case of *Heath v. De Courcy*,¹⁵³ for example, the United States Court of Appeals for the Sixth Circuit held that modification should be granted when changed circumstances warrant fine-tuning of the decree to achieve its purpose.¹⁵⁴ In *Heath*, inmates at an Ohio jail negotiated a consent decree with prison administrators in 1985 that set population caps and restricted double bunking to a limited portion of the jail.¹⁵⁵ Prison officials resisted compliance with the decree for three years and moved for modification to allow more double bunking in 1988.¹⁵⁶ The court noted that consent decrees in prison reform litigation require flexibility and judicial discretion because of the public's strong interest in the efficient operation of its jails.¹⁵⁷ Affirming the district court's modification of the consent decree, the court stated that in applying this standard to prison reform litigation, a trial court must balance the interest in preserving the terms of the decree against the public interest in having criminals complete their sentences.¹⁵⁸

The *Heath* court did not specifically require the movant to offer compelling evidence of how changed factual circumstances adversely affected their administration of the jail.¹⁵⁹ Rather, the *Heath* court indicated that the trial judge should have great discretion to evaluate the history of the decree and the need for modification.¹⁶⁰ It is on this ground that the *Heath* court departed from the flexible standard adopted by other circuits that have required the *movant* to prove to the court that changed circumstances justify modification.¹⁶¹ Moreover, the court in *Heath* did not require that the change

¹⁵² See, e.g., *Plyler v. Evatt*, 924 F.2d 1321, 3124 (4th Cir. 1991) (need for flexible modification standard is "particularly acute" in the prison context); *Kozłowski v. Coughlin*, 871 F.2d 241, 247 (2d Cir. 1989) ("flexibility should be the key to the solution" when modification furthers purpose of decree in prison context).

¹⁵³ 888 F.2d 1105 (6th Cir. 1989).

¹⁵⁴ *Id.* at 1110.

¹⁵⁵ *Id.* at 1107.

¹⁵⁶ *Id.* at 1107-08.

¹⁵⁷ *Id.* at 1109.

¹⁵⁸ *Id.* at 1110.

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *Plyler v. Evatt*, 924 F.2d 1321, 1328 (4th Cir. 1991) (modification granted because state met burden by showing that unanticipated increase in prison population made compliance with terms of decree impossible); *Kozłowski v. Coughlin*, 871 F.2d 241, 248-49 (2d Cir. 1989) (court denied modification because movant Commissioner of Correction failed to meet burden by offering specific evidence that modification was necessary).

in circumstances be *unforeseen*.¹⁶² Other circuit courts that recognized a flexible standard have denied modification if the movant could not demonstrate that changes in circumstance were unforeseen.¹⁶³ These courts have also adhered to *Carey* by requiring a showing of attempted good faith compliance with the decree on the part of the movant.¹⁶⁴ The court in *Heath* not only ignored the *Carey* good faith requirement in its proposed standard for modification, it dismissed it as irrelevant.¹⁶⁵ The standard proposed in *Heath* recognizes an active role for the federal trial judge to exercise equitable authority and rejects a more contractual, hands-off approach that recognizes the terms of the agreement.¹⁶⁶

Thus, lower courts have applied a flexible standard for consent decree modification in institutional reform litigation, especially in prison reform cases.¹⁶⁷ The courts that have adopted a flexible standard differed, however, in their application of certain factors such as good faith compliance and foreseeability.¹⁶⁸ The Supreme Court accepted certiorari of *Rufo v. Inmates of Suffolk County Jail* to determine the appropriate standard for modification of consent decrees in institutional reform litigation.¹⁶⁹

III. THE SUPREME COURT SPEAKS: *RUFO V. INMATES OF SUFFOLK COUNTY JAIL*

In 1992, the United States Supreme Court held in *Rufo v. Inmates of Suffolk County Jail*¹⁷⁰ that the *Swift* standard does not apply

¹⁶² Compare *Heath*, 888 F.2d at 1110 (holding that modification is appropriate if "circumstances and conditions have changed which warrant fine-tuning of the decree") with *New York State Ass'n for Retarded Children Inc. v. Carey*, 706 F.2d 956, 969 (2d Cir. 1983) (holding that modification is proper when "unforeseen obstacles present themselves").

¹⁶³ See *Twelve John Does v. District of Columbia*, 861 F.2d 295, 298 (D.C. Cir. 1988); *Ruiz v. Lynaugh*, 811 F.2d 856, 859 (5th Cir. 1987).

¹⁶⁴ See *Twelve John Does*, 861 F.2d at 300 (court denied modification, noting that city failed to show good faith attempt to comply with the consent decree); *Nelson v. Collins*, 659 F.2d 420, 429 (4th Cir. 1981) (in granting modification request, court noted prison administrators attempted good faith compliance with terms of decree).

¹⁶⁵ See *Heath*, 888 F.2d at 1107 n.2.

¹⁶⁶ See *id.* at 1109-10.

¹⁶⁷ See *Plyler v. Evatt*, 924 F.2d 1321, 1324 (4th Cir. 1991); *Badgley v. Santacrocce*, 853 F.2d 50, 53 (2d Cir. 1988); *Newman v. Graddick*, 740 F.2d 1513, 1520 (11th Cir. 1984).

¹⁶⁸ Compare *Heath*, 888 F.2d at 1110 (holding that modification is appropriate if changed circumstances warrant fine-tuning the decree to achieve its purpose) with *Twelve John Does*, 861 F.2d at 298 (holding that modification requires that changed circumstances are unforeseen and that movant has demonstrated attempted good faith compliance with the decree).

¹⁶⁹ 111 S. Ct. 950 (1991).

¹⁷⁰ 112 S. Ct. 748 (1992).

to requests for modification of consent decrees in institutional reform litigation.¹⁷¹ The Court reasoned that the widespread use of these future-oriented decrees justifies greater flexibility at the time of modification because these decrees often affect the public's interest in the efficient operation of its institutions.¹⁷² The Court therefore adopted a two-pronged flexible standard.¹⁷³ Under this standard, a party seeking modification must first establish significant changed circumstances of law or fact that warrant modification.¹⁷⁴ Second, the proposed modification must be suitably tailored to the changed circumstances.¹⁷⁵ The Court concluded that the United States District Court for the District of Massachusetts erred because it applied an improper standard to deny a request to modify a 1979 consent decree.¹⁷⁶ The Court remanded the case for consideration under its new standard.¹⁷⁷

A. *Facts and Procedural History of the Case*

The litigation originated in 1971 on behalf of a class of inmates at Suffolk County Jail, a county facility for pretrial detainees then known as the "Charles Street Jail."¹⁷⁸ The plaintiffs alleged that conditions of confinement at the Charles Street Jail violated the Eighth and Fourteenth Amendments of the Constitution.¹⁷⁹ At the conclusion of a six-day trial in the United States District Court for the District of Massachusetts in 1973, the district court held that conditions at Charles Street Jail violated the detainees' rights to due process of law under the Fourteenth Amendment.¹⁸⁰

¹⁷¹ *Id.* at 758-59.

¹⁷² *Id.*

¹⁷³ *Id.* at 760.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 759.

¹⁷⁷ *Id.* at 765.

¹⁷⁸ *Id.* at 754. The class was certified under Fed. R. Civ. P. 23(b)(2) on July 29, 1971. Brief of Respondents at 1, *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (No. 90-954).

¹⁷⁹ *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 678 (D. Mass. 1973).

¹⁸⁰ *Id.* at 686. In his opinion, Judge Garrity graphically depicted the deplorable conditions at the Charles Street Jail which he observed while touring the facility. *Id.* at 679-84. He concluded:

Briefly, an inmate at Charles Street who merely stands accused spends from two months to six months or longer awaiting trial. Each day he spends between 19 and 20 hours in a cell with another, strange and perhaps vicious man. When both are in the cell, there is no room effectively to do anything else but sit or lie on one's cot. The presence of a cell-mate eliminates any hope of privacy; an

In its final judgment the court ordered the Suffolk County Sheriff to stop double bunking immediately and to close the jail by June 30, 1976.¹⁸¹ No replacement facility was built, however, and in 1977 the district court judge ordered the closing of the jail and the appropriation of funds for a new facility.¹⁸² Pending appeal, the United States Court of Appeals for the First Circuit stayed the order mandating appropriation of funds, but refused to stay the order closing the facility.¹⁸³ Four days before the closing deadline, the Sheriff filed a plan that the inmates and the district court approved and that became the basis for a consent decree.¹⁸⁴

The district court approved the consent decree on May 7, 1979.¹⁸⁵ The consent decree itself stated its purpose was to "provide, maintain and operate . . . a suitable and constitutional jail for Suffolk County pretrial detainees."¹⁸⁶ Although the text of the consent decree did not explicitly state that single celling was required, attached to and incorporated into the decree was the approved 110-page architectural plan providing for a new facility with single-occupancy cells.¹⁸⁷ The plan also recommended a population cap of 309 prisoners, based upon the estimates of an independent survey that projected a decrease in inmate population from 1979 to 1999.¹⁸⁸

inmate may not use the toilet except in the presence of a stranger mere feet away. He passes his continued hours in a dank, decrepit room, often smelling of human excrement, usually in clothes which he cannot keep clean, and able to see nothing outside the cell except parts of the catwalks and outside wall.

Id. at 687.

¹⁸¹ *Rufo*, 112 S. Ct. at 754.

¹⁸² *Id.* at 755.

¹⁸³ Brief of Respondents at 4, *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (No. 90-954).

¹⁸⁴ *Rufo*, 112 S. Ct. at 755. In approving the proposed plan, the district court noted certain "critical" features of the plan, one of them being single cells. *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* The architectural plan specified that the new jail would have a total of 309 single-occupancy rooms of 70 square feet. *Id.*

¹⁸⁸ *Id.* at 756. The Architectural Program projected that inmate population would decline based on an independent survey. The survey projected the following populations by year:

1979: 245

1980: 243

1981: 241

1982: 239

1983: 238

1984: 236

1985-89: 232

1990-94: 226

1995-99: 216

Id. at 761 n.9.

Finally, the plan called for construction of a new jail on the same site by 1983.¹⁸⁹

By 1984, the city of Boston still had not begun construction of a new jail.¹⁹⁰ Inmate population continued to rise rather than fall as originally predicted, and in order to comply with the population caps contained in the agreed-upon architectural plan, the Sheriff refused to accept any more pretrial detainees at the jail.¹⁹¹ The Attorney General sued the Sheriff in state court seeking an order to compel the Sheriff to accept all detainees delivered to him.¹⁹² The Sheriff filed his own action in state court seeking injunctive relief against the Mayor and city council of Boston in order to provide funding for a new jail.¹⁹³ The state court ordered construction of the jail and the state legislature responded by appropriating funds for the facility in 1985.¹⁹⁴ In 1985, the district court approved a joint request for modification of the decree to increase the capacity of a new jail at a different site, provided single-cell occupancy was maintained.¹⁹⁵ Construction of the new jail on Nashua Street in Boston began in September, 1987 and was completed in May, 1990.¹⁹⁶

In July of 1989, Sheriff Robert Rufo moved for modification of the consent decree in federal district court to allow double bunking of male detainees in 197 of the jail's 316 regular male housing cells.¹⁹⁷ The Sheriff offered two grounds to justify modification.¹⁹⁸ First, he argued that *Bell v. Wolfish* constituted a change in law

¹⁸⁹ *Id.* at 756.

¹⁹⁰ *Id.*

¹⁹¹ See Attorney General v. Sheriff of Suffolk County, 477 N.E.2d 361, 362 (Mass. 1985).

¹⁹² See *id.* at 363. Under Massachusetts General Laws, the Sheriff is under an obligation to operate the jail and house detainees committed to him. MASS. GEN. L. ch. 268, § 20 (1990). Chapter 268, § 20 states in pertinent part:

A jailer or officer who wilfully refuses to receive into his custody a prisoner lawfully directed to be committed thereto upon conviction, upon a charge or crime, or upon a lawful process, shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than two years.

Id.

¹⁹³ See Attorney General v. Sheriff of Suffolk County, 477 N.E.2d at 362.

¹⁹⁴ See *id.* at 366. A single justice for the state court ordered the city to construct a new jail and the Massachusetts Supreme Judicial Court affirmed this order. *Id.* The state legislature appropriated money for the construction of a new jail. See 1984 Mass. Acts 799.

¹⁹⁵ *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 756 (1992). The number of cells was subsequently increased to 453. *Id.*

¹⁹⁶ Brief of Respondent at 14, *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (No. 90-954).

¹⁹⁷ *Rufo*, 112 S. Ct. at 756.

¹⁹⁸ *Id.*

regarding the constitutionality of double bunking, which warranted modification.¹⁹⁹ Second, he contended that a rapid and unexpected rise in inmate population between 1985 and 1989 constituted a change in operative facts that would justify modification.²⁰⁰

The district court denied the Sheriff's modification request, holding that modification was not warranted under either the *Swift* standard or a more flexible standard that looked to the purpose of the decree.²⁰¹ The district court reasoned that the Supreme Court's decision in *Bell* did not directly overrule any legal basis of the consent decree and could not be considered a change in law justifying modification.²⁰² Regarding the alleged unforeseen rise in detainee population, the court conceded that increases in jail populations are "difficult to predict and beyond the control of the Sheriff."²⁰³ The court maintained, however, that the population increases were "neither new nor unforeseen."²⁰⁴ The court concluded that modification was thus inappropriate under *Swift*.²⁰⁵

The district court acknowledged that other courts employed a more flexible standard regarding consent decree modification but concluded that modification should also be denied even under this standard.²⁰⁶ The district court's interpretation of the flexible standard focused on whether modification would undermine a primary purpose of the decree.²⁰⁷ The court determined that a primary purpose of the decree was to provide for a single cell for each detainee.²⁰⁸ Thus, even under a flexible standard, the court denied the Sheriff's request to modify the decree by double bunking because this would undermine a central purpose of the decree.²⁰⁹ The

¹⁹⁹ *Id.* Just one week after the parties signed the original consent decree in 1979, the Supreme Court declared that double bunking was not per se unconstitutional. See *Bell v. Wolfish*, 441 U.S. 520, 542 (1979).

²⁰⁰ *Rufo*, 112 S. Ct. at 756.

²⁰¹ *Inmates of Suffolk County Jail v. Kearney*, 734 F. Supp. 561, 565 (D. Mass. 1990).

²⁰² *Id.* at 564.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 565. The court based its conclusion on the language of *Swift*, which requires "clear showing of grievous wrong evoked by new and unforeseen conditions." *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).

²⁰⁶ *Kearney*, 734 F. Supp. at 565.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* The court's reasoning emphasized that finality and certainty of consent decrees must be preserved to ensure that they remain a valuable means of settlement in prison reform litigation. *Id.* Although the court recognized that the public interest might be affected by the release of some pretrial detainees, the court suggested that local officials appropriate

district court's decision was affirmed in a brief per curiam opinion by the United States Court of Appeals for the First Circuit.²¹⁰ The Sheriff filed a petition for certiorari to the United States Supreme Court that was granted in 1991.²¹¹

B. *The Supreme Court Decision*

The Supreme Court held in *Rufo* that the *Swift* standard for modification of consent decrees is inappropriate in institutional reform litigation.²¹² The Court first established why a more flexible standard is needed in this area.²¹³ It then articulated its new standard that requires the movant to demonstrate that changed circumstances warrant modification and further requires the judge to tailor the modification to the changed circumstances.²¹⁴ Although all members of the Court agreed upon the need for a new standard, the concurrence and dissent expressed reservations over the requirements for modification contained in the majority's new standard.²¹⁵ This disagreement centers on whether, for purposes of modification, a consent decree is to be treated as a contract or a judicial act.²¹⁶

I. Establishing the Need for a Flexible Standard

To justify a more flexible standard for modification of consent decrees in institutional reform litigation, the *Rufo* Court held that *Swift* was limited to the context of that case, where the facts that served as the basis of the consent decree were "impervious to change."²¹⁷ Citing Court precedent that distinguished *Swift* on its facts,²¹⁸ the majority maintained that *Swift* did not preclude flexibility or equitable judicial discretion.²¹⁹ The Court noted the contextual difference of institutional reform litigation, in which consent decrees are future-oriented orders that remain in place for long

more funds to accommodate the detainees and, thus, that the proper inquiry for the court was limited to the legal requirements for modification. *See id.* at 566.

²¹⁰ *Inmates of Suffolk County Jail v. Kearney*, 915 F.2d 1557 (1st Cir. 1990).

²¹¹ *Rufo v. Inmates of Suffolk County Jail*, 111 S. Ct. 950 (1991).

²¹² *See Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 758-60 (1992).

²¹³ *See infra* notes 217-24 and accompanying text.

²¹⁴ *See infra* notes 225-45 and accompanying text.

²¹⁵ *See infra* notes 246-51 and accompanying text.

²¹⁶ *See infra* notes 252-58 and accompanying text.

²¹⁷ *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 758 (1992).

²¹⁸ *See id.* (citing *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968)).

²¹⁹ *See id.*

periods of time and thus are more subject to changing factual circumstances.²²⁰ The Court highlighted a further difference from *Swift*, noting that consent decrees in institutional reform litigation often affect the public's interest in the efficient administration of its institutions.²²¹

The Court concluded that given the unique nature of institutional reform litigation and the widespread use of consent decrees in this area in recent years, a flexible approach to modification is necessary to further the goals of institutional reform litigation.²²² In recognizing the need for greater flexibility in this area, the Court rejected the prisoners' principal argument that the utility of consent decrees hinges on the parties' expectation that the negotiated settlement will be final.²²³ The Court noted that parties can still avoid the costs of litigation by entering into consent decrees, and that they have no guarantee that if they do litigate their claims, they ultimately will win.²²⁴

2. The First Prong: Changed Circumstances

After establishing the need for a more flexible standard, the Court crafted a two-pronged test for future modifications in institutional reform litigation.²²⁵ The first prong requires the movant to establish that significant changes in fact or law warrant modification.²²⁶ The Court determined that a movant may satisfy the burden of establishing a significant change in fact in three ways. First, modification may be warranted if changed factual conditions make compliance with the decree "substantially more onerous."²²⁷ Second, modification is appropriate if the movant can show that the decree is no longer workable due to unforeseen obstacles.²²⁸ Finally, modification may be granted if the movant can demonstrate that, without modification, the decree harms the public interest.²²⁹

After listing the three bases for modification due to changed factual circumstances, the Court added an important caveat.²³⁰ The

²²⁰ *See id.*

²²¹ *See id.* at 759.

²²² *See id.* at 758.

²²³ *See id.* at 759.

²²⁴ *See id.* at 759-60.

²²⁵ *See id.* at 760.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *See id.* at 760-61.

Court noted that if the movant clearly anticipated the changed circumstances at the time it entered the decree, it would have to satisfy a heavier burden by demonstrating attempted good faith compliance since the entry of the decree.²³¹ Although the district court had stated that the rise in inmate population was not unforeseen, the majority downplayed this factual determination given contrary evidence in the record.²³² The Court remanded the case for a further determination of whether the Sheriff actually foresaw a rise in inmate population.²³³

The Court next stated three ways in which a change in law could be the basis for modification. First, the Court maintained that a decree must be modified if one of the parties' obligations later is forbidden by federal law.²³⁴ Second, the Court noted that modification may be warranted if a subsequent change in law legalizes what the decree had prohibited.²³⁵ Third, the Court stated that a clarification of the law could also be a basis for modification.²³⁶ The Court cautioned, however, that a clarification of the law could not result in modification unless the movant demonstrated that its reason for entering the decree was based on a misunderstanding of the governing law.²³⁷ Accordingly, the Court declared that on remand the district court should determine whether the movant actually misunderstood the law before *Bell v. Wolfish* as mandating single celling.²³⁸

²³¹ See *id.* at 761.

²³² See *id.* Specifically, the majority noted the estimated decrease in prison population contained in the 1979 Architectural Program and the 1985 consent decree modification was based on an "unanticipated increase in jail population." *Id.*

²³³ *Id.* The issue of foreseeability was hotly contested in this litigation. See Brief of Respondents at 35, *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (No. 90-954) (urging that modification should only be allowed when change in facts is both "unforeseen and unforeseeable"). The majority specifically rejected Respondent's proposed standard. See *Rufo*, 112 S. Ct. at 760.

The dissent expressed dissatisfaction with the majority's subjective standard. *Id.* at 771 (Stevens, J., dissenting). The dissent favored an objective standard which allows the district court judge to determine whether the change in fact is "reasonably foreseeable." *Id.* (Stevens, J., dissenting).

²³⁴ *Rufo*, 112 S. Ct. at 762.

²³⁵ See *id.* (citing *System Fed'n No. 91 v. Wright*, 364 U.S. 642, 650 (1961)).

²³⁶ See *id.* at 763.

²³⁷ See *id.* The Court created such a limited exception because it recognized that the finality of consent decrees would be undermined if parties could litigate the merits of consent decrees whenever a change in law occurred. See *id.*

²³⁸ *Id.* The dissent expressed dissatisfaction with the majority's view that a clarification of law can be the basis for modification. See *id.* at 771 n.5 (Stevens, J., dissenting). The dissent reasoned that because *Bell* did not conflict with a term of the decree, it did not constitute a change in law warranting modification. *Id.*

3. The Second Prong: Tailoring the Modification

The second prong of the Court's new standard for modification of consent decrees in institutional reform litigation requires the district court to ensure that the proposed modification is "suitably tailored to the changed circumstances."²³⁹ On one hand, the Court cautioned that a proposed modification must neither perpetuate future constitutional violations nor attempt to rewrite the consent decree so that it meets minimum constitutional standards.²⁴⁰ The Court thus recognized that a consent decree is in some ways a contractual undertaking between the parties²⁴¹ that should be accorded finality.²⁴²

On the other hand, the Court noted that concerns about finality must be weighed against both the public interest in safe and efficient institutions and the deference federal courts should accord to local administrators.²⁴³ The majority instructed the district court, on remand, to broaden its discretion and consider the financial constraints of local officials in tailoring the proposed modification.²⁴⁴ The Court's emphasis on deference to local administrators echoes earlier federalism concerns that federal courts exercise caution when ordering injunctive relief against state and local entities.²⁴⁵

C. *Disagreement Over the New Standard and Ambiguities That Remain*

Although the Court announced a new standard for modification of consent decrees in institutional reform litigation, the decision demonstrates continued concern about the nature of consent decrees.²⁴⁶ Justice O'Connor, in a concurring opinion, expressed dis-

²³⁹ *Id.* at 763.

²⁴⁰ *See id.* at 763-64. The Court seems to have borrowed this restriction on modification requests in part from the standard proposed by the Respondents. *See* Brief of Respondents at 37, *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (No. 90-954).

²⁴¹ *See id.* at 757 ("consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature").

²⁴² *See id.* at 764 ("consent decree is a final judgment that may be reopened only to the extent that equity requires").

²⁴³ *See id.* at 764. The public interest and federalism concerns were set forth in detail by Petitioner *Rufo* in his brief. *See* Brief of Petitioner *Rufo* at 23-27, *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (No. 90-954).

²⁴⁴ *See id.* at 764 ("consent decree is a final judgment that may be reopened only to the extent that equity requires").

²⁴⁵ *Rufo*, 112 S. Ct. at 764 (quoting *Board of Educ. v. Dowell*, 111 S. Ct. 630, 632 (1991)). *See supra* notes 103-23 and accompanying text for a discussion of federalism concerns expressed by the Court when injunctive relief is ordered by a federal court against a state or local entity.

²⁴⁶ *See id.* at 757.

satisfaction with the new standard.²⁴⁷ Justice O'Connor indicated that modification of consent decrees should reflect their nature as judicial acts, thereby precluding any rigid standard in favor of a general inquiry as to whether the proposed modification is "equitable."²⁴⁸ Writing in dissent, Justice Stevens, joined by Justice Blackmun, conceded the need for a flexible standard in institutional reform litigation.²⁴⁹ The dissent concluded, however, that the Sheriff's request for modification should still be denied.²⁵⁰ The dissent highlighted the contractual nature of these decrees and reasoned that modification in this case was inappropriate because it would not respect the bargained-for expectations of the parties.²⁵¹

Finally, the new standard does not require that modification be in line with the overall purpose of the decree.²⁵² Even those courts that had adopted the most flexible standards required that the proposed modification not undermine the basic purpose of the decree.²⁵³ This requirement recognized the contractual nature of these decrees by ensuring that the essential agreement remain inviolate.²⁵⁴ The *Rufo* majority did not include the purpose requirement, reasoning that modification would be virtually impossible

²⁴⁷ See *id.* at 765 (O'Connor, J., concurring).

²⁴⁸ See *id.* (O'Connor, J., concurring). The concurrence thus favors a test that follows FED. R. CIV. P. 60(b) and asks whether the proposed modification is equitable. *Id.*

The concurrence recognized that federalism concerns favor deference to local prison administrators. See *id.* at 766 (O'Connor, J., concurring). Yet the concurrence maintained that these concerns must yield to the equitable discretion of the judge, thus emphasizing the nature of consent decrees as judicial acts. See *id.* The majority responded in a footnote that federalism concerns are considered only after the need for modification is shown. *Id.* at 764 n.14.

²⁴⁹ See *id.* at 768 (Stevens, J., dissenting).

²⁵⁰ *Id.* (Stevens, J., dissenting). The dissent conceded that the public interest was a factor in deciding whether to modify a decree. See *id.* at 772 n.7. However, it noted that mere unpopularity with an order mandating expenditure of funds should not be the basis of modification. *Id.*

²⁵¹ See *id.* at 772-73 (Stevens, J., dissenting).

²⁵² See *id.* at 760-63.

²⁵³ See, e.g., *Heath v. De Courcy*, 888 F.2d 1105, 1110 (6th Cir. 1989); *Badgley v. Santacrose*, 853 F.2d 50, 53 (2d Cir. 1988).

²⁵⁴ See *Heath*, 888 F.2d at 1110 (modification will be upheld only if it does not upset basic agreement between the parties).

It should be noted that all parties to the litigation, as well as the United States as Amicus Curiae, included the requirement that a proposed modification not undermine the basic purpose of the decree. See Brief For Respondents at 35, *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (No. 90-954); Brief For Petitioner Sheriff *Rufo* at 32; Brief For Petitioner Commissioner of Correction at 56; Brief of United States as Amicus Curiae at 8.

Commentators have also urged adoption of a standard that looks to the purpose of the decree in institutional reform litigation. See *Modification of Consent Decrees*, *supra* note 6, at 1037.

because alteration of any term in the decree could defeat the purpose of the decree.²⁵⁵ Both the concurrence and dissent disagreed with the majority's conclusion on this issue.²⁵⁶ The concurrence and dissent acknowledged that consent decrees, like contracts, contain certain critical terms that reflect the bargained-for agreement of the parties and should remain undisturbed.²⁵⁷

IV. THE AFTERMATH OF *RUF0*: ENSURING THE VIABILITY OF CONSENT DECREES IN THE FUTURE

In the last two decades, parties have utilized consent decrees to resolve environmental, school desegregation, housing discrimination, antitrust, prison and other institutional reform litigation.²⁵⁸ The advantages of using consent decrees to resolve such complex litigation are numerous. Besides saving time and resources, parties can avoid the adversarial nature of litigation and work together in a spirit of cooperation to negotiate a meaningful solution to a complex problem.²⁵⁹ Once negotiated, the consent decree offers the added advantage of judicial approval. By maintaining court jurisdiction over the consent decree, enforcement is facilitated; the need to prove facts that would otherwise have to be shown to establish the validity of an ordinary contract is unnecessary.²⁶⁰ In addition, prior to *Rufo*, parties welcomed judicial oversight of consent decrees as an assurance that these often complex, future-oriented orders could be fine-tuned to achieve their purpose.²⁶¹

Although the Court's new standard in *Rufo* for modification of consent decrees in institutional reform litigation purports to respect the finality of settlements negotiated in consent decrees,²⁶² an anal-

²⁵⁵ *Rufo*, 112 S. Ct. at 762.

²⁵⁶ See *id.* at 767 (O'Connor, J., concurring) (finding majority conclusion "logically and legally erroneous"); *id.* at 772 (Stevens, J., dissenting) (stating that majority conclusion "misses the point"). The dissent prefaced its opinion by stating that it agreed with the Court's endorsement of the flexible standard first articulated by Judge Friendly in *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969 (2d Cir. 1983). *Rufo*, 112 S. Ct. at 768 (Stevens, J., dissenting). The majority's standard, however, is different from the standard in *Carey* because *Carey* required that modification not frustrate the original purpose of the consent decree. See *Carey*, 706 F.2d at 969.

²⁵⁷ See *Rufo*, 112 S. Ct. at 767 (O'Connor, J., concurring); *id.* at 773 (Stevens, J., dissenting).

²⁵⁸ See Amicus Curiae Brief of Center for Dispute Settlement at 5, *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (No. 90-954).

²⁵⁹ See Sturm, *supra* note 3, at 1446.

²⁶⁰ See Local 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501, 524 n.13 (1986).

²⁶¹ See *id.* at 523-24 n.13.

²⁶² See *supra* notes 239-42 and accompanying text.

ysis of the Court's standard reveals that it signals a grave departure from previous standards in that it will make future modification much easier. Particularly in the area of prison reform litigation, the Court's new standard will likely threaten improvements in prison conditions negotiated by inmates in recent years by allowing prison administrators to escape too easily obligations previously embodied in existing consent decrees. This Note argues that the nationwide crisis in prison overcrowding will afford prison administrators seeking modification of consent decrees that mandate population caps with a way to attain modification under the Court's new standard. Given that prison overcrowding poses a serious threat to the integrity of consent decrees in prison reform litigation, this Note will conclude by exploring what can be done to address the problem of prison overcrowding. Specifically, this Note examines the problem of prison overcrowding in Massachusetts and suggests steps that the state should take to alleviate the acute crisis that currently exists.

A. *The Supreme Court's New Flexible Standard Will Cause Modification of Existing Consent Decrees in Prisons Across the Nation*

The Court's decision in *Rufo* invites prison administrators across the country to seek modification in the near future.²⁶³ According to a 1990 report by the National Prison Project, the entire prison systems of nine states are operating under consent decrees or court orders.²⁶⁴ Forty-one states have at least one institution under court order or consent decree.²⁶⁵ The majority of these decrees impose restraints on overcrowding, largely through population caps.²⁶⁶ State prison administrators bound by these decrees will probably seek modification after *Rufo*.

The administrators will contend that compliance with decrees that set population caps is made onerous by the dramatic rise in inmate population. In the last decade, the inmate population in

²⁶³ See Linda Greenhouse, *Justices Ease Ability to Have Court Pacts Modified*, N.Y. TIMES, Jan. 16, 1992, at A14. Prison administrators have moved for modification in the wake of *Rufo*, and courts have recognized that the new standard is more flexible. See *Stone v. City and County of San Francisco*, 968 F.2d 850, 855 (9th Cir. 1992); *Diaz v. Romer*, 961 F.2d 1508, 1511 (10th Cir. 1992); *Inmates of Allegheny County Jail v. Wecht*, 797 F. Supp 428 (1992). Commentators have also noted the flexibility of the new standard. See Russell W. Gray, Note, *Wilson v. Seiter: Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339, 1366-67 n.153 (1992).

²⁶⁴ PRISON PROJECT, *supra* note 10, at 1.

²⁶⁵ *Id.* at 2.

²⁶⁶ See PRISON SURVEY, *supra* note 10, at 6.

America has doubled.²⁶⁷ The prison population is rising at an annual rate of thirteen percent,²⁶⁸ or by approximately 2,650 inmates per week.²⁶⁹ With over 700,000 inmates already incarcerated in state and federal facilities,²⁷⁰ prison administrators are desperately seeking ways to house the inmates committed to them. The current crisis prompted the Justice Department to announce a shift in policy, stating that it would assist states seeking modification of consent decrees that set population caps.²⁷¹

Under the first prong of the *Rufo* Court's new standard, the movant must show that changed circumstances warrant modification.²⁷² Prison administrators currently bound by consent decrees that impose population caps can demonstrate that modification is warranted in a number of ways. First, they can assert that the recent rise in inmate population is a changed circumstance that makes compliance "substantially more onerous."²⁷³ Complying with consent decrees that impose population caps is obviously made more onerous when the number of persons committed to the custody of prison officials swells. In the *Rufo* case itself, for example, to comply with the consent decree, Suffolk County had to transfer pretrial detainees to distant counties at a cost of close to one million dollars a year.²⁷⁴

Moreover, under the Court's new standard, modification is also appropriate if the decree is detrimental to the public interest.²⁷⁵ In many cases like *Rufo*, the public interest is affected by the enormous cost of compliance with consent decrees that taxpayers must bear.²⁷⁶ Furthermore, *Rufo* also illustrates that adhering to population caps

²⁶⁷ See John A. Powell & Eileen B. Hershenev, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 569 (1991) (citing M. MAUER, AMERICANS BEHIND BARS: A COMPARISON OF INTERNATIONAL RATES OF INCARCERATION 2 (1990)).

²⁶⁸ Donald P. Lay, *Our Justice System, So-Called*, N.Y. TIMES, Oct. 22, 1990, at A19.

²⁶⁹ *Stress Points in the State Budgets*, N.Y. TIMES, Dec. 30, 1990, § 1, at 17.

²⁷⁰ See CRIMINAL JUSTICE INSTITUTE, *supra* note 14, at 1.

²⁷¹ See LaFraniere, *supra* note 146, at A8.

²⁷² See *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 760 (1992); see *supra* notes 226-33 and accompanying text for a discussion of what the Court considers changed factual circumstances.

²⁷³ See *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 760 (1992).

²⁷⁴ Brief of Petitioner *Rufo* at 9, *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (No. 90-954).

²⁷⁵ *Rufo*, 112 S. Ct. at 760.

²⁷⁶ See PRISON PROJECT, *supra* note 10, at 10-11. The report illustrates the high cost of compliance with consent decrees in many states. *Id.* Compliance frequently costs the states "hundreds of millions" of dollars. *Id.*

in the face of a rising inmate population can directly endanger the public interest. To comply with the decree in *Rufo*, the Sheriff had to release potentially dangerous pretrial detainees to make room for other inmates.²⁷⁷ It is hard to imagine a court that would not consider the release of accused felons onto the streets as detrimental to the public interest.

The second prong of the Court's new standard, which requires that any modification be tailored to the changed circumstances, does provide a necessary limitation on modification requests.²⁷⁸ The Court's recognition that principles of finality weigh against rewriting consent decrees offers some assurance that modifications will respect the negotiated settlements of the parties.²⁷⁹ What the Court gives with one hand, however, it takes away with the other. By requiring a judge to consider the public interest and the financial constraints of the states, the Court gives prison administrators seeking modification in the 1990s the distinct advantage.²⁸⁰ With the current economic strife that most states are facing, prison administrators can point to the exorbitant cost of compliance to justify modification. Furthermore, aside from the public interest concerns already mentioned, there is a current national desire to reduce violent crime and rampant drug use.²⁸¹ This public interest from constituents has influenced state legislatures to enact "get tough" crime statutes that often carry with them mandatory sentences.²⁸² Courts tailoring modification requests to changed circumstances will undoubtedly be aware of these mandatory sentencing laws and the substantial contribution they have made to the problem of overcrowding. These courts will likely grant modification and dissolve population caps to make room for the flood of inmates pouring in due to publicly supported anti-crime legislation. Thus, although the

²⁷⁷ See Brief of Petitioner *Rufo* at 39, *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (No. 90-954). This is not an isolated example. Other courts have granted modification to protect the public interest in similar factual circumstances. See *Duran v. Elrod*, 760 F.2d 756, 760 (7th Cir. 1985) (court granted modification of consent decree because denying modification would lead to release of 500 accused felons).

²⁷⁸ See *Greenhouse*, *supra* note 263, at A14.

²⁷⁹ See *Rufo*, 112 S. Ct. at 763-64.

²⁸⁰ The concurrence expressed dissatisfaction with the requirement that courts defer to local prison administrators, noting that "deference to one of the parties to a lawsuit is usually not the surest path to equity." *Id.* at 767 (O'Connor, J., concurring).

²⁸¹ See Austin D. Sarat, *Beyond Rehabilitation*, in *ISSUES IN CRIMINAL JUSTICE* 103, 103-04 (Fred E. Baumann & Kenneth M. Jensen eds., 1989).

²⁸² See generally ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 4.5, at 80-82 (2d ed. 1991). By the late 1980s virtually every state legislature responded to public demand for crime control by enacting mandatory incarceration laws. *Id.*

second prong of the Court's standard offers a perfunctory nod toward the contractual principle of finality, its emphasis on deference to local officials and the public interest suggests, in the prison context, a significant move toward judicial discretion and modification with a freer hand.

Furthermore, the Court's standard makes modification easier by not requiring any initial showing of attempted good faith compliance with the terms of the decree.²⁸³ Under the Court's standard, the movant's lack of good faith is arguably not even a factor unless the party opposing modification can show that changed factual circumstances were actually considered by the movant at the time the decree was entered.²⁸⁴ This determination requires proof of the parties' subjective intent at the time of entering the decree, which will be difficult to demonstrate. In the past the Court has avoided a time-consuming inquiry into the subjective motivations of public officials because it is impractical and difficult to prove.²⁸⁵ Inmates opposed to modification requests in the future will undoubtedly face similar problems proving the subjective knowledge of the movant.

B. The Court's Standard Will Lead to Inequitable Results and Will Threaten the Utility of Consent Decrees in the Future

More importantly, the Court's failure to include a good faith requirement will lead to inequitable results. Assume, for example, that a prison administrator agrees to a consent decree to avoid the threat of litigation. The administrator then immediately resists compliance and exceeds agreed-upon population caps. When the inmates threaten to enforce the terms of the decree, the prison administrator simply moves for modification, stating that the rise in inmate population has made compliance substantially more onerous. Under the Court's new standard for modification of consent decrees in *Rufo*, the prison administrator's lack of good faith arguably might not even factor into the decision of the lower court.²⁸⁶

²⁸³ See *Rufo*, 112 S. Ct. at 760-61. The lower courts recognized that the workability and continued use of consent decrees would be undermined without a prerequisite showing of attempted good faith. See *supra* note 164 and accompanying text; see also *Alliance to End Repression v. Chicago*, 742 F.2d 1007, 1020 (7th Cir. 1984) (en banc) ("[W]ho will make a binding agreement with a party that is free to walk away from an agreement whenever it begins to pinch?").

²⁸⁴ See *Rufo*, 112 S. Ct. at 760-61.

²⁸⁵ See *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982).

²⁸⁶ This is not a far-fetched scenario. Rather, it is exactly what occurred in *Heath v. De*

Perhaps the most damaging blow to the integrity of consent decrees in the wake of *Rufo* is the Court's refusal to include consideration of the basic purpose of the consent decree as part of its new standard for modification.²⁸⁷ Not allowing a judge faced with a request for modification to determine whether the modification accords with the purpose of the decree undermines the contractual nature of consent decrees and deprives the party opposed to modification the benefit of its bargain.²⁸⁸ Even the lower courts that had adopted the most flexible standards for modification of consent decrees had recognized the purpose requirement as a necessary assurance that these agreements would have some finality.²⁸⁹ After *Rufo*, parties contemplating consent decrees as a means of settlement must proceed carefully, because the *Rufo* standard offers no guarantee that even their most basic expectations will be protected.

In the last twenty years, inmates nationwide have utilized consent decrees to facilitate settlement and, more importantly, to realize improvement of confinement conditions. Unfortunately, the nation's current crisis in prison overcrowding and the Supreme Court's adoption of a more flexible standard for modification of consent decrees combine to threaten these improvements. Countless existing decrees will likely be modified. Perhaps more disturbing is that if the prison overcrowding crisis continues, this will undermine the utility of consent decrees as a means of settlement in the future. The incentive to forego litigation and enter a consent decree is diminished if the bargained-for agreements embodied in the terms of the decree can be freely modified.²⁹⁰

As long as the Court's new test for modification of institutional reform consent decrees remains in place, consent decrees can only continue to serve as effective alternatives to litigation if the problem of prison overcrowding is addressed. Population caps and clauses mandating single celling will not be enforced by the courts if the flow of inmates committed to prison officials is not stemmed. An obvious measure to alleviate prison overcrowding is appropriation of more funds to construct new prison facilities. Commentators,

Courcy, 888 F.2d 1105, 1107 & n.7 (6th Cir. 1989). See *supra* notes 155-56 and accompanying text for a discussion of *Heath*.

²⁸⁷ See *Rufo*, 112 S. Ct. at 762.

²⁸⁸ See *id.* at 773 (Stevens, J., dissenting).

²⁸⁹ See, e.g., *Heath*, 888 F.2d at 1110; *Badgley v. Santacroce*, 853 F.2d 50, 53 (2d Cir. 1988).

²⁹⁰ See *Amicus Curiae Brief of the Center For Dispute Settlement* at 22, *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (No. 90-954).

however, have questioned the efficacy of this solution because prison population tends to increase as fast as prison space.²⁹¹ Other commentators, estimating that close to one-half of all prison inmates are there on drug-related charges, have urged that legalization of drugs would solve the prison overcrowding crisis.²⁹²

A discussion of the validity of these proposals is beyond the scope of this Note. The *Rufo* decision can be seen, however, as a continuation of a recent Supreme Court trend toward restricting federal court oversight of institutional reform, especially prison reform.²⁹³ This signals the need for state legislatures to address the problem of prison overcrowding directly, as many have done.²⁹⁴ This Note will conclude with an examination of the current prison overcrowding crisis in Massachusetts and will suggest steps that the state legislature should take to alleviate the problem.

V. THE MASSACHUSETTS MORASS: A CRIMINAL JUSTICE SYSTEM IN NEED OF REFORM

*This is a case with no satisfactory outcome. The new jail is simply too small. Someone has to suffer, and it is not likely to be the government officials responsible for underestimating the inmate population and delaying the construction of the jail. Instead, it is likely to be either the inmates of Suffolk County, who will be double celled in an institution designed for single celling; the inmates in counties not yet subject to court supervision, who will be double celled with the inmates transferred from Suffolk County; or members of the public, who may be the victims of crimes committed by the inmates the county is forced to release in order to comply with the consent decree.*²⁹⁵

—Justice Sandra Day O'Connor,
Rufo v. Inmates of Suffolk County Jail

²⁹¹ See Bradford J. Tribble, Note, *Prison Overcrowding in Alaska: A Legislative Response to the Cleary Settlement*, 8 ALASKA L. REV. 155, 166 (1991).

²⁹² See David Elkins, Note, *Drug Legalization: Cost Effective and Morally Permissible*, 32 B.C. L. REV. 575, 579 (1991).

²⁹³ See *supra* note 117 and accompanying text for a discussion of the Supreme Court's restriction of prison reform in recent years. See also Dwyer, *supra* note 128, at 139 (noting Supreme Court trend of protecting state sovereignty by restricting institutional reform litigation).

²⁹⁴ See *supra* notes 119–23 and accompanying text for description of some states' efforts to address the problems of prison overcrowding.

²⁹⁵ *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 766–67 (1992) (O'Connor, J., concurring).

The problem of prison overcrowding in Massachusetts can be attributed in large part to an utter lack of communication between the three branches of government. In July of 1990, the Boston Bar Association and the Criminal Justice Foundation convened the Task Force on Justice to address problems of public safety in the Massachusetts criminal justice system.²⁹⁶ The Task Force concluded that the criminal justice system in Massachusetts was "not a 'system' at all, but rather a myriad of unconnected bureaucracies lacking shared goals, adequate resources, or clear policy direction."²⁹⁷ The Task Force discovered a prison system operating at 159 percent of capacity, with no hope for any slowdown in the growth rate.²⁹⁸ The state's prisons are so congested that inmates who have served only a fraction of their sentences must be released annually.²⁹⁹ Despite spending over one billion dollars in the last decade to improve correctional facilities and increase capacity by 62 percent, the Commonwealth's prison system remains one of the most crowded in the nation.³⁰⁰ One cannot help but wonder why this is so.

The reason is surprisingly simple and by no means limited to the state of Massachusetts. In an interview, Sheriff Robert Rufo noted that the Massachusetts state legislature has recently passed numerous "get tough on crime statutes" that carry mandatory prison sentencing provisions for drunk driving and drug trafficking violations.³⁰¹ These statutes are an understandable response to political pressure from constituents seeking to combat drunk driving and the drug crisis. As Sheriff Rufo observed, however, "with one swipe of the legislature's pen, the prison population can go through the roof."³⁰²

The "get-tough" legislation passed by Massachusetts is harmful because it does not carry with it the necessary commitment of re-

²⁹⁶ See BOSTON BAR ASS'N & CRIME AND JUSTICE FOUND., *THE CRISIS IN CORRECTIONS AND SENTENCING IN MASSACHUSETTS* 1 (1991) [hereinafter BOSTON BAR ASS'N].

²⁹⁷ *Id.* at 2.

²⁹⁸ See *id.* at 13-14.

²⁹⁹ See *id.* at 2.

³⁰⁰ *Id.* at 5.

³⁰¹ Interview with Robert C. Rufo, Sheriff of Suffolk County, in Boston, Mass. (Jan. 8, 1992). For examples of the Massachusetts "get-tough" legislation, see MASS. GEN. LAWS ANN. ch. 94C, § 32E (West 1989) amended by MASS. GEN. LAWS ANN. ch. 94C, § 32E (West 1992) (statute providing for mandatory prison sentencing for drug traffickers amended in 1988 by lowering amount of cocaine or heroin in person's possession to be considered a drug trafficker from 28 to 14 grams); MASS. GEN. L. ch. 90 § 24 (1990) (state legislature providing mandatory prison sentences for second drunk driving offense).

³⁰² Interview with Robert C. Rufo, *supra* note 301.

sources to the courts, the prosecutors or the corrections system. Furthermore, it is irresponsible to pass such legislation when official reports indicate that in reality the crime rate in Massachusetts has actually *declined* 16 percent since 1980.³⁰³ Studies reveal that these mandatory sentencing laws contribute significantly to the problem of prison overcrowding nationwide.³⁰⁴ These laws are also the most costly of all sentencing initiatives.³⁰⁵ Moreover, they do not seem to have any noticeable deterrent effect.³⁰⁶ Judges, prosecutors and prison officials all criticize mandatory sentencing laws as costly and ineffective.³⁰⁷ The first step that the Commonwealth can take to alleviate prison overcrowding is to repeal the mandatory sentencing laws.

The second step that Massachusetts can take is to follow the lead of other states such as Minnesota and Oregon that have addressed prison overcrowding through sentencing reform.³⁰⁸ The report of the Task Force on Justice contained sentencing reform proposals similar to those of other states.³⁰⁹ Massachusetts Attorney General Scott Harshbarger drafted the proposals into legislation and presented a bill to the Massachusetts Senate this year.³¹⁰ The bill suggests that the legislature establish an independent commission to promulgate sentencing guidelines that the courts in Massachusetts shall use.³¹¹ A primary goal of the commission would be to ensure that the Massachusetts prison population would not exceed the capacity of its prisons.³¹² Specifically, the commission would develop and evaluate intermediate sanctions as a sentencing option.³¹³

The Massachusetts legislature should pass this bill. The experience of other states demonstrates that the establishment of an independent commission is a particularly effective way to address

³⁰³ See BOSTON BAR ASS'N, *supra* note 296, at 10.

³⁰⁴ See CAMPBELL, *supra* note 282, at 83.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 81-83.

³⁰⁸ See generally Bogan, *supra* note 118, at 467 (describing Oregon's recent efforts at sentencing reform); Frase, *supra* note 122, at 727 (describing Minnesota's sentencing reform).

³⁰⁹ See BOSTON BAR ASS'N, *supra* note 296, at 2-5.

³¹⁰ See S. 118 1992 Regular Session, (1992).

³¹¹ See *id.* §§ 2(a), 2(c)(8).

³¹² See *id.* § 1(a)(4).

³¹³ See *id.* § 1(a)(5). Included in the list of possible intermediate sanctions are the following: standard probation; intensive supervision probation; community service; home confinement; day reporting; residential programming; restitution; and means-based fines. *Id.* § 1(c).

prison overcrowding because the commission has the time and necessary expertise to reform sentencing policy that the legislature lacks.³¹⁴ Moreover, the commission is insulated from political pressures and can avoid the need to satisfy constituents.³¹⁵ The legislatures have demonstrated through the enactment of mandatory sentencing laws that they are often motivated by politics of crime control.³¹⁶ An independent commission could impartially coordinate the state's sentencing and corrections functions to maintain balance between prison capacity and sentencing practices.

Finally, the independent commission could explore and eventually implement the use of intermediate sanctions. These include community-based penalty programs, economic penalties, such as day fines, and lesser restrictions on liberty, such as home confinement or day reporting.³¹⁷ Former United States Attorney General Richard Thornburgh recently supported the use of intermediate sanctions, stating that "when criminal justice systems nationwide are bursting at the seams, intermediate punishments can provide the means by which we can hold offenders accountable for their illegal actions, and achieve our goal of increasing public safety."³¹⁸

Consent decrees will not remain a viable settlement option in prison reform litigation unless states address the problem of prison overcrowding. Prison administrators cannot abide by restrictive population caps mandated by consent decrees and simultaneously accommodate the soaring number of inmates committed to them through mandatory sentencing laws. If consent decrees are to be used in the future to improve prison conditions, state legislatures must take steps to arrest the prison overcrowding crisis. Massachusetts should address this problem by repealing its mandatory sentencing laws and passing the sentencing reform bill pending in the legislature.

VI. CONCLUSION

Consent decrees are a very important alternative means of resolving disputes and effectuating remedial change in institutional reform litigation. Unlike consent decrees in private law litigation, however, these decrees are often very complex, future-oriented

³¹⁴ See Frase, *supra* note 122, at 729-30.

³¹⁵ See *id.*

³¹⁶ See *supra* notes 281-83 and accompanying text.

³¹⁷ See BOSTON BAR ASS'N, *supra* note 296, at 21-24.

³¹⁸ *Id.* at 22.

orders that affect the public's interest in the efficient operation of its institutions. The Supreme Court's adoption in *Rufo v. Inmates of Suffolk County Jail* of a new standard for modification of consent decrees in this area reflects an awareness that more flexibility is needed to consider both the public interest and the predicament of local institutional administrators. Nevertheless, the opinion also reveals the Court's continued struggle to determine the nature of a consent decree. While recognizing the hybrid nature of consent decrees as part contract and part judicial act, the *Rufo* Court decision signals a move away from a contractual view of consent decrees in institutional reform litigation. This threatens to undermine the finality of these negotiated settlements by depriving one party of its bargained-for expectations.

After *Rufo*, increased requests for modification of consent decrees currently in place in a majority of state prisons is likely. Inmate populations across the country have risen dramatically during the past decade, and local prison administrators will seek to escape consent decree provisions that mandate population caps and prohibit double bunking in order to accommodate more inmates. Federal judges applying the new standard will probably grant modification more often if the prison overcrowding crisis continues. Therefore, if consent decrees are to continue as a viable means of avoiding protracted and costly litigation in the context of prison reform, it is essential that government officials combat the problem of prison overcrowding. The *Rufo* decision reflects a judicial response to a problem it is not equipped to solve without concurrent efforts by the legislative and executive branches.

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