

Overcoming Failure of the Political Process
A Case Study of the Charles Street Jail Litigation

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"The failure to date to replace the jail is reflective of political inertia."¹

I. Introduction

Judge Garrity's statement from 1973 holds true to the present. This paper explores the effort to reform conditions of confinement for pretrial detainees in the Boston, Massachusetts metropolitan area through the Inmates of the Suffolk County Jail lawsuit.² Section II of the paper considers the environment for litigation at the time of this case from a variety of perspectives, including the prisoners' rights movement, the political dynamic in Boston with other efforts to reform public institutions, and the failing conditions at the Charles Street Jail. Section III examines the history of the litigation itself, focusing on the lengthy efforts to build a new jail, the only way to cure the conditions of confinement at the Charles Street Jail. Section IV analyzes the litigation itself from the perspective of institutional reform litigation theory, concluding that the litigation successfully overcame the failure of the political process by coercing county and state officials into fulfilling their responsibilities under state and federal law. Though this case lowered the standard of proof to modify consent decrees and was concluded by

¹ Inmates of the Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676, 687 (D. Mass. 1973).

² The initial district court decision was Inmates of the Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974), *cert. denied sub nom, Hall v. Inmates of the Suffolk County Jail*, 419 U.S. 977 (1974). This decision shall be referred to hereinafter as District Court 1973. Unpublished orders by the district court and the 1st Circuit Court of Appeals in this case will be cited by [Title of the Order, Date of the Order, Page Number] for easier reading.

application of the Prison Litigation Reform Act (PLRA), Inmates of the Suffolk County Jail proved successful in providing constitutional conditions of confinement for pretrial detainees in the Boston metropolitan area.

II. Context for the Litigation

Before exploring the history of Inmates of the Suffolk County Jail itself, a brief review of the environment for litigation at the time of the suit is necessary understand any limitations or opportunities that were available at the time.

A. Growth of the Prisoners' Rights Movement

The effort to protect the rights of individuals in jails and prisons throughout the United States enjoyed significant success in the time proceeding Inmates of the Suffolk County Jail. The movement, understood as part of a more inclusive society in the aftermath of World War II, began to overcome the traditional "hands-off" doctrine of the Supreme Court through a series of favorable decisions in the 1960s that recognize the constitutional rights of prisoners.³

Monroe v. Pape, the first of these cases, decided in 1961, resurrects the 1871 Civil Rights Act.⁴ The Act allows lawyers to seek damages and injunctions in federal courts for state abuses against individual rights.⁵ Incentives are created for the pursuit of prisoners' rights, allowing attorneys the ability financially to take cases that have merit.

³ See James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts*, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 35 (1983).

⁴ See Monroe v. Pape, 365 U.S. 167 (1961).

⁵ See *id.* See also WAYNE N. WELSH, COUNTIES IN COURT: JAIL OVERCROWDING AND COURT-ORDERED REFORM 10 (1995).

Cooper v. Pate, decided in 1964, held that inmates had standing to pursue claims under the 1871 Civil Rights Act of religious discrimination in court.⁶ The Supreme Court affirmatively recognized the rights of prisoners in Wolff v. McDonnell in stating that "(t)here is no iron curtain drawn between the Constitution and the prisons of this country."⁷

Jails differ significantly from prisons in ways that affect institutional reform litigation. Most people in jail are pretrial detainees, individuals that are presumed innocent until they are proven guilty in a court of law.⁸ The uncertainty of guilt or innocence provides a more compelling rationale for the provision of constitutional conditions of confinement. Prisons exist to punish those guilty of crimes, contributing to a belief that prisoners merit the treatment that they receive. This issue comes directly into play in the initial Inmates of the Suffolk County Jail decision.⁹

B. Boston and the Federal Courts

Boston was consumed with the effort to desegregate schools through the federal courts. In Morgan v. Hennigan, District Court Judge W. Arthur Garrity, Jr. held that various official actions and policies had deliberately segregated the

⁶ See Cooper v. Pate, 378 U.S. 546 (1964).

⁷ Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

⁸ See GARY CORNELIUS, JAILS IN AMERICA: AN OVERVIEW OF ISSUES 1 (2nd ed., 1996).

⁹ See District Court 1973 at 686.

school system.¹⁰ To remedy the violations, Judge Garrity approved a plan prepared by the State Board of Education for the cross-busing of students.¹¹

Resistance to the busing plan was significant and violent.¹² Implementation of the court order against boycotts and violence required the threat of contempt for local education officials and the placement of portions of the school system into receivership.¹³ Much discussion continues to this day on the effectiveness of the order as a remedy.¹⁴

Other efforts to institutionally reform Boston were taking place at this time. For example, the case of Allen v. McDonough fought to reform special education services in Boston's schools.¹⁵ This effort took place in the mid-1970s, during the height of desegregation efforts at the schools.

In short, Boston had been the target of institutional reform litigation at the time of Inmates of the Suffolk County Jail in other contexts with much controversy.

¹⁰ See Morgan v. Hennigan, 379 F. Supp. 410 (1974).

¹¹ See *id.* See also Jonathan L. Entin, *The Tragedy of the Common: Dilemmas of Public School Desegregation in Boston*, 62 NOTRE DAME L. REV. 796, 798-99 (1987) (reviewing J. ANTHONY LUKAS, *COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES* (1985)).

¹² See, e.g. R. SMITH, *Two Centuries and Twenty-four Months: A Chronicle of the Struggle to Desegregate the Boston Public Schools*, in LIMITS OF JUSTICE, 67, 69-70 (H. Kalodner and J. Fishman eds. 1978) (reporting disturbances 130 out of 174 school days of the 1974-1975 school year, resulting in over eight thousand suspensions and 459 arrests).

¹³ See *id.* at 796.

¹⁴ Compare Kate Zernike, *On the Record for Busing*, BOSTON GLOBE, December 8, 1998 (detailing interview with Judge Garrity, who would not have done anything differently with the case) with Jeff Jacoby, *Garrity's Folly: 25 Years After Busing Began*, BOSTON GLOBE, January 4, 1999 (describing plan as failure).

¹⁵ See Michael A. Rebell, *Allen v. McDonough: Special Education Reform in Boston*, in OPPORTUNITIES FOR CHILDREN WITH HANDICAPS 74.

Resistance to court authority over democratic institutions was taking place at the time of the lawsuit.

C. Charles Street Jail

Built in 1851, the 342 cell Charles Street Jail was state of the art for the times. Most facilities of the time were premised on the Quaker ideal that solitude induced contrition.¹⁶ Charles Street had three, five-tiered wings radiating out from a large central area, with cells designed to house one prisoner per cell.¹⁷

Serving as the pretrial detention facility for much of Boston's history, the Charles Street Jail facility was recognized as being inadequate by public officials as early as 1918.¹⁸ Between 1949 and the filing of Inmates of the Suffolk County Jail in 1971, there were seven separate government commissions that studied the Charles Street Jail.¹⁹ All concluded that the facility was inadequate, most recommending the construction of a new facility.²⁰

The series of studies detailed the inadequacies of the facility and the conditions that it created for detainees. There were extreme temperature variations within the tiers, based on the season.²¹ The plumbing system was

¹⁶ See David Arnold, *Locking up Charles Street Jail's Colorful Past*, BOSTON GLOBE, June 18, 1991.

¹⁷ See *id.* See also District Court 1973 at 679.

¹⁸ See David Arnold, *Locking up Charles Street Jail's Colorful Past*, BOSTON GLOBE, June 18, 1991 (stating recognition by the Boston City Council).

¹⁹ Studies were conducted by the City of Boston (1949), a Governor's Committee (1962), the Municipal Research Bureau (1962), the Finance Commission (1963), the Redevelopment Authority (1964), the National Council on Crime and Delinquency (1968), and a Special Legislative Study Commission (1970). See District Court 1973 at 682.

²⁰ See *id.*

²¹ See *id.* at 679.

inadequate and impossible to repair.²² Modern fire escape safety standards were not taken into account with the construction of the facility, allowing only one fire escape in the entire facility while requiring the unlocking of individual cells to remove inmates in case of fire.²³ Problems existed with animals and insects.²⁴ Little medical attention was available to anyone that might have medical problems, both physical and mental.²⁵ The ability to provide adequate food and clothing was limited by the facility itself.²⁶ Recreation time was limited by staff limitations.²⁷

In short, the Charles Street Jail was inadequate as a facility. The governmental actors responsible for making any necessary changes knew this for many years and did nothing.²⁸

III. History of the Litigation

A. Steps to the 1973 District Court Ruling

In 1971, Max Stern, a recent graduate from the University of Pennsylvania Law School affiliated with the Massachusetts Law Reform Institute, filed a class action suit on behalf of inmates at the Suffolk County jail.²⁹ Defendants in the suit are the Sheriff of Suffolk County, the Massachusetts Commissioner of Correction,

²² See *id.* at 680.

²³ See *id.*

²⁴ See District Court 1973 at 680.

²⁵ See *id.* at 681-82.

²⁶ See *id.* at 682-83.

²⁷ See *id.* at 683.

²⁸ The known inadequacy of Charles Street Jail led Boston to make only emergency repairs to the facility from 1949 to the time of the decision. See *id.* at 689.

²⁹ See Rose E. King, Note, *Consent Decree Modification and the Suffolk County Jail: What a Long Strange Trip It's Been*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 231, 268 (1995).

the Mayor of Boston, and the nine Boston City Councillors.³⁰ Judge Garrity, the judge at the center of controversy with Boston school desegregation, drew assignment to this case.

Control over the case resided with attorneys, rather than with the prisoner class. A June 1971 order on pending motions makes this point explicitly.³¹ Judge Garrity offers reasons for why this is acceptable when certifying the inmates as a class while rejecting the motion of direct notice.³² One, "no inmates could possibly have any objection to the relief being sought on their behalf."³³ Two, constantly changing membership in the class makes inadequate a single, direct notice.³⁴ Three, any trial in this case would rely on expert testimony, rather than testimony from individual inmates.³⁵

Constitutional claims are filed under 42 U.S.C. § 1983, alleging defects in the quality and level of incarceration violate the Eighth and Fourteenth Amendments.³⁶ Negotiations between the parties led to the implementation of

³⁰ See District Court 1973 at 678.

³¹ "[C]ontrol of this litigation lies not in the hands of the plaintiffs but rather with the Massachusetts Law Reform Institute and other groups of persons concerned with the welfare of the inmates . . ." Order on Pending Motions, June 29, 1971, at 3.

³² *Id.* at 2.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 3.

³⁶ See District Court 1973 at 679. Claims were also made alleging violations premised on the status of detainees at Charles Street under First and Sixth Amendment analysis. These claims do not play a significant role in what happens with this case and are considered no further in the case study.

two stipulated partial judgments, entered by the court in summer 1972, narrowing the issues left for trial.³⁷

On June 20, 1973, Judge Garrity found that the Charles Street Jail violates the constitutional rights of the plaintiffs under two tests. One, the quality of incarceration at the Charles Street Jail is worse than the quality of incarceration for convict that are being “punished” in Massachusetts correctional facilities.³⁸ Two, limitations on the liberty of a Charles Street Jail detainee are insufficiently justified by the state’s singular interest in presenting the detainee for trial under due process analysis.³⁹

Implementing a remedy required the use of an adequate facility. Recognizing this, the court permanently enjoined the defendants from housing any pretrial detainee with another inmate by December 1973 and from housing any pretrial detainee at Charles Street Jail by July 1976.⁴⁰ While there were other efforts to remedy the unconstitutional conditions of confinement in Judge Garrity’s final judgment, these were limited by the inadequacy of the Charles Street Jail facility.⁴¹

³⁷ The June 2 order ended the use of “heavy solitary” confinement and established conditions for the usage of “light solitary” confinement. The July 6 order promulgated disciplinary rules and procedures while increasing visitation rights for inmates. See *id.* at 691-93.

³⁸ See *id.* at 686-688.

³⁹ See *id.* at 686.

⁴⁰ See District Court 1973 at 691.

⁴¹ Other efforts included physical examinations for inmates, increased recreation time, provision of clothing, and additional visitation time for both attorneys and others. See *id.*

B. Implementation Efforts through the 1979 Consent Decree

Implementation of the 1973 decision has focused exclusively on the creation of an adequate facility to replace the existing Charles Street Jail. In interviews with the principals involved with this case, no mention has been made of any aspect of the judgments other than closing of Charles Street Jail and its unconstitutional conditions of confinement. Creation of a facility that met constitutional standards was the one method to comply with the court order.

Understanding the legal relationship between the various defendants for the provision of the jail helps to explain both the difficulties in building a new facility both before and after the courts became involved. Under Massachusetts statute, each county is required to provide suitable jails.⁴² Furthermore, the mayor and the nine individual councillors of Boston are county commissioners for Suffolk County and have both executive and legislative power.⁴³ The Commissioner of Corrections held statutory responsibility for "general supervision of jails and houses of correction" at the time of the suit.⁴⁴ The Commissioner must also approve any plans for the construction or enlargement of a jail.⁴⁵ The Sheriff maintains primary custody and control over the detention facility, but lacks

⁴² MASS. GEN. LAWS ch. 34, § 3 (1978).

⁴³ MASS. GEN. LAWS ch. 34, § 14 (1978).

⁴⁴ See Inmates of the Suffolk County Jail v. Eisenstadt, 494 F.2d 1196, 1199 (1st Cir. 1974) (describing powers at time of suit). This power has been made more specific to make the Commissioner responsible for establishing "minimum standards for the care and custody of all persons committed to county correctional facilities." MASS. GEN. LAW. Ch. 127, § 1A.

⁴⁵ See MASS. GEN. LAW. Ch. 34, § 14.

spending power.⁴⁶ In this regime of jail administration, it is unclear who should bear what burden for complying with the 1973 order to not use Charles Street Jail.

The defendants spent much time developing acceptable alternatives to the Charles Street Jail. The June 1976 closure date proved to be unworkable, leading Judge Garrity to make the first of several modifications to the 1973 decree.⁴⁷

Taking into account the support of city officials, the district court delayed the closure of Charles Street Jail to July 1, 1977 and authorized the renovation of an existing prison at Deer Island along with the creation of a downtown Boston intake facility.⁴⁸ The Commissioner of Corrections withdrew support for the Deer Island plan, necessitating the vacation of relevant sections of the October 1975 order.⁴⁹

Judge Garrity appointed Edward McLaughlin as a master in 1976 to assist the multiple parties in resolving any differences in meeting the July 1977 deadline.⁵⁰ With the assistance of McLaughlin, the parties decided to renovate the city prison for temporary occupancy while a new facility is constructed.⁵¹ Judge Garrity delayed the ban on new pretrial detainees at Charles Street Jail until

⁴⁶ Telephone Interview with Robert C. Rufo (May 7, 1999) [hereinafter Rufo Interview]. Mr. Rufo currently serves as a judge in West Roxbury District Court. Judge Rufo began work for the Suffolk County Sheriff Department in April 1977, serving as Sheriff during the legal challenge to modification of the consent decree.

⁴⁷ See Memorandum and Order Modifying Decree Dated June 20, 1973, October 20, 1975.

⁴⁸ See *id.* at 4-5.

⁴⁹ See Memorandum of Decision Regarding July 28, 1976 Order and Confirmatory Orders, October 6, 1976 at 2.

⁵⁰ See Memorandum and Orders Regarding Renovation of City Prison Facility and Closing of Charles Street Jail, June 30, 1977, at 1.

⁵¹ See *id.* at 4-5.

November 1, 1977.⁵² This plan fell through, forcing Judge Garrity to order cooperation from Mayor Kevin White and the City Council to make money available to temporarily lease a jail in the new Middlesex County Courthouse and another five week delay.⁵³

Failure to comply with the new December 15 deadline was averted by the First Circuit Court of Appeals, which stayed Judge Garrity's injunction until March 3, 1978.⁵⁴ The Court of Appeals directed the parties to work together to gain voluntary agreement or to submit individual proposals for remedying the constitutional violation.⁵⁵

Predictably, the parties failed to reach agreement and the Court of Appeals pushed back the closure date of Charles Street Jail to October 2, 1978.⁵⁶ The delays here can be traced to the City Council, which expressed support for building a new facility at a price of \$20-\$30 million, if a satisfactory site could be found, but chose to fund renovations at the Charles Street Jail for \$10 million just two weeks later.⁵⁷

By October 1978, the defendant parties came to agreement on the financing and location of the new facility, which would be the current site of the

⁵² See *id.*

⁵³ See Memorandum and Orders Regarding the Use of Middlesex County Jail and the Closing of the Charles Street Jail, November 2, 1977, at 3-4.

⁵⁴ See Memorandum and Order, December 15, 1977, at 4.

⁵⁵ See *id.* at 3.

⁵⁶ See Inmates of the Suffolk County Jail v. Kearney, 573 F.2d 98, 101 (1st Cir. 1978).

⁵⁷ See *id.* at 99.

Charles Street Jail.⁵⁸ An additional order detailing compliance procedures was allowed by Judge Garrity on January 22, 1979.⁵⁹ Negotiations on the specifics of building a constitutionally compliant jail that would resolve the major issues of building renovations, inmate populations, cell size, and minimum day room/recreation areas were assisted by the special master.⁶⁰

The parties entered into a short consent decree on May 7, 1979.⁶¹ The decree modifies a January 1, 1979 architectural program, which details the standards for a 309-person facility at the site of the Charles Street Jail under an 86 week timetable.⁶² The program consulted a variety of state and national standards.⁶³ Architects for the plaintiffs were involved with the development of the plan, which included special rooms for attorney-client meetings, monitor cells for suicide-prone inmates, and individualized showers.⁶⁴

⁵⁸ See Memorandum and Orders as to Pretrial Detention Center, October 2, 1978, at 1.

⁵⁹ See Proposal for Monitoring Compliance with Orders of October 2, 1978, 1.

⁶⁰ See Master's Report Concerning Architectural Program for New Suffolk County Jail, April 12, 1979, at 4. Twenty-four minor issues, so identified by the parties, were addressed during these negotiations. See *id.* at 4-5.

⁶¹ For a published copy of the consent decree, see Inmates of the Suffolk County Jail v. Rufo, 12 F. 3d 286, 295-97 (1st Cir. 1993).

⁶² Consent Decree, May 7, 1979. See Stull Associates & Hellmuth, Obata & Kassabaum, *Suffolk County Detention Center, Charles Street Facility: Architectural Program*, January 1, 1979 [hereinafter Architectural Program 1979].

⁶³ Standards from the Massachusetts Department of Correction, the American Correctional Association, the National Fire Protection Association, the National Sheriff Association, the National Advisory Commission on Criminal Justice Standards and Goals, the American Bar Association Criminal Justice Section, the American Public Health Association were all consulted in the creation of the Architectural Program. See Architectural Program 1979 at 2-3.

⁶⁴ Elliot Rothman consulted for the plaintiffs. Telephone interview with Lynn Weissberg, Attorney for the Plaintiffs (May 10, 1999) [hereinafter Weissberg Interview]. Ms. Weissberg has actively worked on Inmates of the Suffolk County

Most importantly to the plaintiffs, the jail provided single occupancy rooms for all detainees.⁶⁵ At the same time, the Supreme Court was considering whether double occupancy in correctional facilities was per se unconstitutional in Bell v. Wolfish.⁶⁶ The plaintiffs regarded single occupancy to be of such importance to agree to smaller overall cell size during the negotiations of the consent decree.⁶⁷

C. State Court Efforts and Overcrowding in the 1980s

Agreement on a consent decree failed to stop the delay in building a new pretrial detention center. Passage of Proposition 2 ½, supporting 25% budget cuts, spurred fears that capacity would have to be reduced by nearly 75%.⁶⁸ Frustration with delay led plaintiffs' counsel petitioning Judge Robert Keeton, receiving the case from Judge Garrity in 1979 upon appointment to the federal bench, to have Mayor Kevin White testify under oath at a hearing "to learn whether he has indefinitely suspended the Charles Street Jail project."⁶⁹

The consent decree agreed to by the parties more importantly failed to account for the growth of jail overcrowding throughout Massachusetts. In the

Jail when joining the law firm of Stern & Shapiro in the early 1980s. See also Otile McManus, *The 'Glamour Slammer' Debate: A New Generation of Jails in the Boston Area do not Conform to Popular Imagery*, BOSTON GLOBE, August 29, 1990 (Rothman and others describing the importance of even minor design details for jails); Peter J. Howe, *Suffolk Readies Jail for '90 Opening*, BOSTON GLOBE, December 17, 1989.

⁶⁵ See Architectural Program at 37.

⁶⁶ See Bell v. Wolfish, 441 U.S. 520 (1979).

⁶⁷ See Affidavit of Anne Goldstein, submitted November 20, 1992 (describing importance of the issue in negotiations for consent decree while working with Max Stern).

⁶⁸ See William F. Doherty, *75% Inmate Cut Planned at City Jail*, BOSTON GLOBE, March 25, 1981.

architectural program of 1979, the inmate population was projected to decrease steadily from a total of 245 people in 1979 to 216 people by 1999.⁷⁰ The actual number of detainees committed to the Sheriff rose significantly, reaching 300 people for 1983.⁷¹

Plans were completed for the new facility by 1984, but construction had not yet begun and Boston had not appropriated sufficient funding.⁷² Realizing the inadequacy of the new facility, the Sheriff informed Boston that he would not support the plan.⁷³ After seeking allowance to double-bunk inmates, the Sheriff began refusing to accept pretrial detainees above the maximum allowed under the court order on October 15, 1984.⁷⁴

The Attorney General went to state court, seeking to compel the Sheriff to accept all pretrial detainees committed.⁷⁵ The Sheriff responded by filing an action against the mayor of Boston, the Boston City Council, and the Commissioner of Correction, claiming violation of their duties under the Massachusetts General Law to provide him with a suitable jail.⁷⁶ The actions were consolidated and heard

⁶⁹ See Memorandum in Support of Plaintiffs' Motion to Set a Hearing and for Other Relief, January 13, 1981, at 2.

⁷⁰ See Architectural Program at 4.

⁷¹ See Plaintiffs' Memorandum of Law in Opposition to the Sheriff's Motion for Modification of Consent Decree, September 29, 1989, at 10.

⁷² See *id.* at 11.

⁷³ See *id.*

⁷⁴ Rufo Interview.

⁷⁵ See Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 626 (1985) [hereinafter State Decision 1985].

⁷⁶ See *id.*

before a Single Justice Session of the Supreme Judicial Court.⁷⁷ Justice Paul Liacos conducted a series of hearings, pressing the parties to reach consensus.⁷⁸

The parties all agree that a new jail of at least 13 stories and 435 cells should be built at the site of the present jail.⁷⁹ All parties except for the City Council supported a seventeen-story plan. Concluding that this was the only feasible plan, Justice Liacos ordered the construction of the seventeen-story building by the parties involved.⁸⁰ The Supreme Judicial Court affirmed the opinion of Justice Liacos.⁸¹

Sheriff Kearney responded to the overcrowding in a variety of ways provided by state law and the court order of Justice Liacos.⁸² Pretrial detainees were transferred to other county correctional facilities that were willing to cooperate.⁸³ Detainees that had previously served sentences in state institutions were transferred into the custody of the Commissioner of Correction.⁸⁴ Special "jail capacity emergency" hearings were held, where a special Superior Court session selects detainees to transfer to halfway houses or to release on personal

⁷⁷ *See id.*

⁷⁸ *See id.* at 627.

⁷⁹ *See* State Decision 1985 at 627.

⁸⁰ *See id.* at 628.

⁸¹ *See id.* at 632.

⁸² Rufo Interview. *See also* Order No. 16, December 1985, issued by Justice Liacos, sitting as a single justice. Described in Plaintiffs' Memorandum of Law in Opposition to the Sheriff's Motion for Modification of Consent Decree, September 29, 1989, at 14.

⁸³ *See id.*

⁸⁴ *See id.*

recognizance.⁸⁵ The Sheriff instituted a Pretrial Controlled Release Program as an alternative to incarceration.⁸⁶ Modular cells were also installed at the Charles Street Jail.⁸⁷

Following the state court orders, Judge Keeton approved a modification of the 1979 consent decree to allow defendants to increase the size of the new jail if single-cell occupancy is maintained.⁸⁸ The state legislature approved funding for construction of a new jail at Nashua Street.⁸⁹ Construction began in September 1987 and was completed in spring 1990.

D. Efforts to Modify the Consent Decree for Double Occupancy

Much has been written in the legal community about this aspect of the case, which led to more flexible standard for modifications of consent decrees under the Federal Rules of Civil Procedure, Rule 60(b).⁹⁰ Some consideration of this aspect of the history, seen through the experiences of the particular case is necessary.

⁸⁵ See Kevin Cullen, *Record Number of Inmates Sparks Fear of Chaos at Charles Street Jail*, BOSTON GLOBE, September 3, 1988.

⁸⁶ See Plaintiffs' Memorandum of Law in Opposition to the Sheriff's Motion for Modification of Consent Decree, September 29, 1989, at 15.

⁸⁷ See *id.* at 13. See also *Temporary Cells Sought by Kearney*, BOSTON GLOBE, January 18, 1986.

⁸⁸ See Order, April 11, 1985, at 1, *described in* Plaintiffs' Memorandum of Law in Opposition to the Sheriff's Motion for Modification of Consent Decree, September 29, 1989, at 12.

⁸⁹ ST. 1985, c.799.

⁹⁰ See, e.g. Gregory C. Keating, Note, *Settling through Consent Decree in Prison Reform Litigation: Exploring the Effects of Rufo v. Inmates of the Suffolk County Jail*, 34 B.C. L. REV. 163 (1992); Donna Wolfe, Note, *Public Law, Modification of Consent Decrees, More Flexible Standard for Modifications in Institutional Reform Litigation: Rufo v. Inmates of the Suffolk County Jail*, 15 U. ARK. LITTLE ROCK L.J. 95 (1992); Rose E. King, Note, *Consent Decree Modification and the Suffolk County Jail: What a Long Strange Trip It's Been*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 231, 268 (1995).

The Supreme Court, in the 1932 decision of United States v. Swift & Co., established the standard for modification prior to the creation of Federal Rule of Civil Procedure 60(b)(5).⁹¹ The Court found held that “(n)othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.”⁹²

The defendants, led by Robert Rufo, argued that there were substantial and material changes in the law and facts of the case that amount to “new and unforeseen conditions” under the Swift test.⁹³

The change in law was the 1979 Supreme Court decision of Bell v. Wolfish, which ruled that double occupancy in correctional facilities was not per se unconstitutional.⁹⁴ Negotiations for the consent decree took place with this potential ruling on the mind of plaintiffs’ attorneys, if not the defendants.⁹⁵ The consent decree compromised on cell size to achieve single occupancy.⁹⁶

Overcrowding of the Charles Street Jail, unexpected by the calculations present in the consent decree, provided “new and unforeseen” facts that warranted modification of the decree. The history of the 1980s was an effort to

⁹¹ See United States v. Swift & Co., 286 U.S. 106 (1932).

⁹² *Id.* at 119.

⁹³ See Inmates of the Suffolk County Jail v. Kearney, 734 F.Supp 561, 563 (D. Mass. 1990).

⁹⁴ Bell v. Wolfish, 441 U.S. 520 (1979).

⁹⁵ Judge Rufo, in his interview, did not believe that the pending decision was an important consideration for the defendants in the consent decree negotiations. He went on to describe Bell v. Wolfish as being a narrow, fact-driven decision for the Court. Rufo Interview.

⁹⁶ See Affidavit of Anne Goldstein, submitted November 20, 1992, *supra* note 67.

account for an increasing jail population, rather than the decrease planned for in the consent decree.

Additionally, the defendants presented significant amounts of evidence to the district court to support the factual determination that double occupancy would be acceptable at the Nashua Street Jail.⁹⁷ For example, double occupancy met American Correctional Association standards.⁹⁸

In April 1990, Judge Keeton denied the motion to modify the consent decree.⁹⁹ The district court held that the decision in Bell v. Wolfish did not amount to a change in the law that would satisfy Rule 60(b)(5) because the it did not directly overrule any legal interpretation on which the consent decree was based.¹⁰⁰ The court found that the overcrowding conditions were neither new nor unforeseen by the Sheriff.¹⁰¹ By the early 1980s, all parties recognized the population projections in the Architectural Program to be inaccurate. This trend continued throughout the 1980s, but no effort was made to modify the decree after 1985. Finally, Judge Keeton rejected the modification under more flexible standards in other circuits because one of the primary purposes of the decree was

⁹⁷ Rufo Interview.

⁹⁸ See Dolly Smith, *Rufo Says OK of 650-prisoner Limit Boosts Plan for Jail Double-Bunking*, BOSTON GLOBE, August 14, 1991 (announcing American Correctional Association accreditation of double-bunk plan).

⁹⁹ See Inmates of the Suffolk County Jail v. Kearney, 734 F.Supp 561, 566 (D. Mass. 1990).

¹⁰⁰ See *id.* at 564.

¹⁰¹ See *id.* at 564-65.

to provide a separate cell for each detainee.¹⁰² The First Circuit Court of Appeals affirmed and the Supreme Court granted certiorari.¹⁰³

The Supreme Court vacated and remanded the district court judgment.¹⁰⁴ Writing for a 6-2 majority, Justice White articulated the following new standard for interpreting Federal Rule of Civil Procedure 60(b):

*(A) party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances (factual condition or in law) warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance.*¹⁰⁵

Justice White interpreted a significant change in circumstances to be either a significant change in factual conditions that make compliance with the decree significantly more difficult or in law.¹⁰⁶

Even with the new standard for the review of consent decree modifications, double occupancy was not automatically achieved for the Nashua Street Jail.¹⁰⁷ Sheriff Rufo's plan to double-bunk in 197 cells was rejected by Judge Keeton March 1993.¹⁰⁸ The district court recognized that a significant change in the circumstances had occurred with the increase in the number of pretrial detainees beyond that actually foreseen at the time of

¹⁰² See *id.* at 565.

¹⁰³ Inmates of the Suffolk County Jail v. Kearney, 734 F.Supp 561, 566 (D. Mass. 1990), *cert. granted*, 111 S.Ct. 950 (February 19, 1991).

¹⁰⁴ Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367 (1992).

¹⁰⁵ *Id.* at 383.

¹⁰⁶ See *id.* at 384.

¹⁰⁷ Rufo Interview.

¹⁰⁸ See Inmates of the Suffolk County Jail v. Rufo, 148 F.R.D. 14, 25 (D. Mass. 1993), *aff'd*, 12 F.3d 286 (1st Cir. 1993).

the consent decree in 1979 and the modification in 1985.¹⁰⁹ However, the Sheriff failed to show that his proposed modification was tailored to fit the changed circumstance.¹¹⁰

A second effort at modification proved more successful for the defendants. While rejecting the Sheriff's proposal for double occupancy in 161 cells, Judge Keeton allowed double occupancy for 100 cells.¹¹¹ Both parties submitted a joint order to be entered by Judge Keeton in June 1994.¹¹² The order provides procedures for double occupancy, reporting on suspect risks related to double occupancy, and closure of the City Prison.¹¹³ Additionally, the case was kept open for limited purposes for a five year period after the entry of this final order.¹¹⁴

E. The End in Sight: The 1990s and the Prison Litigation Reform Act (PLRA)

With the modification of the consent decree to allow double occupancy and the entry of a final order, the end to Inmates of the Suffolk County Jail was in sight. Passage of the PLRA provided the defendants with an additional opportunity to terminate the consent decree.¹¹⁵

¹⁰⁹ See *id.* at 15.

¹¹⁰ See *id.* at 24.

¹¹¹ See Inmates of the Suffolk County Jail v. Rufo, 844 F.Supp 31 (D. Mass. 1994).

¹¹² See Memorandum and Order, June 14, 1994

¹¹³ See *id.* at 4-8.

¹¹⁴ See *id.* at 18.

¹¹⁵ 18 U.S.C. § 3626 (Supp. 1997).

Congress intended to address what it perceived to be the persistent problems with prisoner litigation in a variety of ways.¹¹⁶ For example, the PLRA established strict limits on the prospective and preliminary relief judges may order, the findings on which the relief must be based, and the permissible length of this relief.¹¹⁷ The effort of the PLRA is to narrow the intrusiveness and the amount of prisoner litigation.¹¹⁸

The district court terminated enforcement of the consent decree via specific performance while denying motion to terminate or vacate defendants' obligations.¹¹⁹ Judge Keeton avoided the question of the PLRA's constitutionality with a narrow reading of the statute.¹²⁰

Given the constitutional issues involved with the PLRA, the United States Department of Justice intervened on appeal to the First Circuit Court of Appeals. The Court found the Act to be constitutional and construed it to entitle corrections officials to the termination of consent decrees involving prison conditions in civil actions.¹²¹ The consent decree was terminated by the Court of Appeals with the November 7, 1997 decision, ending litigation in the matter of Inmates of the Suffolk County Jail.¹²²

¹¹⁶ See, e.g. Eugene J. Kuzinski, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361, 376 (1998).

¹¹⁷ See *id.* at 376.

¹¹⁸ See *id.* See also Weissberg Interview.

¹¹⁹ See Inmates of the Suffolk County Jail v. Sheriff of Suffolk County, 952 F.Supp. 869 (D. Mass. 1997).

¹²⁰ See *id.* at 876-77.

¹²¹ See Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 655 (1st Cir. 1997).

¹²² See *id.* at 663.

IV. Theory of Institutional Reform Litigation: A Possible Explanation for Inmates of the Suffolk County Jail

Highlighting the theory of institutional reform litigation is the debate between Lon Fuller and Owen Fiss on the appropriate role of courts in adjudicating institutional reform cases.¹²³ Though there are fundamental disagreements between the two, unique circumstances exist in Inmates of the Suffolk County Jail that might allow both to consistently support this litigation.

A. Consideration of Institutional Reform Litigation Theory

In *The Forms and Limits of Adjudication*, Lon Fuller defines limits in term of “effective legal action.”¹²⁴ Forms of litigation “refer to the ways in which adjudication may be organized or conducted.”¹²⁵ Adjudication itself should be considered a form of social ordering, different from the two basic forms of social ordering: common aims or reciprocity.¹²⁶ Adjudication differs from these basic forms of social ordering in that its mode of participation centers on the presentation of proofs and reasoned arguments, which allows for more direct participation by the party affected.¹²⁷

Fuller argues that polycentric problems, “situation(s) of interacting points of influence”, are beyond the limits of adjudication.¹²⁸ These problems “normally

¹²³ For an explanation why more topical literature on institutional reform litigation is not consulted for this case study, see *infra* note 147.

¹²⁴ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 354 (1978).

¹²⁵ *Id.*

¹²⁶ See *id.* at 357.

¹²⁷ See *id.* at 363-65. The other forms of social ordering were characterized with examples (contract for reciprocity, elections for common aims).

¹²⁸ *Id.* at 395.

involve many affected parties and a somewhat fluid state of affairs."¹²⁹ However, Fuller acknowledges that all disputes have polycentric elements and that the key question is "knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached."¹³⁰ In these situations, Fuller believed that managerial direction or reciprocity was the two ways to solve sufficiently polycentric problems.¹³¹

In *Foreword: The Forms of Justice*, Owen Fiss defines structural reform as a unique type of litigation, "distinguished by the constitutional character of the constitutional character of the public values, and even more importantly, by the fact that it involves an encounter between the judiciary and the state bureaucracies."¹³² Fiss further defines adjudication to be "the social process by which judges give meaning to our public values."¹³³ Legislative failure is "understood as a general presumption in favor of majoritarianism: the legislature should be seen as standing for those agencies of government, whether they be the chief executive of the polity, or the local school board, or director of corrections, that are more perfectly tied to majoritarian politics than are the courts."¹³⁴ There is no clear connection between legislative failure and upholding constitutional values, given the commitment to representing preferences.¹³⁵ It is

¹²⁹ *Id.* at 397.

¹³⁰ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. at 397 (1978).

¹³¹ *Id.*

¹³² Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

¹³³ *Id.*

¹³⁴ *Id.* at 6.

¹³⁵ *See id.* at 9-10.

unclear what institutions would give meaning to constitutional values if not the courts.¹³⁶ The legitimacy of courts depends not on consent of the people, “but rather on their competence, on the special contribution that they make to the quality of our social life.”¹³⁷ In structural suits, the “mission of the structural decree is to remove the threat posed to constitutional values by the organization.”¹³⁸ This is true even where there may be significant chances of failure, not knowing what is required to remove the threat.¹³⁹

Fiss critiques Fuller’s conception of polycentric disputes.¹⁴⁰ Fuller’s conception of the limits of adjudication, according to Fiss, “is the individual’s right to participate in a proceeding that might adversely affect him.”¹⁴¹ Fiss acknowledges that the type of representation in structural suits challenges these norms.¹⁴² Nearly all public norms created by courts are polycentric.¹⁴³ The concern for the individual fails to account for the modern bureaucracies of the state.¹⁴⁴

B. A Combination of Factors in Inmates of the Suffolk County Jail Would Lead both Fuller and Fiss to Support Institutional Reform Litigation for this Case

¹³⁶ See *id.* at 33.

¹³⁷ Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. at 38 (1979).

¹³⁸ *Id.* at 48.

¹³⁹ *Id.* at 50.

¹⁴⁰ See *id.* at 39.

¹⁴¹ *Id.* at 40.

¹⁴² See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. at 40-41 (1979).

¹⁴³ *Id.* at 43.

¹⁴⁴ See *id.* at 44 (1979).

Other legal philosophers have made the argument that the differences between Fiss and Fuller on the limits of adjudication are overstated at best.¹⁴⁵ The lack of clear criteria for determining when the proper limits of adjudication have been reached makes the level of disagreement uncertain for particular structural remedies advocated by Fiss.¹⁴⁶ Fuller might have been open to consideration of the merits for using adjudication in novel situations.¹⁴⁷

Unique factors in this case: only one possible remedy for the constitutional violation, the united interests in plaintiffs achieving this remedy, and a confused structure of accountability for county correctional facilities; make this act of institutional reform litigation supportable for both Fiss and Fuller.¹⁴⁸ The failure of political leaders to fulfill their responsibilities to provide adequate correctional facilities highlighted the need for institutional reform litigation as well as the difficulties encountered during the litigation itself. But for the litigation, both Robert

¹⁴⁵ See, e.g. Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273 (1995).

¹⁴⁶ See *id.* at 1318-20.

¹⁴⁷ See *id.* at 1320. See also Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 428-29 (1978) (detailing the potential for institutional reform litigation cases to fit within Fuller's philosophical framework).

¹⁴⁸ The narrow and obviousness of the new facility as remedy that makes references to theoretical articles on prison reform litigation less valuable than an examination of foundational theory. For example, Susan Sturm provides an evaluative history of corrections litigation that provides a framework for considering the success of particular cases. See Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639 (1993). Without observation of the Nashua Street Jail in action, evaluation on these criteria would be impossible. Moreover, no one has alleged any difficulties with aspects of the orders or consent decrees outside of the construction of the new facility or single cell occupancy. Rufo Interview. Weissberg Interview.

Rufo and Lynn Weissberg believe that a replacement facility for the Charles Street Jail would not exist.¹⁴⁹ Consideration of the unique circumstances that can be taken away from Inmates of the Suffolk County Jail shall now be considered in turn.

1. Only Possible Remedy Construction of New Facility

There was never disagreement on the need to replace the Charles Street Jail.¹⁵⁰ The stumbling blocks to replacement was disagreement among the defendant parties on financing and siting the facility.¹⁵¹ After the parties reached agreement on financing and siting the Nashua Street Jail, the effort to modify the consent decree focused on double occupancy of cells. Negotiations on implementation of double occupancy began only after Judge Keeton agreed modifying the order for 100 cells.¹⁵²

Fuller's concern with adjudication of polycentric disputes, qualified as it is, lessens because of the nature of this dispute. Provision of constitutionally required conditions of confinement involved only one choice: the creation of a replacement facility. The difficulties of sorting through "interacting points of influence" are not present in remedying this violation.¹⁵³ The limited choice of remedy leaves little for the court to adjudicate that would amount to a polycentric dispute under the Fuller analysis. Under consideration of Fiss, the "threat posed

¹⁴⁹ Interviews.

¹⁵⁰ See District Court 1973 at 686-87, 689.

¹⁵¹ See generally *supra* Section III: B & C.

¹⁵² See *supra* text accompanying notes 112-114.

¹⁵³ See *supra* note 128.

to constitutional values" can only be removed with the creation of a new facility.¹⁵⁴

The risk of failure he accepts for trying to find solutions to complex problems is removed with a sole option for remedy.¹⁵⁵

2. Common Interests for Inmates

Inmates did not play a direct role in most of Inmates of the Suffolk County Jail. Plaintiffs' counsel from its inception controlled the lawsuit. Judge Garrity recognized a unity of interest for the inmates that defendants did not challenge for most of the litigation.¹⁵⁶ Plaintiffs' counsel represented the inmates and their interests. Meaningful participation for pretrial detainees in adjudication was unlikely, given the transitory nature of jail populations without the continued participation of plaintiffs' counsel.¹⁵⁷ Full representation of plaintiffs' interests was maximized to the extent possible, minimizing the polycentric concerns under the Fuller analysis.¹⁵⁸ Fiss recognizes the importance of broad representation of individuals relative to the state.¹⁵⁹

3. Confused, Diffuse Structure of Accountability for Defendants as a Failure of Politics

¹⁵⁴ See *supra* note 138.

¹⁵⁵ See *supra* note 139.

¹⁵⁶ See *supra* text accompanying note 33. *But cf.* Rufo Interview. Judge Rufo argued that double occupancy at the Nashua Street Jail would be preferable to transferring detainees to more distant facilities that sometimes were not under court order for single occupancy.

¹⁵⁷ See *supra* text accompanying note 33.

¹⁵⁸ With agreement for all plaintiffs, representation of this interest is the same as would occur in traditional adjudication.

¹⁵⁹ See *supra* note 144.

Differing and conflicting responsibilities exist for the provision of an adequate county correctional facility.¹⁶⁰ The Sheriff, though responsible for the operations of the facility, lacks the spending power to make necessary changes.¹⁶¹ Changes to the facility need to be approved by the state Commissioner of Correction. The City of Boston government, both the City Council and the Mayor, have legislative and executive power for Suffolk County and control appropriations for county corrections.

These difficulties were recognized back in 1968 in one of the many studies condemning the Charles Street Jail facility.¹⁶² The National Council on Crime and Delinquency survey recommended that "(t)he administration of the Suffolk County Jail should be directly accountable to the state Department of Correction or a citizen board appointed by the City Council."¹⁶³ They found that the "arrangement results in conflicting, overlapping, and often unclear responsibilities, the end product of which is an inadequately administered jail."¹⁶⁴

This uncertainty continued throughout the litigation. The disagreements by the various defendants in the 1980s, culminating in state court action, typify the uncertainty.¹⁶⁵ Robert Rufo identifies the rulings by Justice Liacos as the key to building the Nashua Street Jail.¹⁶⁶ The withdrawal of support for the 1977 Deer

¹⁶⁰ See *supra* text accompanying notes 42-46.

¹⁶¹ Rufo Interview.

¹⁶² See National Council on Crime and Delinquency, *The Suffolk County, Massachusetts, Jail: A Survey*, iii (1968).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See *supra* text accompanying notes 75-81.

¹⁶⁶ Interview.

Island plan by the state Commissioner of Corrections after gaining the support of city officials is another example.¹⁶⁷ This is not to say that there were not significant considerations in the decisions of funding and siting a new correctional facility, but all parties agreed that there was no other way to remedy the unconstitutional conditions of confinement at the Suffolk County Jail.

The resistance to school desegregation by Boston officials made the assumption that public officials will follow court orders in good faith uncertain.¹⁶⁸ The political dynamic at the time had the Boston Mayor and City Council openly declaring their intentions not to comply with the District Court order.¹⁶⁹ Alternatives for the replacement of the facility offered by Councillors' included using a mothballed troop carrier in Boston Harbor and taking the BOSTON GLOBE building by eminent domain for use as a jail.¹⁷⁰ Misstatements on the adequate commitment of funding for the facility by Boston Mayor Kevin White were made.¹⁷¹ A 1980 report investigated the questionable propriety of study and design contracts awarded by the City of Boston, questioning both the competency of the

¹⁶⁷ See *supra* text accompanying note 49.

¹⁶⁸ Judge Garrity acknowledged this difficulty with the city when stating that he had "no illusions about whether (he was) going to get plans without dragging them out like pulling teeth from this city administration." Later at the hearing, Judge Garrity recognizes the similarity of problems with having the city live up to the financial responsibilities of compliance in both this case and the school case. Oral Order, February 24, 1975

¹⁶⁹ Robert Rufo Interview.

¹⁷⁰ See Memorandum in Support of Plaintiffs' Motion to Set a Hearing and for Other Relief, January 13, 1981, at 6.

¹⁷¹ See *id.* at 15-16, 21.

architects as well as "the sincerity of the City's efforts to comply with Judge Garrity's order."¹⁷²

The disagreements between the Suffolk County Sheriff and plaintiffs' counsel on single occupancy of cells should not be understood as a lack of good faith. In the 1980s, Suffolk County was presented with an ever-growing inmate population.¹⁷³ Sheriff Rufo had difficult choices either defy state orders to accept detainees or federal orders not to exceed single cell capacity.¹⁷⁴ The ultimately successful effort to double-bunk at the Nashua Street Jail represented good faith disagreement. The parties have a professional, respectful relationship.¹⁷⁵

Fiss recognizes the importance of courts giving meaning to public values.¹⁷⁶ His broad focus at the removal the threat posed to constitutional values by the organization would allow courts to overcome failures of the political process. State and city officials had governmental notice for at least 22 years that the Charles Street Jail was inadequate as a pretrial detention facility. This inaction perpetrated constitutional violations.

¹⁷² See *Final Report to the General Court of the Special Commission Concerning State and County Buildings*, December 31, 1980, Appendix A at 50.

¹⁷³ Rufo Interview.

¹⁷⁴ *Id.* See also Doris Sue Wong, *Sheriff Defies Court-Ordered Cap on Inmates at Charles St. Jail*, BOSTON GLOBE, February 22, 1989; John Ellement, *Charles Street Inmate Count Back Down to Limit, Transfers Help Suffolk Sheriff Reach Maximum 342 Prisoners Ordered by Courts*, BOSTON GLOBE, February 23, 1989.

¹⁷⁵ For example, then-Sheriff Rufo invited plaintiffs' counsel to speak at the dedication of the Nashua Street Jail. Rufo Interview; Weissberg Interview. See also Ray Richard, *Nashua Street Jail Opens; Will Replace Charles Street; Transfer of All Prisoners Due by End of Month*, BOSTON GLOBE, May 3, 1990.

¹⁷⁶ See *supra* note 132-33.

Fuller would also be concerned with the failure of the political process. Efforts to go through the democratic process, striving for the "common aims" form of social ordering failed. Fuller recognized that adjudication was appropriate at times for disputes with significant polycentric elements.¹⁷⁷ For reasoned argument to prevail, adjudication of Inmates of the Charles Street Jail needed to take place. Both Judge Garrity and Judge Keeton left the defendant parties to determine how best to meet their constitutional duty while upholding the constitutional values. Suspicion of the political process, created through years of resistance and potential lack of good faith, warranted judicial intervention.¹⁷⁸

V. Conclusion

The Inmates of the Suffolk County Jail litigation successfully secured constitutionally adequate conditions for pretrial detainees. The Nashua Street Jail meets or exceeds applicable state and national correctional standards.¹⁷⁹ The obvious and limited choice for remedying the constitutional violations, building a replacement facility, allowed this institutional reform litigation to overcome the failure of Boston's political process. Rulings on the modification of consent decrees and the Prison Litigation Reform Act, though unfavorable to the plaintiffs in the immediate and potentially the prisoners' rights movement overall in the future, did not detract from the immediate success in the building of the Nashua

¹⁷⁷ See *supra* note 130.

¹⁷⁸ See John Hart Ely, *DEMOCRACY AND DISTRUST* 87 (1980) ("a representation-reinforcing approach to judicial review, unlike its rival value-protecting approach, is not inconsistent with, but on the contrary (and quite by design) entirely supportive of, the underlying premises of the American system of representative democracy").

¹⁷⁹ See *supra* notes 63, 98.

Street Jail.¹⁸⁰ But for this lawsuit, it is unlikely that a new facility would have been built to this date.

¹⁸⁰ Ms. Weissberg believes that the most important lesson that could be taken from this case is that the PLRA will prevent successful filing of prisoners' rights suits. Weissberg Interview.