

January 2007

## A Necessary and Proper Role for Federal Courts in Prison Reform: The Benjamin v. Malcolm ConsentDecrees

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### Recommended Citation

Harold BAER Jr. & Arminda Bepko, *A Necessary and Proper Role for Federal Courts in Prison Reform: The Benjamin v. Malcolm ConsentDecrees*, 52 N.Y.L. SCH. L. REV. 3 (2007-2008).

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THE HONORABLE HAROLD BAER, JR. WITH ARMINDA BEPKO

## A Necessary and Proper Role for Federal Courts in Prison Reform: The *Benjamin v. Malcolm* Consent Decrees

This article is dedicated to Judge Morris E. Lasker who began the odyssey upon which the reader is about to embark. In the author's view, to be a good judge requires some smarts and a lot of hard work. To be a great judge requires all that along with the right instincts and the guts to follow them. Judge Lasker has it all.

ABOUT THE AUTHOR: Judge Harold Baer, Jr., graduated *magna cum laude* and Phi Beta Kappa from Hobart College in 1954 and from the Yale Law School in 1957. He was an Assistant United States Attorney in the Southern District of New York and later the chief of the Criminal Division in that office, a partner in a Wall Street firm where he specialized in white collar crime defense work, a justice in the New York State Supreme Court for ten years and currently is, and for the last thirteen years has been, a federal district judge in the Southern District of New York. Armina Bepko graduated from New York Law School, was editor-in-chief of the *New York Law School Law Review*, clerked for Judge Baer and is now an associate with Cleary Gottlieb Steen & Hamilton LLP. Many thanks for invaluable editorial support to Shayna Katz, an intern in Judge Baer's Chambers and a New York Law School student, and Jasmine Elwick, Judge Baer's law clerk.

*“It is said that no one truly knows a nation until one has been inside the jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.”<sup>1</sup>*

## I. INTRODUCTION

As Nelson Mandela teaches, prison conditions reflect the core values of a society and test a nation’s commitment to its self-proclaimed ideals. Over the years I have had the opportunity to observe our core values through multiple lenses—as a citizen, as a lawyer in private practice, as a prosecutor, and as a judge. This article chronicles my experience as the judge that oversees the New York City jails—pursuant to a consent decree entered in 1974—and more specifically, although not exclusively, a complex of institutions known as Rikers Island<sup>2</sup> where the great majority of prisoners are pre-trial detainees.<sup>3</sup> The question presented by this article is whether the federal courts are the appropriate vehicle to oversee prison reform or whether another branch of government is more appropriate. I argue that no other branch of government is so constituted as to generate and maintain the requisite interest and sustained momentum needed to assure minimal constitutional guarantees for detainees in New York City jails.<sup>4</sup> It is in such instances when the legislature and the executive are unable or unwilling to insure minimal constitutional rights that judicial intervention has been and should continue to be a viable solution.

Let me say at the outset that my experience has not been a uniform success. This is borne out by the simple fact that after more than a quarter century of supervision, problems remain and it has cost the taxpayers (in my opinion at least) a considerable sum of money. Nor do I suggest that the apparent failure to act by the executive and legislative branches is indicative of some general mal-

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1. NELSON MANDELA, *LONG WALK TO FREEDOM* 174–75 (1994).
  2. On the East River off the southern edge of the Bronx, Rikers Island originally covered eighty-seven acres of land and belonged to the Dutch Ryker family. The Rykers were descendants of Abraham Rycken, a Dutch settler who moved to Long Island in 1638. New York City purchased the island from the Ryker family in 1884 for \$180,000 and used it as a jail farm. During the Civil War, the island was used as a training ground for African-American regiments. In 1932, the City opened a jail for men there to replace its dilapidated one on Blackwell’s (now Roosevelt) Island. After, in 1954, landfill was added to enlarge the area of the island to 415 acres, enabling the jail facilities to expand and emerge as the modern day Rikers Island. Kodi Barth, *A City of Jails*, <http://www.nyc24.org/2003/islands/zone2/rikershistory.html> (last visited Sept. 15, 2007).
  3. Approximately 72 percent of New York City’s inmates are pre-trial detainees. See The Corr. Ass’n of N.Y., *Prisoner Profile* (Mar. 2006), [http://www.correctionalassociation.org/PVP/publications/prisoner\\_profile\\_2006.pdf](http://www.correctionalassociation.org/PVP/publications/prisoner_profile_2006.pdf). “The average daily inmate population of New York City Department of Correction . . . fluctuates between 13,000 and 18,000. This is more than the prison population of many state correctional systems.” City of N.Y. Dep’t of Corr., *Facilities Overview*, [http://www.nyc.gov/html/doc/html/about/facilities\\_overview.shtml](http://www.nyc.gov/html/doc/html/about/facilities_overview.shtml) (last visited Sept. 15, 2007).
  4. The jails in New York City include the Manhattan Detention Complex (capacity 898); Rikers Facilities (total capacity 15,740); Brooklyn Detention Complex (capacity 759; currently closed); Bronx Detention Complex (capacity 469; currently closed); Queens Detention Complex (capacity 467; currently closed); and Vernon C. Bain Center (capacity 870). See City of N.Y. Dep’t of Corr., *Facilities Overview*, [http://www.nyc.gov/html/doc/html/about/facilities\\_overview.shtml](http://www.nyc.gov/html/doc/html/about/facilities_overview.shtml) (last visited Sept. 15, 2007).

aise. Rather, I argue that when it comes to institutions such as the New York City jails and protections for its powerless population, it is unlikely that either of the other two branches of government are prepared to make such a mission a priority or to provide the necessary—and sometimes tedious—oversight. Let there be no mistake, I am hopeful, and encourage both branches to take a more active role in the future. Indeed, this article is written in part to do just that. Unfortunately, the fact is that legislators are, for the most part, advocates for their constituents and for causes they choose to champion. Attention to prisoners and their rights are not causes high on the list. This article is also an effort to catalogue and, to an extent, clarify what the judicial branch has accomplished in the New York City jails over more than a quarter century, all in an unabashed effort to support the thesis that such a role for federal courts is necessary and proper.

The reader must keep in mind that the judiciary does not go looking for business and did not, as some critics suggest, go looking for the Rikers Island consent decrees in *Benjamin v. Malcolm* or to expend the effort and time that it has required. The court functions *only* where a controversy is brought before it—controversies, by the way, which the parties are unable to resolve amongst themselves, frequently after seeking intervention from the executive and the legislative branches without success. My text here is primarily a discussion of a class action lawsuit initiated by the Legal Aid Society (“LAS”) against the City of New York (the “City”) on behalf of all pre-trial detainees at the City’s jails and the resultant consent decrees crafted by the parties.<sup>5</sup> At the end of this article the reader will draw his or her own conclusions as to whether to keep this tool in the judicial toolshed. While I have affection for the Rikers consent decrees and the improvements which have resulted therefrom, the reader should not attribute my involvement with the decrees as broad support for the correctional philosophy which produced them in the first place.

Following a brief discussion of the tension between the three branches of government, the article provides an overview of consent decrees and of the correctional system in the United States. Section II chronicles the origins of *Benjamin v. Malcolm* presided over by Judge Morris E. Lasker and my involvement which began in 1994. Section II goes on to explore what I consider the achievements accomplished by virtue of the consent decrees’ existence and highlights areas that continue to need improvement and review. Drawing upon the collective experience of the Rikers Island consent decrees, Section III examines the usefulness of consent decrees in light of the Prisoner’s Litigation Reform Act (“PLRA”), the usefulness of private settlement agreements, and some possible other avenues

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5. The suit was instituted in June 1975 on behalf of all pre-trial detainees at the House of Detention for Men on Riker’s Island (“HDM”). The complaint alleged that the conditions under which the plaintiffs were held were “constitutionally impermissible.” *Benjamin v. Malcolm*, 495 F. Supp. 1357, 1359 (S.D.N.Y. 1980). Trial began in October 1976, and concluded in the spring of 1977. *Id.*

that might be employed to accomplish at least some of the gains achieved by the consent decrees. Section IV picks up where the PLRA left off and discusses the limitations of the proposed Federal Consent Decree Fairness Act of 2005. This legislation further emasculates the federal judiciary's role in consent decrees. Finally, Section V concludes that while consent decrees may not be (and I am sure they are not) the most cost or time efficient means of institutional dispute resolution, they continue to be necessary and proper.

*A. The Role of the Judiciary in the Governmental Tripartite*

Understanding the history of the Rikers consent decrees, critiquing the decrees, as well as imagining viable alternatives to them, requires a brief review of the historical debates and tension surrounding the proper role of the three branches of government in lawmaking. Without this historical context, it is nearly impossible to fully grasp the Rikers decrees or fairly evaluate their utility.

Our nation emerged amidst a continuing debate over the concept of mixed monarchy. This controversy over which entity, the King or Parliament, was to be the final decision maker stretches back before Fulmer and Locke.<sup>6</sup> America's founding fathers eventually concluded that the way to solve that problem was with a judicial branch. Despite some criticism by Jefferson and others, a judicial branch was crafted and became an integral part of our Constitution. It emerged slowly but surely as a coequal, independent third branch of government, much as Hamilton had envisioned in the Federalist Papers.<sup>7</sup>

The Constitution established a new form of government with three separate branches—judicial, executive, and legislative—each vested with different responsibilities and powers.<sup>8</sup> The framers of the Constitution adopted the doctrine of separation of powers to diffuse government power and protect individual liberties from government encroachment, a direct result of the founders' experience with corrupt and overreaching monarchs. For example, Madison passionately espoused “the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each depart-

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6. See, e.g., G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 876 n.130, 940–48 (2002).

7. See THE FEDERALIST NO. 78 (Alexander Hamilton). The judiciary was and remains the weaker of the three branches, as Hamilton pointed out. Aside from being “the least dangerous,” it will always be that “the Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated.” *Id.*

8. See *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (“To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts.”). Article I of the Constitution vests all legislative powers in Congress; Article II vests executive power in the presidency; and Article III vests the judicial power in the federal courts. See U.S. CONST. art. I, II, III.

ment the necessary constitutional means and personal motives to resist encroachments of the others.”<sup>9</sup>

We are instructed from an early age that the legislature makes the laws, judges interpret those laws, and the executive carries out the laws. Unfortunately, this lesson is oversimplified and unrealistic. One scholar has offered a more realistic explanation for the continued debates and confusion in this area:

The honest assessment is that we have no way to identify the differences between the powers in contested cases, and we are not likely to have one soon . . . . In short, we do not know what balance means, how to measure it, or how to predict when it might be jeopardized . . . . Inquiring about inter-branch balance is incoherent because it assumes that branches of government are unitary entities with cohesive interests, but that is not true . . . . [Instead, an] effort to match particular state powers with particular government decisionmakers must start with an understanding of how those decisionmakers might exercise that authority . . . [which] requires a fine-grained-appreciation of those forces that push and pull government actors in one direction or another.<sup>10</sup>

Judicial power, in particular, has been subject to debate and criticism. From our earliest history, Hamilton, while seeking the necessary insulation from the legislature and executive, recognized that “[i]t is impossible to keep the judges too distinct from every other avocation than that of expounding the laws.”<sup>11</sup> Almost two centuries later in 1967, Justice Harlan echoed Hamilton’s sentiments about the political realities of government:

From the beginning . . . two views as to the proper role of the Supreme Court in our governmental system have existed . . . . The one [view] is that the Court should stand ready to bring about the needed basic changes in our society which for one reason or another have failed or lagged in their accomplishment by other means. The other [view] is that such changes are best left to the political process and should not be undertaken by judges who, as they should be because of their office, are beyond the reach of political considerations . . . . There can be little doubt . . . but that the former, broader role of the Supreme Court is the one currently in vogue, and that it is resulting in the accomplishment of basic changes in governmental relationships.<sup>12</sup>

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9. THE FEDERALIST NO. 51 (James Madison). See M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 603 (2001) (“Conventional separation of powers analysis relies on two mechanisms to achieve and maintain the dispersal of state power: separating legislative, executive, and judicial power in three different branches and preserving a balance among those branches.”).

10. Magill, *supra* note 9, at 604–06.

11. THE FEDERALIST NO. 73 (Alexander Hamilton).

12. Alpheus Thomas Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385, 385–86 (1969).

Some commentators in the current debate caution against “activist judges”<sup>13</sup> who willingly and eagerly encroach on the power of the legislature to promulgate laws. In the late eighteenth century Madison wrote, “[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.”<sup>14</sup>

The question remains: should courts share with the two politically accountable arms of government—legislature and executive—a more active role in shaping law and policy, or should the independent—and, as some might argue, unaccountable—arm exercise self-restraint and deference to the “legitimate” policymakers?<sup>15</sup> Justice Benjamin Cardozo imagined the necessary balance with respect to judicial authority vis-à-vis the other branches this way:

The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges.<sup>16</sup>

Ironically, the judiciary has been subject to criticism for the same reason it is revered—its lack of direct accountability to the American people. While the legislature and executive, at least arguably, can and have been influenced by special interests, the federal judiciary, again, at least arguably, is properly insulated to protect the interests of the vulnerable and powerless, such as the men and women who populate our prisons.

### *B. A Brief History of Consent Decrees*

To understand and to judge my role in the Rikers Island consent decrees, one must also review the development and nature of consent decrees as tools of dispute resolution. Black’s Law Dictionary defines a “consent decree” as “a court decree [or order] that all parties agree to.”<sup>17</sup> Consent decrees<sup>18</sup> have been described as a “tension-ridden” cross between private contracts and court-ordered

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13. Notably, judicial activism is non-partisan and can restrict freedoms or enlarge them. *See id.* at 387.

14. THE FEDERALIST NO. 47 (James Madison) (emphasis omitted).

15. The battle between formalism, on one hand, and functionalism exists not only among the branches but also within the judiciary itself. *See, e.g.,* Mason, *supra* note 12 (tracing the shifting ideology defining the Supreme Court and its jurisprudence).

16. JUSTICE BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 94 (1921).

17. BLACK’S LAW DICTIONARY 419 (7th ed. 1999).

18. Etymologically, “consent decree,” or “consent judgments,” reflect a tension between orders traditionally issued by courts of equity (decrees) and courts of law (judgments). Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 45 (1987).

adjudication within which the judge is uniquely and controversially positioned.<sup>19</sup> Agreed-upon judgments trace their roots to the English common law and have taken many forms (and names) in their evolution.<sup>20</sup> For example, Pollack and Maitland describe the judicial role in the institution of “fines”<sup>21</sup> after 1175 A.D. as a mix of private party negotiation of the fines—where the parties were obligated to perform under threat of suit and imprisonment—and judicial blessing of that “compromise,” often only with a cursory review of the agreement for “facial defects.”<sup>22</sup>

In time, judges had more than the early pro forma facial review of private agreements at common law—e.g., they would hold hearings on the facts or validity of the agreements or review the court’s subject matter jurisdiction. Even then however, courts made “no judicial inquiry into, or preliminary adjudication of, the facts or applicable law thereto.”<sup>23</sup> In other words, there was no judicial review of the underlying merits. However, the court’s approval of the private agreement rendered it a “judgment” and carried the associated rights and obligations. The entry of a consent decree effectively opened the door to future judicial intervention and involvement.

A review of United States’ legal history shows that courts “generally assumed the availability of consent decrees without much analysis of why courts provided them.”<sup>24</sup> Instead of judicial legitimacy to oversee consent decrees, the debate focused on the nature of the consent decree as a “judicial act” versus a private contract.<sup>25</sup> Early treatises teach that consent decrees were the preferred method of dispute resolution in matrimonial disputes,<sup>26</sup> antitrust actions,<sup>27</sup> pat-

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19. The literature on the “hybrid” nature of consent decrees is voluminous and will not be repeated here. *See, e.g., id.* (exploring the theoretical basis for judicial action premised on consent decrees and the practical effects of such decrees).
  20. *See id.* at 50–54 (discussing FREDRICK POLLOCK AND FREDRIC MAITLAND, 2 THE HISTORY OF ENGLISH LAW 94–97 (1898)).
  21. “Seisin under a fine” was the “final concord levied in the king’s court,” negotiated by the parties and “accepted” by the court. Thus, “fines” were similar to the modern court order. *Id.* (citations omitted).
  22. *Id.* at 52.
  23. *Id.* at 54 (citing A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 1350 at 2773 (5th ed. 1925)).
  24. *Id.* at 52.
  25. *Id.* at 52–53; *see, e.g.,* 1 JOHN BOUVIER, BOUVIER’S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 805 (1914) (“A consent decree binds only the consenting parties; and is not binding upon the court. It cannot be modified without consent, even at the same term; and the consent may be withdrawn before entry.”) (citations omitted).
  26. BOUVIER, *supra* note 25, at 1474 (“In the absence of fraud a consent decree is binding on a married woman . . .”) (citations omitted).
  27. GEORGE W. STOCKING & MYRON W. WATKINS, CARTELS IN ACTION: CASE STUDIES IN INTERNATIONAL BUSINESS DIPLOMACY 106 (1946).

ent infringement,<sup>28</sup> and fair labor enforcement.<sup>29</sup> By 1910, the modern concept of a consent decree took shape:

One entered by consent of the parties; it is not properly a judicial sentence, but is in the nature of a solemn contract or agreement of the parties made under 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.<sup>30</sup>

This characterization reflects the tension between private contract and judicial adjudication.

A review of Supreme Court jurisprudence traces the development of the judicial role with respect to the entry and enforcement of consent decrees. For example, while consent decrees were generally unappealable at English common law, United States courts have adopted a more liberal approach to judicial review of consent decrees.<sup>31</sup> By the 1960s, in the context of civil rights and expanding administrative agency regulation over corporations, the Supreme Court recognized the limits of the parties' control over the consent decree:

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28. EDWIN BORCHARD, *DECLARATORY JUDGMENTS* 814 (2d ed. 1941); *see also* U.S. DEPARTMENT OF JUSTICE, 2 *INVESTIGATION OF GOVERNMENT PATENT PRACTICES AND POLICIES* 350 (Hein & Co. 1978) (1947) (discussing *U.S. v. Standard Oil*, Civ. No. 2091 (D. N.J. Mar. 25, 1942) and resultant consent decree).
29. *See* Robert H. Jackson, *Final Report of the Att'y General's Comm. on Admin. Proc.* 305–06 (1941), available at <http://www.law.fsu.edu/library/admin/pdfdownload/1941appendixD.pdf> (last visited Sept. 15, 2007) (explaining that, for the purpose of enforcing the Fair Labor Standards Act, the Wage and Hour Division of the U.S. Department of Labor is “authorized to negotiate for the entry of a consent decree providing restitution to the underpaid employees” in certain cases).
30. HENRY CAMPBELL BLACK, *A LAW DICTIONARY CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN AND INCLUDING THE PRINCIPAL TERMS OF INTERNATIONAL, CONSTITUTIONAL, ECCLESIASTICAL AND COMMERCIAL LAW, AND MEDICAL JURISPRUDENCE, WITH A COLLECTION OF LEGAL MAXIMS, NUMEROUS SELECT TITLES FROM THE ROMAN, MODERN CIVIL, SCOTCH, FRENCH, SPANISH, AND MEXICAN LAW, AND OTHER FOREIGN SYSTEMS, AND A TABLE OF ABBREVIATIONS* 339 (2d ed.) (1910).
31. *Compare* *Thompson v. Maxwell*, 95 U.S. 391, 397 (1877) (citing the English common law rule that, where, in a case where a consent decree is challenged by a party, “against such a decree a bill of review will not lie.”) *with* *Swift & Co. v. United States*, 276 U.S. 311, 323–24 (1928) (“Under the English practice a consent decree could not be set aside by appeal or bill of review, except in case of clerical error. In this Court a somewhat more liberal rule has prevailed. Decrees entered by consent have been reviewed upon appeal or bill of review where there was a claim of lack of actual consent to the decree as entered, or of fraud in its procurement, or that there was lack of federal jurisdiction because of the citizenship of the parties. But ‘a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause.’”) (internal citations omitted). *See also* *Pac. R.R. v. Ketchum*, 101 U.S. 289, 295 (1880) (“If, when the case gets here, it appears that the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned which were in law waived by the consent, but we must still receive and decide the case. If all the errors complained of come within the waiver, the decree below will be affirmed, but only after hearing. We have, therefore, jurisdiction of this appeal.”).

The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction. In a case like this the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce. Frequently of course the terms arrived at by the parties are accepted without change by the adopting court. But just as the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives, so must it be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives . . . . The court must be free to continue to further the objectives of [a statute] when its provisions are amended. The parties have no power to require of the court continuing enforcement of rights the statute no longer gives.<sup>32</sup>

Thereafter, the consent decree became a powerful tool of enforcement of statutory and constitutional rights of individuals and, increasingly, classes of affected individuals, particularly in the areas of school desegregation, mental health, prison reform, environmental, and antitrust litigation.<sup>33</sup> Modern Supreme Court jurisprudence holds that consent decrees today are generally valid, although limited

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32. *System Fed'n No. 91 Ry. Employees' Dep't v. Wright*, 364 U.S. 642, 652–53 (1961); *see also* *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968) (“*Swift* teaches that a decree may be changed upon an appropriate showing, and it holds that it may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree (the elimination of monopoly and restrictive practices) have not been fully achieved.”); *Columbia Artists Mgmt. v. United States.*, 381 U.S. 348, 352 (1965) (“While the Court has allowed modifications in consent decrees upon occasion, a showing of changed circumstances is usually necessary. Whether a modification of the consent decree was proper in this case, where no changed circumstances were claimed, should not be determined by this Court summarily.”) (internal citations omitted).
33. While it existed as a concept as early as the twelfth century in English law (*see* Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 *CATH. U. L. REV.* 515, 521 (1974) (stating the earliest consumer class action was the English Channel Islands Case in 1309)), it was not until 1937 that the class action took its present form or close to it with the enactment of Rule 23 of the Federal Rules of Civil Procedure. At its nascence, Rule 23 was substantially a restatement of the older equity laws, which left vague and unanswered many of the problems that plagued earlier class actions such as notice, opt out provisions, and judgment requirements which have been largely rectified though not completely by subsequent amendments. *See* FED. R. CIV. P. 23 advisory committee's notes; FED. R. CIV. P. 23(c)(2) & (3) (providing, respectively, that the judgment is binding, and that class members have the option to opt out). Class actions protect the rights of the less fortunate in our society. *Cf.* *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Put simply, class actions are not always vehicles, as some say, to line lawyers' pockets. They may serve the traditional ends of justice through challenges to public institutions. John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 *NOTRE DAME L. REV.* 1419, 1421 (2003) (describing the “social importance of the class action: [i]n some instances, most notably where great social harm is dispersed among countless individuals, the class action is the only mechanism by which our legal system can redress a large-scale public wrong”). Further, “although permitting interest representation denies absent class members formal access to the courts, rejecting that form of representation renders the legal system powerless to perform its most important function—holding accountable the party responsible for a great social harm.” *Id.* In general, these are institutions in critical need of legislative and executive attention but have failed to receive the attention they deserve. Voters, and frequently their representatives, are rarely concerned with the dignity of the mentally infirm or other “unsavory” members of the community who depend on government institutions for their survival. As a consequence, and at times by default, the courts have provided societal minorities with a mechanism which allows them a way to speak

depending on the substantive area,<sup>34</sup> and embody principles of contracts and judgments.<sup>35</sup>

Finally, the Federal Rules of Civil Procedure are silent with respect to “consent decrees” and the process of entry or enforcement. The closest reference is a discussion under Rules 54 and 58 of the “entry of judgment” but there is no discussion of entry of judgments by consent.<sup>36</sup> With this overview of the history and landscape of consent decrees, I turn to a brief historical overview of our federal correctional system, the second component required before our journey into the world of New York City prison reform and the Rikers consent decrees.

### C. Overview of the Correctional System

America has never been in the forefront of prison reform, nor is it known for its enlightened treatment of convicted felons or detainees.<sup>37</sup> In colonial times, there were hardly any prisons and certainly none resembling what we think of when we think of prisons today.<sup>38</sup> Prisons did not begin to appear until well into

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with one voice—to supply a voice for those with no voice. One might suppose this would prompt universal applause; unfortunately, and for several understandable reasons, this is not always the case.

34. For example, as will be discussed later in this article, the Prison Litigation Reform Act limited the use of consent decrees and modification of existing consent decrees in the prison reform context.
35. *Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (“Consent decrees entered in federal court must be directed to protecting federal interests.”); *Lawyer v. Dep’t of Justice*, 521 U.S. 567, 580 n.6 (1997) (“[I]t is the parties’ agreement that serves as the source of the court’s authority to enter any [consent] judgment at all.”) (internal citation and quotation omitted); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992) (describing a consent decree as the “embod[iment of] an agreement of the parties” and also “an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.”); *Firefighters v. Cleveland*, 478 U.S. 501, 519, 525 (1986) (stating that consent decrees have elements of both contracts and judicial decrees and must stem from and serve to resolve a dispute within the court’s subject-matter jurisdiction, must come within the general scope of the case made by the pleadings, and must further the objectives of the law upon which the complaint was based) (internal quotation and citation omitted).
36. FED. R. CIV. P. 54(a) (“Judgment’ as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.”); FED. R. CIV. P. 58(a) (“(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion: (A) for judgment under Rule 50(b); (B) to amend or make additional findings of fact under Rule 52(b); (C) for attorney fees under Rule 54; (D) for a new trial, or to alter or amend the judgment, under Rule 59; or (E) for relief under Rule 60.”).
37. See, e.g., JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 193–94* (2003) (providing an overview of prison reform in the United States, Germany, and France).
38. “The early colonial criminal law was a curious mix of religion, English barbarity, and pragmatism. The relatively small populations of the early American colonies probably determined much of the character of criminal law.” Matthew W. Meskell, Note, *An American Revolution: The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 841 (1999). As a result of such low colonial population, colonists could not afford to institutionalize punishment and, instead, turned to the local religious institutions to met out punishment in the form of public humiliation, corporal tortures, or “prolonged humiliation.” *Id.*

the eighteenth century. This is not to say the colonists had no philosophy about crime and how to handle perpetrators. In essence, criminal punishment was quick and severe and then complete. There was no thought that men and women who had committed a crime could or should be rehabilitated and go on to live useful lives. In fact, largely based on the disutility of formalized prisons, the colonial system of punishment was one of deterrence, not reformation.<sup>39</sup> For example, branding on the forehead was a frequent penalty for a first offense; death for a third.<sup>40</sup>

In the early eighteenth century, as a consequence (at least in part) of population growth and European influences, we saw the beginnings of our prison system in what were characterized as county jails. Prisoners were placed in rooms or perhaps in a single room; there were no cells and there was no effort to distinguish between or separate men, women, or children.<sup>41</sup> For some time and certainly into the second decade of the eighteenth century, while there was capital punishment for murder, many other serious crimes, including arson, rape and burglary, exacted the forfeiture of property, restitution, and relatively brief terms of imprisonment. From the very beginning, conditions in our prisons were marked by overcrowding, fire hazards, and poor sanitation.

Later in the eighteenth century, in what is known as the Age of Enlightenment in Europe, the concept of “correctional” reform began to emerge. At the same time, the hazards of prison life became known and changes began to take place.<sup>42</sup> In his volume, John Howard caught the public’s attention with his detailed discussion of the inhuman conditions prevalent in most jails and prisons. The same kinds of problems emerged from Howard’s inspection as had plagued the prison business from its earliest days. Such issues included poor food or no food, poor ventilation which prompted an increased risk of fire, little or no medical attention, and overcrowding.<sup>43</sup>

Following the American Revolution, our nation embraced the changes brought by the Enlightenment in Europe, including attention to correctional re-

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39. *Id.* at 842.

40. “Colonials punished offenders increasingly harshly for repeat crimes and ‘those who were raised within the community yet persisted in recidivating would, if not banished first, inevitably earn a trip to the gallows.’” *Id.*

41. The Romans, for example, had well defined systems of prisons that separated prisoners based on gender and the nature of the crime committed. NORMAN BRUCE JOHNSTON, *THE HUMAN CAGE: A BRIEF HISTORY OF PRISON ARCHITECTURE* 5 (1973).

42. Prisons were initially designed to hold prisoners in large rooms, which from the onset made policing particularly difficult. While English single cell formation did influence particular prisons, overall, most prisons followed the large holding room system. Early prison reform efforts were strengthened by a string of riots and escapes (or failed escape plots) and a fear for public safety. Meskell, *supra* note 38, at 850.

43. JOHN HOWARD, *THE STATE OF PRISONS* (Professional Books Ltd., 1977) (1777).

form and to prison conditions.<sup>44</sup> Correctional reforms began to appear in state codes and the theory of reform based on rehabilitation replaced earlier thinking devoted almost exclusively to retribution and incapacitation. The modern prison emerged during the early decades of the nineteenth century and incarceration was viewed as simply one of several correctional goals. Unfortunately, the advent of the modern prison and improved prison conditions, as one author suggests:

[S]imply moved corporal punishment indoors where, hidden from public view, it became even more savage . . . . For the most part, the general public did not know what went on behind prison walls. But it regarded the prison as a form of punishment and believed that the undesirables confined there deserved whatever they got.<sup>45</sup>

Towards the middle of the nineteenth century, reform concepts such as parole and the indeterminate sentence emerged and became important correctional tools.<sup>46</sup> The widening use of conditional release and parole reduced prison populations and at the same time were proven in some studies to deter recidivism.<sup>47</sup> Since parole was conditioned on evidence of good behavior and rehabilitation, prisoners were frequently motivated to participate in educational and other programs which might accelerate their release.<sup>48</sup> Parole and conditional release programs continued until the 1980s when, in the federal system, Congress abolished parole and many educational opportunities were curtailed or eliminated alto-

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44. America's victory over the British in the Revolutionary War juxtaposed with its exposure to the emerging scholars of the Enlightenment like Montesquieu, Bentham, and Blackstone forged a new perspective on criminal punishment based on reason and humanity. Meskell, *supra* note 38, at 843.

45. SAMUEL WALKER, *POPULAR JUSTICE* 70 (1980); *see also* Meskell, *supra* note 38, at 859–60 (describing how by 1840 in the face of growing population, “the American public’s exposure to internal prison life declined steadily and consequently the plight of prisoners was not in the public mind”). It was not until Enoch Wines and Theodore Dwight focused attention on penitentiaries in their report to the New York legislature in 1867 that the public was exposed to the internal accounts of health conditions, descriptions of punishment tactics, and rehabilitation efforts with “no small amount of editorializing.” *Id.* The Report concluded that “there is not a prison system in the United States, which tried . . . would not be found wanting.” *Id.* at 860 (citation omitted).

46. *See* JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990* 39–40 (1994) (describing the development of disciplinary parole: “First, labor for modern Westerners is the essential feature of being normal . . . . Second, labor is punitive . . . . Third, labor is a potent means of social control.” (internal citations omitted)).

47. Historically, the rehabilitation and reintegration of the parolee into society were the goals of the parole system; goals not necessarily reflected in the modern system. FREDERICK A. HUSSEY & DAVID E. DUFFEE, *PROBATION, PAROLE, AND COMMUNITY FIELD SERVICES: POLICY, STRUCTURE, AND PROCESS* 61 (1980).

48. However, in the mid-nineteenth century, “[f]ew prisons provided educational facilities and, even when available, prisoners rarely received time to learn basic skills.” Meskell, *supra* note 38, at 860 (citation omitted).

gether, and the thrust of the federal correctional effort was directed primarily towards incarceration.<sup>49</sup>

Reforms—particularly new alternatives to incarceration—were initiated at or shortly after the dawn of the twentieth century. New programs included community service and work release, amongst others.<sup>50</sup> The latter first became law in Wisconsin in 1913 and worked its way east. A work release bill was enacted into law in New York State some half century later, in 1967, and the work release program began in 1970.<sup>51</sup> Work release programs permit prisoners near the end of their terms to work during the day and return to their cell in the evening so as to earn some money, have the opportunity to learn a skill, and to ease their readjustment back into the community.<sup>52</sup> In spite of the availability of such programs, the rise of organized crime and the accompanying violence of the

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49. However, according to the legislative history of 18 U.S.C. § 3583, the purpose of supervised release is to provide rehabilitation to a defendant following a term of imprisonment:

[T]he primary goal of . . . [supervised release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.

S. REP. NO. 98-225, at 124 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3307. In fact, prior to the promulgation of Sentencing Reform Act of 1984 (Pub. L. No. 98-473, 98 Stat. 1987), federal sentencing was indeterminate and bifurcated—judges had broad discretion to sentence a convicted person with a range prescribed by statute, and were assisted by the United States Parole Commission in determining “when an offender was sufficiently rehabilitated to be released.” Bryan R. Diederich, Note, *Risking Retroactive Punishment: Modification of the Supervised Release Statute and the Ex Post Facto Prohibition*, 99 COLUM. L. REV. 1551, 1554–60 (1999) (chronicling the history of 18 U.S.C. § 3583(h) regarding supervised and conditional release).

50. See Daniel Weiss, Note, *California's Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV. 1573, 1584–87 (2005) (outlining the history of the parole and work release systems in the United States);

Not surprisingly, the role played by parole in the correctional system has changed substantially over the twenty years since *Morrissey* was decided. Parole no longer is employed as a vehicle for rehabilitation services. States now use parole primarily as a low-cost alternative to prison and use the parole revocation process to preventively detain parolees for weeks or months. States also are implementing more restrictive forms of conditional release which blur the sharp line *Morrissey* drew for due process purposes between the tight restrictions of imprisonment and the relatively high degree of freedom enjoyed by the parolee.

Thomas J. Bamonte, *The Viability of Morrissey v. Brewer and the Due Process Rights of Parolees and Other Conditional Releases*, 18 S. ILL. U. L. J. 121, 124–28 (1993).

51. See Sara Feldschreiber, Note, *Fee at Last? Work Release Participation Fees and the Takings Clause*, 72 FORDHAM L. REV. 207, 214–19 (2003) (chronicling the history of the work release statute in New York); see also *id.* at 215 (“The New York program has proven successful; the most recent study found that only eight percent of work release participants returned to jail compared to a twenty-seven percent rate of return among those inmates who did not participate in work release.”) (citation omitted).

52. In general, temporary release programs strive “to reduce recidivism by helping inmates to return to a normal and productive life.” *Id.* at 214–15 (discussing New York release programs); see also Ortiz v. Wilson, 448 N.Y.S.2d 918, 919 (Sup. Ct. Albany County 1981) (finding that the purpose of a temporary release program is to “reduce recidivism by helping inmates to return to a normal and productive life”).

1920s and the 1930s brought a new “get tough” policy, which has largely continued through the present day.<sup>53</sup> Yet I hesitate to generalize since at different times during the last half century, some states at least have adopted reforms and improved prison conditions dramatically.

Clearly, prison conditions have markedly improved since the revelations of the early twentieth century,<sup>54</sup> and I believe that those changes, especially those within the last quarter century, are in some measure attributable to consent decrees of the type entered into between New York City and the Legal Aid Society on behalf of its detainees.<sup>55</sup> That said, New York State and, to a degree, the federal government, have over the past quarter century adopted a correction policy focused on legislating new crimes, longer terms, and incarceration and not rehabilitation.<sup>56</sup> This policy has been accompanied by increasing public ambiva-

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53. *But see* Chris Suellentrop, *The Right Has a Jailhouse Conversion*, N.Y. TIMES, Dec. 24, 2006, §6 (Magazine), at 47 (noting that Republicans have taken up traditionally Democratic agendas such as housing and job training for ex-offenders).

54. As Oklahoma Commissioner of Charities and Corrections, Kate Barnard inspected a Kansas penitentiary where Oklahoma prisoners were confined in 1908. Her report to the Oklahoma governor exposed brutalities in the Kansas prison system and led to an investigation that sustained her charges. *See* Oklahoma Dep’t of Corrections, *Oklahoma Department of Corrections: The 20th Century*, at ¶1 (2002), <http://www.doc.state.ok.us/newsroom/publications/DOC%20History.htm>; *see also* HELEN CHRISTINE BENNETT, *AMERICAN WOMEN IN CIVIC WORK* 106–07 (1915).

55. *See, e.g.*, John J. Dilulio, Jr., *Conclusion, What Judges Can Do to Improve Prisons and Jails*, in *COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS* 287, 291 (John J. Dilulio, Jr. ed. 1990).

[I]f the question is one of net assessment, then the impact of judicial intervention into prisons and jails over the last two decades has been positive—a qualified success, but a success just the same. For proponents of judicial restraint, there is no use denying that in most cases levels of order, amenity, and service in prisons and jails have improved as a result of judicial intervention. And in most cases it is equally futile to assert that such improvements would have been made, or made as quickly, in the absence of judicial intervention.

*Id.* at 291.

56. Scholars and courts over the past twenty years have examined the successes and failures of different aspects of the New York prison system. *See, e.g.*, Jennifer R. Wynn and Alisa Szatrowski, *The Modern American Penal System: Hidden Prisons: Twenty-Three-Hour Lockdown Units in New York State Correctional Facilities*, 24 PACE L. REV. 497, 525 (2004) (“Our research based on site visits to nearly every lockdown unit in the New York State prison system gives grim testimony to the serious problems that exist in these facilities. Findings reveal significant numbers of inmates suffering from mental illness as evidenced by the high rates of self-mutilation, suicide attempts and psychiatric hospitalizations, a paradigm that stresses punishment over treatment and a demoralized correctional staff.” (citation omitted)); James R.P. Ogloff et al., *Mental Health Services in Jails and Prisons: Legal, Clinical, and Policy Issues*, 18 LAW & PSYCHOL. REV. 109, 112–15 (1994) (describing a study involving 3684 offenders incarcerated in New York prisons, which found that 8 percent were suffering from severe psychiatric or functional disabilities of the severity ordinarily found among patients in a psychiatric hospital); Scott Burriss, *Prisons, Law and Public Health: The Case for a Coordinated Response to Epidemic Disease Behind Bars*, 47 U. MIAMI L. REV. 291 (1992) (criticizing federal and state prison’s treatment of prisoners with special medical needs and communicable diseases in prisons). *See generally*, *Nolley v. County of Erie*, 776 F. Supp. 715, 740 (W.D.N.Y. 1991) (finding that a prison had deprived the plaintiff of a “necessity of life” by repeatedly failing to provide her with prescribed medication); Spiros A. Tsimbinos, *Is It Time To*

lence and less attention to prisoners' rights and prison conditions.<sup>57</sup> If proven effective, it might at least be understandable. Unfortunately, a primary result of this policy has been the emergence of a growing industry in the prison construction business.<sup>58</sup> State and federal expense budgets for prisons have never before reached their current numbers (all paid for by the taxpayer, of course), and a recent article reports that “[b]y 2005, more than 1.5 million persons were incarcerated in U.S. prisons on any given day, and an additional 750,000 were incarcerated in local jails.”<sup>59</sup>

## II. THE *BENJAMIN* CONSENT DECREES

With this background, I turn to the evolution of conditions in New York City detention facilities and theories of criminal detention, the catalysts for the *Benjamin* consent decrees.

### A. *Rhem v. McGrath*

The “Tombs,”<sup>60</sup> later known as the Manhattan House of Detention for Men, was described in 1871 as follows:

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*Change the Rockefeller Drug Laws?*, 13 ST. JOHN'S J. LEGAL COMMENT. 613, 624 (1999) (discussing the effect of the Rockefeller Drug Laws on prisons: “[b]eginning in the late 1970's, the Legislature realized that the more stringent drug laws had succeeded only in overcrowding New York prisons to deter drug use or crime.”).

57. See, e.g., Kristin L. Burns, Note, *Return to Hard Time: The Prison Litigation Reform Act of 1995*, 31 GA. L. REV. 879, 880–91 (1997) (describing changes in the public perception of the importance of prisoners' rights which, not surprisingly, coincided with the changing of public policy on such rights).
58. See, e.g., J.C. Oleson, Comment, *The Punitive Coma*, 90 CAL. L. REV. 829, 844–46 (2002) (describing the ever-rising costs of prisons such that during the last two decades, roughly a thousand new prisons and jails have been built in the United States) (“[B]etween 1980 and 1994 alone . . . more than \$25 billion was spent on the capital construction costs of new state and federal prisons, an increase of about 141% over the level in fiscal year 1980.”) (citations omitted); see also, Vanessa Blum, *U.S. Building New Prisons for Terrorists: Construction of Guantanamo Jails Signals Long-Term Plans for Base*, LEGAL TIMES, Oct. 4, 2004, at 1 (in the context of detainees, noting government plans to build a new permanent detention facility in Guantanamo Bay, Cuba). These policies have not only encouraged the construction of new prisons, but they have also made the prison business profitable for corporate distributors of prison supplies (food, personal care products, etc.), as well as maximized the profitability of prison labor. Cynthia Chandler, *Death and Dying in America: The Prison Industrial Complex's Impact on Women's Health*, 18 BERKELEY WOMEN'S L.J. 40, 46–54 (2003).
59. Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime*, 19 FED. SENT'G REP. 221, 221 (2007). The 2007 Budget for the Federal Prison system is approximately \$5.1 billion. Dep't of Justice, 2007 Budget Highlights, Resources and Key Performance Measures by Strategic Goal, [http://www.usdoj.gov/jmd/2007summary/pdf/03\\_4\\_15\\_part1\\_2007budgethighlights.pdf](http://www.usdoj.gov/jmd/2007summary/pdf/03_4_15_part1_2007budgethighlights.pdf) (last visited Sept. 15, 2007).
60. The nickname the “Tombs” owes its origins to the fact that the original structure was designed based on an Egyptian mausoleum. See N.Y. Corr. History Society, *A Tale of the Tombs*, <http://www.correctionhistory.org/html/chronicl/nycdoc/html/histry3a.html#tale> (last visited Sept. 15, 2007). The nickname stuck even after the original prison was torn down and rebuilt. *Id.*

The Tombs! where living men are buried, and by a refinement of cruelty, the living are chained to the dying and the dead, until the whole becomes one mass of moral putrefaction . . . .

The Tombs! whence those who were buried, issue forth again, speaking, and moving as men, and bearing the form of humanity; but with death,—death spiritual and final—with death stamped on their visages, and reigning in their souls. These are strong words, but they are not stronger than the truth requires.<sup>61</sup>

A century later, the description was no less painful, but the powers that be in the New York State government had begun to take notice.<sup>62</sup> By 1969, the Tombs were overcrowded and unsanitary, holding an average of 2,000 men in a facility designed to house 925.<sup>63</sup> The situation in the Tombs reflected insufficient regard for inmates who, in addition to being subject to overcrowding and sanitation problems, endured poorly lit and sometimes freezing, sometimes boiling temperatures, arbitrary disciplinary procedures, along with inadequate medical care, lack of recreation, and restrictions on visits and mail. In fact, in November 1969, the New York State Senate Committee on Penal Institutions issued a report that exposed the overcrowded, inadequate Tombs facilities as less humane than our public zoos.<sup>64</sup> Sanitation, or the lack thereof, fueled widespread complaints of rats, roaches, body lice, and lack of soap.<sup>65</sup> At this point the facility reached a breaking point.

In October 1970, riots broke out in the Tombs.<sup>66</sup> Detainees captured a number of prison guards and civilians working in the Tombs, held them as hostages, and threatened to seriously assault and kill them, all to protest against the deplorable prison conditions at the Tombs and to bring their grievances to the attention of the authorities and the public.<sup>67</sup>

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61. N.Y. Corr. History Society, *A History of the Correctional Society of New York*, <http://www.correctionhistory.org/html/chronic/cany/html/cany04a.html> (last visited Sept. 15, 2007) (citation omitted).
62. For example, the Board of Correction came into being on June 25, 1957 when Mayor Robert F. Wagner signed Local Law No. 25 amending Chapter 25 of the New York City Charter by adding Section 626, establishing a nine member non-salaried Board of Correction. See *Progress Through Crisis: 1954–1965*, at 6–7 (cited at <http://www.correctionhistory.org/html/chronic/bdofcorr/bdofcor.html> (last visited Sept. 15, 2007)). The stated mission of the Board of Correction was to visit the jails and make recommendations in the interest of the detainees. *Id.*
63. N.Y. Corr. History Society, *A Tale of the Tombs*, <http://www.correctionhistory.org/html/chronic/nycdoc/html/histry3a.html#tale> (last visited Sept. 15, 2007).
64. Peter Kihss, *Albany Report Calls Jails ‘Crime Breeding Grounds,’* N.Y. TIMES, Nov. 10, 1969, at 30.
65. David Burnham, *The Tombs Called ‘Dungeon of Fear,’* N.Y. TIMES, Apr. 8, 1970, at 45. A survey was conducted by then Manhattan Congressman, Edward I. Koch with the permission of Commissioner McGrath. *Id.*
66. *People v. Brown*, 333 N.Y.S.2d 342, 346 (Sup. Ct. N.Y. County 1972); see also *Rhem v. McGrath*, 326 F. Supp. 681, 683–84 (S.D.N.Y. 1971).
67. *Brown*, 333 N.Y.S.2d at 346. The inmates rioted again in 1971. The Correctional Society of New York, *The History of the Corr. Society of N.Y.: VIII: The Rockefeller Years and the Crisis of Criminal*

After the October riots, conditions at the Tombs only worsened.<sup>68</sup> For example, after the riots, all detainees were indefinitely confined to their cells for what was known as a twenty-four hour “lock in.”<sup>69</sup> A series of disintegrating conditions prompted the Legal Aid Society to file for a preliminary injunction on behalf of the Tombs’ detainees, and by October 26, 1970, the detainees were certified as a class in *Rhem v. McGrath*, a civil rights action brought against the Department of Correction (“DOC”) and the City.<sup>70</sup> In March 1971, Judge Walter R. Mansfield granted the preliminary injunction in part and (1) ordered the DOC to adopt, publish, and distribute to all detainees rules governing detainee behavior and life, and (2) prohibited the DOC from interfering with private consultations between detainees and their attorneys.<sup>71</sup> Shortly thereafter, Judge Mansfield was appointed to the Second Circuit Court of Appeals and the case was reassigned to Judge Morris E. Lasker.<sup>72</sup> By August 2, 1973, following a year of settlement talks and a trial, Judge Lasker entered a consent decree, which addressed the civil rights issues relating to overcrowding, unsanitary conditions, and inadequate medical care.<sup>73</sup>

Judge Lasker issued his first opinion in *Rhem* on January 7, 1974.<sup>74</sup> He found that the inmates had proven all of their allegations and that “[t]he dismal

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*Justice Reform*, <http://www.correctionhistory.org/html/chronic/cany/html/cany08a.html> (last visited Sept. 15, 2007).

68. *Rhem v. McGrath*, 326 F. Supp. at 684.

69. *Id.* The lock-in ended on October 30, 1970. *Id.* at 685.

70. *Id.* at 682. The action alleged that (1) conditions at the Tombs constituted cruel and unusual punishment in violation of the Eighth Amendment; (2) the practice of opening and inspecting inmates’ incoming mail was an infringement on their constitutional right to communicate freely with their attorneys; and (3) the absence of readily-accessible rules and regulations governing the conduct of inmates and correction officers in the Tombs deprives them of due process of law under the Fourteenth Amendment. *Id.*

71. *Id.* at 691. The preliminary injunction also applied to any other case in which the commissioner of correction, or his staff, was a party. *Id.*

72. This was not the last of Judge Mansfield’s involvement in the case, however. As late as 1986, Judge Mansfield issued decisions in *Benjamin* as a judge on the Second Circuit. *See Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986).

73. *Rhem v. Malcolm*, 371 F. Supp. 594, 597 (S.D.N.Y. 1974).

74. *Id.* at 594. At trial LAS advanced several arguments. First, they argued that the conditions at the Tombs violated plaintiffs’ due process rights because, as detainees not yet convicted, the law required that they be held under the least restrictive conditions necessary. *Id.* at 600. In practice, detainees were locked in their respective cells sixteen hours a day, even though the sole justification for their confinement was to ensure their appearance at trial. Approximately 56 percent of detainees sent to jail at arraignment have bail set at \$2,000 or less and about 25 percent have bail set at \$500 or less. Corr. Ass’n of N.Y., *Prisoner Profile*, [http://www.correctionalassociation.org/PVP/publications/prisoner\\_profile\\_2006.pdf](http://www.correctionalassociation.org/PVP/publications/prisoner_profile_2006.pdf). Second, LAS asserted a violation of the equal protection clause because the general conditions in the Tombs were harsher compared to those of convicted prisoners. *Id.* Third, LAS also argued that the detainees’ Eighth Amendment rights, individually or collectively, were violated because the conditions at the Tombs constituted cruel and unusual punishment. *Id.* The City defended the conditions as borne of necessity and argued it was necessary for the inmates to be held in maximum security and the character of the Tombs was constitutionally justified. *Id.*

conditions which still exist in the institution [over three years after the suit was originally filed] manifestly violate the Constitution and would shock the conscience of any citizen who knew of them.”<sup>75</sup> Judge Lasker opined that “the public through its government ha[d] not assumed its responsibilities to provide a decent environment within jail walls.”<sup>76</sup> Further, he suggested that “[c]ourts are the agency which must enforce the execution of public responsibilities when other branches of government fail to do so: courts sit not to supervise prisons but to enforce the constitutional rights of all persons, including prisoners.”<sup>77</sup>

Judge Lasker highlighted the fact that the necessary changes to the Tombs would cost significant amounts of money and would require deliberate and careful planning by the City.<sup>78</sup> Unfortunately, apart from agreeing to redress overcrowding by instituting population caps at the Tombs, it was quickly apparent that the City was not about to cooperate.<sup>79</sup> For the six months that followed, the City dragged its feet, sought extensions, and at the end refused to provide any semblance of a plan—let alone the detailed one sought by the court—to effectuate the necessary changes.<sup>80</sup> As a result of this noncompliance, on July 11, 1974, Judge Lasker ordered the Tombs closed within thirty days absent a comprehensive and specific plan for the elimination of unconstitutional conditions in the facility.<sup>81</sup>

At this time, the City was on the brink of bankruptcy and Mayor Abraham Beame did not place the City’s jails amongst his priorities for funding or attention.<sup>82</sup> It is fair to say that in this time of budget crisis there were more visible

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75. *Rhem v. Malcolm*, 371 F. Supp. at 636. The dismal conditions included excessive lock-in time, deprivation of contact visits, dangerously high noise levels, excessive heat, inadequate ventilation, absence of transparent windows, lack of recreation, excessive use of lock-out areas instead of day areas, programmatic deficiencies, limited employment activities, mistreatment of inmates due to understaffing of correction officers, absence of due process and transparency in disciplinary procedures, lack of a detainee classification system, and inappropriate handling of correspondence. *Id.* at 594.

76. *Id.* at 636.

77. *Id.* (citing *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (internal quotations omitted)).

78. *Id.* at 637.

79. *Rhem v. Malcolm*, 377 F. Supp. 995, 996 (S.D.N.Y. 1974).

80. *Id.* In the preceding two years, Judge Lasker had been patient with the City defendants. He understood that the City would need to commit a great deal of time and money to effectuate significant change and practical constraints would prevent change from happening overnight. That Judge Lasker was frustrated to the point that he was compelled to order such a drastic measure reflected the unwillingness on the part of the executive and legislative branches of our City government to, in good faith, attempt to cure the conditions at the Tombs that violated plaintiffs’ constitutional rights. Judge Lasker described the history of the case as “one of frustration largely caused by the City defendants’ delay and the absence or incompleteness of reports or plans of performance which they were ordered to submit.” *Id.* at 996.

81. *Id.* at 996–97.

82. Corrections were at the bottom of any agenda in the Beame administration. Commissioner Benjamin Malcolm recalled talking to Mayor Beame about some money in his budget to enlarge the kitchen at the Tombs:

public needs such as general sanitation, welfare, police, and fire safety.<sup>83</sup>

The City appealed and the Second Circuit upheld Judge Lasker's decision and emphasized the fact that pre-trial detainees, such as those held in the Tombs, are presumed innocent of the charges against them and are held only for a failure to make bail.<sup>84</sup> The court rejected the City's fiscal arguments and held that inadequate resources did not justify the state's deprivation of constitutional rights.<sup>85</sup> The court added that the facts of the case demanded substantial physical changes to remedy the constitutional violations. Further, because the City cited a financial inability to make any commitments to improve the Tombs, the facts of the case also warranted a more practical approach to equitable relief.<sup>86</sup>

Instead of making any improvements, the City decided to close the Tombs, and by December 20, 1974, the DOC had transferred the Tombs detainees to the House of Detention for Men ("HDM") on Rikers Island.<sup>87</sup> In an interview, Judge Lasker stated that he was surprised that the City opted to close the Tombs. He said: "I didn't realize how much the City was stonewalling until even after I issued the order to comply or close down the Tombs . . . . I thought they would

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I went to Deputy Mayor Cavanagh and said that I would like to switch this money and use it to begin contact visits. He asked where I got the money, and I said it was in my budget. He said that he would rather give it to the sanitation department than the prisons. I wouldn't say they were insensitive, but I would say that it just wasn't one of their priorities. It never was the whole time . . . . Even when things did not cost much, Beame was unresponsive.

Ted S. Storey, *When Intervention Works: Judge Morris E. Lasker and New York City Jails*, in *COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS* 148 (John J. DiIulio, Jr. ed., 1990) (citing Interview with Benjamin Malcolm, former New York City commissioner of correction (July 29, 1987)) (omission in original).

83. *Rhem v. Malcolm*, 507 F.2d 333, 341-42 (2d Cir. 1974).

84. *Id.* at 336. The court explained:

Over two hundred years ago, Blackstone elegantly stated that pre-trial commitment for those unable to make bail "is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and the trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only . . . ."

*Id.* at 342 (internal citations omitted).

85. *Id.* at 341.

86. *Id.* The court stated that for practical purposes, the judiciary should not be in the difficult position of trying to enforce a direct Order to the City to raise and allocate large sums of money. *Id.* Consequently, on remand, the court ordered Judge Lasker to refashion the equitable relief. The court suggested that Judge Lasker's Order should have been framed to close the prison to detainees or to limit its use for detainees to certain narrow functions by a fixed date, unless specified standards were met. Once Judge Lasker established appropriate standards or permissible limited uses, he would then determine whether there was compliance by the specified deadline. If the City failed to satisfy the compliance criteria in time, Judge Lasker, in his discretion, could postpone the effective date of any Order, but only if clear and convincing proof of adequate planning and funding of improvements was produced. *Id.* at 340.

87. *Rhem v. Malcolm*, 389 F. Supp. 964, 966 (S.D.N.Y. 1975). The Tombs did not stay closed indefinitely. By 1983, the Tombs underwent a \$42 million renovation project and the facility was reopened. Philip Shenon, *The Jail Space Shortage Seems Chronic as Crime*, N.Y. TIMES, Oct. 23, 1983, § 4, at 6.

comply.”<sup>88</sup> Unfortunately, moving the pre-trial detainees out of the Tombs did not solve the issue of substandard housing, rather, it merely transferred the problems out of Manhattan and onto Rikers Island where the detainees experienced many of the same atrocious conditions.<sup>89</sup> Shortly thereafter, Judge Lasker issued a ruling and held that the detainees previously housed in the Tombs and presently housed at HDM were still entitled to the constitutional standards enumerated in *Rhem*.<sup>90</sup> Judge Lasker made it clear that as far as the Constitution was concerned, it made no difference whether the detainees were on Rikers Island or the island of Manhattan.<sup>91</sup>

*B. Benjamin v. Malcolm*

In the fall of 1975, the HDM detainees initiated one of the worst jail riots in New York City’s history, taking over seven of the eight cellblocks at HDM.<sup>92</sup> The uprising cost millions of dollars in physical damages and endangered the lives of several correction officers who were taken hostage.<sup>93</sup> To avoid more rioting, Commissioner Malcolm along with other DOC officials initiated negotiations with the detainees.<sup>94</sup> At one point, the detainees asked to speak to Judge Lasker.<sup>95</sup> The riot ended without any fatalities and without much gain for the inmates. Serious reforms were still years away. Mayor Beame visited Rikers once after the riot. It was the one and only time he visited during his entire administration.<sup>96</sup>

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88. Judge Harold Baer, Jr. and Arminda Bepko, Interview with Judge Morris Lasker in Chambers of U.S. District Court of Massachusetts, Nov. 7, 2005 (recording on file with author) [hereinafter Judge Lasker Interview].

89. Plaintiffs abandoned their claims with respect to conditions related solely to the physical arrangements at the Tombs, such as excessive noise and heat and lack of ventilation. However, the plaintiffs still claimed their civil rights were violated with respect to excessive lock-in, lack of recreation, lack of contact visits, inadequate visitation, failure to extend optional lock-in and lack of a detainee classification system. *Rhem v. Malcolm*, 389 F. Supp. 964 (S.D.N.Y. 1975), *aff’d*, 527 F.2d 1041 (2d Cir. 1975).

90. *Rhem v. Malcolm*, 389 F. Supp. at 966–67.

91. *Id.*

92. In 1975, LAS filed *Benjamin v. Malcolm*, 495 F. Supp. 1357 (S.D.N.Y. 1980), on behalf of all present or future detainees at HDM as soon as it became clear that the *Rhem* decision only applied to detainees who had been transferred to Rikers from the Tombs. The *Benjamin* complaint was virtually the same as the one filed in *Rhem* and detailed unsanitary living areas and cells, overcrowding, unbearable noise levels, difficulty and delays with respect to family and attorney visits, and excessive lock-in. Storey, *supra* note 82, at 150. LAS sought and received a preliminary injunction against the City that would confer the same rights on the HDM detainees as *Rhem* had for the Tombs detainees. *Id.*

93. *Benjamin*, 495 F. Supp. at 1360.

94. Storey, *supra* note 82, at 150.

95. *Id.* Judge Lasker remembers giving a lecture at the state penitentiary at Green Haven. After the lecture, a prisoner introduced himself saying: “Judge, I don’t know if you remember me, but we met at the Rikers Island riot.” Judge Lasker Interview, *supra* note 88.

96. Storey, *supra* note 82, at 150.

The trial in the *Benjamin* case began in 1976 and was completed the following year.<sup>97</sup> While the lawsuit was *sub judice*, Edward Koch was elected mayor, and by all accounts, his administration was the first to initiate some of the much needed improvements to the City's jails.<sup>98</sup> In contrast to the Beame administration, Mayor Koch preferred a negotiated settlement, so he asked Judge Lasker to withhold his decision on the pending issues while the parties negotiated.<sup>99</sup> Judge Lasker agreed and entered an order that he would stay a decision while the parties negotiated.<sup>100</sup>

To understand the political landscape, it is worth noting that Commissioner Malcolm and his successors were frequently in an awkward position. While they were appreciative of the involvement of the judiciary as an effective enforcer of change, at the same time, they served at the pleasure of the mayor.<sup>101</sup> However, it should be noted that although the commissioner of correction and his department were the named defendants,<sup>102</sup> reforms were typically negotiated by City officials who were not always realistic about timeframes and who could be tight-fisted when it came to the allocation of funds.<sup>103</sup>

The newly-elected mayor appointed Alan Schwartz, his former law partner, to be his corporation counsel, and negotiations began in earnest.<sup>104</sup> In the fall of 1978 a detailed fifty-page consent decree was signed by all participants, which covered all of the City's jails at Rikers Island, Brooklyn, the Bronx, and Queens.<sup>105</sup> By the spring of 1979 Judge Lasker approved and entered the Partial

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97. *Benjamin v. Malcolm*, 564 F. Supp. 668, 670 (S.D.N.Y. 1983).

98. *See Storey, supra* note 82, at 152. This new approach was exemplified when Mayor Koch went to Rikers Island on Christmas Day before he took office to share a holiday meal with correction officers and inmates. *Id.* at 153. The mayor also reemphasized his new approach in a 1978 speech, stating that the City "accept[s] our responsibility for maintaining jails that are humane and meet constitutional requirements." *Id.*

99. *Id.* at 152–53; *see also Benjamin v. Malcolm*, 495 F. Supp. 1357, 1359 (S.D.N.Y. 1980).

100. *Benjamin*, 495 F. Supp. at 1359.

101. Commissioner Malcolm said that in the beginning of the litigation he thought Lasker was going too far, but as the litigation progressed, his "early view of Lasker as a judge overstepping his boundary changed to that of a judge who had the guts and courage to stand up and keep the system in line." *Storey, supra* note 82, at 152 (internal citations omitted).

102. *Benjamin*, 495 F. Supp. 1357 (defendants Benjamin J. Malcolm, Commissioner of Correction of the City of New York; Arthur Rubin, Warden, New York City House of Detention for Men; Gerard Brown, Deputy Warden, New York City House of Detention for Men; and Abraham D. Beame, Mayor of the City of New York, individually and in their official capacities).

103. Mayor Koch appointed a new Commissioner, William Ciuros, Jr., but his tenure lasted a short nineteen months. *See Storey, supra* note 82, at 153.

104. *Id.*

105. *Benjamin v. Malcolm*, 803 F.2d 46, 48 (2d Cir. 1986). The decree involved six additional related cases: *Forts v. Malcolm*, 156 F.R.D. 561 (New York City Correctional Institute for Women), *Ambrose v. Malcolm*, 156 F.R.D. 561 (Bronx House of Detention for Men), *Maldonado v. Ciuros*, 156 F.R.D. 561 (Adolescent Reception and Detention Center), *Detainees of the Brooklyn House of Detention for Men v. Malcolm*, 156 F.R.D. 561, *Detainees of the Queens House of Detention for Men v. Malcolm*, 156 F.R.D.

Final Judgment by Consent.<sup>106</sup> This was the beginning of an association between the federal judiciary and New York City’s DOC that would span four decades, six mayors, sixteen commissioners of corrections,<sup>107</sup> two federal district court judges, and frequently the Second Circuit Court of Appeals. As might be expected, agreement to the changes in principle came much faster than their execution. For example, many of the provisions required compliance within eighteen to twenty-four months. This timetable proved to be unrealistic.<sup>108</sup>

There were many obstacles to implementation in the beginning that included allocation of funds in the budget and the development of policies for the treatment of inmates by corrections officers—a far longer-term goal than changing written policies. Overcrowding remained an issue, although the population in the jails had fluctuated wildly below and above the inmate cap.<sup>109</sup> This overcrowding, at least in part, was the result of the larger-than-usual number of convicted state prisoners in the City’s correctional facilities because the state was slow to move them out or because they were charged with violating parole, picked up in New York City, and held on Rikers.<sup>110</sup> Despite other improvements, the overcrowding continued and LAS moved for a judgment to grant “relief for unconstitutional overcrowding” and to reduce the population at HDM to one thousand inmates.<sup>111</sup> Judge Lasker, in his first opinion in *Benjamin v. Malcolm*, cited a long history of studies of HDM, and concluded that the facility had been dangerously overcrowded for years.<sup>112</sup> Judge Lasker granted plaintiffs’ motion and capped the HDM population at 1,200.<sup>113</sup>

Thereafter, the overcrowding persisted and Judge Lasker revisited the issue on several occasions.<sup>114</sup> He concluded that an increase in the detainee population

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561, *Rosenthal v. Malcolm*, 156 F.R.D. 561 (Adult Mental Health Center on Rikers Island). See *Benjamin v. Fraser*, 161 F. Supp. 2d 151, 153 n.1 (S.D.N.Y. 2001). The cases were consolidated before Judge Lasker in 1982. *Benjamin v. Fraser*, 343 F.3d 35, 40 (2d Cir. 2003).

106. *Benjamin v. Malcolm*, 803 F.2d 46, 48 (2d Cir. 1986).

107. N.Y. Corr. History Society, *NYC Corrections Commissioners: Since 1896*, <http://www.correctionhistory.org/html/chronic/nycdoc/html/comslist.html> (last visited Sept. 15, 2007) (including acting commissioners of corrections).

108. Benjamin Ward replaced Ciuross as commissioner of correction and was charged with most of the responsibility for implementing the Decrees. *Id.*

109. *Benjamin v. Malcolm*, 495 F. Supp. 1357, 1361 (S.D.N.Y. 1980).

110. *Id.* at 1362.

111. *Id.* at 1360.

112. *Id.*

113. *Id.* at 1365.

114. For example, in July 1981, in an effort to rectify the overcrowding, the City moved for an Order to compel the New York State Department of Correction Services to remove all sentenced inmates from the City’s detention facilities, as required by New York Criminal Procedure Law Section 430.20. See *Benjamin v. Malcolm*, 528 F. Supp. 925, 926 (S.D.N.Y. 1981). The City first moved to join the governor of New York and the state as defendants in August 1980. The City argued that the state was obligated under Section 430.20 of the New York Criminal Procedure Law to remove “forthwith” from City facili-

would put additional pressure on an already overextended medical care system that was plagued by frequent emergencies and inadequate infirmary space.<sup>115</sup> In a denial of one of the City's motions to increase population cap, Judge Lasker astutely observed:

[I]n view of the history of this litigation, it would not be appropriate simply to assume that, if defendants' application were granted subject to court-ordered conditions, those conditions would be met, or continue to be met in the future. Defendants have been subject to court orders for many years, and all of the parties to this lawsuit know through frustrating experience that the entry of an order does not guarantee its timely observance.<sup>116</sup>

This would become a common theme throughout the enforcement of the *Benjamin* consent decrees.

### C. Creation of the Office of Compliance Consultants

Judge Lasker's June 1982 Order created the Office of Compliance Consultants ("OCC").<sup>117</sup> At its inception, the OCC was to mimic some characteristics of a special master, but would be neither a creature of the court, the City, nor the DOC.<sup>118</sup> The OCC's budget is paid by the City.<sup>119</sup> The OCC staff members<sup>120</sup>

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ties persons sentenced to imprisonment in state institutions. At the time Judge Lasker denied the application because the state commissioner assured the court that the state would voluntarily meet its obligations. *Benjamin v. Malcolm*, 88 F.R.D. 333 (S.D.N.Y. 1980). See also N.Y. CRIM. PROC. LAW § 430.20 (2007) ("When a sentence of imprisonment is pronounced, or when the sentence consists of a fine and the Court has directed that the defendant be imprisoned until it is satisfied, the defendant must forthwith be committed to the custody of the appropriate public servant and detained until the sentence is complied with."). Judge Lasker granted this application and ordered the state to move sentenced inmates within forty-eight hours following conviction. Subsequent to Judge Lasker's initial denial, the state prison population grew to such an extent that on August 20, 1981, Judge Lasker entered an Order that required the state to accept, within forty-eight hours of the completion of transfer processing, each person housed at HDM who is sentenced to a term of imprisonment in a state correctional facility. *Benjamin v. Malcolm*, 528 F. Supp. 925, 926 (S.D.N.Y. 1981). It is important to note that the conditions at Rikers were not problems reserved to New York or even to urban city centers but were at least in part problems that state legislators and city officials across the country faced but were unwilling to deal with. By the early 1980s, twenty-nine states were operating either individual institutions or entire prison systems under orders from federal judges who found conditions so intolerable as to be unconstitutional. Wendell Rawls Jr., *Judges' Authority in Prison Reform Attacked*, N.Y. TIMES, May 18, 1982, at A1.

115. *Benjamin v. Malcolm*, 564 F. Supp. 668, 674–75, 685 (S.D.N.Y. 1983).

116. *Id.* at 685.

117. *Benjamin v. Malcolm*, No. 75 Civ. 3073 (S.D.N.Y. June 18, 1982). The Order was entered pursuant to agreement by both parties that the court would appoint a neutral third-party "compliance consultant" to assist defendants in achieving compliance with the consent judgments. The Order did not refer to the body it created as the "Office of Compliance Consultants," rather, the parties themselves chose the current title based on the language in the court's Order.

118. Storey, *supra* note 82, at 159. The first director of the OCC was Kenneth Schoen, a former commissioner of corrections in Minnesota. *Id.* The parties were able to agree to the creation of the OCC in part because of their respect for Schoen. *Id.*

were for the most part, and continue to be, DOC employees, and staff selections are approved by all parties. This arrangement has allowed staff members to visit the facilities without being treated as outsiders. Over the years, the OCC has been instrumental in assisting the parties to work out many disputes informally without depending on the court for resolution.<sup>121</sup>

*D. New and Continuing Problems*

In the mid-1980s, the crack-cocaine epidemic caused more significant and distressing problems for the City's jails. It led to a rise in arrests and an increase in violence, both inmate-on-inmate and staff-on-inmate. In 1986, for example, in the New York City Correctional Institution for Men ("CIFM") on Centre Street, there were over six hundred violent incidents which involved weapons and infractions for possession of weapons.<sup>122</sup> In 1987, Judge Lasker tried the issue of whether the failure of the DOC to employ reasonable measures to protect inmates from violence at CIFM violated the Eighth Amendment's prohibition against the infliction of "cruel and unusual punishment."<sup>123</sup> The City defendants presented evidence at the hearing that they had increased the number of cell searches for weapons, but Judge Lasker found the result to have produced only a slight decrease in the number of slashings and stabbings.<sup>124</sup> Trial testimony detailed the type and frequency of violent behavior.<sup>125</sup> The City only began to keep

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119. *Id.* Admittedly, this salary structure could create a potential conflict of interest for the OCC employees. However, I am aware of no instance of compromised impartiality on the part of the OCC employees. They continue to be nothing less than diligent and objective in their efforts.
120. The current director of the OCC is John Doyle III, shareholder of the New York office of Anderson Kill & Olick, P.C. Mr. Doyle served as assistant counsel to the Lawyers' Committee For Civil Rights Under Law in Jackson, Mississippi in 1965 and 1966, as an Assistant United States Attorney and as assistant chief of the Criminal Division in the United States Attorney's Office for the Southern District of New York in 1966-1971, and as chief of the Criminal Division in 1979-1980. Mr. Doyle received a B.A. from Fordham University and his J.D. from Harvard Law School. Resume, John Doyle (on file with author). Nicole Austin is the deputy director of the OCC. Ms. Austin received a B.A. from Queens College and her M.A. from New York University. She has experience in vocational rehabilitation, outreach, fiscal planning, and administration. Resume, Nicole Austin (on file with author).
121. Storey, *supra* note 82, at 159. One example is the process of drafting periodic reports to the court. Periodically, the OCC circulates its findings among the DOC, LAS and other interested parties for review and comment. At times, this process has identified issues which the DOC has addressed without the court's intervention.
122. Fisher v. Koehler, 692 F. Supp. 1519, 1527 (S.D.N.Y. 1988). Judge Lasker described CIFM as "a medium security facility operated by the New York City Department of Correction. It is the principal facility in which New York City's sentenced male inmates are incarcerated. The city-sentenced inmates at CIFM are serving terms of one year or less for violations, misdemeanors, or low-degree felonies." *Id.* at 1523.
123. *Id.* at 1559.
124. *Id.* at 1527.
125. *Id.* For instance, in the month of February 1987, inmate-on-inmate violence resulted in sixteen slashings, lacerations, or stab wounds requiring sutures or emergency room treatment, and thirteen other serious injuries, including a fractured rib, collapsed lung, a fractured jaw, a neck sprain, and a loss of consciousness. *Id.*

records of violent incidents at CIFM subsequent to the commencement of trial.<sup>126</sup> Although the City attempted to downplay the seriousness of organized inmate violence and extortion, it was apparent that gangs were in control of the jails to a certain extent.<sup>127</sup> The plaintiffs constructed their own records of injury from anecdotal testimony, clinic logs, and infraction logs.<sup>128</sup> The plaintiffs also argued that there was ample unreported violence because inmates feared reprisals.<sup>129</sup>

Even more alarming than the inmate-on-inmate violence, plaintiff witnesses also described routine acts of staff-on-inmate violence and instances of the use of excessive force.<sup>130</sup> The evidence at trial established that five major problem areas at CIFM were significant causes of both inmate-on-inmate and staff-on-inmate violence: overcrowding; excessive reliance on dormitory housing; lack of adequate classification; inadequate staffing and supervision; and inadequate systems for controlling, investigating, and disciplining staff misuse of force.<sup>131</sup> In his opinion, Judge Lasker noted that in response to the litigation, the DOC had developed and launched a system to classify inmates at CIFM.<sup>132</sup> In addition, Judge Lasker credited defendants for taking steps during trial that would reduce the use of force in the future.<sup>133</sup>

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126. *Id.* at 1529.

127. In addition to slashings and beatings, inmates testified to (1) extortion of money in exchange for sleeping space, called “paying rent,” (2) forcing other inmates to wash clothes or do other menial chores called “maytagging,” and (3) forcing inmates to pay for telephone use, called “running the phone.” Many inmates referred to the phrase “snitches get stitches” as a slogan used to threaten inmates who complained to the authorities. *Id.* at 1527–29.

128. *Id.*

129. *Id.*

130. *Id.* at 1532–37. Judge Lasker concluded that:

The eyewitness testimony heard, bolstered by the voluminous documentary evidence of record, supports a finding that there is a pattern of excessive force at CIFM, manifesting itself, *inter alia*, in the recurrence of (1) use of force out of frustration in response to offensive but non-dangerous inmate goading; (2) officers’ use of excessive force as a means of obtaining obedience and keeping order; (3) force used as a *first* resort in reaction to any inmate behavior that might possibly be interpreted as aggressive; and (4) serious examples of excessive force by emergency response teams.

*Id.* at 1538.

131. *Id.* at 1540.

132. *Id.* at 1548. The classification system was launched in May 1987. The judge noted that “classification reduces violence because violent inmates are less likely to commit violent acts against others like themselves, and because, once violent inmates are identified and grouped, it is possible to take appropriate control measures such as putting them in single cells and making changes in staffing and programming.” *Id.* Before trial, the DOC admitted that “general population inmates are not classified or separated by security level, length of sentence, crime of conviction, previous criminal record, or previous history of incarceration.” *Id.* at 1547.

133. *Id.* at 1557. Judge Lasker explained that:

Commissioner Koehler testified that the Department of Correction has (1) increased the standards by which correction officers applicants are examined and tested, T. 3387-93; (2) increased the probationary period for new officers, T. 3395; (3) implemented an early

Notwithstanding the DOC's efforts, Judge Lasker found that the level of use of force at CIFM was excessive. Additionally, he found that the pervasiveness of staff-on-inmate violence was the predictable result of defendants' policies and practices, most significantly the defendants' failure to prevent misuse of force by adequately training officers in the appropriate use of force and defendants' failure to deter misuse of force by adequately investigating and disciplining use of force.<sup>134</sup> Although Judge Lasker commended the DOC for certain reforms, he determined there were still conditions at CIFM that required more work.<sup>135</sup>

In addition, fueled by the crack-cocaine epidemic in the 1980s, the inmate population at Rikers continued to grow.<sup>136</sup> The epidemic led to an increase in arrests, which in turn, caused the prison population to rise, further exacerbating overcrowding.<sup>137</sup> In November 1989, Judge Lasker approved the implementation of a new "Use of Force Policy" to address the unconstitutional levels of prison violence at CIFM.<sup>138</sup> The City faced continuing problems with inmate overcrowding, and in November 1990, Judge Lasker held that the City violated a court Order that prohibited the housing of inmates in non-housing areas for more

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warning system to assist staff experiencing personal or professional problems that can lead to staff misconduct, T. 3399-3405; (4) taken steps to reduce the amount of overtime work by staff, DX XXX at ¶ 4(d); and (5) instituted a central monitoring system, whereby all correctional facilities will maintain a computer file with entries for each officer who has used force; when any officer uses force on three separate occasions, the warden will interview the officer to ascertain if any problem has developed, T. 3339-3344; Directive 5003.

*Id.*

134. *Id.* at 1564.

135. *Id.* at 1565–66.

Here, the record as it stands now gives no assurance that the changes in policy and procedure at CIFM have significantly reduced violence at CIFM. Moreover, to the extent the changes have been successful, it can hardly be said that events have "made it absolutely clear," as required by *Phosphate Export Ass'n.*, that inmate-inmate violence and staff-inmate excessive force "could not reasonably be expected to recur." It was clear from his testimony that Commissioner Koehler is attempting in good faith to improve conditions at CIFM, and the determination that many of these efforts have been spurred in part by this litigation is not meant as a criticism: certainly this is a case of better late than never. However, the depressing reality is that while commissioners come and go, problems linger on, and present and future inmates are entitled to the assurance that these problems will be, and remain, redressed. Accordingly, the court is obligated to issue an injunction fitted to the circumstances.

*Id.* at 1566 (internal citations omitted).

136. Crystal Nix, *Tensions at Rikers: Complex Causes*, N.Y. TIMES, Oct. 19, 1986, § 1 at 46.

137. As a result, the City again applied to the court to amend the court Order imposing inmate population limits. In April 1989, Judge Lasker concluded not to do so. *Benjamin v. Koehler*, 710 F. Supp. 91, 95 (S.D.N.Y. 1989).

138. *Fisher v. Koehler*, No. 83 Civ. 2128, 1989 WL 135912, at \*2 (S.D.N.Y. Nov. 8, 1989). In April 1990, the Second Circuit affirmed Judge Lasker's earlier finding that prison conditions at CIFM violated the Eighth Amendment. *Fisher v. Koehler*, 902 F.2d 2, 3 (2d Cir. 1990).

than twenty-four hours.<sup>139</sup> Largely because of the City's noncompliant record, the court imposed a series of fines for future violations.<sup>140</sup> The City urged a modification to the contempt Order and urged that fine money be diverted to a bail fund instead of given directly to prisoners as stipulated in the consent decrees, but that too was rejected by Judge Lasker.<sup>141</sup> It is fair to say that without the constant vigilance of Judge Lasker and his quick response to plaintiffs' concerns, much of the violence and discontent at Rikers and the other jails would have only escalated.

In the early 1990s, the parties began to address the portions of the consent decrees that governed the provision of food services to detainees.<sup>142</sup> Ultimately, the City agreed to meet the requirements of the decrees by utilizing the "cook/chill" method of food preparation by which food is prepared in advance at a production center, chilled, transported, and reheated at the point of service.<sup>143</sup>

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139. *Benjamin v. Sielaff*, 752 F. Supp. 140 (S.D.N.Y. 1990). Non-housing areas include dayrooms, receiving rooms, gymnasiums, and program space. In 1981, the court entered an Order enjoining the Department from housing inmates in non-housing areas. *Id.* at 141. In April 1989, inmates were again required to spend days of confinement in gymnasiums and unsanitary receiving rooms. *Id.* As a result, plaintiffs moved to hold defendants in contempt for violating the 1981 Order. *Id.* On May 3, 1989, Judge Lasker issued an additional Order (the "1989 Order") prohibiting the Department of Correction from confining inmates in non-housing areas for more than twenty-four hours. *Id.* The 1989 Order also required defendants to house "overload inmates" (inmates being transferred from a housing area in one facility to a housing area in another facility) without delay, setting a guideline of twelve hours. *Id.* at 142.

140. *Id.* at 148. Judge Lasker ordered that for the first twenty-four hours thereafter or any part thereof, each detainee held in violation of the 1989 Order would be paid \$150, and for each additional twelve-hour period, or any portion thereof, the detainee would be paid an additional \$100. *Id.*

141. *Benjamin v. Sielaff*, No. 75 Civ. 3073, 1990 WL 212911 (S.D.N.Y. Dec. 14, 1990). Judge Lasker denied defendants' motion for several reasons. Principally, he held that sanctions in the form of payments to a bail fund rather than to individual inmates had been imposed in cases that involved large-scale deficiencies, where there was impact on all inmates in the facility but no specific impact on particular individuals. However, where the violation of a court Order caused particular injury to individual plaintiffs, Judge Lasker found that appellate courts generally required that the injured plaintiffs be directly compensated. *Id.* at \*1. In addition, Judge Lasker decided against the creation of a bail fund because doing so might undermine the bail decisions made by state court judges, and because of the administrative difficulties involved in creating and administering such a fund. *Id.* at \*2.

142. *Benjamin v. Malcolm*, 156 F.R.D. 561, 563 (S.D.N.Y. 1994).

143. *Id.* To implement the City's decision and to expedite compliance with the requirements of the decree, the court directed the OCC to prepare a Food Service Work Plan, which would identify the tasks required to bring the defendants into compliance and set schedules for the accomplishment of each task. In June 1991, the court adopted the first Food Service Work Plan and entered it as an Order. After the defendants failed to carry out the terms of this Work Plan, it was revised to add new dates and steps agreed upon by the parties, and the court entered a Revised Food Service Work Plan as an Order on July 10, 1992 (The "1992 Food Service Order"). The same day, frustrated by the pattern of continued noncompliance, the court entered its Order: Re Compliance with Work Plan Deadlines (the "1992 Compliance Order"), which created a schedule of coercive fines for failures to adhere to the requirements of the Work Plan. The 1992 Food Service Order required the defendants to make a decision by November 1, 1993 as to the means by which they would provide cook/chill food—either by contracting with a vendor or by building its own cook/chill production center. *Id.* By 1993, pursuant to court Order, the City had decided that it would provide food to inmates by purchasing cook/chill food from a facility located in Orangeburg, New York at

*E. The Changing of the Guard*

In 1994, Judge Lasker moved to Boston to sit as a senior district court judge for the District of Massachusetts. At Judge Lasker's urging, and with the concurrence of the parties, the case was assigned to me. This happened only months after my confirmation as a federal district judge, but I immediately undertook the challenge presented by the consent decrees and the challenge of trying to measure up to Judge Lasker. I spent some time with Judge Lasker during the balance of 1994 to familiarize myself with the history and status of the case. This offered a window into Judge Lasker's thinking and allowed me to witness his dedication to devising viable solutions to the remaining issues raised by the consent decrees.

I issued my first ruling in 1995, shortly after the case was reassigned to me, as the City sought an extension of time to further evaluate and perhaps devise a less expensive alternative to the cook/chill method of food service agreed upon earlier by the parties.<sup>144</sup> The City and plaintiffs agreed to an alternative that would bring the City within substantial compliance with the consent decrees without converting to the cook/chill plan.<sup>145</sup> That same year, there were more inmate violence problems and I adopted the parties' agreed upon modification of the consent decrees to include a ban on the possession or display of jewelry indicative of gang affiliation.<sup>146</sup>

The problem of inmate overcrowding continued to plague the New York City jails, and in February 1996, pursuant to an Order issued by Judge Lasker in 1990, I directed the payment of fines to two prisoners who were held in a non-housing area for more than twenty-four hours.<sup>147</sup> Inmate overcrowding and prison violence seemed to go hand-in-hand, and in April 1996, I temporarily modified the consent decrees to allow a limitation on access to the Central Punitive Segregation Unit ("CPSU") law library because violence had grown in and

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the Rockland Psychiatric Center (the "Rockland County facility"). A year later, the City moved for an Order modifying its obligation to use the Rockland County facility.

144. *Benjamin v. Malcolm*, 884 F. Supp. 122 (S.D.N.Y. 1995). The system in place at that time was "cook/serve," where the food for each facility was cooked on the premises of the facility. *Id.* at 123. The goal of the "cook/chill" method was to avoid serving food below health code required temperatures. Citing financial hardship, the City sought a ninety-day extension of time to institute the "cook/chill" method. *Id.* at 123-24. The City cited the greatly increased cost of the cook/chill system, estimated at between \$348 and \$378 million, as well as the City's "worsening" financial condition. *Id.* at 124. I did not differ much with the plaintiffs' assertion that the City was attempting to "wiggle" out of its obligations under the consent decree, but I nonetheless granted an extension of fifty-six days for the City to develop a cheaper alternative. *Id.*

145. *Benjamin v. Jacobson*, No. 75 Civ. 3073, 1995 WL 681297 (S.D.N.Y. Oct. 2, 1995). It was a complex plan to update existing kitchens and ensure among other things, that food be stored and served at appropriate temperatures.

146. *Benjamin v. Malcolm*, No. 75 Civ. 3073, 1995 WL 378529 (S.D.N.Y. June 26, 1995).

147. *Benjamin v. Jacobson*, No. 75 Civ. 3073, 1996 WL 51194 (S.D.N.Y. Feb. 7, 1996).

en route to the library.<sup>148</sup> The Corrections Department had hoped simply to deliver legal books to violent inmates (the CPSU is reserved for the most violent inmates), with the belief that library assaults would thereby be reduced, but I rejected this proposal.<sup>149</sup>

*F. The Prison Litigation Reform Act*

In 1996, Congress passed and President Clinton signed the Prison Litigation Reform Act (“PLRA”) as part of an appropriations bill.<sup>150</sup> Its purpose was two-fold. First, the PLRA’s early Congressional sponsors touted it as a vehicle by which the explosion of what they concluded was frivolous prison litigation would be curtailed.<sup>151</sup> For instance, Senator Robert Dole cited an analysis by the National Association of Attorneys General, which estimated that the states spend over \$80 million each year on frivolous inmate litigation.<sup>152</sup> Second, the PLRA was enacted in response to the urging of state officials who saw the judiciary as taking control of the prison system they believed would and should be monitored only by the legislature.<sup>153</sup>

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148. *Benjamin v. Jacobson*, 923 F. Supp. 517 (S.D.N.Y. 1996). The CPSU was moved to OBCC on March 9–10, 1996. *Id.* at 518.

149. Editorial, *Court Control of the City Jails*, N.Y. TIMES, Mar. 4, 1996, at A16; see Ross Sandler, *The City Seeks to Regain Control Over its Jails, and Receives Help from the Federal Court and Congress*, 2 CITY LAW 49, 53 (June/July 1996) (detailing examples of violence, such as in a five week period there were eleven infractions, several of which had been brutal slashings and beatings which resulted in hospital treatment for both inmates and prison guards).

150. 18 U.S.C. § 3626 (1996). When it was finally signed into law, the PLRA was included as Title VIII of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996). The House of Representatives first introduced the PLRA as H.R. 667, the Violent Criminal Incarceration Act of 1995. H.R. REP. NO. 104-21 (1995). Title II of H.R. 667 was called “Stopping Abusive Prisoner Lawsuits” and its purpose was to curtail frivolous inmate litigation. H.R. 667, 104th Cong. (1995). Title III of H.R. 667 was called “Stop Turning Out Prisoners” and its purpose was to limit prospective relief for prisoners. *Id.* H.R. 667 did not survive for long at the time because in December 1995, President Clinton vetoed the omnibus appropriations bill to which H.R. 667 was attached. 142 CONG. REC. 8238 (1996) (statement of Sen. Abraham).

151. Some of the frivolous lawsuits mentioned by the Senators who sponsored the bill include: (1) an inmate who claimed \$1 million in damages for civil rights violations because his ice cream had melted; (2) an inmate alleged that being forced to listen to his unit manager’s country and western music constituted cruel and unusual punishment; (3) an inmate sued because he was served chunky instead of smooth peanut butter; (4) two prisoners sued to force taxpayers to pay for sex change surgery while they were in prison. 142 CONG. REC. S3703 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham). It is doubtful that the above examples are representative of the majority of inmate lawsuits. From my experience with *Benjamin*, it is clear that even pre-trial detainees can and are subject to violence and excessive force, among other constitutional wrongs. However, the degree to which inmate claims lack merit is less clear. That over 94 percent of inmates that file lawsuits do not realize any relief is troubling but is not conclusive evidence that a majority of inmate claims are meritless. Editorial, *Criminal Oversight*, WALL ST. J., June 10, 1996, at A18.

152. 141 CONG. REC. 27,042 (1995) (statement of Sen. Dole).

153. On September 19, 1995, representatives from the National Association of Attorneys General wrote a letter to the Majority leader, Senator Bob Dole, to express the association’s strong support for the PLRA. *Id.* at 26,553. See also 142 CONG. REC. 8236 (1996) (statement of Sen. Abraham) (stating that prisoner

The legislative history of the PLRA is sparse, in large part because the PLRA was not the subject of significant debate.<sup>154</sup> Nevertheless, the record is clear with respect to the criticism that federal courts had overstepped their authority and were molycoddling prisoners in state and local jails.<sup>155</sup> Put another way, the sentiment was that the time had come to require the municipal and state legislatures to take responsibility for their own correctional facilities.<sup>156</sup> After all, the PLRA sponsors opined, the cost of providing proper conditions in prisons is a state and municipal obligation and thus should be borne by state and municipal legislative bodies, which unlike the judiciary, are accountable to their constituents.<sup>157</sup> Again, the alleged problem at which the legislation took aim was the proposition—echoed throughout much of the testimony before the Senate Judiciary Committee hearing—that prisons have become too comfortable due to the intercessions of federal judges.<sup>158</sup>

The PLRA narrowed the previously available remedies utilized by federal courts to correct unlawful prison conditions, and this narrowing was precisely the aspect of the PLRA that changed the contours of the consent decrees in *Benjamin*. Three sections of the PLRA were and continue to be relevant to the *Benjamin* consent decrees: Section 3626(a)(1)(A) (the “prospective relief” provisions), Section 3626(b) (the “termination” provision), and Section 3626(E)(2)(A)(I) (the “automatic stay” provision).

Under the prospective relief provision, federal courts are not permitted to “grant or approve any prospective relief unless and until the court finds that such

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lawsuits have resulted in “turning over the running of our [state’s] prisons to the [federal] courts”); 141 CONG. REC. 27,042 (1995) (statement of Sen. Dole) (detailing how the guidelines set by the PLRA will “restrain liberal Federal judges who see violations of constitutional rights in every prisoner complaint . . . [and use them] to micromanage State and local prison systems.”); *Id.* at 27,045 (1995) (statement of Sen. Kyl) (noting that the PLRA will assure that the states “regain control of the Federal court system, and we do not just allow the Federal judges to dictate to the States how their prison systems will be run”).

154. See 142 CONG. REC. 8236 (1996) (statement of Sen. Abraham); 142 CONG. REC. 5193 (1996) (statement of Sen. Kennedy); 141 CONG. REC. 35,623 (1995) (statement of Rep. LoBiondo); 141 CONG. REC. 27,041 (1995) (statement of Sen. Hatch); 141 CONG. REC. 26,548 (1995) (statement of Sen. Dole); 141 CONG. REC. 26,448 (1995) (statement of Sen. Abraham); *Overhauling the Nation’s Prisons: Hearing on S. 400 Before the Sen. Comm. on the Judiciary*, 104th Cong. (1995) (statement of Steve J. Martin); 141 CONG. REC. 14,570 (1995) (statement of Sen. Dole); H.R. REP. NO. 104-21 (1995).

155. *Benjamin v. Jacobson*, 935 F. Supp. 332, 340–41 (S.D.N.Y. 1996). See also *Overhauling the Nation’s Prisons: Hearing on S. 400 Before the Sen. Comm. on the Judiciary*, 104th Cong. (1995) (statement of Steve J. Martin).

156. *Overhauling the Nation’s Prisons: Hearing on S. 400 Before the Sen. Comm. on the Judiciary*, 104th Cong. (1995) (statement of Steve J. Martin).

157. See, e.g., *Inclusion of Provisions of the Canady-Geren Bill: Hearing on H. 3019 Before the H. Judiciary Comm., Subcomm. on Crime*, 104th Cong. (1995) (statement of Lynne Abraham, Philadelphia District Atty.) (stating that federal court micro-management of the state’s prisons “has intruded itself unnecessarily into the state criminal justice systems and completely undermined their integrity and their ability to dispense justice”).

158. Martin, *supra* note 154.

relief is narrowly drawn, extends no further than necessary to correct the violation of the federal right [of a plaintiff or class of plaintiffs], and is the least intrusive means necessary to correct the violation of the federal right.”<sup>159</sup> This aspect of the prospective relief provision is often referred to as the “need-narrowness-intrusiveness” test.<sup>160</sup> Moreover, in order to construct the appropriate remedy, courts must “give substantial weight to any adverse impact on public safety or the operation of [the] criminal justice system.”<sup>161</sup>

Under the termination provision, a defendant or intervener is entitled to “immediate termination of prospective relief” in cases where a court originally granted prospective relief without making the findings that are now mandatory under Section 3626(a).<sup>162</sup> Prospective relief may continue, however, if the court “makes written findings based on the record that the prospective relief remains necessary to correct a current or ongoing violation of the federal right, extends no further than necessary to correct the violation of the federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.”<sup>163</sup> Finally, the automatic stay provision requires a court—beginning thirty days from the filing of a motion to terminate all prospective relief—to stay such prospective relief pending the court’s decision on the underlying motion.<sup>164</sup>

Not surprisingly, the City moved for immediate termination of the consent decrees and all supplemental orders.<sup>165</sup> Each side submitted extensive declarations along with thousands of pages of exhibits.<sup>166</sup> The exhibits essentially provided a historical survey of the consent decrees.<sup>167</sup> The City took the position that the consent decrees have added to what they characterized as micro-management of the jails.<sup>168</sup> Michael F. Jacobson, then commissioner of the Department of Correction, suggested that the City of New York was in some sense coerced into signing the consent decrees and what he described disparagingly as “court ordered” stipulations.<sup>169</sup>

In July 1996, I held that the termination provision of the PLRA was constitutional and vacated the consent decrees pursuant to the termination provi-

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159. 18 U.S.C. § 3626(a)(1)(A) (2000). *See* 18 U.S.C. § 3626(g)(7) (defining prospective relief as “all relief other than compensatory monetary damages”).

160. *See, e.g.*, Benjamin v. Jacobson, 172 F.3d 144, 150 (2d Cir. 1999).

161. 18 U.S.C. § 3626(a)(1)(A) (2000).

162. 18 U.S.C. § 3626(b)(2) (2000).

163. 18 U.S.C. § 3626(b)(3) (2000).

164. 18 U.S.C. § 3626(e)(2)(A)(I) (2000).

165. Benjamin v. Jacobson, 935 F. Supp. 332 (S.D.N.Y. 1996).

166. *Id.* at 342.

167. *Id.*

168. *Id.*

169. *Id.*

sion.<sup>170</sup> I was not alone in so holding; at that time, five other courts had upheld the constitutionality of the termination provision.<sup>171</sup> Only one court struck down the termination provision as violative of the separation of powers.<sup>172</sup> I maintained my supervisory role pending defendants' appeal to the Second Circuit ruling on my vacatur of the consent decrees.<sup>173</sup>

The Second Circuit determined the fate of the consent decrees in a panel decision in 1997<sup>174</sup> and in an *en banc* decision in 1999.<sup>175</sup> In its 1999 *en banc* decision, the Second Circuit reconsidered and vacated its prior panel decision.<sup>176</sup> The Second Circuit agreed with me that the termination provision of the PLRA is constitutional, but "only if it is interpreted as simply constricting the jurisdiction of the federal courts to enforce the consent decrees, rather than as annulling those decrees."<sup>177</sup> The Second Circuit thus held that:

The Act provides for the termination, though not the annulment, of consent decrees that do not meet the need-narrowness-intrusiveness criteria established by the Act; that plaintiffs' constitutional challenges to the termination provision were properly rejected; and that plaintiffs were entitled to an opportunity to show, in accordance with the Act, that any or all of the prospective relief ordered by the Decrees should be continued.<sup>178</sup>

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170. *Benjamin v. Jacobson*, 935 F. Supp. 332 (S.D.N.Y. 1996).

171. *See Gavin v. Branstad*, 122 F.3d 1081, 1083 (8th Cir. 1997); *Plyler v. Moore*, 100 F.3d 365, 368 (4th Cir. 1996), *cert. denied*, 138 L.Ed. 2d 217 (1997); *Jame v. Lash*, 965 F. Supp. 1190, 1192 (N.D. Ind. 1997); *Jensen v. County of Lake*, 958 F. Supp. 397, 400 (N.D. Ind. 1997); *Inmates of the Suffolk County Jail v. Sheriff of Suffolk County*, 952 F. Supp. 869, 883 (D. Mass. 1997).

172. *Hadix v. Johnson*, 947 F. Supp. 1100 (E.D. Mich. 1996).

173. *See Benjamin v. Jacobson*, No. 75 Civ. 3073, 1997 WL 5910 (S.D.N.Y. Jan. 7, 1997). Fire safety at the prisons was an ongoing problem and in April 1997, I ordered the City to provide the OCC with the details of their fire safety plan for Rikers Island and other scheduled maintenance. *Benjamin v. Jacobson*, No. 75 Civ. 3073, 1997 WL 187351, at \*1 (S.D.N.Y. Apr. 15, 1997). By November 1998, I ordered the City to adhere to proposed improvement schedules, to apprise plaintiffs and the OCC of their progress and any potential delays, and to submit to the court an internal procedure proposal for response to fire safety reports. *Benjamin v. Kerik*, No. 75 Civ. 3073, 1998 U.S. Dist. LEXIS 18036 (S.D.N.Y. Nov. 13, 1998).

174. *Benjamin v. Jacobson*, 124 F.3d 162, 162 (2d Cir. 1997). The panel reasoned that even absent findings of need-narrowness-intrusiveness the PLRA did not require the termination of consent decrees but merely prohibited their enforcement in federal court, with the parties free to enforce them in state court. *Id.*

175. *Benjamin v. Jacobson*, 172 F.3d 144, 154 (2d Cir. 1999). The Court of Appeals thus stated:  
It follows that the Consent Decrees remain binding on the parties, although the jurisdiction available to them to enforce these binding agreements has been changed. And the parties are no more free to ignore the agreements they have made than they are to ignore any other agreement as to which no redress in federal courts is available.

*Id.* at 178.

176. *Id.* at 154.

177. *Benjamin v. Jacobson*, 124 F.3d at 164.

178. *Benjamin v. Jacobson*, 172 F.3d at 154.

The PLRA would only “immediately” terminate consent decree provisions that were “granted in the absence of the specified need-narrowness-intrusiveness findings.”<sup>179</sup>

Pursuant to the circuit’s decision, I held hearings to make findings with respect to some of the provisions of the consent decree.<sup>180</sup> I determined that several facets of the consent decree could not pass constitutional muster under the PLRA.<sup>181</sup> However, I held that prospective relief was available with respect to many of the provisions, and added a requirement for a due process hearing for inmates placed on restraint status and Red I.D. status, as well as the delays in inmates’ meetings with counsel.<sup>182</sup> The Second Circuit affirmed, holding that where pre-trial detainees challenged prison regulations that compromised the Sixth Amendment’s safeguard of the right to counsel because the regulations hindered attorney visitation, pre-trial detainees were not required to show actual injury. The Second Circuit found that there was a continuing need for prospective relief regarding detainees’ right to counsel, the relief granted complied with the PLRA, and pre-trial detainees subject to additional restraints during movement within or outside the jail were entitled to reasonable procedural protections.<sup>183</sup>

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179. The Second Circuit accordingly remanded the case and instructed me to allow the plaintiffs to show that any or all of the prospective relief should be continued. *Id.* at 158, *cert. denied*, 528 U.S. 824, 120 S.Ct. 72, 1999 U.S. LEXIS 5098 (1999).

180. On February 7, 8, 9, 14, and 15, 2000, I held hearings that examined, among other things, the conditions affecting attorney visitation in the defendants’ prisons and the due process afforded to Red I.D. and Restraint status detainees. *Benjamin v. Kerik*, 102 F. Supp. 2d 157, 161 (S.D.N.Y. 2000).

181. I struck down the law library portions of the consent decrees because I did not find any injury regarding alleged inadequacies in the law library facilities; the provisions of the decrees relating to involuntary placement in the DOC’s maximum security, protective custody, and homosexual housing units because there was no evidence that inmates placed in these units were deprived of a liberty interest; and the mail handling portions of the consent decrees because there was no evidence that mail handling practices violated inmates’ due process rights. *Id.* Pursuant to the PLRA, the District Court, by Order dated December 15, 2000, terminated three additional Orders related to the consent decrees. These include: the Consent Order Re: Contact Visits at NYCCIFW in *Forts v. Malcolm* (July 29, 1978); the Order Re: Overcrowding in Consolidated Cases v. *Malcolm* (June 23, 1981); and the Stipulation for Order Re: Medical/Health Services in Consolidated Cases v. *Malcolm* (July 10, 1991). *Benjamin v. Fraser*, 161 F. Supp. 2d 151, 154 (S.D.N.Y. 2001).

182. I held that prospective relief was available to Red I.D. and restraint status inmates because I found that these physical restraints were a severe deprivation of liberty, and therefore that the DOC should have afforded disciplinary due process hearings to such inmates in accordance with the Supreme Court’s decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974) (holding that a prisoner was entitled under the Due Process Clause of the Fourteenth Amendment to notice and some kind of a hearing in connection with discipline determinations involving serious misconduct). *Benjamin v. Kerik*, 102 F. Supp. at 175. I also determined that relief was available to rectify the delays in attorney visitation because (1) administrative obstacles to attorney-client visitation in the facilities burdened detainees’ right to counsel and right of access to courts and (2) these obstacles were not justifiable restrictions on the right of detainees’ access to courts. *Id.* at 178.

183. *Benjamin v. Fraser*, 264 F.3d 175, 190–91, 191 n.13 (2d Cir. 2001).

*G. Where We've Come From And Where We Are Today*

The areas of prospective relief that I have upheld under the PLRA include: (1) environmental health (including sanitary conditions, ventilation, lighting, and extreme temperatures), (2) attorney visitation and confidentiality, (3) due process in the context of pre-trial detainees who are placed in Red I.D. and restraint status, (4) fire safety, and (5) modular housing units. In this section, I reflect upon the improvements in each area and identify remaining open items.

*1. Environmental Health*

In May 2000,<sup>184</sup> I held hearings on environmental health conditions and determined that: (1) there was a continuing and ongoing violation of the basic right to adequate ventilation in ARDC, GMDC, GRVC, JATC, MDC, NIC, OBCC, RMSC, and the mental observations units at AMKC;<sup>185</sup> (2) sanitation in non-medical areas, and sanitation in the RMSC clinic and the GMDC infirmary failed to meet basic constitutional standards;<sup>186</sup> and (3) lighting was constitutionally inadequate in the medical areas at the GMDC infirmary and the RMSC clinic and in the non-medical areas at all of the defendants' jails, with the exceptions of ARDC and AMKC.<sup>187</sup> I found significant improvements and no constitutional violation in some areas (e.g., plumbing, vermin control, food service, personal hygiene, and laundry).<sup>188</sup>

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184. *Benjamin v. Fraser*, 161 F. Supp. 2d 151, 154 (S.D.N.Y. 2001). The fourteen jails under review in the May proceeding were the Anna M. Kross Center ("AMKC"), the Adolescent Reception and Detention Center ("ARDC"), the George Motchan Detention Center ("GMDC"), the James A. Thomas Center ("JATC"), the Rose M. Singer Center ("RMSC"), the George R. Vierno Center ("GRVC"), the North Infirmary Command ("NIC"), and the West Facility ("West") on Rikers Island; the Vernon C. Bain Center ("VCBC"), a "maritime facility" anchored off the Bronx; the Manhattan Detention Center ("MDC"), the Queens Detention Center ("QHD"), the Brooklyn Detention Center ("BKHD"), and the Bronx Detention Center ("BXHD"). Hereinafter, I refer to these jails by their acronym equivalents.

185. *Benjamin v. Fraser*, 161 F. Supp. 2d at 189. As the court explained in its subsequent opinion of March 2001, the court in its January 2001 decision had inadvertently included QHD among the facilities that required remedy to improve ventilation. *Benjamin v. Fraser*, 2001 U.S. Dist. LEXIS 3173, at \*20 (S.D.N.Y. Mar. 20, 2001). In addition, the court determined that ventilation in the intake areas of QHD was constitutionally inadequate. *Id.*

186. *Benjamin v. Fraser*, 161 F. Supp. 2d at 189.

187. *Id.* at 185–86.

188. *Id.* at 189. I directed the parties to submit recommendations for prospective relief governing ventilation, sanitation, and lighting within thirty days from the date of my Order. Instead, by March 2001, both parties moved for reconsideration and clarification of the January 2001 Order. *Benjamin v. Fraser*, No. 75 Civ. 3073, 2001 U.S. Dist. LEXIS 3173, at \*1 (S.D.N.Y. Mar. 20, 2001). Pursuant to these motions, I held that BKHD and QHD were constitutionally deficient with respect to intake ventilation, but that minimal constitutional standards appeared to be met with respect to intake ventilation at VCBC and West Facility. In addition, I held that as of the May 2000 hearings the sanitary conditions at NIC's medical areas (inclusive of NIC's clinics areas and infirmary housing areas) constituted a current and ongoing constitutional violation. I further required that the OCC monitor the temperature at AMKC, ARDC, BKHD, GMDC, GRVC, JATC, NIC, QHD, OBCC, and RMSC.

Between 2001 and 2002, the City moved to stay certain Orders related to environmental conditions and other previous issues.<sup>189</sup> For example, in March 2002, the City moved the Second Circuit for a stay of limited aspects of my Orders.<sup>190</sup> By Order dated April 23, 2002, the Second Circuit granted a stay of three provisions of my prior Orders providing for a six-foot separation between inmate beds, completion of remaining shower renovations, and replacement of lighting fixtures.<sup>191</sup>

Thereafter, and on a more serious issue, the Second Circuit, in response to defendants' appeals of my 2001 Orders, agreed with my conclusions that the OCC was not a special master under the PLRA, and that the PLRA governed special masters, but only subsequent to the Act's enactment.<sup>192</sup>

#### a. Sanitation

Sanitary conditions are a recurring problem in the City's jails. My 2001 Environmental Order set detailed schedules for cleaning the prisons.<sup>193</sup> While these Orders smack of the kind of micro-managing I neither enjoy nor advocate, the saddest part is that the OCC and LAS painted a picture of such distressful conditions that I had no choice.

The DOC's compliance with the provisions of my 2001 Environmental Order regarding sanitary conditions has been mixed. During 2002 and early 2003, the DOC seemed to be improving the sanitary conditions in the jails.<sup>194</sup> Between

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189. In July 2001, I held that the OCC as an entity properly fell within the statutory requirements of the PLRA: specifically, that (1) the OCC was not a special master and, regardless, it would still not be subject to the PLRA because Section 3626(f) only applies to court agents appointed post-PLRA enactment, (2) the OCC was not a form of prospective relief, and that even if it was, it was necessary, narrowly drawn, and as unobtrusive as possible. *Benjamin v. Fraser*, 156 F. Supp. 2d 333, 341-47 (S.D.N.Y. 2001).

190. *Benjamin v. Fraser*, 343 F.3d 35, 43 (2d Cir. 2003).

191. *Id.*

192. *Id.* at 43-50.

193. For example, in my April 26, 2001 Environmental Order, I charged the defendants with the following tasks with respect to AMKC (except for the medical areas), ARDC, GMDC, RMSC, JATC, GRVC, NIC, OBCC, MDC, BKHD, QHD, West, VCBC, and BXHD: (1) to clean and sanitize various personal hygiene and sanitation areas at least once per day and power wash the showers with a bleach solution once per quarter; (2) to complete shower replacement by August 1, 2002; (3) to clean and sanitize living areas once per week; (4) to clean cells upon vacancy; (5) to clean and sanitize mattresses between uses by different detainees; (6) to provide ample cleaning supplies and instruments that are stored in clean and ventilated areas; and (7) to provide detainees with food storage containers. *Benjamin v. Fraser*, 156 F. Supp. 2d at 345.

194. This may be surmised by the fact that complaints about sanitation were for the most part dropping during each consecutive monitoring period in 2002. From January through March 2002, the OCC received twenty-three complaints relating to different aspects of sanitation. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 5 (Jan. 1, 2002-Mar. 31, 2002). During the period from April through July 2002, OCC received twenty-seven sanitation complaints. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 5 (Apr. 1, 2002-July 31, 2002). From August through December 2002, OCC received nine sanitation complaints. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 5 (Aug. 1, 2002-Dec. 31, 2002). From Jan-

2003 and 2004, the OCC began to monitor the condition of the showers in accordance with the findings of its sanitation expert.<sup>195</sup> The DOC implemented a number of measures to address the issues highlighted by the expert’s report—for example, the use of “Clean Teams” consisting of a number of inmates supervised by trained DOC staff to clean the shower and bathrooms in each area once a month. The OCC inspected a sampling of the bathroom and shower areas, and found much improvement compared to earlier conditions.<sup>196</sup> There was a significant decrease in the number of complaints about sanitary conditions.<sup>197</sup> The OCC found that for the most part the DOC was delivering adequate cleaning supplies.<sup>198</sup> In mid-2004, OCC’s expert found that the DOC had made “signifi-

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uary through April 2003, OCC received eight complaints on sanitary conditions. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 5 (Jan. 1, 2003–Apr. 30, 2003).

195. From the period beginning January through April 2003, OCC began monitoring the conditions of the showers in accordance with the findings of the expert. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 7 (Jan. 1, 2003–Apr. 30, 2003). In September 2002, the expert inspected the sanitary conditions at GMDC and RMSC. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 5 (Aug. 1, 2002–Dec. 31, 2002). From May through August 2003, OCC received sixteen complaints regarding sanitation, primarily concerning the bathroom and shower areas. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 5 (May 1, 2003–Aug. 31, 2003). In its May through August 2003 report, OCC continued to find improvement in the sanitation conditions throughout the housing areas in each jail. *Id.* From September through December 2003, OCC received fifteen complaints regarding sanitation. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 4 (Sept. 1, 2003–Dec. 31, 2003). During this period, however, OCC itself began monitoring sanitation conditions in all areas, for which it found 315 violations.

196. *See* all sources cited *supra* note 195.

197. The number of complaints OCC received continued to drop. From January through April 2004, OCC received twelve complaints regarding sanitation, and observed 294 violations. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 4 (Jan. 1, 2004–Apr. 30, 2004). From May through August 2004, OCC received six complaints regarding sanitation, and observed 295 violations. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 5 (May 1, 2004–Aug. 31, 2004). In addition, during the May through August 2004 monitoring period, OCC inspected the sanitation conditions in the living areas of RMSC and in the bathroom and shower areas of the modular housing units at RMSC. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 2, 5 (May 1, 2004–Aug. 31, 2004). OCC observed that the majority of cells were clean and found only minimal violations in the modulares. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 5 (May 1, 2004–Aug. 31, 2004). From September through December 2004, the OCC received ten complaints regarding sanitation and observed 614 violations. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 4 (May 1, 2004–Aug. 31, 2004). OCC conducted inspections of sanitation conditions at AMKC and GRVC and found marked improvements. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 5 (Sept. 1, 2004–Dec. 31, 2004).

198. During the first third of 2004, OCC examined whether DOC provided the housing areas with sufficient amounts of cleaning supplies to maintain adequate sanitary conditions. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 8 (May 1, 2004–Aug. 31, 2004). In addition, the OCC found that of all the jails, the sanitary conditions in the bathrooms and showers in ARDC were by far the worse. *Id.*

cant progress” in the sanitary conditions at certain facilities.<sup>199</sup> LAS’s expert sanitarian also found the clinic sanitation to have greatly improved.<sup>200</sup> Between 2005 and 2006, compliance and improvements were mixed.<sup>201</sup> While major violations<sup>202</sup> have been infrequent, the City continues to struggle, albeit for the most part successfully, to fully comply with the Environmental Orders pursuant to the consent decrees.

#### b. Ventilation

Ventilation problems in the City’s jails have persisted for decades.<sup>203</sup> Proper ventilation requires an adequate supply of fresh air coming in and an adequate exhaust of impure air.<sup>204</sup> Proper “ventilation may be achieved either through active or passive means.”<sup>205</sup> Among other things, my various Environmental Orders concerning ventilation have required defendants to inspect, test, and repair or replace all ventilation systems and to certify that these tasks were completed.<sup>206</sup> For the period January through April 2004, the OCC compiled its

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199. On May 26 and 27, 2004, the OCC’s expert inspected the clinics at NIC, RMSC, and GMDC. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 7 (May 1, 2004–Aug. 31, 2004).

200. Legal Aid’s expert joined the OCC’s expert during the second day of his inspection on May 27, 2004. *Id.*

201. During the first third of 2006, the OCC reported marked improvements in sanitation as compared with the previous monitoring period in 2005. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 6 (Jan. 1, 2006–Apr. 30, 2006). Also during this period, the OCC’s expert sanitarian, Mr. Pepper, inspected a sample of the jails and noted improvement in the areas of cleaning and sanitizing. *Id.* During the latter two-thirds of 2006, the OCC observed an increase in sanitation violations and a decline from the previous monitoring period with respect to the sanitary conditions in bathrooms and showers.

202. For example, one “major violation” reported by the expert sanitarian was the improper storage and cleaning of the cleaning equipment itself. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 7 (May 1, 2004–Aug. 31, 2004).

203. *Rhem v. Malcolm*, 371 F. Supp. 594, 627 (S.D.N.Y. 1974). For example, as far back as 1974, the court noted that “inadequacy of ventilation [at MHD] . . . unnecessarily burden[s] the health of its prisoners.” *Id.*

204. *Benjamin v. Fraser*, 161 F. Supp. 2d 151, 160 (S.D.N.Y. 2001).

205. *Id.* (“Active ventilation is commonly used in sealed buildings with few apertures, and involves the use of mechanical air delivery and exhaust systems. Passive ventilation relies on the exchange of air through open windows.”).

206. *Benjamin v. Fraser*, No. 75 Civ. 3073 (S.D.N.Y. Apr. 26, 2001) (“Order on environmental conditions”). DOC was also required to (1) establish a system to balance the mechanical ventilation systems annually; (2) complete mechanical repairs to roof fans at ARDC and inventory other required ventilation repairs; (3) provide a repair schedule such that all ventilation repairs are completed before August 1, 2002; (4) ensure that all bathroom and shower areas have functional mechanical ventilation at all times; (5) ensure that all windows designed to be opened were operational; (6) with the exception of mental health areas, not house detainees in cells without operational windows; (7) provide OCC and the court with information regarding non-functioning or malfunctioning mechanical ventilation in intake areas; and (8) ensure that ventilation registers in cells and dorms in intake areas are cleaned weekly. *Id.* In November 2003, I issued another Order to further the City’s efforts to remedy the constitutionally deficient ventilation systems. *Benjamin v. Horn*, No. 75 Civ. 3073 (S.D.N.Y. Nov. 14, 2003) (“Order regarding testing and

own findings on ventilation and compared them to the inspections performed by the Public Health Sanitarian.<sup>207</sup> In certain jails or housing areas the OCC found a greater number of violations and in others the Public Health Sanitarian found more violations.<sup>208</sup> The OCC concluded that because of the discrepancy, it would procure a ventilation expert to review the findings of the Public Health Sanitarian.<sup>209</sup>

Ventilation has been a particularly challenging area because it has involved numerous expert investigations with competing findings (and interests for that matter) as well as possibly unrealistic goals.<sup>210</sup> Despite these mixed findings, the ventilation problem has seen improvements. For example, during the last monitoring period of 2006, the OCC found that in the housing areas surveyed, 93 percent of the windows were operable.<sup>211</sup> Further, the City, as of September 15, 2007, has provided a sweeping ventilation plan which at last promises to improve the air quality and circulation throughout the jails.

### c. Lighting

Further, in my 2001 Environmental Order, I found that few facilities provided adequate foot-candles of light and that in most facilities the lighting was

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repair of ventilation systems”). This Order was issued after the Second Circuit’s decision of September 2003, in which it affirmed my January and March 2001 determinations that ventilation was constitutionally deficient in ARDC, GMDC, GRVC, JATC, MDC, NIC, OBCC, RMSC, BKHD, QHD, and the mental observation units at AMKC. *Benjamin v. Fraser*, 343 F.3d 35, 57 (2d Cir. 2003). The Second Circuit remanded the ventilation balancing issue to this court for resolution, and the November 14, 2003 Order merely memorialized the agreement reached by the parties on how to address ventilation in the facilities. *Id.*

207. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 6 (Jan. 1, 2004–Apr. 30, 2004).

208. *Id.* Despite my Order, during the May through August 2004 monitoring period, the OCC inspected the vents in BBKC and found 257 to be poorly maintained. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 8 (May 1, 2004–Aug. 31, 2004).

209. *Id.* at 13. The OCC procured ventilation expert Lawless & Magione in 2005. In July 2005, the ventilation expert submitted its report on conditions at OBCC, GRVC, RMSC, and NIC. On January 17, 2006, the parties met with the ventilation expert to discuss its findings in further detail. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS, *supra* note 208, at 13.

210. In 2005, the OCC procured a ventilation expert to study ventilation at four of the jails. Beginning in January 2006, the OCC set out to monitor the operability of windows in facilities governed by the ventilation portion of the April 26, 2001 Environmental Order. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 9 (Sept. 1, 2005–Dec. 31, 2005). The ventilation expert, Lawless & Mangione, studied the ventilation at OBCC, GRVC, RMSC, and NIC, and submitted its report in July of 2005. Unfortunately, the OCC determined that the expert’s recommendations were not practical, and by early 2006 the parties met again with the expert in order to obtain recommendations on how to implement more immediate and realistic remedies. *Id.*

211. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 52 (Sept. 1, 2006–Dec. 31, 2006). The OCC surveyed fifty-nine housing areas in GMDC and inspected 2062 windows. *Id.*

constitutionally inadequate.<sup>212</sup> In general, the best recorded light outputs measured approximately twelve to thirteen foot-candles of light and the worst measured approximately two to three foot-candles of light.

On April 7, 2006,<sup>213</sup> after hearing from plaintiffs and defendants (as I always do), I ordered the defendants to, among other things, provide no less than twenty foot-candles of light at bed or desk level for each inmate, and in areas where this would be unduly burdensome, to provide no less than fifteen foot-candles of light.<sup>214</sup> I also directed the OCC to monitor the defendants' compliance with the Order, and included a provision that terminates the Order if, after one year of monitoring, the OCC reports that defendants are in substantial compliance, and plaintiffs do not apply within forty-five days of the OCC's report to extend the monitoring.<sup>215</sup>

Thereafter, the DOC undertook a light bulb replacement project.<sup>216</sup> Some facilities have already been completed.<sup>217</sup> In July 2006, the OCC staff received the requisite equipment with which to monitor lighting and the staff were trained on its use by the DOC.<sup>218</sup> On September 10, 2007, the OCC reported approximately 80 percent compliance with the twenty foot-candle requirement

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212. *Benjamin v. Fraser*, 161 F. Supp. 2d 151, 182 (S.D.N.Y. 2001) ("While this Court will not decide here which standard is appropriate, it is clear that all but a few Department facilities are dimly lit and thus provide constitutionally inadequate lighting.").

213. Pursuant to the Second Circuit's September 2003 decision in *Benjamin v. Fraser*, 343 F.3d 35 (2d Cir. 2003).

214. *Benjamin v. Fraser*, No. 75 Civ. 3073 (S.D.N.Y. Apr. 7, 2006) ("April 7 Lighting Order"). I ordered the defendants to accomplish the transition to adequate lighting by no later than May 1, 2006, except where capital renovations or replacement of light fixtures were required. I also ordered the defendants to (1) notify the OCC and plaintiffs' counsel of the areas in which fifteen foot-candles of light will be provided; (2) notify the OCC and plaintiffs' counsel as to the reasons, if any, which prevent the defendants from complying with the May 1, 2006 deadline; (3) replace all fluorescent bulbs after 8,000 hours of use; (4) replace ballasts as needed; (5) conform policy directives so that they are consistent with the requirements of my Order; (6) not house detainees in cells with lights that do not work properly; (7) provide at least one table with twenty foot-candles of light in case defendants are unable to provide fifteen foot-candles of light in the dormitories; (8) properly clean or replace obscured light shields and bulbs/fixtures in the dormitories; and (9) provide no less than thirty foot-candles of general lighting and one hundred foot-candles of task lighting in the medical areas at GMDC, NIC, and RMSC where patients are examined and medication is handled. *Id.*

215. *Id.* The April 7 Lighting Order replaced paragraph 17 of the April 26, 2001 Environmental Order. The termination provision does not terminate the provision of light in medical areas. *Id.*

216. The light bulb replacement project began in the summer of 2005. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 10 (Sept. 1, 2005–Dec. 31, 2005).

217. VCBC and GRVC are completed, BBKC required no changes, and the other facilities are in various stages of completion.

218. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 16 (May 1, 2006–Aug. 31, 2006).

and there has been no determination with respect to termination of the lighting provisions of the consent decrees.<sup>219</sup>

**d. Extreme Temperatures/Heat Sensitivity**

In my 2001 Environmental Order, I directed the OCC to monitor the inside temperature in each facility on each day when the outside temperature drops below 55°F or exceeds 85°F.<sup>220</sup> In the event that the ambient temperatures were to fall below 55°F or exceed 85°F, then the warden and the director of environmental health would be notified. The DOC’s response to extreme temperature conditions mirrored that of ventilation—i.e., experts were retained by DOC and the parties.<sup>221</sup> Upon review of information supplied by the parties and the OCC, this court, on July 26, 2004, entered an Order (the “July 2004 Heat Order”) that addressed the potential health risks to certain inmates from extreme temperature conditions, and obliged the DOC to take certain precautions, triggered by the outside temperature having reached 85°F.<sup>222</sup> The July 2004 Heat Order provided for automatic termination on October 15, 2005 if “OCC does not find any evidence of current and ongoing constitutional violations of plaintiffs’ federal rights.”<sup>223</sup> At the DOC’s behest this Order was subsequently amended in a December 22, 2004 Order (“December 2004 Amended Heat Order”). Among other things, the December 2004 Amended Heat Order listed medical conditions that would render the detainee “heat-sensitive” and would require immediate transfer to air-conditioned housing.<sup>224</sup> The automatic termination provision was extended<sup>225</sup> and the Heat Order remains in effect pending full compliance.<sup>226</sup>

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219. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 28–29 (May 1, 2007–Aug. 31, 2007).

220. OFFICE OF COMPLIANCE CONSULTANTS, *supra* note 218, at 9. The “outside temperature” represents the temperature measured at LaGuardia Airport by the National Climatic Data Center (U.S. Dep’t of Commerce). The temperature was to be monitored as to whether it dropped below 55°F, from October 1 until May 31. The temperature was to be monitored as to whether it exceeded 85°F on any day of the year. The Order set forth at what times the inside temperature was to be monitored depending on whether the outside temperature was above 85°F or below 55°F, in addition to detailing the method by which OCC employees were to measure the inside temperature. *Id.*

221. By July 2003, the OCC retained an expert on issues associated with heat-related illness. *Benjamin v. Horn*, No. 75 Civ. 3073, 2006 U.S. Dist. LEXIS 30211, at \*2 (S.D.N.Y. May 18, 2006).

222. *Id.* at \*2–3.

223. *Id.* at \*3.

224. *Benjamin v. Fraser*, No. 75 Civ. 3703 (S.D.N.Y. Dec. 22, 2004) (“amended Heat Order”) (listing medical conditions used to identify inmates for air-conditioned housing: if the patient receives lithium, has Parkinson’s disease, requires infirmary care, is sixty-five years or older, has a documented history of hospitalization for heatstroke, receives one or more drugs raising risk of heat-related illnesses, has type I or type II diabetes, has dementia, suicidal tendencies, depression or mental retardation, or had a history of congestive heart failure or myocardial infraction).

225. Due to the DOC’s failure to provide contemporaneous records during the summer of 2005, the automatic termination provision was extended, by Order of October 14, 2005 to December 1, 2005, further extended by Order of November 29, 2005 to December 31, 2005, and finally, by Order of December 22, 2005 until

For several months in 2003 the parties and the OCC discussed the DOC's response to extreme temperature conditions<sup>227</sup> to ensure that the facilities were not unbearably hot in the summer or cold in the winter.<sup>228</sup> By the end of 2005, the DOC's compliance efforts were, at best, stagnant.<sup>229</sup> By 2006, however, the DOC recorded some improvements.<sup>230</sup> One notable accomplishment is the DOC's agreement and issuance of prisoner locator cards to signal the prisoner's heat-sensitive status to officers and staff and thus, facilitate their transfer to air-conditioned housing.<sup>231</sup> While there have been notable improvements, the challenge now is the timely transfer of heat-sensitive inmates to air-conditioned housing. On May 31, 2007, at the onset of New York's summer heat, in an attempt to ensure future compliance with past Orders in this area and protect heat-sensitive inmates, I issued an Order which established a structure that includes fines for non-compliance in this area. While I am hopeful that the end is in sight, all the returns are not yet in.

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such time the court decides that termination is proper. *Benjamin v. Horn*, No. 75 Civ. 3073, 2006 U.S. Dist. LEXIS 30211, at \*3 (S.D.N.Y. May 18, 2006).

226. *Id.*

227. Letter from John A. Horowitz, Office of Compliance Consultants, to the Honorable Harold Baer, Jr. (Aug. 12, 2003) (on file with author). The DOC and LAS more or less agreed that providing detainees with blankets and extra clothing was a sufficient ameliorative measure on cold days. On hot days, the parties determined that with the exception of CPSU detainees, providing unlimited access to showers, and providing ice during the afternoon hours would be sufficient. *Id.*

228. For the period January through April 2004, DOC recorded ninety days in which the temperatures in the facilities reached below 68°F and seventeen days in which the temperatures in the facilities exceeded 85°F. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 11 (Jan. 1, 2004–Apr. 30, 2004). During the next monitoring period, from May through August 2004, unsurprisingly, the DOC recorded zero days in which the temperatures in the facilities reached below 68°F and sixty-one days in which the temperatures in the facilities exceeded 85°F. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 11 (May 1, 2004–Aug. 31, 2004). From September through December 2004, however, DOC recorded forty-seven days in which the temperatures in the facilities reached below 68°F and six days in which the temperatures in the facilities exceeded 85°F. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 12 (Sept. 1, 2004–Dec. 31, 2004).

229. *Benjamin v. Horn*, No. 75 Civ. 3073, 7–8 (S.D.N.Y. Jan. 23, 2006). During the period from September through December 2005, DOC recorded eighty-three days in which the temperatures in the facilities reached below 68°F and thirty-six days in which the temperatures in the facilities exceeded 85° F.

230. In the January through April 2006 monitoring period, DOC recorded forty-five days in which the temperatures in the facilities reached below 68°F and nineteen days in which the temperatures in the facilities exceeded 85°F. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 10–11 (Jan. 1, 2006–Apr. 30, 2006). From May through August 2006, DOC recorded seven days in which the temperatures in the facilities reached below 68°F and forty-seven days in which the temperatures in the facilities exceeded 85°F. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON ENVIRONMENTAL CONDITIONS 10 (May 1, 2006–Aug. 31, 2006).

231. The DOC assigns particular colors to inmates to reflect their status. White signifies the inmate's status as "heat-sensitive." Theoretically, all cards and files associated with this inmate are the same color to provide greater assurances that officers and other staff will respond to particular medical needs. Teleconference with Nicole Austin, Deputy Director of OCC (Apr. 18, 2007) (notes from teleconference on file with author).

## 2. *Attorney Visitation*

Almost from the beginning of my involvement with the case, LAS had complained about attorney visitation problems such as the length of time both LAS and non-LAS lawyers had to wait before they met with clients. Indeed, after a hearing in 2000, I found that defense lawyers frequently waited two hours or longer after arriving at a facility before they met with their client.<sup>232</sup> Defense attorneys testified that the wait sometimes forced them to completely abandon efforts to meet with clients after coming all the way to Rikers.<sup>233</sup>

I observed that several factors contributed to these delays. First, many Department facilities had few counsel rooms relative to the number of detainees housed at the facility.<sup>234</sup> Second, certain detainees could not be moved to counsel rooms without escort officers.<sup>235</sup> Third, inmates were generally not brought to counsel rooms during inmate counts, which at times delayed visits for several hours.<sup>236</sup> Because the counts were held at unpredictable times and the Department did not furnish schedules, attorneys could not time their visits to avoid the counts.<sup>237</sup> The Department's bureau chief for management and planning conceded that security considerations did not require the freeze of inmate movement during counts, and that while detainees were not brought to a visit with their attorney during counts, they were taken to family visits.<sup>238</sup> Defendants agreed that transporting detainees to meet with their attorney during counts would not lead to security or administrative problems.<sup>239</sup>

I found that attorney-client visitation had been significantly compromised by these delays.<sup>240</sup> Several LAS attorneys testified that they had largely stopped visiting clients at particular facilities, and that the delays deterred necessary consultation, particularly given that LAS attorneys typically handle sixty to one

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232. *Benjamin v. Kerik*, 102 F. Supp. 2d 157, 176 (S.D.N.Y. 2000). As mentioned earlier, in my June 2000 decision, I held that prospective relief was available regarding the delays in inmates' meetings with counsel. In September 2001, the Second Circuit affirmed my decision in its entirety. *See Benjamin v. Fraser*, 264 F.3d 175 (2d Cir. 2001).

233. *Benjamin v. Fraser*, 264 F.3d at 180.

234. *Id.* at 179. At the time, the ratio of counsel rooms to detainees varied dramatically between different department facilities. NIC, with 476 detainees, had only one counsel room. The ratio of rooms to detainees was 1:176 at MDC, but 1:683 at ARDC. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 179–80.

239. *Id.* at 180.

240. *Benjamin v. Kerik*, 102 F. Supp. 2d 157, 178 (S.D.N.Y. 2000).

hundred cases at a time.<sup>241</sup> I also found that courthouse visits were not an adequate substitute for jailhouse visits for a variety of reasons.<sup>242</sup>

In an August 2000 Order (the “August 2000 Attorney Visitation Order”), I instructed defendants to, among other things, establish procedures to ensure that attorney visits commence in a timely manner (within thirty to forty-five minutes),<sup>243</sup> that an adequate number of attorney rooms were available,<sup>244</sup> and that they afford the requisite degree of privacy.<sup>245</sup>

The DOC’s compliance with the attorney delay aspect of the August 2000 Attorney Visitation Order was outstanding. By 2003 and throughout 2004, the DOC’s compliance rate with respect to the steps the DOC was required to take to rectify delays hovered, without fail, at about 95 percent.<sup>246</sup> Confidential attorney visiting rooms progressed a bit more slowly, but the DOC worked toward

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241. *Benjamin v. Fraser*, 264 F.3d 175, 180 (2d Cir. 2001). For example, LAS attorney Heidi Segal testified: Because you know you’re experiencing significant delays . . . you make determinations about whether or not you even have the time to visit a client, so there are times that you would forego a visit if you only had four hours free that day as opposed to six or seven. On days . . . where I experienced significant delays, I would cut short my visit . . . .

*Id.*

242. *Benjamin v. Kerik*, 102 F. Supp. 2d at 176–77. Courthouse visits were not available on less than a day’s notice, nor in the evenings or on weekends. Attorneys were required to call every hour to see if their client has been produced. Inmates might be returned to jail before the attorney arrives, or might not be produced at all. Some of the counsel rooms at the courthouses are not private, creating another problem the court was asked to resolve. Finally, when attorneys rely on courthouse visits, the burden on the client may cause the attorney-client relationship to suffer. Inmates are awakened at 4:00 a.m. for transport to court and may wait eight hours in a bullpen to see their attorney. Depending on their restraint status, inmates may spend the entire day in restraints in order to meet with their attorney for a few minutes. *Id.*; *see also* *Benjamin v. Fraser*, 264 F.3d. at 180.

243. *Benjamin v. Kerik*, No. 75 Civ. 3073 (S.D.N.Y. Aug. 3, 2000) (“Order on attorney visitation”). Attorney visits were to commence within forty-five minutes of the time that an attorney or his agent checks in at the Riker’s Island Control Building, or within thirty minutes of the time that an attorney checks into a facility located off of Riker’s Island. *Id.*

244. The number of attorney rooms available at each facility would be based on a historical analysis of the number of attorney visits to each facility for the past two years. *Id.*

245. *Id.* I also ordered defendants to (1) establish procedures that include (i) taking and immediately addressing complaints by attorneys waiting longer than forty-five minutes at Riker’s Island or longer than thirty minutes at a borough facility, (ii) allowing attorneys to make appointments to see a prisoner in advance, and (iii) a plan to audit compliance; (2) submit the aforementioned in the form of a proposed directive to the court and the plaintiffs for review within thirty days and for comment and amendment by the court; and (3) report to the court quarterly on their compliance with the terms of the Order. *Id.*

246. From October through December 2003, there was 95 percent compliance with my August 2000 Order. N.Y. CITY DEP’T OF CORR. INSPECTIONAL SERVICES COMPLIANCE DIVISION, ATTORNEY VISIT MONITORING REPORT (Oct. 1, 2003–Dec. 31, 2003). From January through March 2004, the combined compliance rate for all the jails was 94.67 percent. N.Y. CITY DEP’T OF CORR. INSPECTIONAL SERVICES COMPLIANCE DIVISION, ATTORNEY VISIT MONITORING REPORT (Jan. 1, 2004–Mar. 31, 2004). For the period of April through June 2004, there was a 94.49 percent compliance rate. N.Y. CITY DEP’T OF CORR. INSPECTIONAL SERVICES COMPLIANCE DIVISION, ATTORNEY VISIT MONITORING REPORT (Apr. 1, 2004–June 31, 2004). From July through September 2004, there was a combined compliance rate of 94.63 percent. N.Y. CITY DEP’T OF CORR. INSPECTIONAL SERVICES COMPLIANCE DIVISION, ATTORNEY VISIT MONITORING REPORT (July 1, 2004–Sept. 30, 2004). From October through December 2004,

compliance with my Order. By August 2006, the rooms were constructed and the Order was terminated.<sup>247</sup>

### 3. *Red I.D./Restraint Status Due Process*

Red I.D. detainees include those detainees found to possess a weapon while in the custody of the Department of Correction. Red I.D. detainees are permitted to move within the jails without physical restraints, but when Red I.D. detainees are moved anywhere outside their facility, their hands are fitted with black tubes termed “security mitts,” and are cuffed behind the back with their hands facing outwards.<sup>248</sup> The cuffs may also be attached to their waist chain and leg irons.<sup>249</sup>

Restraint status is more restrictive than Red I.D.<sup>250</sup> Individuals are designated as such when, according to the DOC, they have committed a violent act while in the DOC’s custody.<sup>251</sup> Restraint status detainees are subject to the same restraints as Red I.D. detainees but, in addition, they are restrained anytime they are moved within the jail.<sup>252</sup>

Red I.D. and restraint status are extraordinary and painful limitations on the liberty of pre-trial detainees and LAS sought to restrict their use.<sup>253</sup> On August 10, 2000, I issued an Order (the “August 2000 Restraints Order”) to address several due process issues, including that of prompt hearings and periodic medical reviews for detainees with these designations.<sup>254</sup>

With respect to the appeals process, this Order required, among other things, that (1) within seventy-two hours of placing a detainee in Red I.D. and/or enhanced restraint status, the DOC must afford said inmate a hearing in accordance with *Wolff v. McDonnell*,<sup>255</sup> and (2) the facility’s deputy warden for security shall review appeals of such placements and render a written decision within seven days of receiving an appeal from a detainee.<sup>256</sup> With respect to periodic medical reviews, the August 2000 Restraints Order also provided, among other things, that the Department provide a monthly medical review of

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there was 95.92 percent compliance with my Order. N.Y. CITY DEP’T OF CORR. INSPECTIONAL SERVICES COMPLIANCE DIVISION, ATTORNEY VISIT MONITORING REPORT (Oct. 1, 2004–Dec. 31, 2004).

247. *Benjamin v. Kerik*, No. 75 Civ. 3073, at 1–2 (S.D.N.Y. Aug. 8, 2006) (“Order terminating attorney visitation Order”).

248. *Benjamin v. Fraser*, 264 F.3d 175, 181 (2d Cir. 2001).

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* For example, restraint status detainees are restrained even when they are moved to the recreation area or law library.

253. *Benjamin v. Kerik*, 102 F. Supp. 2d 157, 175 (S.D.N.Y. 2000).

254. *Benjamin v. Kerik*, No. 75 Civ. 3073, at 2 (S.D.N.Y. Aug. 10, 2000).

255. 418 U.S. 539 (1972).

256. *Benjamin v. Kerik*, No. 75 Civ. 3073, at 2 (S.D.N.Y. Aug. 10, 2000).

the health of prisoners subject to Red I.D. status and restraint status.<sup>257</sup> Finally, the August 2000 Restraints Order directed defendants to draft procedures ensuring that the terms of the Order would be implemented and to report to the court on a quarterly basis with respect to compliance with the terms of the Order.<sup>258</sup> In September 2002, I granted LAS's contempt motion with respect to the DOC's noncompliance with portions of the August 2000 Restraints Order.<sup>259</sup>

Improvements in this area have been significant considering the circumstances. The parties and the OCC worked together to create a system whereby whenever a detainee is placed on a physical restraint status, the initial placement form as well as the medical review form signed by a member of the facility's medical staff are immediately faxed to the OCC.<sup>260</sup> In 2003, the OCC identified only nine detainees who did not receive a medical review within the requisite period.<sup>261</sup> This number dropped to six by 2004.<sup>262</sup> Because of the DOC's re-

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257. *Id.* at 3.

258. *Id.* at 3–4. On December 15, 2000, by memo endorsement, the court approved defendants' proposed procedures (known as Directive 4518) and advised that they be made effective as soon as conveniently possible but in no event later than December 31, 2000. *Benjamin v. Fraser*, No. 75 Civ. 3073, 2002 U.S. Dist. LEXIS 18342, \*3–4 (S.D.N.Y. 2002).

259. I imposed monetary sanctions and other prospective relief. *See Benjamin v. Fraser*, No. 75 Civ. 3073, 2002 U.S. Dist. LEXIS 18342 (S.D.N.Y. Sept. 26, 2002). For example, defendants would be fined \$200 each and every time they fail to provide an initial hands-on medical review within forty-eight hours of a prisoner being placed in Red I.D. and/or enhanced restraint status and \$250 for each succeeding twenty-four hours without such a review, the fine to be deposited in the prisoner's account, or \$200 each time they fail to issue a written decision within seven days from receiving an inmate's appeal and/or are unable to provide documentation thereof, and \$500 for each successive day of failed response, the fine to be deposited in the inmate's account. *Id.* at \*38–42. In my opinion and Order, I found that none of the reviews required under my August 2000 Order occurred until the end of 2001. However, I also found that when the reviews did occur in 2001, 95 percent of the documented appeals were decided within seven days, and for the first quarter of 2002, 93 percent of the documented appeals were decided within seven days. *Id.*

260. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 13 (Jan. 1, 2003–Apr. 30, 2003). Subsequent to my September 2002 Order, the OCC began to monitor compliance and to work with the parties to achieve compliance on the August 2000 Order. *Benjamin v. Kerik*, No. 75 Civ. 3073 (S.D.N.Y. Aug. 11, 2000) ("Order regarding restraint due process"); OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 2 (Aug. 1, 2002–Dec. 31, 2002).

261. From January through April 2003, the OCC identified two detainees who had not received a medical review within the requisite period. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 13 (Jan. 1, 2003–Apr. 30, 2003). From May through August 2003, the OCC identified six detainees who had not received a medical review within the requisite period. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 9 (May 1, 2003–Aug. 31, 2003). On June 9, 2003, the court signed an Order instructing the DOC to pay a fine to three affected inmates. *Id.* From September through December 2003, the OCC found one detainee who did not receive a medical review within the requisite period. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 14 (Sept. 1, 2003–Dec. 31, 2003). In addition, the OCC identified one detainee who did not receive within the mandated period a written answer to a Red I.D. appeal. *Id.*

262. From January through August 2004, the OCC did not identify any detainees who failed to receive a medical review within the requisite period or whose appeals were not decided within the requisite period. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 17 (Jan. 1, 2004–Apr. 30, 2004); OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 17 (May 1, 2004–Aug. 31, 2004). From September through December 2004, the OCC identified

markable compliance, in May 2006, my August 2000 Order terminated subject to the DOC instituting a system to track Red I.D. detainees.<sup>263</sup>

#### 4. *Fire Safety*

In 1988, the OCC engaged a fire safety expert to tour the DOC facilities and to advise the OCC and the parties of his findings. The expert found “[o]vert fire safety hazards, e.g., combustion dangers, absence of fire warnings, exit signs and evacuation plans.”<sup>264</sup> It was not until August 1990 that the City retained a consulting firm to conduct a comprehensive examination of the infrastructures of Rikers and North Brothers Island, which included an extensive evaluation of fire alarm systems.<sup>265</sup> The firm’s findings and recommendations, which were presented to the OCC and LAS in June 1991, provided the basis for the DOC’s 1992 Fire Safety Master Plan (“FSMP”).<sup>266</sup>

In late 1989, the DOC’s own internal Fire and Safety Unit began reporting serious violations in the jails. For example, the fire alarm system at OBCC was deemed “unreliable and/or inoperable,” and was reported to have been in this condition since shortly after the jail opened in 1985.<sup>267</sup> In February 1992, the Fire and Safety Unit reported that GRVC was “without an operable smoke/fire alarm system” and that “[t]his condition has existed since the facility opened for operation in 1991.”<sup>268</sup> Later that year, the Unit reported that the fire alarm, smoke detection, and smoke purge systems at the Manhattan Detention Center had been inoperable since 1983.<sup>269</sup>

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six detainees who were placed in Red I.D. without receiving medical review within the requisite period. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 18 (Sept. 1, 2004–Dec. 31, 2004). The OCC also found that all inmate appeals were decided within the requisite period. *Id.* at 19.

263. *Benjamin v. Fraser*, No. 75 Civ. 3073 (S.D.N.Y. May 23, 2006) (“Order regarding Red I.D. status”).

264. OFFICE OF COMPLIANCE CONSULTANTS, PROGRESS REPORT #19 27 (Mar. 1, 1988–Aug. 31, 1988). The DOC subsequently agreed to provide the OCC and LAS with a date by which it would produce cost estimates and a plan for remediation of fire safety issues.

265. OFFICE OF COMPLIANCE CONSULTANTS, PROGRESS REPORT #31 2–3 (Nov. 1992–Mar. 1993).

266. *Id.*

267. N.Y. CITY DEP’T OF CORR. FIRE AND SAFETY UNIT, FIRE AND SAFETY INSPECTION OF OTIS BANTUM CORRECTION CENTER 1 (Oct./Nov. 1989).

268. N.Y. CITY DEP’T OF CORR. FIRE AND SAFETY UNIT, FIRE AND SAFETY INSPECTION OF THE GEORGE R. VIerno CENTER 1 (Feb. 1992).

269. N.Y. CITY DEP’T OF CORR. FIRE AND SAFETY UNIT, FIRE AND SAFETY INSPECTION OF MANHATTAN DETENTION CENTER (NORTH AND SOUTH TOWERS) 3 (May 1992). During this period, the OCC also began to document serious fire safety hazards at several of the larger facilities on Rikers Island. In 1992, the OCC reported, “[t]en of the modular units at ARDC are not properly hooked into the Control Room” and that “none of the fire alarm pull stations work” at AMKC. OFFICE OF COMPLIANCE CONSULTANTS, OCC PROGRESS REPORT #29 22 (Oct. 1, 1991–Feb. 28, 1992).

By the end of 1995, the parties had resolved all disputes regarding fire safety at AMKC, except for the issue of smoke detection.<sup>270</sup> By 1996, the parties agreed to evaluate the fire safety plans for six jails individually.<sup>271</sup>

On December 9, 1999, I ordered the OCC to complete, through its retained consultants, an assessment of fire safety conditions in the remaining jails by April 1, 2000.<sup>272</sup> In early 2006, the fire safety expert surveyed fire safety in AMKC.<sup>273</sup> To date, although fire safety in AMKC is far from ideal, he found several areas of improvement, which included the installation of: (1) sprinklers in the majority of areas containing high combustible loads (such as storage areas), (2) smoke detectors on the first floor in the main corridor of building A, and (3) a new manual fire alarm system in AMKC housing units one through five.<sup>274</sup> Apart from these improvements, he did not find that fire hazards at AMKC overall had changed since 1993.<sup>275</sup> Fire safety continues to be a concern and requires continued attention from the court and the parties.<sup>276</sup>

### 5. *Modular Housing Units*

The modular housing units on Rikers Island are generally one-story wood-framed structures appended to the ARDC, AMKC, GMDC, and RMSC.<sup>277</sup> All

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270. OFFICE OF COMPLIANCE CONSULTANTS, OCC PROGRESS REPORT #39 4 (July 1, 1995–Dec. 15, 1995). In December 1995, however, the DOC indicated that it no longer accepted the concept of a court-ordered fire safety work plan and instead offered to submit to the OCC and LAS its updated FSMP. *Id.* at 3–4.

271. OFFICE OF COMPLIANCE CONSULTANTS, OCC PROGRESS REPORT #41 11 (May 1, 1996–Aug. 30, 1996). In February of 1993, the OCC retained a fire safety expert and registered engineer, Thomas Jaeger, to evaluate the DOC's Fire Safety Master Plan. He is president of Jaeger & Associates, LLC, a consulting fire protection engineering firm and an officer of the National Fire Protection Association. National Fire Protection Association, <http://www.nfpa.org/itemDetail.asp?categoryID=503&itemID=18013&URL=About%20Us/Board%20of%20Directors/Second%20Vice%20Chair> (last visited Sept. 16, 2007). Mr. Jaeger's evaluations of the jails were suspended in 1996 pending resolution of the City's motion to terminate the consent decrees. *Id.* The OCC's fire safety expert evaluated the DOC FSMP for AMKC in 1993, BKHD in 1995, and MDC in 1997. In each case, he concluded that the proposed plan was inadequate because it would not correct the majority of the fire safety deficiencies and, if fully implemented, would not provide a fire safe environment to the occupants of the facility. In April 1997, I ordered the City to provide the OCC with its FSMP, and instructed the City that I expected the plan to be substantially equivalent in detail to the Plan provided in 1992. In May 26, May 27, and June 1 through June 3, 1998, I held hearings on the status of fire safety. In November 1998, I issued a decision with findings with respect to the BXHD and BKHD.

272. *Benjamin v. Kerik*, No. 75 Civ. 3073 (S.D.N.Y. Dec. 9, 1999) ("Order on motion to terminate prospective relief").

273. OFFICE OF COMPLIANCE CONSULTANTS, REPORT ON OCC-MONITORED CONDITIONS 19 (May 1, 2004–Aug. 31, 2004).

274. *Id.* at 5.

275. *Id.* at 16.

276. *See generally*, Eugene B. Pepper, *Sanitation Inspections for New York City Jail Facilities at Rikers Island* (Mar. 3, 2006).

277. *Benjamin v. Kerik*, No. 75 Civ. 3073, 1998 WL 799161, at \*1 (S.D.N.Y. Nov. 13, 1998). For explanation of acronyms, *see supra* note 184.

modular units at AMKC, ARDC, and GMDC were installed in 1987, except that modular two of ARDC was installed in 1990.<sup>278</sup> In February 1996, a registered sanitarian completed an assessment of the wood framed modular units located in AMKC, ARDC, and GMDC.<sup>279</sup> His report concluded that the “overall conditions of the wooden modular units were so poor as to be unhealthful and potentially unsafe for the occupants.”<sup>280</sup> Among other things, he noted significant deterioration of the building structures, unclean and unsanitary conditions, and insufficient light and ventilation.<sup>281</sup> There was some discussion about whether the modular housing units should be destroyed because of their atrocious conditions and fire safety concerns but, at the time, the City opined that it could not house its prisoners without the use of the modular units.

In February and March 2006, the OCC visited the modular units to assess the safety of the fire systems that had been installed between February 1994 and January 1995 pursuant to court Order.<sup>282</sup> The OCC found the modular fire safety systems to be in an appalling state of disrepair.<sup>283</sup>

In 1997, the City began to replace the defective roofs by using a sprayed foam roofing system.<sup>284</sup> This system appears to have reduced the number of leaks and damage to fire safety equipment.<sup>285</sup> However, in 2006, I ordered a total of eight modular units located in AMKC, ARDC, GMDC, and RMSC be shut down and demolished because the units were grossly unsafe and replete with health hazards.<sup>286</sup> The DOC has inspected the modular units and has issued a

278. WARD DUEL, ENVIRONMENTAL EVALUATION 4 (Feb. 1996).

279. WARD DUEL, ENVIRONMENTAL EVALUATION 1 (Feb. 1996).

280. WARD DUEL, ENVIRONMENTAL EVALUATION 4 (Feb. 1996).

281. *See* WARD DUEL, ENVIRONMENTAL EVALUATION 1–4 (Feb. 1996).

282. OFFICE OF COMPLIANCE CONSULTANTS, OCC PROGRESS REPORT #40 15 (Dec. 16, 1995–Apr. 30, 1996).

283. *Id.* at 16. In its report the OCC stated that:

The alarm systems in seven of the sixteen modulars were completely inoperable and, in some cases, had not worked for over a year; the sprinkler systems in twelve modulars were not operating as designed due to problems associated with the fire alarm systems; six fire alarm control panels had been vandalized by Department staff and three had been damaged by water leaking through the roof and could not be repaired until the warranty agreement; and the electromagnetic door lock systems in all three modulars at [ARDC] were inoperable. In addition, facility maintenance and management staff generally did not know how to operate or maintain the modular fire safety systems, and equipment and components were not being periodically cleaned, tested or inspected by NYFD, as required by the two-year warranty contract.

*Id.*

284. *Benjamin v. Kerik*, No. 75 Civ. 3073, 1998 WL 799161, at \*4 (S.D.N.Y. Nov. 13, 1998).

285. *Id.*

286. *Benjamin v. Horn*, No. 75 Civ. 3073, at 2 (S.D.N.Y. Feb. 19, 2006) (“Order regarding modular housing units”) (“[I]n light of their structural and other defects, [the units] shall never again be used for inmate occupancy and shall be demolished, if they have not already been demolished, at a time to be determined by the Department of Correction.”).

report in which it concludes that there are no immediate structural safety concerns with regard to the occupied housing modularity.<sup>287</sup> Consequently, and for the moment, the modularity remain standing but because of a significantly reduced count in the prison population, few prisoners are housed in them. As noted at the outset of this article, consent decrees are a reactive and not proactive instrument and without the plaintiff moving against such a report from the DOC, I am not likely to do more.

### 6. Summary

It is apparent that there have been significant improvements and significant delays in the way in which the DOC has complied with court Orders, and this noncompliance has plagued the court since the inception of this litigation.<sup>288</sup> On the other hand, except for fire safety, sanitation, and some issues regarding heat-sensitive detainees, the areas that remain before the court after the PLRA are few and far between, and in most, court oversight has terminated. Most importantly, it is clear that under judicial supervision, City jails and those forced to live there, are, for the most part, living in conformity with constitutional guaranties. The detail, which to some may seem overwhelming, has been provided to help the reader decide for herself whether there could and should be a better way to assure minimal constitutional guaranties to detainees in New York City jails.

## III. CONSENT DECREES VS. PRIVATE SETTLEMENT AGREEMENTS

To evaluate the relative value of the *Benjamin* consent decrees, it is important to look not only at the significant improvements at Rikers that have come about as the result of the consent decrees, but also at other approaches taken by the Judiciary to address similar complaints. The PLRA provides for two separate and distinct remedies; both employ settlement concepts. In both consent decrees and private settlements, the parties are able to settle a lawsuit on mutually acceptable terms that the court agrees to enforce as a judgment. The critical difference is that a consent decree affords ongoing monitoring and enforcement mechanisms not provided in a private settlement.

Under the provisions of the PLRA, a federal court cannot enter or approve prospective relief pursuant to a consent decree unless the relief is (1) narrowly drawn, (2) reaches no further than needed to correct the infringement, and (3)

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287. *Id.* at 1.

288. It is worth noting that one significant milestone often absent from the discussion is the dramatic change in the physical appearance of Rikers. Most recently on my annual visit to Rikers to tour the facilities, I was struck by the overall improvements in the physical structure—fewer missing tiles, cleaner showers and bathrooms, and in certain areas, newly painted walls. I could not help but wonder whether these aesthetic improvements coincided with the overall progression in the jails since the onset of the decrees. Though compliance is not yet complete, and issues remain, the aesthetic improvements are noteworthy.

provides the least intrusive means to correct the violation.<sup>289</sup> By definition, this form of “prospective relief” requires a finding by the court or admission by the defendant that a federal right has indeed been violated. By contrast, private settlements do not require the same finding or admission.<sup>290</sup> In addition, private settlements lack any judicial enforcement other than the reinstatement of the proceeding under certain circumstances.<sup>291</sup> In these instances, plaintiffs may return to the federal court that approved the settlement, seek to have the case reinstated and then proceed to trial. Alternatively, plaintiffs may initiate a breach of contract action in state court and seek specific performance.

Consent decrees are defined as “any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements.”<sup>292</sup> A private settlement agreement “means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled.”<sup>293</sup>

Not surprisingly, there are reasons that plaintiffs would prefer a consent decree while defendants would favor private settlements. First, plaintiffs may opt for a consent decree because of the implicit finding that a violation of a federal right has occurred. Second, the court that enters a consent decree also retains jurisdiction over it. As a result, plaintiffs are not required to file an independent lawsuit every time the other party violates a provision of the consent decree. Plaintiffs may also prefer a consent decree because it involves court monitoring and thereby accelerates compliance. Defendants may be more apt to comply promptly because a failure to act in accordance with the terms of a consent decree may be met with a contempt order. As discussed earlier, this is how the OCC came into existence. The court may also serve to interpret the consent decree to

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289. 18 U.S.C. § 3626(a)(1)(A) (2000) states:

Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

290. 18 U.S.C. § 3626(c)(2) (2000) states:

(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

291. *Id.*

292. 18 U.S.C. § 3626(g)(1) (2000).

293. 18 U.S.C. § 3626(g)(6) (2000).

help the parties resolve any ongoing disputes before they reach litigation. Finally, plaintiffs may prefer consent decrees to private settlements because the consent decree is generally easier to modify if circumstances change. Private settlement agreements do not afford the same flexibility and plaintiffs are limited in the remedies they may seek.

It is also apparent why defendants would find private settlements to be a more attractive solution. For example, in a private settlement, there is no finding of a violation of a federal right. In a private settlement, a governmental defendant need not admit to any wrongdoing. In addition, the defendant will usually prefer not to have the judicial oversight inherent in consent decrees.

Whatever the preferences of plaintiffs and defendants, the private settlement arrangement is increasingly being used in lieu of consent decrees.<sup>294</sup> For example, Judge Chin recently presided over a settlement in *Ingles v. Toro*,<sup>295</sup> a comparable case involving another plaintiff class of detainees at Rikers Island. Inmates of various institutions operated by the DOC filed a civil rights action against the City alleging excessive force in its prisons and detention facilities.<sup>296</sup> After four years of negotiations, Judge Chin helped the parties reach a settlement.

In the settlement, the affirmative duties taken on by the DOC in order to better monitor the use of force and perhaps stop the use of excessive force are not dissimilar to some of the obligations of the DOC under the *Benjamin* consent decrees. The agreement between the parties will remain in effect until November 1, 2009, at which time the federal court will lose any authority to compel the City's compliance. In such a private settlement agreement, if plaintiffs believe the City has not complied with its duties—or in effect has breached its agreement—plaintiffs only recourse is to move before Judge Chin to have the case reinstated and proceed to trial.<sup>297</sup> Of course, plaintiffs may also commence an action in state court for breach of contract, but this is tantamount to starting the litigation all over again.

The ability of plaintiffs to come to the court and urge compliance is why the *Benjamin* consent decrees have been so effective in the long term. In cases like *Benjamin*, violations once remedied can backslide and become a violation of rights once again. This was most strikingly obvious in instances of sanitation and overcrowding throughout the years. The consent decree, unlike the private settlement agreement, allows for the necessary flexibility without forcing plaintiffs to file new lawsuits and start over each time the conditions at the facility become constitutionally objectionable. Settlements may be appropriate in some

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294. See, e.g., *Laube v. Campbell*, 333 F. Supp. 2d 1234 (M.D. Ala. 2004); *Ingles v. Toro*, 438 F. Supp. 2d 203 (S.D.N.Y. 2006); *Billips v. Horn*, No. 04 Civ. 1086 (S.D.N.Y. Feb. 14, 2005) (stipulation of settlement and dismissal).

295. *Ingles v. Toro*, 438 F. Supp. 2d 203 (S.D.N.Y. 2006).

296. *Id.* at 204.

297. *Id.* at 210; see also 18 U.S.C. § 3626(c) (2000).

situations, but seemingly, only a consent decree, like the decrees in *Benjamin*, provides for the necessary oversight to ensure success in protecting the rights of the disenfranchised as guaranteed by the Constitution.

In *Ingles*, that the agreement between the parties was a private settlement rather than consent decree was an important consideration for the City. One of its goals in entering the settlement was that the commissioner should not cede any of his authority or discretion.<sup>298</sup>

The City took a similar approach in another case that came before me in 2004. In *Billips v. Horn*, inmates sued the City and claimed that the DOC did not appropriately credit their jail time when inmates were in the hospital for either physical or emotional afflictions.<sup>299</sup> The DOC recognized the need for a more adequate policy and system to track this information so that the time could be deducted from inmates' sentences. Rather than admit a federal right had been violated or endure a trial on this issue, the City, with approval from plaintiffs represented by LAS, developed a plan of settlement. Under this plan, the DOC would remedy the problem by setting up computerized systems to track this information.<sup>300</sup> The DOC would also provide a quarterly report and have necessary conferences with the court, but at the end of two years of monitoring, the court's authority would end.

Like many policy and institutional changes, personnel and technology adjustments to account for those time credits could not be instituted overnight. The DOC needed time to set up computer systems and software to track inmates and their time spent in hospital. The settlement agreement gave the DOC only a year to put those systems in place and then another two years of monitoring by the court to ensure ongoing compliance.

*Billips* and *Ingles* are decidedly different from the ongoing heat and sanitation problems in the City's jails. I approved the private settlement in *Billips* because I did not believe that plaintiffs could have found any greater degree of relief if the issue had been litigated. Judge Chin had the same view in *Ingles*.<sup>301</sup>

It is also important to note that the settlement agreements in *Billips* and *Ingles* provided for a compliance-monitoring period.<sup>302</sup> It did not, however, provide for any mechanism for the court to sanction non-compliance. It merely allowed for the cases to be reinstated, thus complying with the stringent parameters of private settlements pursuant to the PLRA. This was the most troubling part of my decision to approve the settlement in *Billips*, but because the City had arranged very specific and concrete plans for compliance and because I believed

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298. *Ingles*, 438 F. Supp. 2d at 210; see also 18 U.S.C. § 3626(c) (2000).

299. *Billips v. Horn*, No. 04 Civ. 1086 (S.D.N.Y. Feb. 14, 2005) (stipulation of settlement and dismissal).

300. *Id.*

301. *Ingles*, 438 F. Supp. 2d at 214.

302. *Id.* at 209 ("The agreement will remain in effect until November 1, 2009 . . .").

the relief was the most defendants could achieve, I approved it, despite the loss of any ongoing oversight.

#### IV. THE FEDERAL CONSENT DECREE FAIRNESS ACT OF 2005

Ongoing consent decrees like the ones in *Benjamin* have prompted Congress to take a closer look at what might be done to further limit the role of the judiciary in the enforcement of constitutional standards in our public institutions and has led to a bill entitled the Federal Consent Decree Fairness Act of 2005 (“Bill”).<sup>303</sup> The Bill was introduced at least ostensibly in response to what its supporters claim is a trend by the judiciary to wrest “public policy decisions from the control of elected officials—the governor, the legislature, the mayor, the city counsel—and put them indefinitely in the hands of a small group of plaintiff’s attorneys and an unelected federal judiciary.”<sup>304</sup>

Encouragement for the Bill came from a book by Ross Sandler and David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government*, and a conference held on the subject by the American Enterprise Institute, a conservative think tank.<sup>305</sup> Primarily, the Bill attempts to make it easier for a city or state to vacate or modify a consent decree.<sup>306</sup> The text of the Bill spells out numerous “congressional findings” that are meant to provide insight into the use of consent decrees.<sup>307</sup> It asserts that: (1) consent decrees are for remedying violations of rights and may not be used to advance other policies, (2) consent decrees should give deference to local officials, and (3) consent decrees should contain realistic strategies for ending court supervision.<sup>308</sup>

Based on these “findings,” the Bill introduces several blanket limitations to consent decrees. First, it authorizes state or local governments and related officials sued in their official capacity to file a motion to modify or vacate a consent decree upon the earlier of (1) four years after the consent decree is originally

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303. Federal Consent Decree Fairness Act, S. 489, 109th Cong. (2005); Federal Consent Decree Fairness Act, H.R. 1229, 109th Cong. (2005) [hereinafter Federal Consent Decree Fairness Act].

304. *Federal Consent Decree Fairness Act: Hearing on S. 489 Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 109th Cong. 3 (2005) [hereinafter *Senate Judiciary Committee Hearings*]; see also *Federal Consent Decree Fairness Act: Hearing on S. 489 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the Committee of the H. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter *House Judiciary Committee Hearings*].

305. See ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003); Symposium, *Governing By Consent Decree?*, American Enterprise Institute, (June 9, 2005) [http://www.aei.org/events/eventID.1078/event\\_detail.asp](http://www.aei.org/events/eventID.1078/event_detail.asp) (transcript available at <http://www.aei.org/events/filter.,eventID.1078/transcript.asp>).

306. Federal Consent Decree Fairness Act, S. 489, 109th Cong. (2005); Federal Consent Decree Fairness Act, H.R. 1229, 109th Cong. (2005).

307. Federal Consent Decree Fairness Act, S. 489, 109th Cong. § 2 (2005); Federal Consent Decree Fairness Act, H.R. 1229, 109th Cong. § 2 (2005).

308. Federal Consent Decree Fairness Act, S. 489, 109th Cong. § 2 (2005); Federal Consent Decree Fairness Act, H.R. 1229, 109th Cong. § 2 (2005).

entered; or (2) in the case of a civil action in which a state or a local government is a party, the expiration of the term of office of the highest elected state or local government official authorizing the consent decree.<sup>309</sup> Second, the Bill shifts the burden of proof to plaintiffs “to demonstrate that the continued enforcement of a consent decree is necessary to uphold a federal right.”<sup>310</sup> Third, it nullifies consent decrees pending a ruling on a motion to modify or vacate if the court fails to rule on such a motion within ninety days of filing the motion.<sup>311</sup> Finally, the Bill purports to be applicable to all consent decrees regardless of when the consent decree was entered and whether any relief has been obtained before its enactment.<sup>312</sup>

Although it is not clear from the text or congressional hearings how exactly this proposed law is meant to interact with the limitations already provided by the PLRA, if directly applied, the Bill will most likely leave prisoners’ rights at the cell door. On its face it claims to apply to all consent decrees, but much of this Bill echoes the parameters for the judiciary in the PLRA, which is similar in scope and purpose, i.e., to limit the judiciary’s role with respect to consent decrees. The structure and limitations are in many ways similar. For example, both the Bill and the PLRA provide for the automatic termination of any court order or consent decree two years after entry of such relief.<sup>313</sup> If there is a finding that the consent decree has been violated, and the motion for termination is denied, the motion may be renewed one year from the date of denial.<sup>314</sup> This suggests that despite the parallels, the two laws would operate independently of each other, but unfortunately, there has not been enough discussion in Congress to answer this question conclusively.

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309. Federal Consent Decree Fairness Act, S. 489, 109th Cong. § 3 (2005); Federal Consent Decree Fairness Act, H.R. 1229, 109th Cong. § 3 (2005) (proposing to amend Chapter 111 of title 28, United States Code, with Sec. 1660(b)(1)(A-B)).

310. Federal Consent Decree Fairness Act, S. 489, 109th Cong. § 3 (2005); Federal Consent Decree Fairness Act, H.R. 1229, 109th Cong. § 3 (2005) (proposing to amend Chapter 111 of title 28, United States Code, with Sec. 1660(b)(2)).

311. Federal Consent Decree Fairness Act, S. 489, 109th Cong. § 3 (2005); Federal Consent Decree Fairness Act, H.R. 1229, 109th Cong. § 3 (2005) (proposing to amend Chapter 111 of title 28, United States Code, with Sec. 1660(b)(4)).

312. Federal Consent Decree Fairness Act, S. 489, 109th Cong. § 4 (2005); Federal Consent Decree Fairness Act, H.R. 1229, 109th Cong. § 4 (2005)

313. 18 U.S.C. 3626(b)(1) (2000), which reads as follows:

- (A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener—
  - (i) 2 years after the date the court granted or approved the prospective relief;
  - (ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or
  - (iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act [enacted April 26, 1996], 2 years after such date of enactment.

314. *Id.*

*A. The Bill Provides Strict, Inflexible Time Limits*

Supporters of the Bill argue that ongoing consent decrees linger too long, outlive their usefulness, and become outdated.<sup>315</sup> For example, Senator Lamar Alexander discussed in the Senate Judiciary Committee Hearings a consent decree entered in 1974 in New York City that established a form of bilingual education for children.<sup>316</sup> Now Senator Alexander claims that the parents of New York City school children would like to have their children learn English in a different type of class, but parents and school officials are bound by an outdated and obsolete consent decree.<sup>317</sup> But for every parade of horrors that details how consent decrees outlive their purpose, there are just as many instances where it took a long time for government defendants to comply because of the resources and extensive work that was required to assure compliance.<sup>318</sup>

The Bill places strict limitations on the allowable duration of consent decrees; a state or local government that is party to a consent decree can request that the decree be reviewed for termination after four years or a “change of control” in administrations.<sup>319</sup> The first and most obvious problem with this provision is that it would give the government defendant an opportunity to challenge the decree regardless of whether the affirmative duties provided in the consent decree had been addressed. For example, if a consent decree was entered in June and in the November elections the incumbent administration was defeated the consent decree would be subject to re-examination some six months after its entry. Should a newly elected administration be given this fiat, and a consent decree be so easily undone?

Senator Charles Schumer of New York hinted that he might be willing to support a bill such as this if the time period were not tied to the political cycle, as it is with a “change of control” provision.<sup>320</sup> Senator Schumer suggested a limit of any extension to ten years.<sup>321</sup> But I am not certain that any specifically prescribed length of time is appropriate in light of the burden shifting provision discussed below. A more effective device might entail some sort of periodic examination and written findings by the court.

The four year time limit combined with the “change of control” provisions in the proposed Bill are too restrictive and deny courts the type of flexibility neces-

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315. *Senate Judiciary Committee Hearings, supra* note 304, at 3 (statement of Sen. Lamar Alexander).

316. *Id.* at 4 (statement of Sen. Lamar Alexander).

317. *Id.*

318. For example, the New Orleans Sewerage and Water Board entered into a consent decree whereby the city of New Orleans would take specific steps over eleven years to build a new sewage collection system because the old one frequently caused raw human sewage to run into the streets.

319. Federal Consent Decree Fairness Act, S. 489, 109th Cong. (2005); Federal Consent Decree Fairness Act, H.R. 1229, 109th Cong. (2005).

320. *Senate Judiciary Committee Hearings, supra* note 304, at 16 (statement of Sen. Charles E. Schumer).

321. *Id.*

sary to effectively enforce plaintiffs' rights. Even with the possibility for the extension of the decree, a four year limit may defeat and clearly inhibit efforts that deserve extended oversight. The *Benjamin* consent decrees were first signed in 1978 and have been sustained through five mayoral administrations.<sup>322</sup> New York City jails would never have seen the necessary and varied improvements now in place, had *Benjamin* been subject to restrictions like those proposed in the Bill and had subsequent mayors adopted Mayor Beame's position.

It is also important to note that the Bill does not define precisely what constitutes a "change in control." How many members of a city council or board of supervisors, as Congressman Howard Berman pondered, must rotate or simply be re-elected to implicate this change of control provision?<sup>323</sup> Consent decrees could face even shorter lives depending on the interpretation of such a provision.

*B. The Bill Improperly Shifts the Burden of Proof to Plaintiffs to Re-prove Violations*

When a consent decree is reviewed by the court, the burden of proof to show a need for continued enforcement of the consent decree will rest with the plaintiff that initially sought the relief.<sup>324</sup> Proponents provide a creative rationale for the burden-shifting concept and opine that it is an advantage for plaintiffs because "state or local officials must be able to overcome plaintiffs' proof that the court is still needed to prevent future violations."<sup>325</sup> This begs the question why, one might ask, is extra burden placed on plaintiffs an advantage? Why shouldn't the burden be left on the defendants to show compliance with the consent decree; after all, wasn't that the thrust of the litigation from the beginning? Proponents also point out that noncompliant officials face the certainty of judicial hearings and a finding that there are violations.<sup>326</sup> But noncompliant officials are currently subject to judicial hearings and contempt if they fail to comply. Portraying such a burden shift as being favorable to plaintiffs is at best misleading. Nor does this change do anything to level the playing field. It is the plaintiffs who generally lack the resources to litigate and should not be made to re-prove violations at the discretion of defendants. Rather, the burden should remain on defendants to show that they are in compliance. Otherwise, this provision is little more than an escape hatch for newly elected politicians who disagree with the previous ad-

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322. This, of course, assumes *arguendo* that the Bill might apply to consent decrees that might also be governed by the PLRA. See *Benjamin v. Malcolm*, 495 F. Supp. 1357, 1359 (S.D.N.Y. 1980).

323. *Senate Judiciary Committee Hearings, supra* note 304, at 17 (statement of Prof. Ross Sandler, New York Law School).

324. Federal Consent Decree Fairness Act, S. 489, 109th Cong. § 3; Federal Consent Decree Fairness Act, H.R. 1229, 109th Cong. § 3 (2005).

325. *Senate Judiciary Committee Hearings, supra* note 304, at 15 (statement of Prof. Ross Sandler, New York Law School).

326. *Id.*

ministration's view and disavow those undertakings.<sup>327</sup> Further, jail and prison inmates who seek to vindicate their constitutional rights may be prejudiced by this provision. The legal resources available to inmates are limited and to force inmates and their counsel to relitigate the merits of the underlying violations at least every four years would further limit those already scarce funds.

Where a government defendant acknowledges an abridgment of constitutional rights and voluntarily enters into a consent decree to remedy the abridgment, plaintiffs should not then be required to re-prove their position every time a new mayor takes office. Many consent decrees involve ongoing and potentially recurring problems, and to require the underrepresented plaintiff class to shoulder such a burden is illogical. From a probabilistic standpoint (based on history and logic), it is more likely that government defendants have not made sufficient changes to comply with the decree, and the defendant should bear the burden of proving that the need for the decree no longer exists. Unfortunately, the likely reasons for such a request will be that a new mayor does not subscribe to the agreement entered into by his or her predecessor, or has other plans for the budget.

Our central concern throughout this article is that shifting responsibility for these issues to the legislative branch would be for the most part an exercise in futility. In an era of enormous financial investments in campaigns and lobbying legislative bodies, elected legislators have little incentive to look out for the interests of the powerless and disenfranchised, mostly because they don't vote. Without the federal court and the opportunities for consent decrees and their enforcement by the court, we have seen pre-trial detainees' rights go unheeded.

### *C. The Bill Reduces Incentives for Plaintiffs to Settle*

In light of the limitations described above, it is difficult to imagine a situation where plaintiffs would believe the relief offered through settlement is better than what they could achieve through trial and, therefore, there is no incentive for plaintiffs to negotiate and ask the court to enter a consent decree. Congressman Howard Berman, the Ranking Democrat on the House Subcommittee on the Courts, the Internet and Intellectual Property, correctly voiced his doubts about the Bill, when he opined that cities or states will as a matter of course move to vacate or modify consent decrees in order to shift the burden to the plaintiff who will be forced "to reprove [sic] his case simply because the defendant asked for a review of the decree."<sup>328</sup> This raises a doubt as to whether plaintiffs would have any incentive to settle their claims when the government holds a sword of

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327. See, e.g., *Senate Judiciary Committee Hearings, supra* note 304, at 18 (statement of Prof. Timothy Stoltzfus Jost, Wash. and Lee Univ. Sch. of Law) (suggesting that proponents of the Bill from Tennessee wanted to pass the legislation to free themselves of consent decrees renegotiated in 2003 that were "no longer convenient").

328. *Senate Judiciary Committee Hearings, supra* note 304, at 6 (statement of Rep. Howard Berman).

Damocles over the plaintiff's head by being able, under certain circumstances, to force a review almost immediately after a decree is entered. Even if the remedies outlined in a particular consent decree had not been adhered to by the defendant, the plaintiff still bears the burden of re-proving the need for the continuation of the decree. Because plaintiffs know that the decree could be reviewed so frequently (with the burden on the plaintiffs), they will be reluctant to agree to a consent decree that might otherwise solve the problems and lead to a termination of the decree.

Neither the plaintiffs nor the government defendants will be likely to enter into a consent decree when they know the settlement could be void in four years, or sooner depending on how the "change of control" provision is interpreted. What would happen to consent decrees if after years of negotiations, one is finally agreed to and entered but comes at the end of a mayor's term? A new mayor would have the power to immediately review and dismantle the decree, whether the problems addressed were solved or not.<sup>329</sup>

To add insult to injury, the Bill would tax the resources of the already underfunded federal courts. By reducing any incentive to settle, the Bill will increase litigation in the federal courts and likely the number of trials. Any requirement that makes inmates "demonstrate" continued violations every fourth year, or more frequently, will doubtless add to federal dockets around the country. The requirement in the Bill that such motions be ruled on within ninety days will only compound these resource issues.

Such limitations would make it increasingly difficult for judges to protect the rights of inmates who should be able to rely on and expect that their hard fought for remedy will be enforced. This is what happened in the early days of the *Benjamin* consent decrees and had those plaintiffs been forced to re-file their claims or periodically prove that constitutional violations remained, I doubt there would have been much, if any, improvement in conditions experienced in the 1960s and 1970s when this lawsuit began and the jails were at their worst. Oswald Spengler's cyclical view of history would once again be dramatically played out at the expense of the powerless.<sup>330</sup>

*D. The Court Will Not Be More Effective in Enforcing Consent Decrees*

Likewise, the argument that courts will be more effective if the Bill were to become law is flawed. Proponents believe that the Bill will actually make it easier for federal judges to compel compliance because "judges will still be able to hold defendants in contempt, fine officials and their agencies, incarcerate recalci-

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329. *Id.*

330. See generally OSWALD SPENGLER, *THE DECLINE OF THE WEST* (Charles Francis Atkinson trans., Knopf 1962) (1928).

trant officials, compel explanations and reports . . . .”<sup>331</sup> But these are the same tools available to judges now, and with the proposed time limitations, it is hard to believe that judges will be able to do more in a more restricted period of time.

Proponents also argue that ongoing consent decrees are needlessly expensive, but so is the cost of litigation. The severe temporal limitations and reduced incentive to settle will force plaintiffs to litigate through judgment in federal court and will require defendants to waste valuable resources defending a claim when they could have spent that time and money in the more productive effort of reaching settlement. In terms of the legislative goal here, it is counterproductive as it wrests control over the imposed remedy from the hands of the government defendant.

Another problem may be the existence of under-funded mandates. Congress creates rights under federal law, but oftentimes fails to appropriate the necessary funds sufficient to ensure that state and local governments may meet those goals. It is important to remember consent decrees are the product of voluntary agreements between the government and the plaintiff to address one or more violations of federal rights that have, as a rule, gone un-remedied, in some instances for years. If consent decrees are limited by the passage of this Bill, the courts will undoubtedly be further clogged with individual cases and a multitude of issues that would be better suited and likely more quickly resolved by a consent decree.

*E. The Bill Does Not Necessarily Reflect the Thinking of the Supreme Court*

Proponents of the Bill rely on the decision in *Frew v. Hawkins* as support for the proposition that the Bill reflects the thinking of the Supreme Court.<sup>332</sup> In *Frew v. Hawkins*, Texas State court officials entered into a consent decree approved by the Federal District Court with many specific proposals to comply with a Medicaid program aimed at making an early diagnosis of illness and disease in children.<sup>333</sup> For example, the federal statute required states participating in the program to arrange for the provision of “screening services in all cases where they are requested,” as well as “corrective treatment.”<sup>334</sup> The consent decree directed the Texas Department of Health to implement toll-free phone numbers so that aid recipients might arrange for appointments.<sup>335</sup> Two years after the consent decree was entered, petitioners filed a motion to enforce it. In a unanimous decision, the court upheld the consent decree stating “federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent

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331. *Senate Judiciary Committee Hearings, supra* note 304, at 14 (statement of Prof. Ross Sandler, New York Law School).

332. *Id.* at 3 (statement of Michael S. Greve, American Enterprise Institute).

333. 540 U.S. 431 (2004).

334. *Id.* at 435.

335. *Id.*

decree may be enforced.”<sup>336</sup> While it is true that the *Frew* court suggested that consent decrees should be narrow in scope and return policy decisions to state and local governments as soon as possible, it was equally concerned with the adequate enforcement of consent decrees as it was with returning discretion to officials.

The federal court must exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State’s obligations is returned promptly to the State and its officials. As public servants, the officials of the State must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities. A State, in the ordinary course, depends upon successor officials, both appointed and elected, to bring insights and solutions to problems of allocating revenues and resources. The basic obligations of federal law may remain the same, but the precise manner of their discharge may not. If the State establishes reason to modify the decree, the court should make the necessary changes; where it has not done so, however, the decree should be enforced according to its terms.<sup>337</sup>

Notice the court’s emphasis of enforcement and successful compliance as well as the emphasis on the prompt return of responsibility to defendant. A court would ignore such guidance at its peril. Moreover, no court seeks the continued drain on its time and resources that enforcement of consent decrees requires. Despite the perception that some politicians have sought to create, there is no epidemic amongst federal judges to become proxy to school or prison administrators.

At the end of the day, cases like *Benjamin* that involve complicated and ongoing constitutional violations never have, and cannot now, be solved by the regime required under this Bill. As an example let’s examine the overcrowding issue. Overcrowding is not a discrete problem—jail populations ebb and flow and can, depending on circumstances, be so great that detainees’ constitutional rights are violated. If limitations on consent decrees are not flexible enough to deal with such a recurring problem, plaintiff detainees will be forced to re-litigate their case each time the jail becomes overcrowded. This would have been an untenable situation at Rikers. It has taken nearly thirty years for the City to reach substantial compliance in most of the areas covered by the consent decrees, not the least of which has been population control. If the *Benjamin* case had been subjected to the proposed legislation, there would have been no institutional memory, many judges would have been involved in serial fashion, and there would have been a litigation explosion with hundreds of lawsuits.

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336. *Id.* at 440.

337. *Id.* at 442.

## V. CONCLUSION

The changes that were necessary to protect the constitutional rights of detainees have now been accomplished or are within reach. While it took considerable time and effort by the court and the parties, such changes were unlikely to be accomplished through legislative action.

Put another way, the fact is that LAS championed prisoners' rights in the Federal District Court and their efforts could not have brought the same results through the legislative process. The legislature is just not equipped to have replicated the progress or provided the necessary vigilance that have brought our jails to this juncture, e.g., overcrowding is no longer an issue, attorneys no longer wait for hours to consult with clients, and attorney visiting rooms are for the first time private and secure, and on an institutional level, the consent decrees have helped to maintain and improve the physical plant of the jails and to keep them safe for human habitation, food services now ensure that detainees are adequately fed while in custody and that the food is prepared and served in a sanitary environment.

While courts may be criticized for their oversight role, it is still their responsibility when litigation is brought before them to determine, and where appropriate protect, the constitutional rights of detainees just like the rights of any one of us.

Clearly consent decrees should not last in perpetuity. They should be available to litigants, but only for an appropriate period of time and factual circumstances should dictate when they are to terminate. For discrete violations, a time limit for the decree might make sense. As we have also seen, in certain instances, a private settlement may work. Consent decrees are not identical, and arbitrary time limits on consent decrees, irrespective of individual circumstances may be counterproductive.

Judges have a duty to protect the rights of those who come before the court and request relief for cognizable violations of constitutional rights. "[W]hen people came to me and said ['] my rights have been violated, ['] I couldn't say ['] get lost, ['] or ignore them. I had to decide whether I thought they did make a case or did not make a case and I decided that [the Rikers detainees in *Benjamin*] did make a case and I had to do something about it."<sup>338</sup> Judge Lasker also made the point that no judge "asks for the cases, no one wants to keep them forever."<sup>339</sup> Some argue that judicial oversight is inefficient because of how busy federal judges are and while Judge Lasker does not dispute this, he wonders if there exists a better system that will protect the constitutional rights of pre-trial detainees. I share his doubts. There are of course any number of important and

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338. Interview with Judge Lasker, *supra* note 88.

339. *Id.*

## A NECESSARY AND PROPER ROLE FOR FEDERAL COURTS IN PRISON REFORM

helpful associations that work towards improving prison conditions, but in the last analysis, the Judiciary is the only entity that can adequately enforce constitutional protections. It is important that we allow it to do so.