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APART FROM THE CROWD: FLORIDA'S NEW PRISON RELEASE PROGRAM

MARK DYKSTRA

ON MARCH 20, 1986, the number of inmates in Florida's state prisons exceeded 98% capacity.¹ Under a 1983 statute, once the governor verifies that the inmate population exceeds 98%, a state of emergency must be declared and prisoners must be released until the prison population is at 97% capacity.² Due to a slow verification process, legislative wrangling, and the passage of new procedural laws, state prison inmates were not released until June 3, 1986, under a new alternative program in the emergency release statute. Some 500 prisoners were released, but a state of emergency was never declared.³

In the 1986 Regular Session, legislators fought bitterly but eventually passed legislation which increased to 99% the prison capacity level triggering mandatory inmate release, and they created a new program to supervise those released.⁴ Governor Graham's awkward position of opposing early release⁵ while trying to stay within

1. Letter and accompanying report from Louie L. Wainwright, Secretary, Florida Department of Corrections, to Governor Bob Graham (Mar. 20, 1986) (on file at Fla. S. Comm. on Correct., Probat. & Parole) [hereinafter cited as Wainwright letter of Mar. 20]. Ninety-eight percent of capacity as of March 20, 1986, was 29,133 prisoners. *Id.* Capacity was measured by "system maximum capacity" as determined in a court order; it was roughly the total design capacity minus certain facilities with that figure increased by one-third. *Costello v. Wainwright*, No. 72-109-Civ-J-14 (M.D. Fla. Oct. 23, 1979) (overcrowding settlement agreement).

2. FLA. STAT. § 944.598(3) (1985). First, sentences of inmates eligible for gain time are reduced up to 30 days. If after 15 days the population still exceeds 98% of capacity, the secretary of corrections and the Parole and Probation Commission shall authorize the release of other inmates. *Id.*

3. A state of emergency was avoided only because it was never declared. The inmate population grew to 29,834 by June 3, 1986—over the 29,731 level of March 20, 1986. But the Department of Corrections (DOC) found almost 200 "crisis beds" so that, technically, 100% capacity was never reached. *Graham signs inmate-release bill*, Tallahassee Democrat, June 3, 1986, at 1A, col. 3. An inmate population level less than 100% avoids a federal court action against the state under *Costello*. Under the statute, a state of emergency might have in fact existed.

4. Ch. 86-46, 1986 Fla. Laws 87 (amending FLA. STAT. § 944.598 (1985)). Supervised community release is a form of probation made available to certain nonviolent offenders serving the last 90 days of their sentences. Interview with Leonard Flynn, correctional officer, Florida Department of Corrections (June 18, 1986) (notes on file, *Florida State University Law Review*) [hereinafter cited as Flynn interview].

5. Letter from Governor Bob Graham to Senator Harry Johnston (Mar. 12, 1986) (on file, Office of the Governor).

the constitutionally defined limits on prison overcrowding⁶ gave many legislators the opportunity to urge prison reform and introduce bills providing for death warrants which do not expire.⁷ Additionally, bills reducing gain-time allowances for prison inmates were introduced.⁸ The surpassing of the 98% prison capacity limit was never verified by Governor Graham, though the legislative process took ten weeks.⁹ The state prison system during this time almost reached 100% capacity, a level violative of federal law.¹⁰ Indeed, it appears that the new 99% cap and the supervised community release program will be tested almost immediately, as the prison population is rising faster now than ever before.¹¹ The possible release of prisoners from the state prison system is but one symptom of a larger problem. Prison overcrowding and related medical, food, and sanitation issues have been the subject of continued federal litigation and legislative debate in Florida for more than a decade.¹² In 1986, the legislature increased appropriations for state prison construction,¹³ approved higher county jail population capacities,¹⁴ allowed for "double-bunking" in county jails,¹⁵ and created a medical authority for state prisons.¹⁶ In this Comment, the author examines the scope of the prison problems in Florida, analyzes the effect of past litigation and legislation, and evaluates the results of legislative action in 1986.

6. *Costello v. Wainwright*, No. 72-109-Civ-J-14 (M.D. Fla. Oct. 23, 1979) (overcrowding settlement agreement).

7. Fla. HB 227 (1986).

8. Fla. HB 130 (1986).

9. *Graham signs inmate-release bill*, Tallahassee Democrat, June 3, 1986, at 1A, col. 3.

10. *See supra* note 3.

11. *Crackdowns Crowd Prisons*, Tallahassee Democrat, July 30, 1986, at 1A, col. 3.

12. *Ancata v. Prison Health Servs.*, 769 F.2d 700 (11th Cir. 1985); *Arias v. Wainwright*, TCA 79-0792 (N.D. Fla. 1979); *Mitchell v. Utreiner*, 421 F. Supp. 886 (N.D. Fla. 1976); *Costello v. Wainwright*, 397 F. Supp. 20 (M.D. Fla. 1975), *modified*, 525 F. 2d 1239 (5th Cir. 1976), *reh'g granted*, 528 F.2d 1381 (5th Cir. 1976), *vacated*, 539 F.2d 547 (5th Cir. 1976), *rev'd*, 430 U.S. 325 (1977), *on remand*, 553 F.2d 506 (5th Cir. 1977); *Carson v. Miller*, 370 So. 2d 10 (Fla. 1979); Correctional Reform Act of 1983, ch. 83-131, 1983 Fla. Laws 435 (codified at FLA. STAT. § 944.598 (1985)).

13. Ch. 86-167, 1986 Fla. Laws 121.

14. Ch. 86-80, § 1, 1986 Fla. Laws 3 (amending FLA. STAT. § 951.23 (1985)).

15. Ch. 86-235, § 1, 1986 Fla. Laws 337, 342 (amending FLA. STAT. § 951.23 (1985)).

16. Ch. 86-183, § 18, 1986 Fla. Laws 126, 128.

I. THE OVERCROWDING PROBLEM

Statistics on prison populations indicate an unprecedented growth. The nationwide incarceration rate¹⁷ has increased more rapidly in the last fifteen years than at any time on record.¹⁸ From 1971 to 1983, the nation's incarceration rate increased from 96.4 to 179 per 100,000 people, a dramatic 86% increase.¹⁹ The actual inmate population for this period more than doubled, from 198,061 in 1971 to 419,820 in 1983.²⁰ The southern region of the country has had the greatest increase in inmates. The 1971 incarceration rate in the South of 123.9 per 100,000—well above the national average—nearly doubled to 225 per 100,000 by 1983.²¹

A. *How Florida Stacks Up*

Florida's incarceration rate, traditionally one of the nation's highest,²² nearly doubled from 135.8 per 100,000 residents in 1971 to 255 per 100,000 residents in 1985.²³ Florida's actual inmate population grew by approximately 110% over the last decade. As of 1983, Florida had more than 29,000 inmates in its state system—approximately seven and one-half percent of the nation's total prison population.²⁴

Analysts have theorized about the reasons for the dramatic increase in the number of inmates in the country's prisons.

Speculation about the causes of the rapid surge in prison population in the early seventies provided explanations ranging from the maturing baby boom to the economic dislocations of inflation and unemployment. Sunbelt states pointed to the economic development of the 1970s with its attendant growth in population and infrastructure. . . . Experienced observers pointed to tougher attitudes among criminal justice practitioners: Judges, they said,

17. Calculated "as 100,000 times the ratio of inmates . . . to the Bureau of the Census estimate of civilian population for July 1 of the corresponding year." NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, AMERICAN PRISONS AND JAILS, VOL. II: POPULATION TRENDS AND PROJECTIONS 11 (1980).

18. The national prison statistics are derived from a mail survey conducted by the Bureau of Census for the Bureau of Justice Statistics, which has been conducted since 1926. *Id.* at 10.

19. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 648 (1984) [hereinafter cited as 1984 SOURCEBOOK].

20. *Id.* at 647.

21. *Id.* at 648.

22. *Id.*

23. FLORIDA DEP'T OF CORRECTIONS, ANNUAL REPORT 51 (1985).

24. See 1984 SOURCEBOOK, *supra* note 19, at 650-51 (based on 1982 data).

were handing out longer sentences and more of them; prosecutors were striking harder bargains; offenders were committing and being arrested for more serious crimes which carried higher penalties; parole boards were granting releases more cautiously and returning technical violators more quickly.²⁵

Florida's rapid population growth,²⁶ accelerated by the arrival of 130,000 Cuban refugees in 1980²⁷—many of whom were previously convicted criminals²⁸—and the illicit drug trade in South Florida²⁹ provide some explanation for the increased number of Florida inmates.

State prison systems nationwide have been strained because of the inmate increase. Eight states,³⁰ including Florida, have had their prison systems declared unconstitutional because of overcrowding.³¹ In 1978, two-thirds of the nation's state prisoners had less than the federally suggested sixty square feet of individual cell space,³² and even worse, 44% lived in high-density, multiple-occupancy units.³³ Twenty-two states, including Florida, had a substantial number of inmates living in units shared by fifty or more prisoners.³⁴

25. NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, AMERICAN PRISONS AND JAILS, VOL. I: SUMMARY FINDINGS AND POLICY IMPLICATIONS OF A NATIONAL SURVEY 23 (1980) [hereinafter cited as AMERICAN PRISONS I]. The number of reported violent crimes rose 47.3% from 1969 to 1974. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 11 (1974).

26. Florida's population increased by 12.6% from 1980 to 1984. 1985 FLORIDA STATISTICAL ABSTRACT 3 (A. Shoemyen ed.).

27. Department of State, Press Release No. 192 (May 25, 1983).

28. *Id.* See Leich, *Contemporary Practice of the United States Relating to International Law*, 77 AM. J. INT'L L. 875 (1983).

29. See, e.g., *Impact of the South Florida Task Force on Drug Interdiction in the Gulf Coast Area: Hearing Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 4-5 (1983) (statement of Sen. Hawkins); *South Florida Law Enforcement Conference: Hearing Before the House of Rep. Select Comm. on Narcotics Abuse and Control*, 98th Cong., 2d Sess. 2 (1984) (statement of Rep. Wilson).

30. Texas, Florida, Mississippi, Tennessee, Alabama, Oklahoma, Michigan, and Rhode Island. See AMERICAN PRISONS I, *supra* note 25, at 33-34.

31. U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

32. NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, AMERICAN PRISONS AND JAILS, VOL. III: CONDITIONS AND COSTS OF CONFINEMENT 60-62 (1980). The study defined density as high (less than 60 square feet of cell floor space per inmate), medium (60 to 79 square feet), and low (80 square feet or more). *Id.* at 59. Sixty square feet was considered the minimum allowable standard. *Id.* at 40.

33. *Id.* at 70-71. The study defined crowded as less than 60 square feet of floor space per inmate. *Id.*

34. *Id.* at 75-76. Fifty inmates per high-density unit constituted extreme crowding.

To alleviate crowding, the Florida Legislature has increased funding for new prison construction and operating expenses. Between 1972 and 1985, annual appropriations for the Florida prison system grew from approximately \$36 million to approximately \$322 million.³⁵ Providing new beds has cost the state approximately \$250 million over this fourteen-year period.³⁶ In 1986, the Florida Legislature appropriated \$33 million for new prison facilities.³⁷ However, partly because of previously contracted prison closures,³⁸ and partly because of the diversion of funds to various parole programs,³⁹ the actual number of prison beds in Florida now stands at approximately 30,000, triple the 1972 total. In late 1985, Florida Department of Corrections (DOC) Secretary Louie L. Wainwright noted: "In the event of an inmate population surge in the future, [we] . . . could again face a serious overcrowding situation."⁴⁰

The Florida Legislature has relied heavily on the federal guidelines established in *Costello v. Wainwright*.⁴¹ The 1979 *Costello* settlement agreement marked the culmination of eight years of litigation by prisoners seeking to force state compliance with federal court orders to reduce prison crowding.⁴² It has become the framework for Florida correctional reform.

B. *The Inside Issues*

Prior to the recent rise in prison inmate populations, courts followed a hands-off policy with respect to prisoner rights, traditionally intervening in prison matters only to interpret statutes or to regulate administrative details.⁴³ The reasons for this judicial ab-

35. FLORIDA DEP'T OF CORRECTIONS, *supra* note 23, at 1 (statement by Sec. Wainwright).

36. Florida Dep't of Corrections, estimate of legislative appropriations for new prison beds since 1971-72 (n.d.) (on file at Department).

37. Telephone interview with Cynthia Burt, Staff Analyst, Senate Committee on Appropriations (Aug. 5, 1986) (notes on file, *Florida State University Law Review*) [hereinafter cited as Burt interview].

38. *Costello v. Wainwright*, No. 72-109-Civ-J-14 (M.D. Fla. Oct. 23, 1979) (overcrowding settlement agreement). The state agreed to a reduction of 1,426 prison beds. *Id.*

39. See Correctional Reform Act of 1983, ch. 83-131, § 13, 1983 Fla. Laws 435, 447 (codified at FLA. STAT. § 948.001 (1985)).

40. FLORIDA DEP'T OF CORRECTIONS, *supra* note 23, at 1.

41. No. 72-109-Civ-J-14 (M.D. Fla. Oct. 23, 1979) (overcrowding settlement agreement).

42. *Id.*

43. See Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963) [hereinafter cited as *Beyond the Ken*]; see also Gottlieb, *The Legacy of Wolfish and Chapman: Some Thoughts About "Big Prison Case" Litigation in the 1980s*, in PRISONERS AND THE LAW 2-3 (1985); Comment,

stention were largely constitutional. Separation of powers questions arose with respect to the executive branch's administration of prisons. Moreover, the federal courts, adhering to the concept of federalism, cautiously handled state matters.⁴⁴ Generally, courts would tread into the field of penology only if the prisoner's claim outweighed the court's self-restraining policies.⁴⁵ Forms of actions brought by prisoners—habeas corpus, mandamus, and statutory and common law tort claims—were restrictive procedurally, making access to the courts difficult for inmates.⁴⁶

In the 1960's, the posture of the courts changed. Section 1983 of the Civil Rights Act⁴⁷ emerged as an effective remedy and the application of the eighth amendment to the states through the due process clause of the fourteenth amendment⁴⁸ provided a vehicle for prisoners' claims. Indeed, as the number of inmates increased, so did prison litigation.⁴⁹ The conclusion that overcrowding was a negative influence on prison life was "widely accepted."⁵⁰ Instances of physical aggression, the danger of epidemic,⁵¹ and the threat of prison riot⁵² were traced directly to overcrowding. Furthermore, evidence suggested that overcrowding in pretrial detention centers might prejudice a defendant at trial.⁵³

The eighth amendment's cruel and unusual punishment clause⁵⁴ recently has become applicable to crowded prison conditions. Dur-

The Role of the Eighth Amendment in Prison Reform, 38 U. CHI. L. REV. 647 (1971) [hereinafter cited as *The Role of the Eighth Amendment*].

44. See, e.g., *Prieser v. Rodriguez*, 411 U.S. 475 (1973); *United States v. Marchese*, 341 F.2d 782, 789 (9th Cir. 1965).

45. See Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971).

46. See Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. C.R.-C.L. L. REV. 227 (1970); Weintraub, *Development of Scope of Review in Judicial Review of Administrative Action: Mandamus and Review of Discretion*, 33 FORDHAM L. REV. 359 (1965); see also *The Role of the Eighth Amendment*, *supra* note 43, at 655.

47. 42 U.S.C. § 1983 (1982). See *Monroe v. Pape*, 365 U.S. 167 (1961); Gottlieb, *supra* note 43, at 2, 4-5.

48. U.S. CONST. amend. XIV, § 1 provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law"

49. In 1981, more than 8,000 cases involving conditions of prison confinement were pending. *Rhodes v. Chapman*, 452 U.S. 337, 354 n.2 (1981) (Brennan, J., concurring).

50. NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *THE EFFECT OF PRISON CROWDING ON INMATE BEHAVIOR* 2 (1980).

51. *Id.*; McKay, *Prison Overcrowding: The Threat of the 1980's*, in PRISONERS AND THE LAW 6-3 (1985).

52. E.g., *Costello v. Wainwright*, 397 F. Supp. 20, 27 (M.D. Fla. 1975).

53. Cf. Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641 (1964).

54. U.S. CONST. amend. VIII. For a concise history of the cruel and unusual punishment clause, see generally Brenner, *The Parameters of Cruelty: Application of Estelle v. Gamble*

ing the nineteenth century the clause was interpreted as prohibiting only barbarous or torturous acts.⁵⁵ In this century, however, there has been a movement away from the physical brutality requirement. In a 1910 case, *Weems v. United States*,⁵⁶ the Supreme Court applied the prohibition to extreme punishment for alleged falsification of payroll accounts,⁵⁷ noting that "[t]he clause . . . is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."⁵⁸ In 1958, in *Trop v. Dulles*,⁵⁹ the Court held unconstitutional a federal law requiring loss of American citizenship as the penalty for wartime desertion.⁶⁰ Chief Justice Warren wrote, "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."⁶¹

Despite movement toward a de-emphasis of the physical brutality requirement for application of the eighth amendment, until recently neither prison guards' conduct nor the physical effect of prison conditions has been subject to constitutional scrutiny. Corporal punishment imposed on an inmate must have been of such character as to "shock [the] general conscience" for courts to intervene.⁶² In 1968, six years after the eighth amendment was made applicable to the states by means of the incorporation doctrine,⁶³ the nonphysical aspects of the cruel and unusual punishment clause were questioned for the first time in a correctional context. In *Jackson v. Bishop*,⁶⁴ the United States Court of Appeals for the

to Sentences Imposed Upon the Physically Fragile Offender, 12 AM. J. CRIM. LAW 279 (1984).

55. See, e.g., *Hobbs v. State*, 32 N.E. 1019 (Ind. 1893).

56. 217 U.S. 349 (1910).

57. Weems, a disbursing officer employed by the United States Government in the Philippine Islands, was sentenced to 15 years of hard labor in shackles. He lost his right to vote, hold office, administer property, obtain retirement benefits, exert parental or marital authority, and was placed on lifetime probation. He allegedly misdirected 612 pesos. *Id.* at 366.

58. *Weems*, 217 U.S. at 378.

59. 356 U.S. 86, 100 (1958).

60. Trop, an Army private stationed in French Morocco in 1944, was convicted under § 401(g) of the Nationality Act of 1940. He left the stockade for one day, and was returning when arrested. *Id.* at 87-88.

61. *Id.* at 100.

62. See, e.g., *Roberts v. Pegelow*, 313 F.2d 548 (4th Cir. 1963); *Queen v. South Carolina Dep't of Corrections*, 307 F. Supp. 841 (D.S.C. 1970); *Roberts v. Peppersack*, 256 F. Supp. 415 (D. Md. 1966); *Rauk v. Schooley*, 211 F. Supp. 921 (D. Colo. 1962); *Blythe v. Ellis*, 194 F. Supp. 139 (S.D. Tex. 1961). See generally *Beyond the Ken*, *supra* note 43.

63. *Robinson v. California*, 370 U.S. 660 (1962).

64. 404 F.2d 571 (8th Cir. 1968). Debate over the purposes of incarceration has involved four main principles: deterrence, incapacitation, retribution, and rehabilitation. For an outline of these positions, see S. RUBIN, *THE LAW OF CRIMINAL CORRECTIONS* 735-64 (2d ed.

Eighth Circuit held use of the whip was unconstitutional, finding it to be cruel and unusual punishment without rehabilitative potential. More significantly, the prisoners brought a class action; acceptance by the courts undermined the notion that only named inmates could sue. This concession by the courts greatly expanded the scope of judicial review to include several newly relevant constitutionally based prisoner claims, such as general prison conditions, lack of rehabilitative facilities, and overcrowding.⁶⁵

Once the totality of conditions⁶⁶ in prisons came under federal jurisdiction as constitutional claims, there was an explosion of prisoner litigation.⁶⁷ Courts began examining a wide range of issues, including

the quality of food, clothing, ventilation, fire hazards, noise, illumination, sanitation, protection from violence, and medical care, . . . the provision of physical recreation, the extent of crowding, the adequacy of staffing and classification, and the existence of education or job opportunities. In short, courts attempted to examine the total penal environment.⁶⁸

An ad hoc approach to testing for unconstitutional conditions and fashioning remedies was necessary as prison litigation created new legal doctrine.⁶⁹ Indeed, as the litigation grew and judges found fresh and imaginative ways of invoking the eighth amendment, the lower federal courts followed a controversial policy which "seemed to be the very antithesis of the hands-off doctrine."⁷⁰

For its part, the Supreme Court applied the cruel and unusual punishment clause against capital punishment statutes,⁷¹ inadequate or indifferent medical treatment,⁷² and an isolation sentence

1973). For an analysis of how these purposes are affecting Florida's correctional system, see L. Polivka, Corrections Issue Paper 1 (1986) (unpublished manuscript) (on file with Office of the Governor) [hereinafter cited as Corrections Paper].

65. See *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); see also *The Role of the Eighth Amendment*, *supra* note 43, at 658.

66. *Id.* See *Gottlieb*, *supra* note 43, at 2-5 to 2-6, 2-17 to 2-19. "Totality of conditions" refers to a broad range of prison conditions. *Id.*

67. *Rhodes v. Chapman*, 452 U.S. 337, 354 n.2 (1981) (Brennan, J., concurring).

68. *Gottlieb*, *supra* note 43, at 2-5.

69. *Id.* at 2-6.

70. *Id.*

71. *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating death penalty laws for being arbitrary and capricious in violation of the eighth amendment). *But see Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding death penalty laws with guided discretion sentencing procedures).

72. *Estelle v. Gamble*, 429 U.S. 97 (1976).

longer than thirty days.⁷³ Nevertheless, few of the big prison cases reached the Supreme Court during the 1970's,⁷⁴ and those that did were rebuffed by the due deference principle and a narrow reading of prisoners' rights.⁷⁵ Not until the end of the decade was the question of prison reform presented to the Supreme Court.

In *Bell v. Wolfish*,⁷⁶ the Court upheld the constitutionality of double-bunking,⁷⁷ the publisher-only rule,⁷⁸ body cavity searches, a ban on receiving packages, and a room search rule in a New York pretrial detention center. The Court held that "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment."⁷⁹ Later, in *Rhodes v. Chapman*,⁸⁰ the Court affirmed its position on double-bunking. While conditions could still be "restrictive and even harsh," the *Rhodes* standard was whether prison conditions "deprive[d] inmates of the minimal civilized measure of life's necessities" when judged by "contemporary standard[s] of decency."⁸¹

Faced with a Supreme Court standard reminiscent of the hands-off doctrine and an escalation of litigation from the prisons, federal courts have disagreed on the scope of their review and the forms of relief available. "To a remarkable degree, *Wolfish* and *Chapman* only have intensified the confusion in the lower courts."⁸² Some courts have moved away from the totality of conditions approach and focused on "core conditions"⁸³ when considering a constitutional claim against prison conditions. While state prison systems are still subject to federal court orders to comply with certain standards, the remedies applied today are less intrusive on the state's

73. *Hutto v. Finney*, 437 U.S. 678 (1978).

74. 2 PRACTICING LAW INST., PRISONER'S RIGHTS 643 (1979).

75. See, e.g., *Procunier v. Martinez*, 416 U.S. 396 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974); see Gottlieb, *supra* note 43, at 2-8 to 2-9.

76. 441 U.S. 520 (1979).

77. "Of the 389 [single] residential rooms at the [Metropolitan Correctional Center in New York], 121 had been 'designated' for 'double-bunking' [placing two inmates in a single room]." *Id.* at 526 n.4.

78. The rule prohibited "the receipt of all books and magazines mailed from outside the [pretrial detention center] except those sent directly from a publisher or a book club." *Id.* at 528.

79. *Id.* at 539.

80. 452 U.S. 337 (1981).

81. *Id.* at 347.

82. Gottlieb, *supra* note 43, at 2-24.

83. *Id.* at 2-17 to -19. Core conditions are usually a select group of specific conditions such as "adequate food, clothing, shelter, sanitation, medical care and personal safety." *Id.* at 2-18. See, e.g., *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982).

operation of its prisons and focus on more specific constitutional violations.⁸⁴ Recently, in *Whitley v. Albers*,⁸⁵ the shooting of an inmate in the knee by a guard during a prison riot was upheld as constitutional because it was not "wanton or unnecessary," given the situation. However, *Whitley* probably will have little effect on prison condition litigation. *Chapman* and *Wolfish* concerned new prisons with relatively good conditions. Several other cases have been denied review.⁸⁶ "Therefore taking only the most favorable pro-institution cases, the Supreme Court has been able to issue rhetorical flourishes that question judicial intervention, yet not thwart that intervention in America's worst institutions."⁸⁷ For now, the more subjective constitutional interpretations by the lower federal courts will probably continue to dominate this area.

C. Costello v. Wainwright

*Costello v. Wainwright*⁸⁸ is Florida's leading prison case. In the fourteen years since the litigation began, Florida's state prison system has been ruled unconstitutionally overcrowded, federal courts have imposed mandatory guidelines, settlement agreements have been reached, and numerous legislative programs have been initiated. However, the two major issues in the case—overcrowding and the adequacy of medical treatment and facilities—have yet to be resolved, and thus threaten to prolong further the legal process.⁸⁹

Costello has had a significant impact on Florida legislation. Since *Bell* and *Wolfish*, federal courts in Florida have adopted a policy of judicial restraint, leaving legislators to implement new

84. See Gottlieb, *supra* note 43, at 2-21 to 2-24. This has been especially true in Florida. Since the beginning of the 1980's, judicial relief for inmates has been largely based on narrow violations of prior settlement agreements. Telephone interview with Ray Wilson, Staff Director, Senate Committee on Corrections, Probation and Parole (Aug. 5, 1986).

85. 106 S. Ct. 1078, 1087 (1986).

86. *E.g.*, *Smith v. Fairman*, 690 F.2d 122 (7th Cir. 1982), *cert. denied*, 461 U.S. 946 (1983); *Newman v. Alabama*, 683 F.2d 1312 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), *modified*, 688 F.2d 266, *cert. denied*, 460 U.S. 1042 (1983); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

87. Gottlieb, *supra* note 43, at 2-25.

88. 397 F. Supp. 20 (M.D. Fla. 1975), *modified*, 525 F.2d 1239 (5th Cir. 1976), *reh'g granted*, 528 F.2d 1381 (1976), *vacated*, 539 F.2d 547 (5th Cir. 1976), *rev'd*, 430 U.S. 325 (1977), *on remand*, 553 F.2d 506 (5th Cir. 1977).

89. Interview with Ray Wilson, Staff Director, Senate Committee on Corrections, Probation and Parole (July 10, 1986) (notes on file, *Florida State University Law Review*) [hereinafter cited as Wilson interview].

laws based on settlement agreements. This has forced the legislature to remedy Florida's corrections problems.

Separate complaints were filed on February 9, 1972, by inmates Michael V. Costello and Roberto K. Celestineo, alleging eighth and fourteenth amendment violations in Florida prisons due to inadequate medical treatment and overcrowding.⁹⁰ The cases were consolidated and the plaintiffs amended their complaint to request a court-ordered reduction of the prison population, provision of necessary health care, and an injunction preventing the state from providing medical care at a level below the constitutional requirements.⁹¹

The case was tried in district court in 1975.⁹² The court adopted the findings of a court-established commission⁹³ which had found "gross systematic deficiencies in the delivery of adequate medical care to the inmates."⁹⁴ Furthermore, the prisoners and the state agreed that "severe overcrowding may be injurious to the physical and mental health" of inmates and should be eliminated.⁹⁵ Based on these findings, the court issued a preliminary injunction reducing the prison population to "emergency" capacity within one year and "normal" capacity by the end of 1976.⁹⁶ The court noted the overcrowding crisis, stating that the Secretary of Corrections,⁹⁷ had closed prisons to new inmates three times due to overcrowding, and thereafter was under strict orders from Governor Reubin Askew not to refuse new inmates.⁹⁸ The court concluded: "The

90. *Costello*, 397 F. Supp. at 21.

91. *Id.* at 21-22.

92. *Id.* at 20.

93. The commission was directed by Kenneth Babcock, a physician with advanced training in hospital administration. *Id.* at 23 n.1.

94. *Id.* at 34.

95. *Id.* at 24.

96. The court adopted these definitions:

[Emergency capacity] represents the population beyond which the institution must be considered critically, and quite probably, dangerously overcrowded. It includes every bed in the institution which it is judged can safely be occupied at times of peak populations either due to intermittent and unpredictable population surges or to emergency and temporary circumstances within the institution or elsewhere in the Division'. 'Normal capacity' is . . . that population which an institution can properly accommodate on an average daily basis. It represents that population which best utilizes the resources currently available. It should include some vacant beds, to accommodate population surges, and to allow for different classifications of inmates within institutional totals.

Id. at 34 & n.10 (citations omitted).

97. Louie L. Wainwright.

98. *Costello*, 397 F. Supp. at 34.

overwhelming evidence points toward blatant deprivations of the plaintiffs' constitutional rights, which the State of Florida has been unwilling to rectify."⁹⁹

Affirming the district court, the United States Court of Appeals for the Fifth Circuit recognized the state's time constraints and modified the injunction, moving the target date for normal capacity to mid-1977.¹⁰⁰ However, a rehearing en banc was granted, and the injunction was vacated.¹⁰¹ The Supreme Court reversed the Fifth Circuit and reinstated the inmate release time schedule, holding that Florida's prison system was beneath constitutionally mandated limits.¹⁰²

1. Health Care

As part of the *Costello* litigation, medical treatment for inmates was studied. In 1975, Joseph Alderete,¹⁰³ a member of the Babcock Commission, reported that, depending on the institution, health care had improved in varying degrees at Florida's prisons. Overcrowding, however, neutralized these gains and the "system as a whole was still below minimally adequate health care."¹⁰⁴ A second survey was conducted in 1976 and an update, the Hastings Report, was filed in 1980.¹⁰⁵ The researchers reported that prison health care had improved substantially since 1976, but that the staff was still not fully competent to handle serious medical problems.¹⁰⁶ The parties entered into a binding Health Care Settlement Agreement in 1981. The Agreement has been the basis for all subsequent litigation regarding medical treatment.¹⁰⁷

The 1981 Agreement was approved shortly after the Supreme Court's decisions in *Bell* and *Wolfish*. Federal judges in Florida perhaps were taking their cue from these decisions, leaving the dispute in the hands of decision-makers closest to the problem—that is, the legislature, state prison officials, and the inmates. Since the 1981 Agreement, the court has been called upon to resolve differ-

99. *Id.*

100. *Costello*, 525 F.2d 1239 (5th Cir. 1976).

101. *Costello*, 539 F.2d 547 (5th Cir. 1976).

102. *Costello*, 430 U.S. 325 (1977).

103. Hospital director and chief medical officer for the federal penitentiary in Atlanta, Ga.

104. *Costello*, No. 72-109-Civ-J-14, slip op. at 10 (M.D. Fla. Aug. 22, 1985) (opinion and order) (on file, *Florida State University Law Review*).

105. *Id.* at 10.

106. *Id.*

107. *Id.*

ences,¹⁰⁸ but has based its orders on the Agreement and has recently appointed a special master¹⁰⁹ and a monitor¹¹⁰ to handle issues presented in the case. Indeed, the 1981 agreement appears to have revived use of the hands-off doctrine by the federal courts in Florida.¹¹¹

The 1981 Agreement called for the creation of health care management positions, the establishment of Health Services and Mental Health Services plans, additional funding, and a three-year abatement of health care litigation to give the Department of Corrections time to implement the new policies.¹¹²

In 1983, the parties agreed the expert medical survey should include all major Florida prisons and should examine the quality of general medical, surgical, gynecological, dental, optical, pharmaceutical, dietary, and sanitary services delivered to the inmates. The examination should be based on the minimal standards of "care, skill and treatment recognized as reasonable and prudent by physicians under similar conditions."¹¹³ Filed in 1985, the survey showed that serious problems remained.¹¹⁴ It also showed that substandard medical care at the Department of Corrections' Reception and Medical Center at Lake Butler had contributed to the deaths of seventeen inmates.¹¹⁵ In August, 1985, the court appointed the special master and monitor to oversee medical treatment and continued to abate litigation. Prison medical treatment will be the focus of debate for several years.¹¹⁶

108. See, e.g., *Costello*, No. 72-109-Civ-J-14 (M.D. Fla. June 10, 1986) (status conference).

109. Joseph R. Julin, former Dean of Law at the University of Florida. See Fla. S., Comm. on Correct., Probation, & Parole, transcript of hearing at 19 (Apr. 8, 1986) (transcript on file with committee) (discussion on prison capacity and health care) [hereinafter cited as Transcript of Apr. 8].

110. Robert Cullen, Esq., Atlanta, Ga.

111. See generally Gottlieb, *supra* note 43.

112. *Costello*, No. 72-109-Civ-J-14 (M.D. Fla. July 20, 1981) (1981 health care settlement agreement).

113. *Costello*, No. 72-109-Civ-J-14, slip op. at 3 (M.D. Fla. Aug. 22, 1985) (opinion and order).

114. *Id.* at 1.

115. *Id.* at 3.

116. See Wilson interview, *supra* note 89.

2. Overcrowding

The overcrowding of Florida prisons was studied by the DOC¹¹⁷ in 1975, subsequent to the *Costello* court's preliminary injunction setting guidelines for reducing population levels. The studies established design capacities and maximum capacities for each prison and a system maximum capacity for the statewide system.¹¹⁸

In 1980, the 1979 Settlement Agreement on overcrowding was approved.¹¹⁹ Since the *Costello* litigation had begun, prison populations had risen from 10,000 to 20,000, and \$141 million had been appropriated by the legislature for new prison construction.¹²⁰ The Agreement focused, not on possible constitutional violations due to overcrowding, but on the immensity of the problem and on the state's administrative difficulties in operating such an overburdened system. The Agreement used the DOC classifications and provided for annual filings of design, maximum, and system

117. *Costello*, No. 72-109-Civ-J-14 (M.D. Fla. Oct. 11, 1980) (order approving overcrowding settlement agreement).

118. *Id.* A design capacity is the population an institution can maintain within certain cell-size and prisoner-per-cell specifications. Maximum capacity is approximately 133% of system capacity combined with tighter specifications. System maximum capacity is 133% of the aggregate design capacities at any given time. The outlined specifications are:

1. "Design Capacity:"

a. Rooms and Cells, 40 square feet to 90 square feet: one inmate per room or cell.

b. Dormitories and rooms exceeding 90 square feet: one inmate per 55 square feet.

c. Confinement: except to the extent that separate confinement cells have been constructed, an amount of rooms or cells equal to 3% of total Design Capacity shall be deducted from Design Capacity and set aside for confinement purposes.

2. "Maximum Capacity:"

a. Rooms and Cells:

(1) 40 square feet to 60 square feet: one inmate per room or cell.

(2) Over 60 square feet to 90 square feet: two inmates per room or cell, except one inmate per room or cell at Florida State Prison or other Maximum Security Institutions or facilities which may be constructed.

b. Dormitories and rooms exceeding 90 square feet: One inmate per 37.5 square feet, with double-bunking generally along the outer walls of dormitories.

c. Confinement: except to the extent that separate confinement cells have been constructed, an amount of rooms or cells equal to 3% of total Maximum Capacity shall not be available for Maximum Capacity, and shall be set aside for confinement purposes.

3. "Mobile Homes:" Double-wide mobile homes, to the extent used, are assigned 12 inmates at Design and Maximum Capacity. Mobile homes are used as honor dormitories as a reward to well behaved inmates.

Id.

119. *Id.* (order approving settlement agreement).

120. *Id.*

maximum capacities on July 1; changes from the previous year; and actual July 1 population figures.¹²¹ An additional term mandated the closure of certain aging facilities by July 1, 1985, reducing bedspace by 1,426 beds. Perhaps most importantly, the Agreement also dismissed the plaintiffs' eighth amendment claims, exonerating the state of any constitutional violations.

The 1979 Agreement marked the point in the *Costello* overcrowding litigation when the federal courts began to move toward a policy of judicial restraint. The 1979 Agreement has served as the basis for all recent *Costello* litigation and has been the framework within which Florida legislators have toiled. Indeed, the legislature in 1986 based its new inmate release program on concepts developed in that Agreement.¹²² The federal courts, meanwhile, have intervened only during emergencies, and then only to assert the terms of the 1979 Agreement.¹²³

Since 1980, overcrowding problems have resurfaced due, in part, to unexpectedly high admission levels.¹²⁴ In a 1982 status conference held to inquire into the inmates' allegations of overcrowding, the DOC "revealed that nineteen of the State's twenty-five major penal institutions were operating at levels in excess of their respective Maximum Capacities."¹²⁵ Temporary plywood housing units, containing 1,640 "crisis" beds, were proposed by DOC to manage the inmate population surge. Despite the court finding that housing inmates in such units was cruel and unusual punishment, the state's action was upheld because it was only temporary.¹²⁶ The state was ordered to be in compliance with the 1979 Agreement by October, 1982, and to remain in compliance. In approving the crisis beds, the court stated:

Further recalcitrance in building adequate permanent facilities to house state prisoners will breed further woes for the defendants. July 1, 1985 is fast approaching and . . . defendants are expected to be in full compliance on that date with the provisions of the

121. *Id.*

122. *See id.* The 99% cap on inmate populations is really 99% of system maximum capacity, or approximately 133% of design capacity.

123. *Costello*, No. 72-109-Civ-J-14 (M.D. Fla. Aug. 22, 1985) (opinion and order).

124. *Id.* at 13.

125. *Id.* (quoting order of July 14, 1982 at 2).

126. *Id.* at 15.

overcrowding settlement agreement relating to "System Maximum Capacity."¹²⁷

Largely due to legislative action in 1983,¹²⁸ prison overcrowding did not present a major problem until 1986. Indeed, no additional prison space was constructed from 1983 through early 1985,¹²⁹ as the inmate population actually declined.¹³⁰

3. *Arias v. Wainwright*

In *Arias v. Wainwright*,¹³¹ a case involving local and county jail conditions, inmates filed an amended complaint in 1979 alleging that the DOC had failed in its statutory duty to promulgate and enforce rules ensuring constitutional conditions in Florida's jails.¹³² The Partial Settlement Agreement¹³³ called for the DOC to conduct semiannual medical inspections and yearly fire-safety inspections and to disclose any rules violations. The plaintiff class reserved the right to continue litigation, if necessary, on the sufficiency of the rules.

Since the Agreement, the inmates have monitored the DOC's compliance through documentary review, correspondence, conferences, and inspections.¹³⁴ The DOC has made more frequent inspections and initiated lawsuits against counties based on substandard conditions.¹³⁵ The Agreement has been extended several times, and now constitutes the final word by the court in the *Arias* litigation.¹³⁶

Like the *Costello* agreements, the 1981 *Arias* Agreement follows a policy of judicial restraint similar to that exhibited by the Su-

127. *Costello*, No. 72-109-Civ-J-14, slip op. at 9 (M.D. Fla. July 14, 1982) (order requiring compliance with overcrowding settlement agreement).

128. See Correctional Reform Act of 1983, 83-131, 1983 Fla. Laws 435 (codified at FLA. STAT. § 944.598 (1985)).

129. Corrections Paper, *supra* note 64, at 11.

130. FLORIDA DEP'T OF CORRECTIONS, *supra* note 23, at 49.

131. TCA 79-0792 (N.D. Fla. 1979).

132. FLA. STAT. § 951.23 (1985).

133. *Arias*, TCA 79-0792 (N.D. Fla. Dec. 21, 1981) (stipulation and agreement of partial settlement).

134. Interview with Jim Peters, Assistant Attorney General, Department of Legal Affairs (Sept. 17, 1986) (notes on file, *Florida State University Law Review*) [hereinafter cited as Peters interview of Sept. 17].

135. Staff of Fla. S. Comm. on Correct., Probat. & Parole, SB 70 (1986) Staff Analysis 1 (rev. Mar. 4, 1986) (on file with committee).

136. *Arias*, TCA 79-0792 (N.D. Fla. Sept. 15, 1986) (order extending 1981 settlement agreement).

preme Court in *Bell* and *Chapman*. By requiring the DOC to enforce jail rules, and by having their compliance monitored by the inmates' counsel,¹³⁷ the court has left the dispute with the parties involved, forcing them to resolve their differences on their own.

Several problems remain. The court has not initiated any new provisions since the original agreement resulting in informal give and take among the parties. For example, poor lighting or unsanitary toilet conditions in the jails will no longer give rise to complaints, as these conditions have been tolerated by the prisoners.¹³⁸ However, the overall problems of jail conditions have not been resolved,¹³⁹ to date, four counties have asked the legislature to help fund new jails.¹⁴⁰ Like *Costello*, the *Arias* litigation threatens to continue for years, with health care and overcrowding again the major issues.¹⁴¹

II. RECENT FLORIDA LEGISLATION

Florida's penal system has been extensively revised by recent legislatures. Overcrowding has led to procedural, administrative, and philosophical changes.¹⁴² Legislative measures in the 1980's have been aimed at keeping offenders out of prison or jail rather than at putting them in.

In 1982, the legislature met in a special session to address problems created by the rapid prison population growth.¹⁴³ During this session, the legislature created an eleven-member Corrections Overcrowding Task Force (COTF) chaired by Governor Bob Graham and Attorney General Jim Smith. The COTF was "charged with the responsibility of analyzing prison overcrowding and formulating solutions."¹⁴⁴ Significantly, "[t]he Task Force's philosophy was that the primary purpose of corrections is punishment ac-

137. *Arias*, TCA 79-0792 (N.D. Fla. Dec. 21, 1981) (settlement agreement).

138. Peters interview of Sept. 17, *supra* note 134.

139. Interview with Jim Peters, Assistant Attorney General, Department of Legal Affairs (Aug. 4, 1986) (notes on file, *Florida State University Law Review*).

140. Lafayette, Madison, Suwanee and Taylor. Staff of Fla. H.R. Comm. on Correct., Probat. & Parole, HB 392 (1986) Staff Analysis 1 (rev. Feb. 5, 1986) (on file with committee).

141. Wilson interview, *supra* note 89. *Arias* is presently a dormat case, yet the plaintiff prison class is anticipated to pursue future litigation. See also Peters interview of Sept. 17, *supra* note 134.

142. See generally Corrections Paper, *supra* note 64.

143. CORRECTIONS OVERCROWDING TASK FORCE, FINAL REPORT & RECOMMENDATIONS 4 (1983).

144. *Id.*

completed in the most cost-effective way by ensuring adequate prison space for dangerous and habitual offenders and developing punitive non-incarcerative sanctions."¹⁴⁵

The COTF recommended fifty-seven changes, several of which were included in the Correctional Reform Act of 1983.¹⁴⁶ The Act provided for the creation of a Community Control Program prescribing alternatives to incarceration for nonviolent offenders, a complete revision of the gain-time formula used to parole inmates, and the establishment of an inmate release mechanism to be activated when the prison population reached 98% of a systemwide cap.¹⁴⁷ Sentencing guidelines based on prior conviction history and the severity of offense was another important COTF recommendation that was adopted by the legislature.¹⁴⁸

The Correctional Reform Act was initially successful. In 1984, 72% of the convicts eligible for incarceration were diverted to new community control programs.¹⁴⁹ Many of these cases were handled by probationary measures, including fines and probation, by treatment in a probationary community facility, by split sentences (prison and probation), by monetary or nonmonetary restitution, and by public service restitution. The remainder were sentenced under "Florida's most ambitious community-based alternative to prison,"¹⁵⁰ a program including intensive probation and surveillance measures such as house arrest. Furthermore, the caseload per supervisor ratio could not exceed 20-to-1. The program was available to members of target groups consisting of probation or parole violators charged with technical or misdemeanor violations and felons who could not be placed on probation because of serious offenses or criminal backgrounds. Primarily because of these community-based alternatives to prison confinement, Florida's prison population decreased throughout 1984.¹⁵¹

145. *Id.*

146. Correctional Reform Act of 1983, ch. 83-131, 1983 Fla. Laws 435 (amending FLA. STAT. chs. 947, 948 (1985)); FLORIDA DEP'T OF CORRECTIONS, CORRECTIONAL COMPASS 5-6 (Aug. 1983); STAFF OF JT. LEGIS. MGT. COMM., DIV. OF LEGIS. LIBRARY SERVICES, FLORIDA LEGISLATURE: 1983 SUMMARY OF GENERAL LEGISLATION 103-09.

147. Remarks of Attorney General Jim Smith at the American Correctional Ass'n Winter Conference (Jan. 18, 1985), reprinted in D. VAN NESS & L. BARNS, CRIMINAL JUSTICE REFORM IN THE 1980's: THE FLORIDA STORY (1985).

148. Correctional Reform Act of 1983, ch. 83-131, § 7, 1983 Fla. Laws 435, 441-42 (codified at FLA. STAT. § 775.075 (1985)).

149. Corrections Paper, *supra* note 64, at 12.

150. *Id.*

151. The population declined from almost 29,000 inmates to an average monthly population of just over 27,500. *Id.* at 11.

A new gain-time computation system was instituted, replacing a system described by the COTF as discriminatory and almost incomprehensible.¹⁵² The gain-time computation allows for virtual day-to-day gain time every month—an inmate now receives ten days a month nondiscretionary basic gain time, plus up to twenty days a month discretionary incentive gain time.¹⁵³ These new measures, applicable to cases decided after July 1, 1978,¹⁵⁴ were designed to encourage inmates to abide by prison rules and constructively use their incarceration time.¹⁵⁵ Since 1983, however, the new system has been perceived as almost too successful. Critics have pointed to an erosion of public confidence in the judicial system, noting that some convicts served as little as half their sentences because of gain-time allowances.¹⁵⁶ Yet, on the whole, the 1983 gain-time program has reduced average sentence length little compared with the pre-1983 parole system.¹⁵⁷

Gain-time allowances were at the heart of the 98% prison capacity inmate release mechanism.¹⁵⁸ This rule, part of the Correctional Reform Act, required the DOC secretary to notify the governor when prison populations reached 98% of the system's maximum capacity set by the 1980 Settlement Agreement.¹⁵⁹ Once the governor has verified the figures, the secretary is to declare a state of emergency to last until the prison population drops to 97% of capacity.¹⁶⁰ As much as thirty days of gain time, in five-day increments, would be credited to eligible inmates. Should the population drop to 97% capacity within fifteen days, prisoners serving the last sixty days of nonmandatory sentences of less than three years would be released every five days. Moreover, after fifteen days, selected target groups¹⁶¹ are to become eligible for "compul-

152. CORRECTIONS OVERCROWDING TASK FORCE, *supra* note 143, at 40.

153. Correctional Reform Act of 1983, ch. 83-131, § 8, 1983 Fla. Laws 435, 442-43 (codified at FLA. STAT. § 944.275 (1985)).

154. *See, e.g.*, Fuller v. Wainwright, 458 So. 2d 1131 (Fla. 4th DCA 1984); *see also* Weaver v. Graham, 450 U.S. 24 (1981) (ex post facto law may not apply to already determined sentence).

155. Staff of Fla. H. R. Comm. on Correct., Probat. & Parole, HB 130 (1986) Staff Analysis 2 (rev. May 5, 1986) (on file with committee) [hereinafter cited as Staff Analysis].

156. *Id.*

157. Corrections Paper, *supra* note 64, at 9.

158. FLA. STAT. § 944.598 (1985).

159. Costello, No. 72-109-Civ-J-14, slip op. at 5 (M.D. Fla. Oct. 11, 1980) (order approving overcrowding settlement agreement).

160. FLA. STAT. § 944.598 (1985).

161. The target groups are:

(a) Any inmate confined in a state correctional facility with a sentence of 3 years or less, unless serving a minimum sentence, who is within the last 6 months prior

sory conditional release."¹⁶² These target groups would not include inmates serving mandatory sentences—those incarcerated for forcible felonies or drug trafficking, or for being habitual felons.¹⁶³ Until the 1986 crisis, the inmate release mechanism had not been used or altered.

The 1983 correctional measures seem to have outlived their effectiveness. Community control, for example, now is viewed by many judges as an alternative to probation but not to incarceration.¹⁶⁴ As for gain-time allowances, there are rumblings of discontent from deterrence-minded legislators concerned about the actual time being served in prison.¹⁶⁵ Also, the inmate release mechanism was short-circuited by the 1986 legislation that placed the trigger at the higher capacity level of 99%.¹⁶⁶ Despite the noticeable 1984 decline in prison populations, largely due to the 1983 Correctional Reform Act, and even though prison populations are again on the rise,¹⁶⁷ only slightly more than half of the general public in Florida now favors rehabilitative alternatives to prison for certain offenders.¹⁶⁸

III. THE LEGISLATURE'S 1986 REGULAR SESSION

During the 1986 Regular Session, correctional reform was again a major issue. Legislation was enacted dealing with the *Costello/Arias* health and crowding problems, including a revision of the 1983 inmate release mechanism¹⁶⁹ and a new prison administration law.¹⁷⁰ Bills relating to death row inmates,¹⁷¹ the 1983 gain-time formula,¹⁷² and appropriations for prison facilities during crowded

to his release; (b) Any inmate confined in a state correctional facility with a sentence of more than 3 years, but less than 8 years, unless serving a mandatory minimum sentence, who is within the last year prior to his release; (c) Any inmate confined in a state correctional facility with a sentence of 8 years or more, unless serving a mandatory minimum sentence, who is within the last 18 months prior to his release.

Id. § 944.598(4).

162. *Id.*

163. *Id.*

164. Corrections Paper, *supra* note 64, at 12.

165. Staff Analysis, *supra* note 155, at 2.

166. Ch. 86-46, § 1, 1986 Fla. Laws 87 (amending FLA. STAT. § 944.598 (1985)).

167. See generally FLORIDA DEP'T OF CORRECTIONS, *supra* note 23; cf. *supra* note 3 (Florida prison inmate population almost reached 100% capacity in 1986).

168. Corrections Paper, *supra* note 64, at 27.

169. Ch. 86-46, § 1, 1986 Fla. Laws 87 (amending FLA. STAT. § 944.598 (1985)).

170. Ch. 86-183, § 2, 1986 Fla. Laws 126 (amending FLA. STAT. § 951.06 (1985)).

171. Fla. HB 227 (1986).

172. Fla. HB 130 (1986).

periods failed.¹⁷³ Generally, the rehabilitative goals embraced by the Correctional Reform Act of 1983¹⁷⁴ conflicted with a growing deterrence movement.¹⁷⁵ However, the most pressing needs of the DOC were addressed. The legislation seems to have tempered support for rehabilitative programs with a desire that inmates serve their sentences. Limiting such intentions were the ever-present *Costello* and *Arias* guidelines, which continued to direct legislative action.

A. State Prison Legislation

As the number of inmates in Florida's prisons increased, the legislature was forced to act in order to abide by the 1980 *Costello* Agreement. During the 1986 Regular Session, several corrections issues were intertwined with legislation addressed to the overcrowding problem, bringing lawmakers into conflict with Governor Graham.

1. Senate Bill 870—Changing the Cap

In April 1985, Governor Graham suggested raising the statutory 98% prison capacity limit to 100%, citing a future shortage of bed-space.¹⁷⁶ The suggestion met with some opposition and no legislative action was taken. Throughout 1985 the inmate population continued to increase. Construction delays caused some new prisons to open behind schedule.¹⁷⁷ By April 1986, the idea of repealing the statute and increasing the cap seemed much more reasonable.

In a letter to Senate President Harry Johnston¹⁷⁸ and House Speaker James Harold Thompson,¹⁷⁹ Governor Graham, noting a lack of federal funding for "an influx of more than 700 inmates who are the responsibility of the federal government," asked that the 98% release mechanism be clarified to exclude federally subsidized inmates or be altered to accommodate them. The Governor

173. Fla. HB 549 (1986).

174. Correctional Reform Act of 1983, ch. 83-131, 1983 Fla. Laws 435 (codified at FLA. STAT. § 944.598 (1985)).

175. See Gottlieb, *supra* note 43, at 2-16.

176. Interview with Ray Wilson, Staff Director, Senate Committee on Corrections, Probation and Parole (June 11, 1986) (notes on file, *Florida State University Law Review*) [hereinafter cited as Wilson interview of June 11].

177. Transcript of April 8, *supra* note 109, at 4.

178. Dem., West Palm Beach, 1974-1986.

179. Dem., Quincy, 1974-1986.

stated that the federal inmates—most of whom were Cuban refugees—should be taken into federal custody or deported. Further, he intended “to exhaust all legal alternatives available to avoid early release of prisoners,” pointing out that his “budget recommendations . . . this year address the need for additional contract beds and quick-construction beds.”¹⁸⁰

The March 20 inmate count showed fifty-two prisoners more than the 98% cap.¹⁸¹ Although releases seemed to be required by law, no immediate action was taken. Broadly interpreting the statute, and noting that the 98% cap had never been used, the Governor’s staff studied the verification procedures and concluded that verification of the prison population would take six to eight weeks and cost approximately \$54,000.¹⁸² Three major questions were to be answered for complete verification: inmate population, usable prison space, and possible alternatives to incarceration. In those six to eight weeks, the inmate population would have reached more than 100% capacity.¹⁸³

Technically, there was no state of emergency because Secretary Wainwright’s totals were not verified. The situation was confusing for some; Senator Curtis Peterson¹⁸⁴ thought the state was in violation of its own law.¹⁸⁵ Florida would have been in violation of federal law—as propounded by the *Costello* Settlement Agreement—if the inmate population reached 100% of system maximum capacity, or approximately 133% of design capacity.¹⁸⁶ Indeed, the 98% cap was intended as an “alarm trigger” to ensure compliance with federal law.¹⁸⁷ Thus, the concerns expressed by Senator Peterson were due to the length of time necessary for the “verification” process and the potential violation of federal law.

Senate Bill 870, which would have raised the state cap to 100% and altered the early release eligibility scheme for inmates, was

180. Letter and accompanying news release from Governor Bob Graham to Senator Harry Johnston and Representative James Harold Thompson (Mar. 12, 1986) (on file with the Office of the Governor). Gov. Graham did not want to release prisoners if it could be avoided. Wilson interview of June 11, *supra* note 176.

181. Wainwright letter of Mar. 20, *supra* note 1.

182. Memorandum from B. Jack Osterholt, Deputy Director, Office of Planning and Budgeting, Office of the Governor, to Governor Bob Graham (Mar. 8, 1986) (on file with the Office of the Governor).

183. See *supra* note 3.

184. Dem., Lakeland.

185. Transcript of Apr. 8, *supra* note 109, at 6.

186. *Costello*, No. 72-109-Civ-J-14 (M.D. Fla. Oct. 23, 1979) (overcrowding settlement agreement).

187. Transcript of Apr. 8, *supra* note 109, at 6.

filed on April 4, 1986, and referred to the Senate Corrections, Probation and Parole Committee.¹⁸⁸ On April 21, Governor Graham called a meeting to discuss the overcrowding issue.¹⁸⁹ It was apparent that clarifying the 98% cap to exclude the approximately 700 Cuban refugees under federal detention in Florida prisons was not a viable option because it raised fourteenth amendment questions. Furthermore, most of these inmates were considered dangerous criminals.¹⁹⁰ Besides, Fidel Castro refused to accept the refugees back in Cuba.¹⁹¹ Raising the cap, however, still seemed like a good idea. Governor Graham wanted a 100% cap because that would mean approximately 290 more beds. New computers could tell the DOC when the prison population was nearing lawful capacity so action could be taken to avoid violating federal law.¹⁹² The House had not proposed a bill and Representative Christian Meffert¹⁹³ predicted that, at most, a 99% cap would be approved.¹⁹⁴

The House, however, was examining the prison overcrowding problem from several angles. The House Corrections, Probation and Parole Committee focused more on post-incarceration measures and had proposed several bills which would make probation a form of community control,¹⁹⁵ establish a community re-entry program,¹⁹⁶ and grant conditional gain-time accompanied by community supervision upon release.¹⁹⁷ Some of the House members, on the other hand, were more deterrence-minded. Representative John Renke¹⁹⁸ filed House Bill 130, which would have substantially reduced gain-time awards for prisoners.¹⁹⁹ Representatives James Ward²⁰⁰ and Bobby Brantley²⁰¹ filed House Bill 227, a bill that

188. FLA. S. JOUR. 115 (Reg. Sess. Apr. 17, 1986).

189. See Wilson interview of June 11, *supra* note 176.

190. *Id.* See also Fla. Legis., S. Comm. on Correct., Probat. & Parole, computer printout (Mar. 15, 1986) (two-thirds of 793 Mariel Cubans convicted of parole ineligible offenses—murder, armed robbery, assault, etc.) (printout on file with committee).

191. Castro had threatened not to allow Mariel refugees back to Cuba if the U.S. did not turn off Radio Marti, a federal, Miami-based Spanish radio station. When the station was not turned off, Castro made good his threat. Wilson interview of June 11, *supra* note 176.

192. Interview with Gene Adams, Director of Legislative Affairs, Office of the Governor (June 23, 1986) (notes on file, *Florida State University Law Review*) [hereinafter cited as Adams interview].

193. Dem., Ocala.

194. Wilson interview of June 11, *supra* note 176.

195. Fla. HB 1325 (1986).

196. Fla. HB 1319 (1986).

197. Fla. HB 317 (1986).

198. Repub., New Port Richey.

199. Fla. HB 130 (1986).

200. Dem., Ft. Walton Beach.

would have eliminated the need for the governor to reissue a death warrant after a previous warrant had expired during a stay of execution.²⁰² House Bill 549, sponsored by Representative James Watt,²⁰³ would have made funds available from the Working Capital Fund for the emergency construction of prisons during periods of overcrowding. On April 30, the House Corrections Committee sponsored a bill similar to Senate Bill 870 which was designed to raise the state cap to 99%.²⁰⁴

Senate Bill 870 made its way quickly through the Senate Corrections, Probation and Parole Committee, and the Appropriations Committee.²⁰⁵ The community rehabilitation program was adopted in part, and a supervised community release program for those inmates released under the 100% cap was made part of a committee substitute.²⁰⁶ The bill that passed the Senate on May 21 had a 100% cap. It altered the pool of inmates eligible for early release to include only those within ninety days from the end of prison terms of three years or less, defined "current population" as all actual state prisoners, and established the supervised community release program which would be more stringent than probation but less stringent than work release.²⁰⁷

2. House Opposition

One of Governor Graham's objectives was to raise the cap as soon as possible to avoid releasing any inmates early.²⁰⁸ However, this objective was frustrated by Senate Bill 870's slow passage through the House. The situation became more urgent as state prisons gradually filled and the cap was not raised. The fact that the House Rules Committee did not put Senate Bill 870 on the special order calendar before May 27 astonished Governor Graham: "I can't believe the House of Representatives wants to assume responsibility for having the federal courts take over our prison system."²⁰⁹

201. Repub., Longwood, 1978-1986; Lieutenant Governor-elect, 1986.

202. Fla. HB 227 (1986).

203. Repub., North Palm Beach, 1978-1986.

204. Fla. HB 1323 (1986).

205. FLA. LEGIS., HISTORY OF LEGISLATION, 1986 REGULAR SESSION, HISTORY OF SENATE BILLS at 144, CS for SB 870.

206. *Id.* at 144, CS for SB 870.

207. Fla. CS for SB 870 (1986) (First Engrossed).

208. Adams interview, *supra* note 192.

209. *Prisoner plan called political*, Tallahassee Democrat, May 21, 1986, at 8A, col. 2.

The opposition to Senate Bill 870 stemmed from philosophical differences between Governor Graham and certain House members. Representative Ward's House Bill 227, a bill that on its face only streamlined the death penalty procedure, would reduce the governor's discretion over when capital inmates are executed.²¹⁰ Representative Renke's House Bill 130, which would have all but eliminated the gain-time program by reducing allowances, contradicted the 1980's corrections legislation.²¹¹ When Committee Substitute for Senate Bill 870 finally reached the House floor on May 27, the 100% cap had been reduced to 99% and both House Bill 227, which had passed the House earlier but stalled in the Senate Committee on Judiciary-Criminal,²¹² and House Bill 130 were tacked on as amendments.²¹³ The bill passed by a wide margin and was sent back to the Senate.²¹⁴

During the prior House proceedings, the Governor's aides had consistently stated that Governor Graham opposed any change in the capital punishment law.²¹⁵ Governor Graham argued that the present procedure worked efficiently and that changing the statute would open the door for new appeals.²¹⁶

By the end of May, there were three principal factors creating pressure on the legislature.²¹⁷ First, Governor Graham wanted to raise the prison capacity limit to at least 99% but opposed any change in the death penalty procedure. Second, Representative Ward wanted to alter the death penalty procedure by limiting the governor's discretion on death warrants. Lastly, Florida's prisons were becoming more crowded.

When Committee Substitute for Senate Bill 870 reached the Senate floor with the 99% cap, death warrant, and gain-time

210. See generally *Florida, a Story of Politics and Death*, NAT'L L.J., July 16, 1984, at 1. (Governor has control over Florida's death penalty procedure).

211. See, e.g., Correctional Reform Act of 1983, ch. 83-131, 1983 Fla. Laws 435 (codified at FLA. STAT. § 944.598 (1985)).

212. FLA. H.R. JOUR. 150 (Reg. Sess. Apr. 18, 1986); FLA. S. JOUR. 194 (Reg. Sess. May 6, 1986).

213. FLA. H.R. JOUR. 535 (Reg. Sess. May 27, 1986).

214. FLA. H.R. JOUR. 556 (Reg. Sess. May 28, 1986). The margin of vote on May 28 was 109-to-4. *Id.*

215. Fla. H.R., Comm. on Correct., Probate & Parole, tape recording of proceedings (Feb. 12, Mar. 5-6, 1986) (on file with committee); Fla. S., Comm. on Correct., Probate & Parole, tape recording of proceedings (May 1, 5, 1986) (on file with committee).

216. Adams interview, *supra* note 192.

217. See generally *House approves, change in prison cap, adds death warrant proposal*, Tallahassee Democrat, May 28, 1986, at 8A, col. 1.

amendments attached, the Senate had four options.²¹⁸ First, the Senate could refuse to concur with the amendments, but the margin of passage in the House made it unlikely the House would recede. Second, the Senate could delete the death warrant amendment and accept the 99% cap, but again the House would have to recede. A third option would be to take no further action on Senate Bill 870 and try to amend the 100% cap provision onto another Senate bill in the House, but the necessary bill probably would not be heard in the 1986 Regular Session.²¹⁹ Lastly, the Senate could pass the bill as amended by the House and let Governor Graham decide whether to veto it. This would either cause renewed constitutional death penalty litigation²²⁰ or, if vetoed, risk a violation of the *Costello* Agreement.²²¹ On May 29, the Senate chose the second option, concurring with the 99% cap, but refusing to accept the death warrant or gain-time amendments.²²² Committee Substitute for Senate Bill 870 was sent back to the House with the request that it recede.²²³ On May 30, the House refused to recede.²²⁴ Debate on the House floor focused on the governor's power in signing death warrants and several unlikely scenarios suggested that a governor, in an election year, could affect the rights of hundreds of death row inmates.²²⁵ Representative Meffert, who voted to recede, raised concerns about the chances of implementing the bill's uncontested corrections programs if the death warrant amendment remained.²²⁶ The final vote was sixty to forty-seven against receding.²²⁷

May 30 was a Friday, a day when county jails transfer large numbers of inmates to state prisons in order to clear out their fa-

218. Notes of Ray Wilson, Staff Director, Senate Committee on Corrections, Probation and Parole (n.d.) (notes on file, *Florida State University Law Review*).

219. Fla. SB 308 which was identical to Fla. HB 433 was deep on the House special order calendar at the time. Fla. H.R. Jour. 417 (Reg. Session May 19, 1986).

220. "A bright defense lawyer could use it [the death warrant amendment] to delay executions for four or five years." Art Wiedinger, Ass't Gen. Counsel to Gov. Graham, quoted in *House Approves change in prison caps adds death warrant proposal*, Tallahassee Democrat, May 28, 1986, at 8A, col. 3.

221. *Costello*, No. 72-109-Civ-J-14 (M.D. Fla. Oct. 23, 1979) (overcrowding settlement agreement).

222. FLA. S. JOUR. 491-93 (Reg. Sess. May 29, 1986).

223. *Id.*

224. FLA. H.R. JOUR. 614 (Reg. Sess. May 10, 1986).

225. Fla. H.R., tape recording of proceedings (May 30, 1986) (on file with Clerk) (statements of Rep. Upchurch) [hereinafter cited as House Debate].

226. *Id.*

227. FLA. H.R. JOUR. 614 (Reg. Sess. May 10, 1986).

cilities for the weekend.²²⁸ It seemed imperative that something be done to alleviate the crowding problem, as prison population exceeded 99% capacity.²²⁹ At this point, Governor Graham met privately with Representative Ward. In a meeting described as "unpleasant," Representative Ward said the Governor told him: "[T]he whole world is going to know—11 million people are going to know that you are responsible for the emergency release."²³⁰

On Monday, June 2, Committee Substitute for Senate Bill 870 was again read in the House. The criticism of Governor Graham was intense: "The Governor put himself in this box with the population caps, he needs the bill to get out of that box—but he doesn't like continuing death warrants."²³¹ Representative Messersmith²³² raised a point of order to question whether the House should be hearing the bill again, but the chair ruled that the point was not well taken. The House ultimately receded from the death warrant and gain-time amendments, and passed Committee Substitute for Senate Bill 870 with its 99% cap.²³³ The bill was engrossed, enrolled, and signed by Governor Graham that day, and the new supervised community release program was put into effect immediately.²³⁴

B. *The Arias Legislation*

The legislature was guided largely by the *Arias Settlement Agreement* in considering county jail legislation during the 1986 Regular Session. The new laws are intended to uphold the Agreement, although inmate population growth has caused some difficulties.

1. *House Bill 276*

One new law permits double-bunking in county jails if jail rules are satisfied and state cell regulations are met.²³⁵ It was sharply debated in the House Corrections, Probation and Parole Commit-

228. *Inmates lose time off*, Tallahassee Democrat, May 21, 1986, at 8A, col. 2.

229. *Id.* See also *supra* note 3.

230. *House stalls on measure to raise prison-population cap*, Tallahassee Democrat, May 30, 1986, at 10A, col. 3.

231. House Debate, *supra* note 225 (statement of Rep. Patchett).

232. Repub., Lake Worth.

233. FLA. H.R. JOUR. 679, 680 (Reg. Sess. June 2, 1986).

234. FLA. S. JOUR. 541, 565 (Reg. Sess. June 2, 1986). See also *Graham signs inmate-release bill*, Tallahassee Democrat, June 3, 1986, at 1A, col. 3.

235. Ch. 86-235, § 1, 1986 Fla. Laws 337, 342 (amending FLA. STAT. § 951.23 (1985)).

tee.²³⁶ Randall Berg, who represents the plaintiff class in *Arias*, pointed out that double-bunking would lead to crowding and would have negative psychological effects on inmates.²³⁷ Berg further argued that the practice would prolong the *Arias* litigation by creating a new issue and would likely result in several new claims. Moreover, the new law would not provide additional state funding for the additional jail inmates, placing the financial burden upon the counties. The pressing county inmate population problem, however, outlasted Berg's arguments. It was generally agreed that the counties do have a bed-space problem.²³⁸ Representatives Mefert and Hollingsworth²³⁹ pointed to the rapid filling of a new \$9 million jail in Tampa and the large backlog of state prisoners in the county jails.²⁴⁰ As far as inmates are concerned, the new minimum specification requirements would limit the effects of crowding.

The double-bunking bill became a "train" pulling several related measures.²⁴¹ The remainder of Committee Substitute for House Bill 276 was concerned with the *Arias* Settlement Agreement provisions: ensuring that the DOC complied with the health and fire safety inspection requirements,²⁴² requiring jail construction to comply with the jail rule design standards,²⁴³ and recognizing the advisory nature of the DOC's Jail Review Committee.²⁴⁴ House Bill 276 passed the House and the Senate by wide margins.²⁴⁵

Another new law dealing with county jail populations may have far-reaching ramifications. Senate Bill 308, sponsored by Senators Peter Weinstein,²⁴⁶ Tom McPherson,²⁴⁷ and Ken Jenne,²⁴⁸ effectively nullified the jail rule factoring formula in Broward County.

236. Interview with Tod Stupski, Staff Analyst, House Committee on Corrections, Probation and Parole (July 3, 1986) [hereinafter cited as Stupski interview].

237. *Id.*

238. *Id.*

239. Dem., Lake City, 1970-1972, 1976-1986; Sen., 1986-

240. Staff of Fla. H.R. Comm. on Correct., Probat. & Parole, CS for HB 276 (1986) Staff Analysis 1 (rev. 18, 1986) (on file with committee).

241. Ch. 86-235, § 1, 1986 Fla. Laws 337 (amending FLA. STAT. § 951.23 (1985)).

242. *Id.* (amending FLA. STAT. § 951.23(6)(1985)).

243. *Id.* (amending FLA. STAT. § 951.23(3)(1985)).

244. *Id.* (amending FLA. STAT. § 951.23(6)(1985)).

245. FLA. H.R. JOUR. 314-15 (Reg. Sess. May 9, 1986); FLA. S. JOUR. 522 (Reg. Sess. May 30, 1986).

246. Dem., Coral Springs.

247. Dem., Ft. Lauderdale.

248. Dem., Hollywood.

Logically extended, the legislation could adversely affect the *Arias Settlement Agreement*.²⁴⁹

The formula, which was used to calculate maximum county jail capacity, was ignored in *Carruthers v. Navarro*,²⁵⁰ a recent federal case which set a new maximum inmate population level for Broward County's jail. The bill simply acknowledged the new arbitrarily set capacities without considering staffing, food, and medical requirements.²⁵¹ Perhaps most disturbing, the new law²⁵² could prevent the DOC from enforcing the jail capacity element of the state jail rules through court action. The bill passed unanimously.²⁵³

Only Broward County is immediately affected by the new law, but Pinellas, Palm Beach, and Orange counties—all with pending federal litigation—could have their jail capacity levels increased.²⁵⁴ Counties with pending state litigation will probably not be affected.²⁵⁵ Some counties' jail problems are more closely related to other factors, like medical treatment and sanitation, than to inmate population, therefore they will not be affected by the new law.²⁵⁶

Chapter 86-80 and Chapter 86-235 appear to be instances of the looming inmate population problem pressing legislators to react reflexively.²⁵⁷ There are several arguments against the practice of double-bunking, and the effects of new federally imposed population limits might be damaging to previously settled county jail litigation.

IV. CONCLUSION

One month after Senate Bill 870 became law, Attorney General Smith—as he campaigned for the Democratic gubernatorial nomination—asked Governor Graham to call a special session to ad-

249. "Factoring" formulas, used to calculate maximum capacity for each county jail, had been worked out with the DOC pursuant to FLA. ADMIN. CODE R. 33-8.15 (1983).

250. No. 76-6086 (S.D. Fla. 1985).

251. Staff of Fla. S. Comm. on Correct., Probat. & Parole, SB 308 (1986) Staff Analysis 2 (final Mar. 11, 1986) (on file with committee).

252. Ch. 86-80, 1986 Fla. Laws 435 (amending FLA. STAT. § 951.23 (1985)).

253. FLA. S. JOUR. 275 (Reg. Sess. May 14, 1986); FLA. H.R. JOUR. 646 (Reg. Sess. May 30, 1986).

254. See *Carruthers*, No. 76-6086 (S.D. Fla. 1985).

255. *Id.*

256. Stupski interview, *supra* note 236.

257. See generally McKay, *supra* note 51, at 6-9 (reactions of 1970's and 1980's legislators to prison overcrowding).

dress the continued increase in prison admissions.²⁵⁸ While one month may have been too short a time to assess new legislation, the Attorney General's concerns raised some interesting questions. Will Florida stay its course with respect to corrections programs, modifying existing legislation and court-made agreements as it goes? Or should Florida pass another Correctional Reform Act to drastically alter the correctional system?

It seems the latter is in order. All indications point to an unprecedented influx of prisoners into Florida's prison system in the near future.²⁵⁹ The new supervised community release program will have to bear the brunt of this surge, regardless of whether the new program can meet the test, which is doubtful considering its limitations.²⁶⁰ Indeed, the new program will merely provide Governor Graham and the DOC some breathing space on the corrections problem. A cynical view is that Governor Graham did not want state correctional problems to interfere with his campaign for the United States Senate, so he ignored the problem. A more probable view is that the resurgence of inmate populations has put Florida politicians in the awkward position of extending and modifying already outdated three-year-old legislation. Regardless, Florida will have to take a hard look at its correctional system to determine a course for the future.

The importance of this realization is made more evident when the federal courts' policy of judicial restraint is considered. Essentially, real involvement by the courts ended with the *Costello* and *Arias* Agreements five years ago. Since then, Florida legislators have been responsible for keeping the prison system within federal guidelines. The dramatic reforms in the Correctional Reform Act of 1983 kept the state's prison population within the federal guidelines for only two years.²⁶¹ An assumption that the 1986 legislation would work for an equally short period is already being proved.²⁶²

258. Letter from Attorney General Jim Smith to Governor Bob Graham (July 2, 1986) (on file with Dep't of Legal Affairs).

259. See *Crackdowns Crowd Prisons*, *supra* note 11.

260. *Id.* See also Flynn interview, *supra* note 4 (only inmates serving the last 90 days of a sentence eligible for program); interview with Liz Middleton, Staff Director, House Committee on Corrections, Probation and Parole (Sept. 17, 1986) (bill intended to be only a stop-gap measure). Figures for June and July 1986, show the number of guilty dispositions have far exceeded expectations, thus overburdening the new supervised community release program. FLA. H.R., COMM. OR CORRECT., PROBAT. & PAROLE, MONTHLY GUILTY DISPOSITIONS—ACTUAL AND PROJECTED (Sept.-Aug. 1986) (on file with committee).

261. Corrections Paper, *supra* note 64, at 12.

262. *Crackdowns Crowd Prisons*, *supra* note 11.

The prison population problem in Florida is an issue that will not go away. *Costello* litigation, relegated to a court-appointed special master, threatens to continue into the 1990's.²⁶³ New claims from county jail inmates are being filed regularly.²⁶⁴ Moreover, there are indications from the Supreme Court and lower federal courts that penology will be limited to the "grassroots" of government. Something must be done, and the Florida Legislature must do it.

Research in the field of penology has supplied several alternatives regarding the future of prison reform. Accreditation of federal prisons by detached and objective commissioners has been debated,²⁶⁵ and even nationalization of all prisons has been suggested.²⁶⁶ Other proposals include correction by restitution²⁶⁷ and the expansion of prison industries where inmates contribute to society.²⁶⁸

States have implemented novel correctional systems to counter the prison population crisis with relative success. For example, California and Minnesota enacted systems providing financial incentives to individual counties for keeping commitments to state prisons below certain levels.²⁶⁹ Recently many states, including Florida, have adopted determinate sentencing, which utilizes sentencing guidelines and accumulations of gain time.²⁷⁰ As the Florida experience demonstrates, however, this approach has not had long-term controlling effects on state prison population trends.

An option for Florida, then, is a modified work-release system, where the work is done within prison walls,²⁷¹ coupled with proce-

263. See Wilson interview, *supra* note 89.

264. "Since 1981, 35 suits have been filed (under *Arias*) in circuit court . . ." Staff of Fla. S. Comm. on Correct., Prob. & Parole, SB 70 (1986) Staff Analysis 1 (rev. Mar. 4, 1986) (on file with committee).

265. See Bazelon, *The Case Against Correctional Accreditation*, in PRISONERS AND THE LAW 18-3 (1985); George, *The Case for Correctional Accreditation*, in PRISONERS AND THE LAW 18-19 (1985).

266. See Fogel, *Let's Nationalize the State Prisons*, in PRISONERS AND THE LAW 19-3 (1985).

267. See Young, *A Proposal for a New Correctional System: Correction by Restitution*, in PRISONERS AND THE LAW 20-3 (1985).

268. See Burger, *Factories with Fences: The Prison-Industries Approach to Correctional Dilemmas*, in PRISONERS AND THE LAW 21-3 (1985).

269. NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, AMERICAN PRISONS AND JAILS, VOL. IV: SUPPLEMENTAL REPORT—CASE STUDIES OF NEW LEGISLATION GOVERNING SENTENCE AND RELEASE 2 (1980).

270. See Correctional Reform Act of 1983, ch. 83-131, 1983 Fla. Laws 435 (codified at FLA. STAT. § 944.598 (1985)).

271. See Burger, *supra* note 268, at 21-4.

dures which lower state incarceration rates.²⁷² Both programs are based on an economic view of prisons, and a mixture of the two would combine the rehabilitative and deterrence objectives. As Florida's annual appropriation to the DOC is now more than \$400 million,²⁷³ the profitability of extended prison industry programs and the economic feasibility of local correctional guidelines should appeal to most tax-minded legislators. The liberal wing of the state government should be satisfied with the rehabilitative merits of the prison industry as it fosters inmate self-esteem and humane values.²⁷⁴ The county correctional approach should appeal to more conservative legislators because it would facilitate a smoothly operating state system more capable of handling hardcore recidivists or violent offenders.²⁷⁵ In short, an economic approach towards the state prison system, combining rehabilitation and deterrence objectives, is an appealing approach for Florida.

Perhaps more important, this strategy would sidestep the *Costello* litigation altogether. Since the early 1980's, the Florida Legislature has been bound by the Settlement Agreements. While not putting these Agreements into jeopardy, a prison industry/county incentive approach would point the state in a new direction and eventually remove it from the supervision of the federal courts. A new correctional program would take much time and effort, but if Florida's present dilemma of upholding eighth amendment rights while ensuring a safe and effective prison system is to be resolved, the effort must be made.

272. See Young, *supra* note 267; see also THE COUNCIL OF STATE GOVERNMENTS, STATE SUBSIDIES TO LOCAL CORRECTIONS (1977).

273. In all, \$404 million was appropriated for fiscal year 1986-87. See Burt interview, *supra* note 37.

274. Burger, *supra* note 268, at 21-4.

275. See Young, *supra* note 267, at 2, 6, 91-104, 126.