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A Pioneer in Prison Reform: *Costello v. Wainright* and its Paradoxical Legacy in Florida Prisons

Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975)

by Mariko K. Shitama

Introduction

In 1972, prisoners Michael V. Costello and Robert K. Celestino filed separate *pro se* complaints in the United States District Court for the Middle District of Florida alleging overcrowded conditions and inadequate health care in Florida prisons.[1] These claims were consolidated, amended by court-appointed counsel, and authorized by Senior United States District Judge Charles Ray Scott[2] as a class action for declaratory and injunctive relief on behalf of all present

Mariko K. Shitama, received the J.D. 2013 at the University of Florida Levin College of Law. The author thanks the Historical Society for the U.S. District Court for the Middle District of Florida, the *Florida Historical Quarterly* and the *Florida Law Review* for the opportunity to write this Comment and learn some intriguing Florida history. She also thanks Nicholas Outman and Tamara Van Heel for their valuable feedback and support.

1 Costello v. Wainwright, 397 F. Supp. 20, 21 (M.D. Fla. 1975); Opinion and Order at 5–6, Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975) (Case Nos. 72-109-Civ-J-14, 72-94-Civ-J-14).

2 Judge Scott was nominated to the U.S. District Court for the Middle District of Florida by President Lyndon B. Johnson in 1966, assumed senior status in 1976, and served in the district until his death in 1983. *Biographical Directory of Federal Judges: Scott, Charles Ray*, Fed. Jud. Ctr., http://www.fjc.gov/servlet/nGetInfo?jid=2129&cid=999&ctype=na&instate=na (last visited July 4, 2012).

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and future Florida Department of Corrections (DOC) inmates.[3] In their amended complaint, the plaintiffs alleged that the overcrowding and inadequate medical care in Florida prisons constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[4] The plaintiffs sought a preliminary injunction ordering defendant Louie L. Wainwright, as Director of the Florida Division of Corrections,[5] to reduce Florida's inmate population to "normal capacity" within the following year and to close Florida's prisons to new inmates.[6] Judge Scott initially denied the injunction without prejudice, finding it was "moot" because defendant Wainwright had himself "closed the prison system to additional inmates because of the danger to the health and lives of the inmates."[7]

By 1975, the legislature had refused to provide funds sufficient to address the overcrowding problem, and Florida Governor Reubin Askew—up for a difficult reelection[8]—ordered the defendant to lift the ban on the entry of new inmates.[9] Within three months of this order, the inmate population increased from 11,420 to 12,748 prisoners,[10] and the plaintiffs renewed their motion for

3 *Costello*, 397 F. Supp. at 21–22; Opinion and Order, *supra* note 1, at 5–6; *see also* Celestineo v. Singletary, 147 F.R.D. 258, 259 (M.D. Fla. 1993) (Opinion and Order Granting Final Judgment of *Costello*). This Comment refers to all Florida Department of Corrections prisons as both DOC prisons and Florida prisons.

4 *Costello*, 397 F. Supp. at 21. The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," and is made applicable to the states through the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660, 667 (1962).

5 In 1978, the Florida Division of Corrections was renamed the Florida Department of Corrections. *Timeline: A History of Corrections in Florida*, FLA. DEP'T OF CORR., http://www.dc.state.fl.us/oth/timeline/1976-1979a.html (last visited Jan. 31, 2012). Other defendants in the case included the Director of the Division of Mental Health and members of the Florida Parole and Probation Commission.

6 *Costello*, 397 F. Supp. at 34 n.10. Normal capacity was defined by the American Justice Institute (AJI) and the defendants as "that population which an institution can properly accommodate on an average daily basis. . . . It should include some vacant beds, to accommodate population surges, and to allow for different classifications of inmates . . . ." *Id.* Normal capacity at the time of the order was 7,000 inmates, and emergency capacity was 8,300. *Id.* at 22. The actual number of inmates in DOC custody was approximately 10,300. *Id.*

7 *Id.* at 22.

8 Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC'Y REV. 731, 740 (2010).

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

10 *Id.* at 22. At this time, normal capacity was 9,313 prisoners. *Id.*

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a preliminary injunction, the basis for the decision in *Costello v. Wainwright.*[11] At trial, the district court made extensive factual findings regarding Florida's prison conditions, relying primarily on a comprehensive health survey of all DOC facilities.[12] Based on these findings, Judge Scott concluded that severe overcrowding in Florida prisons—which were operating well above "emergency capacity"[13]—had led to the systemic denial of adequate medical care for inmates and constituted cruel and unusual punishment.[14] To remedy these constitutional violations, Judge Scott issued a preliminary injunction ordering defendant Wainwright to reduce Florida's inmate population to emergency capacity within the following year and to normal capacity by December of 1976.[15]

The United States Court of Appeals for the Fifth Circuit initially affirmed Judge Scott's ruling.[16] Yet upon a rehearing en banc, it vacated the ruling on the grounds that the preliminary injunction required approval by a three-judge panel.[17] After granting certiorari, the Supreme Court reversed the en banc opinion and reinstated the Fifth Circuit's earlier decision affirming the injunctive order on its merits.[18] Two years later, the parties reached a settlement agreement in which they stipulated that no individual DOC prison could exceed "maximum capacity" for more than five days and the

11 *Id.*

12 *Id.* at 23–32; *see also infra* notes 65–68.

13 The AJI and the defendants defined "emergency capacity" as:
[T]he population beyond which the institution must be considered critically, and quite probably, dangerously overcrowded. It includes every bed in the institution which. . .can safely be occupied at times of peak populations. . . . *Costello*, F. Supp. at 34.

14 *Id.* at 33.

15 *Id.* at 34.

16 Costello v. Wainwright, 525 F.2d 1239, 1252 (5th Cir. 1976). In 1976 the "former" Fifth Circuit encompassed the Middle District of Florida, and all of what was subsequently divided into the current Fifth and Eleventh Circuits on October 1, 1981. Bonner v. Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). Fifth Circuit cases decided prior to October 1, 1981 are binding in the Eleventh Circuit. *Id.* at 1209.

17 Costello v. Wainwright, 539 F.2d 547, 552 (5th Cir. 1976).

18 Costello v. Wainwright, 430 U.S. 325, 326 (1977), *opinion reinstated*, 553 F.2d 506, 507 (5th Cir. 1977), *vacated in part*, 539 F.2d 547, 552 (5th Cir. 1976), *rev'd*, 430 U.S. 325, 326 (1977).

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inmate population of the entire DOC could not exceed "design capacity" plus one third.[19]

Costello was at the forefront of the movement to protect prisoners' rights through judicially imposed prison reform,[20] and has had a profound and lasting impact on Florida's prisons. While *Costello* averted a prison overcrowding disaster in Florida, it was also used—perhaps ironically—to campaign for the State's significant expansion of its prison system.[21] Judge Scott did not mandate any particular approach to remedying the State's constitutional violations, but his opinion seemed to contemplate a balanced approach to reducing prison overcrowding. This Comment considers the possibly unintended consequences *Costello* has had on prison reform and the criminal justice system in Florida.

A Brief History of the Eighth Amendment and Institutional Prison Reform

To understand the legal framework and the remedy employed in *Costello*, it is necessary to examine the context in which the case was decided. Beginning with *Brown v. Board of Education*[22] in 1955, federal courts began actively enforcing the constitutional rights of individuals in state institutions through injunctive remedies.[23] However, it was almost two decades before the courts expanded this role to protect prisoners' rights from unconstitutional conditions of confinement.[24]

First, courts had to establish that prisoners retain their constitutional rights once their freedom has been lawfully deprived. In *Jackson v. Godwin*,[25] the Fifth Circuit reversed the district court's

19 Settlement Agreement at 5–8, Costello v. Wainwright, Case Nos. 72-109-Civ-J-S, 72-94-Civ-J-S (M.D. Fla. 1979). The agreement defined "design capacity" as forty to ninety square feet of space for inmates living in individual cells and at least fifty-five square feet per inmate for those living in dorms, and defined "maximum capacity" as approximately 33% less space than design capacity per inmate with double bunking allowed along outer walls. *Id.*

20 *See, e.g.*, Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626, 636–37 (1981); Robert E. Buckholz et al., Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 788–89 (1978).

21 *See infra* notes 87–98 and accompanying text.

22 349 U.S. 294, 349 (1955).

23 *See, e.g.*, Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 641 (1993).

24 *See* Holt v. Sarver, 309 F. Supp. 362, 365 (E.D. Ark. 1970).

25 400 F.2d. 529 (5th Cir. 1968).

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decision denying relief to a black prisoner who claimed that the Florida State Prison had deprived him of equal protection of the law when it denied his requests to receive black reading materials.[26] The Fifth Circuit rejected the view that prisoners lose their constitutional rights when they forfeit their freedom, and held that they lose only those rights "expressly or by necessary implication" taken by law.[27]

Still, the question remained whether prison conditions themselves could constitute cruel and unusual punishment. In *Trop v. Dulles*,[28] the Supreme Court defined the scope and meaning of the term "cruel and unusual" as provided in the Eighth Amendment.[29] It concluded that the standard is founded on the notion of the "dignity of man" and is therefore necessarily a flexible one, most aptly measured by "society's evolving standards of decency."[30] With this standard in mind,[31] courts began to sanction prisoners' allegations that the conditions of their confinement were so afflictive as to offend basic notions of human decency and to order prisons to undertake extensive remedial action.[32]

Then, in 1970, the Eastern District of Arkansas in *Holt v. Sarver*[33] became the first court to find the conditions of an entire state's penal institution to be cruel and unusual, and to take equitable action to remedy them.[34] The court outlined the deplorable conditions within the Arkansas Penitentiary System, including the brutal practices of using chain gangs and a "trusty" system, where inmates and not civilians were employed as guards.[35] These trusty

26 *Id.* at 530. The prisoner filed this claim under 42 U.S.C. § 1983. *Id.*
27 *Id.* at 532.
28 356 U.S. 86 (1958).
29 *Id.* at 99–101.
30 *Id.* at 100–01.
31 In *Estelle v. Gamble*, 429 U.S. 97, 102 (1976), the Supreme Court affirmed this as the appropriate standard for Eighth Amendment claims regarding prison conditions, when it concluded that inhumane conditions of imprisonment do not comport with "evolving standards of decency." *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
32 *See Sturm, supra* note 23, at 641.
33 *Holt*, 309 F. Supp. 362 (E.D. Ark. 1970).
34 *Id.* at 365 ("As far as this Court is aware, this is the first time that convicts have attacked an entire penitentiary system in any court . . . .."). The court found that the Eighth Amendment is not limited to punishment directed at an individual, and that prison conditions "shocking to the conscience of reasonably civilized people" constitute cruel and unusual punishment. *Id.* at 372–73.
35 *Id.* at 369–71, 373–74.

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inmates wielded guns and unfettered power over their fellow inmates, and inflicted extreme violence upon them.[36]

The district court issued a very general injunctive order commanding the State of Arkansas to "move in good faith and with diligence"[37] to bring its trusty system, barracks, and isolation units in compliance with the Eighth Amendment.[38] The district court was not willing to condemn the trusty system outright, however,[39] and its vague order gave little concrete guidance to the State.[40] Although the court understood its duty to protect the constitutional rights of Arkansas prisoners, precedent did not provide a roadmap for implementation.

The Fifth Circuit attempted to expand and clarify the parameters of judicial intervention in *Gates v. Collier*[41] and *Newman v. State of Alabama*,[42] two cases that affirmed injunctive orders requiring institutional prison reform.[43] In *Gates*, the district court went a step further than the court had in *Holt*. It found that the Mississippi Penitentiary's trusty system and conditions of confinement[44] constituted cruel and unusual punishment, and ordered the prison to take very specific remedial steps, including the elimination of the trusty system.[45]

The Fifth Circuit affirmed the district court's order, finding that this remedy was neither "burdensome" nor "beyond the remedial jurisdiction of the district court."[46] While the circuit court recognized that it was clearly outside the authority of federal courts to "undertake to run the prison," it concluded that the required measures were merely "parameters for administration," and were the minimum safeguards necessary to cure the State's grave constitutional violations.[47] The Fifth Circuit stated unequivocally

36 *Id.* at 373–76.
37 *Id.* at 385.
38 *Id.* at 383.
39 *Id.*
40 *See id.* at 382–85.
41 501 F.2d 1291 (5th Cir. 1974).
42 503 F.2d 1320 (5th Cir. 1974).
43 *Gates*, 501 F.2d at 1322; *Newman*, 503 F.2d at 1322.
44 *Gates*, 501 F.2d at 1309. These conditions included overcrowding, lack of inmate classification by severity of offense, lack of supervision by civilian guards, and a generally abhorrent lack of adequate protection against physical abuse by fellow inmates. *Id.*
45 *Id.*
46 *Id.* at 1309–10.
47 *Id.*

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that, regardless of any funding shortage, "if the State chooses to run a prison it must do so without depriving inmates of the rights guaranteed to them by the federal constitution."[48]

In *Newman v. Alabama*,[49] the Fifth Circuit affirmed a district court order requiring the State of Alabama to provide adequate medical treatment to inmates.[50] Echoing language from its opinion in *Gates*, the circuit court noted that "deference which shields officials engaging in intemperate action and which excuses judicial myopia is incompatible with our role as arbiters of the Constitution."[51]

The Delicate Business of Judicial Intervention

The essence of the *Gates* and *Newman* decisions is that while district courts are clearly not authorized to exercise the administrative duties of the executive branch or the lawmaking of the legislature (such as deciding how much money to spend on prisons or even whether to have them), it is undoubtedly the duty of the courts to protect prisoners from unconstitutional action (or inaction) of the state. This authority includes the power to issue injunctions compelling states to remedy constitutional infirmities they have failed to address on their own.[52]

Judge Scott understood this nuanced role in the instant case, *Costello v. Wainwright*. He balanced the court's duty as arbiter of the Constitution with its duty to refrain from intervening in the administration of the DOC beyond setting parameters for compliance with the Constitution.[53] Judge Scott noted that the district court had been "reluctant to intervene in the overcrowding crisis" for at least three years, during which time defendant Wainwright had closed the prisons to new inmates on three occasions.[54] However, Judge Scott decided to act once the Governor

48 *Id.* at 1320.
49 503 F.2d 1320 (5th Cir. 1974).
50 *Id.* at 1331. Two years later, in *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), the Supreme Court held that the "elementary principles [of the Eighth Amendment] establish the government's obligation to provide medical care" to those whom it incarcerates.
51 *Newman*, 503 F.2d at 1329.
52 *See id.*
53 Costello v. Wainwright, 397 F. Supp. 20, 34 (M.D. Fla. 1975).
54 *Id.* at 34.

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of Florida prohibited the defendant from refusing new inmates in spite of "overwhelming evidence" that Florida's prisons were overcrowded and operating under unconstitutional conditions.[55]

Evidentiary Findings: Cruel and Unusual Conditions in Florida's Prisons

Specifically, the district court found clear evidence in the record that the Florida DOC was violating its "affirmative duty" to provide adequate routine and emergency medical care to its inmates, and that severe overcrowding had "greatly exacerbated" these systemic deficiencies.[56] The evidence in *Costello* came primarily from a comprehensive health survey of all Florida prisons (Report), conducted by an independent, court-appointed doctor.[57] The Report outlined the "gross systemic deficiencies" in medical care[58] and recommended a reduction in the inmate population to protect the "physical and psychiatric wellbeing of the inmates."[59] The defendants stipulated to the key findings of the Report, including its proposed remedies.[60]

The district court also detailed the findings of the key expert witnesses at trial,[61] including medical opinions that the DOC was housing excessive numbers of inmates in areas much too small, creating increased racial tension; increased possibility of riots;[62] increased danger of epidemics of communicable diseases; and increased confinement leading to emotional problems and greater use of tranquilizers.[63] Although the defendant was not

55 *Id.*
56 *Id.* at 33–34.
57 *Id.* at 23.
58 *Id.*
59 *Id.* at 26.
60 *Id.* at 23. The parties stipulated that: (1) the plaintiffs were not receiving medical treatment required by the Report's guidelines; (2) the Report described "necessary improvements to the delivery of medical services within the prison system . . . a major factor in meeting minimal constitutional standards"; and (3) "severe overcrowding may be injurious to the physical and mental health of the Plaintiffs" and should be eliminated. *Id.* at 23–24
61 *Id.* The expert witnesses included the defendant's own employee who was working as a doctor within the DOC, as well as "a physician internist and consultant to the Florida Department of Health and Rehabilitative Services," affiliated with the DOC. *Id.* at 24, 30.
62 *Id.* at 25.
63 *Id.* at 30.

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a medical expert, he corroborated these findings through his testimony.[64] The district court found "overwhelming evidence" of a "direct . . . correlation between severe overcrowding . . . and the deprivation of minimally adequate health care," and that the overcrowding endangered the lives of inmates by increasing violence within prisons.[65]

As part of its fact-finding the district court visited one of the DOC's medical facilities, Lake Butler Reception and Medical Center (RMC).[66] RMC was an intake center for classifying and treating new inmates before sending them to permanent housing facilities. It was operating at double normal capacity: 768 inmates were living in dormitories designed for 384.[67] The facility housed several hundred inmates sleeping on the floors of one-man cells due to lack of bed space in permanent housing facilities.[68] The court was "most disturb[ed]" by these one-man cells, which were seven by nine feet and housed four inmates in each.[69] According to RMC's own personnel, these conditions created a inadequate system of inmate classification that "contribut[ed] to the proliferation of rapes, assaults and tension" in the general population.[70] The court summarized this as a "potentially...very explosive situation."[71]

A Balanced Remedy: Bringing the DOC into Compliance with the Eighth Amendment

In May of 1975, Judge Scott ordered the defendant to reduce its inmate population—in five stages set by the court—to emergency capacity within one year and to normal capacity by December of 1976.[72] Judge Scott recognized that the DOC could increase capacity through the use of temporary shelters and the construction of new prisons.[73] He was careful not to require

64 *Id.* at 29–30.
65 *Id.* at 31.
66 *Id.* at 32.
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.* at 34. The court found that the DOC was around 2,682 inmates over emergency capacity. *Id.*
73 *Id.* At the time of the order, the construction of new prisons was already underway. *Id.*

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a reduction of a fixed number of inmates, or a numeric cap on how many inmates the DOC could accept at any given time.[74] Instead, he framed the injunction in terms of capacity, requiring a minimum amount of space per inmate at any given time.[75] Judge Scott commended the defendant for using innovative solutions such as temporary housing to address overcrowding, and noted that the court "hope[d] to provide a continuing incentive to the [DOC] to maintain its pertinacious program of developing further innovations to increase the capacity of [its] penal system."[76]

Still, the language of the opinion suggests that Judge Scott did not contemplate the long-term expansion of Florida's prisons as the inevitable outcome of his order. He pointed out that "[t]here are numerous means by which the inmate population may be reduced."[77] Judge Scott enumerated some of these options, including the DOC's statutory authority to grant inmates good time credits, and emphasized the DOC's "great[ ] flexibility" to grant earlier releases.[78] Judge Scott also suggested that the Florida Parole and Probation Commission (also a defendant in the case) "accelerate the granting of paroles."[79] He noted that this would not require the release of dangerous inmates, because according to the defendant's "own testimony, 30% to 50% of the inmate population could be [released] . . . without any danger to the community."[80] Finally, Judge Scott encouraged increased pre-trial intervention for victimless crimes as a way to reduce incarceration.[81]

In light of this language, it appears that Judge Scott saw deceleration of the Florida prison population as sound budgetary policy. Moreover, he seemed to suggest normative policy reasons for decreasing reliance on incarceration in the face of budgetary constraints. He explained that "severe overcrowding . . . perpetuate[s] antisocial behavior and foster[s] recidivism," and "ultimately disserve[s] the rehabilitative goals of the correctional system." He opined that "[a] free democratic society cannot cage inmates like animals in a zoo . . . and expect

74 *Id.* at 34–35.
75 *Id.* at 35.
76 *Id.* at 34–35.
77 *Id.* at 35.
78 *Id.*
79 *Id.*
80 *Id.*
81 *Id.*

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them to emerge as decent, law abiding, contributing members of the community," without "society becom[ing] the loser."[82]

Yet, Judge Scott recognized that alternatives to incarceration are legislative considerations that eclipse the jurisdiction of the federal courts, and that the legislature must ultimately decide whether increased reliance on incarceration is in fact sound policy. He emphasized that the State of Florida could "place as many convicted persons as the state courts permit in its jails and prisons," so long as the State provided "minimally adequate health care and housing" to its inmates.[83]

Therefore, in keeping with the spirit of the Fifth Circuit's decisions in *Gates* and *Newman*, Judge Scott understood that the district court's authority was limited to imposing only that equitable relief necessary to correct the State of Florida's constitutional violations.[84] The court would likely have violated the separation of powers and the federalist structure of government had it ordered the DOC to reduce overcrowding by lowering its population to a fixed number of prisoners.[85] Accordingly, it acted to protect the constitutional rights of Florida's prisoners by ordering the State to bring its prison population to normal capacity by any means within the State's discretion.[86] However, given the measured attitude towards incarceration reflected in the decision's dicta, Judge Scott likely did not foresee or intend that *Costello* would be used to campaign for Florida's extraordinary prison expansion over the next several decades, and to accommodate, rather than temper, growing imprisonment rates. And yet this is precisely what happened.

If I Had a Hammer: Using *Costello* to Push Through Florida's Prison Expansion

Initially, *Costello* led to a decrease in prison overcrowding. The subsequent settlement agreement imposed population caps based on capacity,[87] but the DOC struggled to comply.[88] Unwilling to

82 *Id.* at 38.
83 *Id.* at 37.
84 *See* Newman v. Alabama, 503 F.2d 1320, 1329 (5th Cir. 1974); Gates v. Collier, 501 F.2d 1291, 1301 (5th Cir. 1974).
85 *See Costello*, 397 F. Supp. at 34; *Newman*, 503 F.2d at 1329.
86 *Costello*, 397 F. Supp. at 34, 35.
87 *See* Settlement Agreement, *supra* note 19, at 6–9.
88 *See* Schoenfeld, *supra* note 8, at 745.

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fund prison construction sufficient to comply with the agreement, the Florida Legislature created the Corrections Overcrowding Task Force (COTF) to develop alternative solutions.[89] Many of the COTF's recommendations were codified in the Correctional Reform Act of 1983,[90] which most notably created a Community Control Program for nonviolent offenders and increased gain-time for parole inmates.[91] These changes lead to a short-lived decrease in the prison population throughout 1984.[92]

However, in the mid 1980s the War on Drugs, the emergence of crack cocaine, and a national spike in violent crime ushered a political climate that emphasized deterrence and stigmatized rehabilitation, and lead to increasingly punitive criminal policy and a sharp increase in Florida's prison population.[93] Although Florida expanded early-release for parole inmates in 1983, it simultaneously abolished parole for individuals convicted post-1983.[94] Overcrowding was again a palpable crisis. Initially a thorn in the DOC's and legislature's sides, the *Costello* settlement became an effective tool for funding prison expansion to accommodate the exploding prison population.[95] A former deputy director of the DOC put it bluntly:

> The [settlement agreement] helped us tremendously . . . . We wanted . . . that . . . "maximum capacity" beyond which we wouldn't be able to go without violating the *Costello* Agreement. That . . . gave us the hammer we needed to go to the legislature and say " . . . we are within two percentage points of being in contempt of court, we have got to build

89 *See* Schoenfeld, *supra* note 8, at 746; Mark Dykstra, *Apart From the Crowd: Florida's New Prison Release Program*, 14 FLA. ST. U. L. REV. 779, 795 (1986).

90 Dykstra, *supra* note 93, at 796 (citing Correctional Reform Act of 1983, ch. 83-131, 1983 Fla. Laws 435 (amending FLA. STAT. chs. 947, 948 (1985)).

91 *Id.*

92 *Id.*

93 *See* Schoenfeld, *supra* note 8, at 747 ("Between . . . 1986 and 1987, prison admissions increased by 7,400 offenders (or 33 percent). Forty-six percent of this . . . was due to the increase in admissions for drug crimes."); ALEXIA COOPER AND ERICA L. SMITH, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008 2 (2010).

94 PAROLE: THEN AND NOW, SENATE RESEARCH CENTER 3 (1999), *available at* www.senate.state.tx.us/src/pdf/ib0599.pdf.

95 *See* Schoenfeld, *supra* note 8, at 754.

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> more beds, or we are going to have to trigger this release mechanism"—and nobody wanted to do that, so they said, "We'll give you money for more beds."[96]

In 1972 the annual budget for the Florida prison system was $36 million; by 1985 it was $322 million. By another account, "the Florida Legislature . . . relied heavily on the federal guidelines established in *Costello*" to secure this funding.[97]

In 1987, the new governor, Bob Martinez, similarly used the *Costello* agreement to obtain funding for mass prison expansion. He sent state legislators lists of offenders from their districts and claimed they would be released by court order if the State failed to act.[98] These tactics appear to have been effective. Between 1987 and 1991, the legislature funded the construction of twenty major correctional facilities, creating room for an additional 27,087 Florida inmates.[99]

In this way, *Costello*—which contemplated a balanced approach to reducing prison overpopulation—was ultimately used for the singular purpose of expanding Florida's prison system to accommodate the dramatic growth of its incarceration rates. Florida had 12,748[100] inmates in seventeen prisons when *Costello* was decided.[101] Today there are roughly 100,000 inmates in sixty prisons.[102] Florida's corrections budget exceeds two billion dollars,[103] and represented an estimated 9.4% of the State's general revenue budget in 2011.[104] Last year, Florida's prison population

96 *See* Schoenfeld, *supra* note 8, at 746–47. A state senator also told Schoenfeld in an interview: "I don't like letting them out on administrative gain time at all, but we've got to go by the federal guidelines until we build enough prisons to hold them." *Id.* at 750.

97 *See e.g.* Dykstra, *supra* note 93, at 783; Schoenfeld, *supra* note 8, at 745–47.

98 *See* Schoenfeld, *supra* note 8, at 749.

99 *Id.* at 751.

100 Costello v. Wainwright, 397 F. Supp. 20, 22 (M.D. Fla. 1975).

101 Louie L. Wainwright, Annual Report 1975–76: Florida Department of Offender Rehabilitation 16, 19, 23, 27, 31 (1976).

102 *Quick Facts About the Florida DOC*, Fla. Dep't Corrections, http://www.dc.state.fl.us/oth/Quickfacts.html (last updated Feb. 2012).

103 Transparency Florida: Shining the Light on Florida's Budget, *available at* http://www.transparencyflorida.gov/Agency.aspx?FY=12&BE=70000000&M=.

104 Final Budget Report 2011, Florida Fiscal Portal 3 (2011), *available at* http://floridafiscalportal.state.fl.us/Documents.aspx?FY=2012&AGY=0100&EXID=125&DisplayAgy=N.

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continued to rise by over 1,500 inmates.[105] At a time when the State's annual budget shortfall is projected to total two billion dollars, this is a costly trajectory.[106]

A Lasting but Uncertain Legacy: Prison Reform or Prison Expansion?

Prison litigation reform like *Costello* has been critical in establishing and enforcing the fundamental rights of prisoners and minimum standards for their conditions of confinement.[107] However, as states have been required to reduce overcrowding in prisons, they have most often responded by simply constructing new ones.[108] Like Florida, the nationwide trend in criminal justice has unquestionably been one of mass incarceration:[109] the prison population in the United States is now over 2.3 million people.[110] In many states, corrections is the single largest budget item.[111] In a time of shrinking revenues and state budget crises, mass incarceration is an unsustainable approach to criminal justice, and it raises the likelihood that prison conditions will fall below what is constitutionally acceptable.[112] Yet, increasing criticism of judicial

105 Diana Moskovitz, *Florida Prison Population Rises as Most States Show Declines, Study Says*, FLORIDA ISSUES (Mar. 17, 2010, 7:45 AM), http://florida-issues.blogspot.com/2010/03/florida-prison-population-rises-as-most.html (noting that this distinction is due to the Florida Legislature's failure to initiate cost-effective alternatives to imprisonment).

106 ELIZABETH MCNICHOL, ET AL., CENTER ON BUDGET AND POLICY PRIORITIES, STATES CONTINUE TO FEEL RECESSION'S IMPACT 5 (2012), *available at* http://www.cbpp.org/cms/index.cfm?fa=view&id=711.

107 *See* Sturm, *supra* note 23, at 662.

108 *See id.* at 678.

109 DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 1–2 (Univ. of Chi. Press 2007).

110 Adam Liptak, *US Population Dwarfs That of Other Nations*, N.Y. TIMES (Apr. 23, 2008), *available at* http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all.

111 *See* Sturm, *supra* note 23, at 695.

112 For instance, in 2011, the Supreme Court affirmed a district order directing the State of California to remedy ongoing Eighth Amendment violations within its prisons, where severe overcrowding led to deficient medical care and the proliferation of "needless suffering" and "preventable deaths." Brown v. Plata, 131 S. Ct. 1910, 1922, 1923, 1925 (2011). The Court found that the order was necessary in part because California's ongoing attempts to address the crisis through new construction had repeatedly failed due to budgetary limitations. *Id.* at 1931.

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oversight in prisons has led to a federal judiciary more reluctant to engage in such oversight,[113] and statutory limitations have constrained the judiciary's discretion and ability to do so.[114]

As this scenario plays out in Florida, it is unclear what *Costello*'s legacy will be. What is clear is that budgetary problems are having a significant impact on Florida's prison system. The Correctional Medical Authority (CMA) was an independent state agency developed to provide ongoing oversight of the DOC's health services and to ensure compliance with the *Costello* settlement agreement and the Eighth Amendment.[115] In 1993, Judge Scott's successor Judge Susan H. Black[116] entered a final judgment permanently closing *Costello.*[117] Judge Black found that the CMA was providing satisfactory oversight of the DOC,[118] and concluded that so long as the CMA was adequately funded it would continue to provide "moral and legal authority" sufficient to "make future involvement of the federal courts unnecessary."[119] This order ended two decades of the district court's involvement in Florida's prisons.[120]

Last fall the Florida Legislature defunded the CMA, and with it, independent oversight of Florida's prisons.[121] In addition, a political

113 In 1996, Congress passed the Prison Litigation Reform Act (PLRA) to limit federal judicial intervention in prison litigation. Catherine G. Patsos, *The Constitutionality and Implications of the Prison Litigation Reform Act*, 42 N.Y. L. Rev. 205, 253–54, 239 (1998) (arguing that this limitation on federal courts is an unconstitutional exercise of Congress's power); *see also* Sturm, *supra* note 23, at 642.

114 *See* Patsos, *supra* note 118, at 256 (arguing that the PLRA unconstitutionally prevents federal courts from enforcing the constitutional rights of prisoners).

115 Celestino v. Singletary, 147 F.R.D. 258, 262 (M.D. Fla. 1993).

116 Judge Black was nominated to the U.S. District Court for the Middle District of Florida in 1979 by President Jimmy Carter, where she served as chief judge from 1990 to 1992. *Biographical Directory of Fedreal Judges: Black, Susan Harrell*, Fed. Jud. Ctr., http:www.fjc.gov/servlet/nGetinfo?jid=184&cid=999&ctype=na&instate=na (last visited Sept. 23 2012). In 1992 she was nominated to the U.S. Court of Appeals for the Eleventh Circuit by President George H. Bush, where she remains today, having assumed senior status in 2011. *Id.* Judge Black took over the Costello case when Judge Scott died in 1983. *See supra* note 2; Schoenfeld, *supra* note 8, at 747.

117 *Id.* at 264.

118 *Id.*

119 *Id.* at 263.

120 *Id.* at 264.

121 *Agency Overseeing Prison Medical Care Is Shut by Legislative Action*, The Sun Sentinel (Aug. 19, 2011), *available at* http://articles.sun-sentinel.com/2011-08-19/news/fl-prison-health-watchdog–no-more-20110819_1_private-prisons-prison-improvements-cma.

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movement to cut costs by privatizing Florida prisons is ongoing,[122] and the State has plans to close seven major prisons.[123] The impact of these cost-cutting measures on Florida's prison conditions remains to be seen, and the extent to which *Costello* is a watershed for prison reform or prison expansion will ultimately be decided by the State of Florida's response to this crisis.

122 *Bill to Privatize Prisons Dies in Senate*, THE MIAMI HERALD (Feb. 14, 2012), *available at* http://www.miamiherald.com/2012/02/14/2642075/bill-to-privatize-prisons-dies.html.

123 Kathleen Haughney, *State to Close 7 Prisons*, THE SUN SENTINEL (Jan. 12, 2012), *available at* http://weblogs.sun-sentinel.com/news/politics/dcblog/2012/01/state_to_close_7_ prisons.html.

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