St. Mary's Law Journal

Volume 24 | Number 2 Article 12

1-1-1993

Consent Decrees Resulting from Institutional-Reform Litigation May Be Modified upon Showing a Significant Change in Law or Fact and a Modification Appropriately Tailored to that Change.

Christy J. Lindsay

JUDGMENTS—Consent Decrees—Consent Decrees Resulting from Institutional-Reform Litigation May Be Modified upon Showing a Significant Change in Law or Fact and a Modification Appropriately Tailored to that Change.

Rufo v. Inmates of Suffolk County Jail, ___ U.S. ___, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992).

In 1971, the inmates of Suffolk County Jail sued the local government for confining them in unconstitutional living conditions.[1] Chief among their complaints was the practice of double-bunking prisoners.[2] After nine years of litigation, the inmates obtained a consent decree requiring the government to eliminate these malignant conditions through the construction of a new facility with single-occupancy cells for detainees.[3] In 1989, Robert C. Rufo, the Sheriff of Suffolk County, moved to modify the decree pursuant to Federal Rule of Civil Procedure 60(b)(5),[4] alleging that changes in facts and in law required modification of the decree to allow double-bunking.[5] Sheriff Rufo argued that a 1979 Supreme Court opinion[6] which held that double-bunking was not per se unconstitutional constituted a change in law compel-

---

1. Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 690 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974). The unconstitutional conditions about which the inmates complained included: double bunking, lack of privacy, inadequate diet and health care, structural inadequacies, poor plumbing, extremely filthy beds and toilets, fire hazards, insects, and rats. *Id.* at 678-80. Such conditions are the equivalent to punishment and, therefore, invoke the Eighth Amendment of the United States Constitution. *Id.* at 686.

2. *Id.* at 678. Double-bunking (placing two inmates in a single cell) was a primary concern because lack of sufficient space increased tensions among inmates who were locked up together for approximately twenty hours per day. *Id.* at 679.

3. Rufo v. Inmates of Suffolk County Jail, 734 F. Supp. 561, 561 (D. Mass.), *aff'd*, 915 F.2d 1557 (1st Cir. 1990), and *vacated and remanded*, ___ U.S. ___, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992). Although judgment in the original suit was in favor of the inmates, the sheriff did nothing to fulfill his obligations under the original court order. *Id.* at ___, 112 S. Ct. at 754-55, 116 L. Ed. 2d at 879. Finally, after judicial intervention, a consent decree was agreed upon in 1979. *Id.* at ___, 112 S. Ct. at 755, 116 L. Ed. 2d at 880. The decree incorporated an architectural program of the new facility which required that the facility include single occupancy rooms of 70 square feet. *Id.*

4. FED. R. CIV. P. 60(b)(5). For modification to be appropriate, federal rules require that "it is no longer equitable that the judgment should have prospective application." *Id.*

5. *Rufo*, ___ U.S. at ___, 112 S. Ct. at 757, 116 L. Ed. 2d at 882. Sheriff Rufo requested permission to double-bunk in cells designed only to accommodate one person. *Id.*

6. Bell v. Wolfish, 441 U.S. 520, 530-43 (1979) (holding that double-bunking does not deprive pretrial detainees of their Fifth Amendment due process right).

ling modification of the decree.[7] Sheriff Rufo also asserted that an allegedly unanticipated increase in the pretrial detainee population created a change in fact which made double-bunking necessary in the near future in order to accommodate all of the detainees.[8] The United States District Court for the District of Massachusetts denied the motion, holding that Sheriff Rufo did not produce a "clear showing of grievous wrong evoked by a new and unforeseen condition" as required by cases interpreting Rule 60(b).[9] The court also rejected Sheriff Rufo's claim of a change in law, holding that the Supreme Court's 1979 decision was merely a clarification of existing law.[10] The Court of Appeals affirmed.[11] The United States Supreme Court granted certiorari to determine whether sufficient grounds for modification existed.[12] Held — *vacated and remanded.* Consent decrees resulting from institutional-reform litigation may be modified upon showing a significant change in law or fact and a modification appropriately tailored to that change.[13]

Consent decrees are compromises reached by disputing parties that are approved and signed by a judge.[14] This combination of agreement and judicial intervention makes the consent decree a hybrid of a contract and a judi-

---

7. *See Rufo*, __ U.S. at __, 112 S. Ct. at 756, 116 L. Ed. 2d at 881 (arguing change in law based on Court's 1979 decision in *Bell*).

8. *Id.*

9. Inmates of Suffolk County Jail v. Kearney, 734 F. Supp. 561, 563 (D. Mass.), *aff'd*, 915 F.2d 1557 (1st Cir. 1990), and *rev'd sub nom.* Rufo v. Inmates of Suffolk County Jail, __ U.S. __, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992). The court found that the increase in detainees had in fact been foreseen or was a foreseeable problem. *Id.* at 564. The "grievous least wrong" standard was developed by Justice Cardozo in 1932 and states that "[n]othing less than a clear showing of grievous wrong evoked by a new and unforeseen condition should lead . . . to [a] change [in] what was decreed after years of litigation. . . ." United States v. Swift, 286 U.S. 106, 119 (1932).

10. *Kearney*, 734 F. Supp. at 564.

11. Inmates of Suffolk County Jail v. Kearney, 915 F.2d 1557, 1557 (1st Cir. 1990), *rev'd sub nom.* Rufo v. Inmates of Suffolk County Jail, __ U.S. __, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992). The First Circuit affirmed without a written opinion. *Id.*

12. *Rufo*, __ U.S. at __, 112 S. Ct. at 748, 116 L. Ed. 2d at 867.

13. *Id.* at __, 112 S. Ct. at 752-53, 116 L. Ed. 2d at 877.

14. *See* Rufo v. Inmates of Suffolk County Jail, 734 F. Supp. 561, 563 (D. Mass.) (noting that prison inmates and government officials entered into consent decree formally approved by district court), *aff'd*, 915 F.2d 1557 (1st Cir. 1990), *and vacated and remanded*, __ U.S. __, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992); *see also* Ruiz v. Lynaugh, 811 F.2d 856, 858 (5th Cir. 1987) (stating that district court approved stipulation); New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 958 (2d Cir. 1983) (permitting negotiation between two parties); 49 C.J.S. *Judgments* § 173 (1947) (discussing evolution of consent decrees); 31 AM. JUR. *Judgments* § 458 (1940) (stating that courts have power to approve consent agreements between disputing parties); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1020 n.2 (1986) (indicating that consent decree is judicial approval of compromise between parties). The court's stamp of approval is necessary to make the decree judicially enforceable. *See* 49 C.J.S. *Judgments* § 173 (1947) (explaining significance of judicial approval).

cial order.[15] Consent decrees bind the parties to their promises and terminate any further litigation, thus conserving time and money.[16] The use of consent decrees is both advantageous and efficient because the parties craft the decrees rather than a third party.[17] Because the terms of the decree are not set by the court, parties may negotiate agreements providing for broader remedies than those available to the court.[18]

The past thirty years have witnessed the growth of a new form of judgment—the institutional reform consent decree.[19] Distinguishable from gen-

---

15. *See* Rufo v. Inmates of Suffolk County Jail, __ U.S. __, __, 112 S. Ct. 748, 751, 116 L. Ed. 2d 867, 876 (1992) (demonstrating combination of contractual agreement and judicial enforcement); United States v. Swift, 286 U.S. 106, 106 (1932) (requiring that plaintiffs and defendants agree to terms monitored by court); Lorain NAACP v. Lorain Bd. of Educ., 768 F. Supp. 1224, 1240 (N.D. Ohio 1991) (illustrating example of judicial modification of consent decrees); *see also* 49 C.J.S. *Judgments* § 173 (1947) (stating that consent decrees are like contracts with approval of court); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1020 n.2 (1986) (recognizing this hybridization). As one commentator has noted, "[A] consent decree resembles a private contract in that it represents an agreement of the parties in settlement of litigation." Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 726. Yet, such decrees retain an injunctive nature in that, once they are approved by the judge, the court enforces compliance. *Id.* The courts primarily construe consent decrees as contracts, relying on the "four corners" of the agreement. *Id.*

16. *See* Kozlowski v. Coughlin, 871 F.2d 241, 247 (2d Cir. 1989) (noting time and money saved by decrees); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 725 (stating that consent decrees settle disputes and are more economical than litigation).

17. *See* Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325, 1338 (1st Cir. 1991) (acknowledging court's role as policy manager in consent decrees); *Kozlowski*, 871 F.2d at 246 (expressing need for parties to resolve questions of institutional reform); *Carey*, 706 F.2d at 959 (allowing plaintiffs, not court, to decide number of beds per location); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 725-26 (noting that judges only approve decrees); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1020 n.2 (1986) (recognizing that parties sculpt consent agreements).

18. *See Rufo*, __ U.S. at __, 112 S. Ct. at 762-63, 116 L. Ed. 2d at 889 (showing that parties may undertake to do more than is constitutionally required to settle disputes); Local 92, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501, 525 (1986) (permitting parties to impose remedies greater than court could impose); Milliken v. Bradley, 418 U.S. 717, 738 (1974) (allowing remedy to exceed constitutional minimum). It is not considered an abuse of discretion for the court to allow a party to a consent judgment to undertake more than the court could order via the Constitution. *Rufo*, __ U.S. at __, 112 S. Ct. at 762, 116 L. Ed. 2d at 888. *See generally* 49 C.J.S. *Judgments* § 178 (1947) (stating that consent decree is not invalid because it obligates parties to do more than they are required); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1027-41 (1986) (noting that consent decrees expand number of potential remedies).

19. *See Kozlowski*, 871 F.2d at 247 (noting emergence of institutional-reform consent decrees during past twenty years); Twelve John Does v. District of Columbia, 861 F.2d 295, 295 (D.C. Cir. 1988) (involving constitutional rights of prison inmates); *Ruiz*, 811 F.2d at 861

eral consent decrees, institutional reform consent decrees do not exist between private parties, but rather between the government and a private party.[20] They usually result from suits against the government for reformation of public institutions rather than for monetary compensation.[21] Desegregating schools, improving quality of care for disabled patients, and correcting prison overcrowding problems are just a few examples of typical relief sought by institutional-reform decree plaintiffs.[22] These decrees are generally designed to accomplish goals gradually over a specified period of time.[23] The nature of institutional-reform consent decrees—because they al-

---

(noting rise in institutional reform litigation). *See generally* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 725 (recognizing growth in number of structural reform cases); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1020 (1986) (discussing increase in suits against public institutions).

20. *See, e.g.*, Board of Educ. of Okla. City Pub. Sch. v. Dowell, __ U.S. __, __, 111 S. Ct. 630, 630, 112 L. Ed. 2d 715, 715 (1991) (consent decree between private party and city Board of Education); Heath v. De Courcy, 888 F.2d 1105, 1109 (6th Cir. 1989) (citing differences in general decrees and institutional-reform decrees); *Ruiz*, 811 F.2d at 857 (illustrating example of consent decree between private parties and state institutions); Nelson v. Collins, 659 F.2d 420, 421 (4th Cir. 1981) (involving consent decree between private party and prison institution); *Lorain NAACP*, 768 F. Supp. at 1242 n.22 (listing governmental defendants as characteristic of institutional-reform litigation); *see also* Note, *Institutional Reform Litigation: Representation in the Remedial Process*, 91 YALE L.J. 1474, 1474 (1982) (listing institutions commonly involved in reform litigation); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1033 (1986) (stating that government is original defendant in institutional-reform litigation).

21. *See, e.g.*, *Rufo*, __ U.S. at __, 112 S. Ct. at 754, 116 L. Ed. 2d at 879 (suing for reformation of prison conditions); *Kozlowski*, 871 F.2d at 241 (inmates suing for prison reform); *Carey*, 706 F.2d 956, 958 (plaintiff class suing for reformation of conditions at state school for mentally handicapped); Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 725 (noting that plaintiffs seek structural reformation of institutions); *see also* Note, *Institutional Reform Litigation: Representation in the Remedial Process*, 91 YALE L.J. 1474, 1474 (1982) (listing institutional reforms sought by plaintiffs); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1020 (1986) (stating that plaintiffs do not just seek compensation but rather long-term reforms). Plaintiffs typically sue for reformation as opposed to compensation because money damages would not adequately correct an on-going violation of the plaintiff's constitutional rights. *See generally id.* at 1020 (discussing need for flexible standards in consent decree modification).

22. *See Dowell*, __ U.S. at __, 111 S. Ct. at 633, 112 L. Ed. 2d at 723 (demonstrating school desegregation decree); *Ruiz*, 811 F.2d at 857 (discussing prison-reform consent decree); *Carey*, 706 F.2d at 958 (involving decree for quality of patient care); *see also* Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1265 (citing types of reform sought in institutional reform litigation); Note, *Institutional Reform Litigation: Representation in the Remedial Process*, 91 YALE L.J. 1474, 1474 (1982) (listing examples of relief sought by plaintiffs).

23. *See, e.g.*, *Rufo*, __ U.S. at __, 112 S. Ct. at 756, 116 L. Ed. 2d at 881 (building new facilities by specified date); *Carey*, 706 F.2d at 958 (defendant having difficulty meeting goals

most always implicate constitutional rights—makes them important not only to the parties involved, but also to third parties and the public at large.[24] Due to the long-term nature of these institutional consent decrees, their terms are often based on speculation as to future circumstances, thus creating a potential need for future modification as those circumstances change.[25]

Theoretically, parties enter consent decrees with the intent that they be final judgments; in reality, however, some decrees prove unworkable due to unexpected changes in conditions.[26] For example, modification may also be

---

after considerable effort and passage of time); *Nelson*, 659 F.2d at 422 (placing deadline on long-term reformation of prison system); *see also* Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1020 (1986) (noting that institutional reforms are typically long-term endeavors). *See generally* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 725-29 (discussing implementation process of institutional reform decrees). These objectives take a considerable amount of time to accomplish because they usually involve reform of great magnitude that requires an inordinate amount of time, planning, and effort. *Id.*

24. *See, e.g.*, Plyler v. Evatt, 924 F.2d 1321, 1324 (4th Cir. 1991) (noting that institutional reform litigation is aimed at broad public policy objectives); *Kozlowski*, 871 F.2d at 251 (explaining that modification of consent decrees should take into consideration public interests involved); *Lorain*, 768 F. Supp. at 1241 (stating that institutional consent decrees usually involve significant public interests); *see also* Note, *Institutional Reform Litigation: Representation in the Remedial Process*, 91 YALE L.J. 1474, 1474 (1982) (noting that institutional-reform litigation affects individuals who are not actual parties); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1032 (1986) (discussing impact of institutional reform litigation on general public).

25. *See Rufo*, __ U.S. at __, 112 S. Ct. at 753, 116 L. Ed. 2d at 877 (holding that speculation of future prison population was incorrect and therefore potential reason for modification); *Twelve John Does*, 861 F.2d at 298-99 (giving unforeseen circumstances as basis for modification of consent decree); *Carey*, 706 F.2d at 970-71 (modifying decree because of unattainable objectives). *See generally* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 726 (noting need to modify consent agreements); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1021 (1986) (discussing inevitability of modification in some consent decrees).

26. *See, e.g.*, Rufo v. Inmates of Suffolk County Jail, 734 F. Supp. 561 (D. Mass.), *aff'd*, 915 F.2d 1557 (1st Cir. 1990), *and vacated and remanded*, __ U.S. __, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992) (seeking modification due to rise in prison detainee population); Heath v. De Courcy, 888 F.2d 1105, 1110 (6th Cir. 1989) (stating that change in conditions could warrant modification); Kozlowski v. Coughlin, 871 F.2d 241, 251 (2d Cir. 1989) (noting that sometimes decrees should be amenable to modification when circumstances change); Twelve John Does v. District of Columbia, 861 F.2d 295, 297 (D.C. Cir. 1988) (seeking decree modification because of rise in prison population); Ruiz v. Lynaugh, 811 F.2d 856, 860 (5th Cir. 1987) (finding modification proper if due to changing circumstances); New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 959 (2d Cir. 1983) (meeting demands of decree proved impossible due to lack of necessary facilities for mentally handicapped); Nelson v. Collins, 659 F.2d 420, 422 (4th Cir. 1981) (requesting modification due to unexpected rise in prison population); *see also* Jean F. Rydstrom, Annotation, *Construction and Application of Rule 60(b)(6) of Federal Rules of Civil Procedure Authorizing Relief from Final Judgment or*

necessary if the dangers which the decree was intended to remedy are subsequently eliminated.[27] The courts have the inherent power to order such modifications,[28] and the Federal Rules of Civil Procedure give the courts the express power to revise consent decrees when the original provisions are no longer equitable.[29]

Order for "Any Other Reason", 15 A.L.R. FED. 193, 225 (1973) (explaining how changed circumstances can be basis for modification of limits); Jean F. Rydstrom, Annotation, *Construction and Application of Rule 60(b)(5) of Federal Rules of Civil Procedure Authorizing Relief from Final Judgment Where Its Prospective Application Is Inequitable*, 14 A.L.R. FED. 309, 316-17 (1973) (noting that unforeseen changes are basis for modification); Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Decrees*, 1986 U. ILL. L. REV. 725, 727 (acknowledging that certain decree provisions may become unworkable).

27. *See* Rufo v. Inmates of Suffok County Jail, __ U.S. __, __, 112 S. Ct. 748, 762, 116 L. Ed. 2d 867, 886 (1992) (stating that modification is warranted if statutory or decisional law changed to make legal what decree was designed to remedy); Board of Educ. of Okla. City Pub. Sch. v. Dowell, __ U.S. __, __, 111 S. Ct. 630, 633-35, 112 L. Ed. 2d 715, 723-25 (1991) (arguing that five years of decree provisions have eliminated danger and allow for decree dissolution); Systems Fed'n v. Wright, 364 U.S. 642, 648 (1961) (permitting previously prohibited actions when law upon which decree was based had changed); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 753 (noting that elimination of dangers allows for modification); Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in Federal Courts*, 64 TEX. L. REV. 1101, 1104 (1986) (demonstrating that change in law may eliminate problem). The problems that the decrees seek to remedy may be eliminated because new laws may turn what was illegal into something legal. *Rufo*, __ U.S. at __, 112 S. Ct. at 762, 116 L. Ed. 2d at 888.

28. *See* United States v. Swift, 286 U.S. 106, 114 (1932) (Justice Cardozo asserting power of courts to modify decrees); *Heath*, 888 F.2d at 1110 (noting that courts have power to modify consent decrees); *Twelve John Does*, 861 F.2d at 297 (stating that decrees are subject to modification by courts); *Ruiz*, 811 F.2d at 860 (recognizing that courts retain power to modify consent decrees); Duran v. Elrod, 760 F.2d 756, 758 (7th Cir. 1985) (affirming court's power of decree modification); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 754 (agreeing that courts have modification power regardless of whether or not stated in decree); Timothy S. Jost, *From Swift to Stotts and Beyond: Modifications of Injunctions in Federal Courts*, 64 TEX. L. REV. 1101, 1105 (1986) (illustrating that courts' power to modify can be found in Federal Rule of Civil Procedure 60(b)). Courts retain the power to modify continually changing consent decrees because, as Justice Cardozo argued, a consent decree is a combination of contract law and a court order; therefore courts can correct future wrongs whether or not the right was reserved in the decree. Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 754 n.91.

29. FED. R. CIV. P. 60(b)(5). *See, e.g.*, *Rufo*, __ U.S. at __, 112 S. Ct. at 756, 116 L. Ed. 2d at 881 (decree provisions no longer equitable under Rule 60(b)(5)); *Twelve John Does*, 861 F.2d at 297 (examining modification of consent decrees); *Carey*, 706 F.2d at 960 (considering Rule 60(b)(5) modification of consent decrees owing to unattainable decree provisions). *See generally* Jean F. Rydstrom, Annotation, *Construction and Application of Rule 60(b)(5) of Federal Rules of Civil Procedure Authorizing Relief from Final Judgment Where Its Prospective Application Is Inequitable*, 14 A.L.R. FED. 309, 311 (1973) (noting reasons for allowing modification under Rule 60(b)(5)); Lloyd C. Anderson, *Implementation of Consent Decrees in Struc-*

In *Swift v. United States*,[30] a landmark decision by the United States Supreme Court, Justice Cardozo set a strict standard for modification of consent decrees, requiring movants to demonstrate extreme, unexpected hardship and oppression.[31] Justice Cardozo adopted this rigid standard in order to protect small, weak parties from larger, more powerful ones.[32] Many appellate courts still rely on Justice Cardozo's opinion and have adopted his "strict test."[33] However, there is a modern trend toward adopting a more flexible standard.[34] This "flexible test" is deemed particularly appropriate in the case of the institutional-reform consent decree because of its speculative, long-term nature.[35] The typical, flexible standard utilized by

---

tural Reform Litigation, 1986 U. ILL. L. REV. 725, 757 (discussing codification of power to modify consent decrees in Rule 60(b)(5)).

30. 286 U.S. 106 (1932).

31. *Swift*, 286 U.S. at 119. Justice Cardozo, in defining his strict "grievous wrong" test, stated that defendants must show that they are "suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression." *Id.* The reasons behind the strict standard include: advancing policies favoring settlement, conserving stability, preserving legitimacy and authority of the courts, helping to prevent further litigation, and preventing deprivation of hard-won benefits. *See generally* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 753 (discussing reasons for strict standards); Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1129-31 (1986) (listing justifications for strict standard).

32. *Swift*, 286 U.S. at 118. Cardozo's test was designed to prevent monopolistic meat companies from destroying the businesses of small grocers. *Id.*

33. *See, e.g.*, Kearney v. Inmates of Suffolk County Jail, 915 F.2d 1557, 1557 (1st Cir. 1990) (affirming decision to adopt strict standard); *Twelve John Does*, 861 F.2d at 301 (using rigid test in deciding questions of modification); Neely v. City of Grenada, 799 F.2d 203, 211 (5th Cir. 1986) (applying strict standard and allowing modification upon showing that purpose of decree is fulfilled); Roberts v. St. Regis Paper Co., 653 F.2d 166, 173 (5th Cir. 1981) (utilizing strict test); *see also* Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1105 (1986) (noting that *Swift* opinion still dominates to large extent); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1024 (1986) (applying cases that follow *Swift*).

34. *See, e.g.*, *Rufo*, __ U.S. at __, 112 S. Ct. at 765, 116 L. Ed. 2d at 892 (adopting more flexible test due to nature of institutional reform decree modification); *Heath*, 888 F.2d at 1108-09 (holding strict standard inappropriate for reform decree); *Carey*, 706 F.2d at 970 (allowing "freer" modification); *Nelson*, 659 F.2d at 429 (granting modification under flexible standard). *See generally* Bruce Fein, *Loosening the Ties of Consent Decrees*, LEGAL TIMES, Feb. 3, 1992, at 22 (discussing flexible approach used in *Rufo*); Martin A. Schwartz, *Modification of Institutional Reform Decrees*, N.Y. L.J., Mar. 17, 1992, at 3 (noting change to more flexible standard). Advancing public interest, correcting wrongs of unworkable decrees and inequitable provisions, and accommodating change are a few reasons for adopting a flexible test. Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1137-48 (1986).

35. *See* Plyler v. Ivatt, 924 F.2d 1321, 1324 (4th Cir. 1991) (discussing uniqueness of institutional reform litigation); *Heath*, 888 F.2d at 1109 (stating that institutional-reform consent decrees are fundamentally different from general decrees and requiring different modifica-

federal courts requires the movants to establish a significant change in law or fact and an appropriately designed modification of the institutional-reform decree.[36] Under the flexible model, requested modifications should seek to accommodate changed circumstances and should not redraft the decree.[37]

Although the flexible standard for modification of institutional-reform consent decrees is growing in popularity, the circuit courts are still split between the strict and flexible tests.[38] However, the recent Supreme Court decision, *Rufo v. Inmates of Suffolk County Jail*,[39] may soon end this debate.[40]

---

tion standards); Lorain NAACP v. Lorain Bd. of Educ., 768 F. Supp. 1224, 1240-41 (N.D. Ohio 1991) (giving reasons for different modification standard for reform decrees); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 753 (recognizing that strict standard should not always be used); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1032 (1986) (noting speculative nature of reform decrees should allow for easier modification).

36. *See Rufo*, __ U.S. at __, 112 S. Ct. at 762, 116 L. Ed. 2d at 888 (requiring change in law or fact); *Ruiz*, 811 F.2d at 861 (stating change in law or fact as requirement for modification); *Nelson*, 659 F.2d at 424 (allowing modification upon showing of change in law or fact); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 755 (discussing changed circumstances as requisite of modification); Bruce Fein, *Loosening the Ties of Consent Decrees*, LEGAL TIMES, Feb. 3, 1992, at 24 (listing requirements for decree modification). Many courts also demand that this change be unforeseen and that movants show a good-faith effort to comply. *Twelve John Does*, 861 F.2d at 300. Courts may also want the movants to show that the modification is in the best interests of the general public. Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1148 (1986).

37. *See Rufo*, __ U.S. at __, 112 S. Ct. at 760, 116 L. Ed. 2d at 886 (stating that modification should accommodate changed circumstance); *Ruiz*, 811 F.2d at 861 (requiring that modification does not frustrate original purpose of decree); *Lorain NAACP*, 768 F. Supp. at 1242 (noting that modification should work toward effectuating purpose of decrees, not toward rewriting it). *See generally* Bruce Fein, *Loosening the Ties of Consent Decrees*, LEGAL TIMES, Feb. 3, 1992, at 24 (stating holding in *Rufo*); Martin A. Schwartz, *Modification of Institutional Reform Decrees*, N.Y. L.J., Mar. 17, 1992 at 3 (discussing requirements of modifications in *Rufo*).

38. *See Rufo*, __ U.S. at __, 112 S. Ct. at 748, 116 L. Ed. 2d at 867 (adopting flexible test). *Compare Heath*, 888 F.2d at 1108-09 (supporting flexible standard) *with Twelve John Does*, 861 F.2d at 301 (advocating rigid test). *See generally* Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1105 (1986) (stating that *Swift* opinion is still widely used); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1024 (1986) (citing cases that follow *Swift*).

39. __ U.S. __, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992).

40. *See id.* at __, 112 S. Ct. at 748-49, 116 L. Ed. 2d at 867-68 (stating that flexible test is to be used in institutional-reform litigation). *See generally* Bruce Fein, *Loosening the Ties of Consent Decrees*, LEGAL TIMES, Feb. 3, 1992 at 24 (noting future impact of *Rufo*); Martin A. Schwartz, *Modification of Consent Decrees*, N.Y. L.J., Mar. 17, 1992, at 3 (discussing significance of *Rufo* opinion).

In *Rufo*, the United States Supreme Court completely abandoned the application of Justice Cardozo's "grievous wrong" test in requests for modification of consent decrees arising from institutional-reform litigation.[41] Writing for the majority, Justice White first explained that Federal Rule of Civil Procedure 60(b)(5) authorizes modification of consent decrees when their enforcement becomes inequitable.[42] Therefore, the majority argued that district courts need broad modification power in order to implement the objectives of Rule 60(b)(5) with regard to institutional-reform consent decrees.[43] Justice White further explained that because many reform decrees last for a number of years, and circumstances invariably change, modifications should be readily available to achieve the goals of reform litigation.[44] For these reasons, the majority held that the "grievous wrong" standard does not apply to institutional-reform consent decrees.[45] Under the new standard adopted by the Court, modification may be obtained if movants can establish a change in fact or law that makes compliance with the consent decree provisions substantially more onerous, unworkable, or harmful to the public interest.[46] If the changes were foreseen at the time the decree was agreed upon, the Court placed a heavier burden on the movants to show that although they entered the decree in "good faith" and attempted to comply with its provisions, modification is still necessary.[47] Finally, the Court required that the modification be appropriately tailored to the changed condition.[48]

With regard to the new standard, the majority noted that in deciding whether to allow modification, district courts should give great deference to state and local government officials because they understand both what is needed and what can be done to achieve community goals.[49] The majority also acknowledged that it would be unfair to make new local officials comply with provisions agreed upon by their predecessors.[50] Justice White emphasized that district courts should permit modifications unless the modifications would create or perpetuate greater problems or constitutional

---

41. *Rufo*, __ U.S. at __, 112 S. Ct. 749, 116 L. Ed. 2d 869. The Supreme Court noted that Justice Cardozo's test was too rigid and that a more flexible test was needed. *Id.* at __, 112 S. Ct. at 760, 116 L. Ed. 2d at 886.

42. *Id.* at __, 112 S. Ct. at 757, 116 L. Ed. 2d at 883.

43. *Id.* at __, 112 S. Ct. at 760, 116 L. Ed. 2d at 886.

44. *Id.* at __, 112 S. Ct. at 758, 116 L. Ed. 2d at 884.

45. *Rufo*, __ U.S. at __, 112 S. Ct. at 764-65, 116 L. Ed. 2d at 892.

46. *Id.* at __, 112 S. Ct. at 760, 116 L. Ed. 2d at 886.

47. *Id.* at __, 112 S. Ct. at 760-61, 116 L. Ed. 2d at 887.

48. *Id.* at __, 112 S. Ct. at 764, 116 L. Ed. 2d at 891.

49. *Rufo*, __ U.S. at __, 112 S. Ct. at 764, 116 L. Ed. 2d at 891.

50. *Id.*

violations.[51]

In her concurring opinion, Justice O'Connor agreed with the majority's judgment but not with its reasoning.[52] Justice O'Connor felt that the district court had not abused its discretion and that its opinion should have been affirmed.[53] Justice O'Connor emphasized that the nature of the Court's review was quite limited because appellate review for consent decrees should examine only whether the district court abused its discretion, not whether the appellate court would have reached the same conclusion as the district court.[54] Justice O'Connor also recognized that district court judges, such as *Rufo's* Judge Keeton, are likely to have years of experience with the problems and the parties at hand, making them the most qualified to decide modification issues.[55]

Although Justice O'Connor agreed with the judgment, she noted several problems with the majority opinion.[56] First, Justice O'Connor noted that the case could not have a truly satisfactory outcome.[57] The Justice explained that because "[t]he new jail is simply too small . . . [s]omeone has to suffer, and it is not likely to be the government officials responsible for underestimating the inmate population and delaying the construction of the jail. [I]t is likely to be . . . the inmates."[58] Further, Justice O'Connor observed that the district court recognized that single-occupancy cells were the "most important element" of the consent decree.[59] According to Justice O'Connor, the majority's conclusion that the modification of this central element was an inadequate basis for denial of modification was unsupported by

---

51. *See id.* at __, 112 S. Ct. at 764, 116 L. Ed. 2d at 891-92 (noting that modification is virtually always allowed).

52. *Id.* at __, 112 S. Ct. at 765, 116 L. Ed. 2d at 892 (O'Connor, J., concurring).

53. *Rufo*, __ U.S. at __, 112 S. Ct. at 765, 116 L. Ed. 2d at 842 (O'Connor, J., concurring). Justice O'Connor gave two main reasons for believing that Judge Keeton may not have fully exercised his discretion. *Id.* First, Judge Keeton required that the change in circumstance be unforeseen under the grievous wrong standard. *Id.* at __, 112 S. Ct. at 766, 116 L. Ed. 2d at 893-94 (O'Connor, J., concurring). Justice O'Connor contended that changes, even when anticipated, may require modification to preserve equity under Rule 60(b)(5). *Id.* Second, Justice O'Connor stated that "[w]hile the lack of resources can never excuse a failure to obey constitutional requirements," the district court still should have considered Suffolk County's resources in deciding whether continued compliance with the decree obligations remained equitable. *Rufo*, __ U.S. at __, 112 S. Ct. 766, 116 L. Ed. 2d at 893-94 (O'Connor, J., concurring). For these reasons, Justice O'Connor agreed with the majority that the case should be remanded, but only to allow the district court to exercise proper discretion. *Id.*

54. *Id.*

55. *Id.* at __, 112 S. Ct. 766, 116 L. Ed. 2d at 893-94 (O'Connor, J., concurring).

56. *See id.* (recognizing errors in majority opinion).

57. *Rufo*, __ U.S. at __, 112 S. Ct. at 764, 116 L. Ed. 2d at 892 (O'Connor, J., concurring).

58. *Id.* at __, 112 S. Ct. at 766-67, 116 L. Ed. 2d at 894 (O'Connor, J., concurring).

59. *Id.* at __, 112 S. Ct. at 767, 116 L. Ed. 2d at 895 (O'Connor, J., concurring).

authority. Disagreeing with the majority,[60] Justice O'Connor also asserted that modification of one provision of the decree, especially the most important one, could sometimes completely defeat the purpose of the decree although the decree was well-drafted, workable, or essentially valid.[61] As an example, the Justice charged that if the district court were to find that the inmates would never have entered into the consent decree had it not been for the single-occupancy cell provision, it would not be an abuse of the court's discretion to deny the request for modification.[62] Finally, Justice O'Connor found problematic the majority's opinion concerning the great deference granted to the state and local governmental officials.[63] The Justice conceded that deference in resolving day-to-day issues is necessary, but emphasized that "[d]eference to one of the parties to a lawsuit is usually not the surest path to equity," especially when one of the movants has had a very poor record of compliance.[64] Justice O'Connor further contended that district courts should not be forced to give deference to one side over another, because the views of both sides are important for a just decision.[65]

Justice Stevens and Blackmun joined in a dissenting opinion, agreeing with the majority on the issue of developing a flexible standard for some reform decrees but disagreeing with the majority's use of the standard in *Rufo*.[66] Justices Stevens and Blackmun explained that the flexible standard articulated by Judge Friendly in *New York State Ass'n for Retarded Children, Inc, v. Carey*[67] is appropriate for modification of most institutional reform consent decrees.[68] Judge Friendly's test states that modification is justified if the provisions are not working or are unnecessarily burdensome and if the modified decree would better achieve the goals of the consent decree.[69] Judge Friendly further noted that requested modifications should be analyzed in light of the central purpose of the decree so as to be consistent with that purpose.[70] The dissent of Justices Stevens and Blackmun addressed the issue of central purpose and concluded that Sheriff Rufo's re-

60. *Id.*

61. *Rufo*, __ U.S. at __, 112 S. Ct. at 767, 116 L. Ed. 2d at 895 (O'Connor, J., concurring). Justice O'Connor is referring to the majority's assertion that if modification of one decree provision undermines the central purpose of the decree, then that decree is essentially invalid. *Id.*

62. *Id.*

63. *Id.* at __, 112 S. Ct. at 767, 116 L. Ed. 2d at 895 (O'Connor, J., concurring).

64. *Id.*

65. *Rufo*, __ U.S. at __, 112 S. Ct. at 768, 116 L. Ed. 2d at 896 (O'Connor, J., concurring).

66. *Id.* (Stevens, J., dissenting).

67. 706 F.2d 956 (2d 1983).

68. *Rufo*, __ U.S. at __, 112 S. Ct. at 768, 116 L. Ed. 2d at 896 (Stevens, J., dissenting).

69. *Id.* at __ n.__, 112 S. Ct. at 770 n.2, 116 L. Ed. 2d at 898 n.2 (Stevens, J., dissenting).

70. *Id.* at __, 112 S. Ct. at 772, 116 L. Ed. 2d at 901 (Stevens, J., dissenting).

quested modification would severely undermine the decree's main purpose because, as reflected in the decree's history, prohibition of double-bunking was a central purpose of the decree.[71] Justice Stevens expressly stated that "[i]t is particularly important to apply a strict standard when considering modification requests that undermine the central purpose of a consent decree."[72]

The movant's history of noncompliance was also taken into account by the dissenters.[73] The dissenting justices noted that it was nineteen years after the inmates filed suit before the new jail was completed, and at least five years after the entrance of the consent decree before the movants even started to make a plan for compliance.[74] Justices Stevens and Blackmum also insisted that the Sheriff's claim of fiscal limitation illustrates a perpetual reluctance to allocate funds adequate to avoid the initial violation or to comply with the decree.[75] The dissenters also recognized that as soon as compliance was achieved, the movants sought modification in order to comply no longer.[76]

Finally, the dissenters explained that although the movants had not anticipated the increase in detainee population when the consent decree was formulated, the increase was obviously anticipated when the movants sought modification of the decree to allow for more cells in 1985.[77] The movants, therefore, had foreseen this potential problem for at least four years and had failed to take sufficient preventative measures while the problem could still be corrected.[78] Furthermore, the 1985 modification explicitly stated that capacity could be increased so long as "single-cell occupancy is maintained under the design for the facility."[79] In closing, Justices Stevens and Blackmun reminded the movants that they had committed themselves to providing single cells in 1979, that they had reaffirmed this promise in 1985 and that, therefore, their commitment should be honored to prevent compromising the motives for entering into consent decrees.[80]

---

71. *Id.*

72. *Rufo*, __ U.S. at __, 112 S. Ct. at 772, 116 L. Ed. 2d at 900-01 (Stevens, J., dissenting).

73. *Id.*

74. *Id.* at __, 112 S. Ct. at 769, 116 L. Ed. 2d at 897 (Stevens, J., dissenting).

75. *Id.* at __, 112 S. Ct. at 772, 116 L. Ed. 2d at 900-01 (Stevens, J., dissenting).

76. *Rufo*, __ U.S. at __, 112 S. Ct. at 769, 116 L. Ed. 2d at 897 (Stevens, J., dissenting).

77. *Id.* at __, 112 S. Ct. at 771, 116 L. Ed. 2d at 899-900 (Stevens, J., dissenting). In 1985, the movants requested modification of the consent decree to allow for a larger facility because of an unanticipated increase in detainee population. *Id.*

78. *Id.* at __, 112 S. Ct. at 771, 116 L. Ed. 2d at 899-900 (Stevens, J., dissenting). When movants finally requested the modification at hand, the problem could no longer be corrected by enlarging the facility because the prison was essentially completed. *Id.*

79. *Id.* at __, 112 S. Ct. at 769, 116 L. Ed. 2d at 897 (Stevens, J., dissenting).

80. *Rufo*, __ U.S. at __, 112 S. Ct. at 773, 116 L. Ed. 2d at 902 (Stevens, J., dissenting).

The strict "grievous wrong" standard developed by Justice Cardozo was designed to protect weak individuals and small classes from large groups and powerful institutions.[81] The majority in *Rufo* stated several logical reasons why the strict test is not appropriate for institutional-reform consent decrees, including the long-term nature of the decrees and their effects on public interests.[82] However, the reasons behind the majority's excessively flexible test may have had their roots elsewhere—namely, in the Court's tradition of granting somewhat undue deference to governmental bodies in order to preserve harmony among them.[83]

There are several elements of the majority's "test" that demonstrate its over-flexibility.[84] First, in *Rufo*, the majority noted that Rule 60(b)(5) of the Federal Rules of Civil Procedure allows modification of a consent decree if

---

The dissenters recognize that litigants will be reluctant to enter into consent decrees if they are so easily and readily modifiable. *Id.*

81. *See* United States v. Swift, 286 U.S. 106, 117 (1932) (discussing need to prevent huge monopolies from destroying their weaker competition). In *Swift*, the consent decree was designed to protect small grocery store suppliers from large, monopolistic meat-packing companies because the companies were in a position to "starve out weaker rivals." *See id.* Ruiz v. Lynaugh, 811 F.2d 856, 860 (5th Cir. 1987) (noting reasons for strict test); New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 967-68 (2d Cir. 1983) (recognizing Justice Cardozo's protection of small businesses from unfair practices of large companies); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 753 (noting that strict test prevents harm to private parties by refusing requests of institutions to lower their obligations); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1022-24 (1986) (revealing reasoning of *Swift* opinion).

82. Rufo v. Inmates of Suffolk County Jail, __ U.S. __, __, 112 S. Ct. 748, 751-53, 116 L. Ed. 2d 867, 876-77 (1992); *see* Board of Educ. of Okla. City Pub. Sch. v. Dowell, __ U.S. __, __, 111 S. Ct. 630, 636-37, 112 L. Ed. 2d 715, 724 (1991) (noting speculative nature of consent decrees); Heath v. De Courcy, 888 F.2d 1105, 1109 (6th Cir. 1989) (noting that long-term nature required flexible modification standard for institutional-reform consent decrees); *Carey*, 706 F.2d at 969 (discussing reasons for flexible test); Nelson v. Collins, 659 F.2d 420, 424 (4th Cir. 1981) (discussing applicability of flexible modification standards). *See generally* Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1032-36 (1986) (distinguishing institutional-reform consent decrees from general consent decrees); Bruce Fein, *Loosening the Ties of Consent Decrees*, LEGAL TIMES, Feb. 3, 1992, at 24 (discussing Supreme Court's reasons for adopting flexible modification test). .

83. *See* William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49, 111 (1991) (noting Supreme Court's explicit deference to government); Lisa Simotas, *In Search of a Balance: AIDS, Rape, and the Special Needs Doctrine*, 66 N.Y.U. L. REV. 1881, 1923 (1991) (discussing deference given by Supreme Court to judgment of governmental entities). *See generally* Jean M. Meaux, *Justice Scalia and Judicial Restraint: A Conservative Resolution of Conflict Between Individual and State*, 62 TUL. L. REV. 225, 246 (1987) (revealing Justice Scalia's heightened deference to government that usually works to detriment of minorities).

84. *See generally Rufo*, __ U.S. at __, 112 S. Ct. at 754-64, 116 L. Ed. 2d at 879-92 (1992) (explaining elements of majority's reasoning that are too lax on governmental institutions).

the decree proves to be inequitable; yet the majority, in its "flexible test," lowered this requirement by allowing modification upon the showing of a mere burden.[85] It further follows from Rule 60(b)(5) that a change in law or fact, in order to support modification, would have to render the decree provision inequitable; therefore, simply showing that a change occurred, as required by the majority, would be inadequate.[86] Although the majority required movants to show a good faith effort to comply with a decree if the movants had anticipated the changes before entering into the consent decree, the majority failed to affix this same burden to movants who anticipated changes after entering the decree but ignored them, allowing them to develop to the point where they would justify modification of the decree.[87] These governmental movants should be required to request modification as soon as the changes are anticipated so as to prove good faith and to avoid the potential for incurrable problems.[88]

The majority's assertion that governmental parties seeking modification of

---

85. *Id.* at __, 112 S. Ct. at 760, 116 L. Ed. 2d at 887; *see Ruiz*, 811 F.2d at 858 (requiring more than burden to warrant modification); Inmates of Suffolk County Jail v. Kearney, 734 F. Supp. 561, 563 (D. Mass.) (noting that Rule 60(b)(5) requires that consent decrees be inequitable in order to justify modification), *aff'd*, 915 F.2d 1557 (1st Cir. 1990); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 757 (elaborating on what is inequitable under Rule 60(b)(5)); Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1105 (1986) (discussing minimum requirements of Rule 60(b)(5)).

86. *See Ruiz*, 811 F.2d at 857 (denying modification because implementation of consent decree difficult but not impossible); Twelve John Does v. District of Columbia, 861 F.2d 295, 301 (D.C. Cir. 1988) (refusing modification because consent decree still workable); *Carey*, 706 F.2d at 971 (granting modification of consent decree provision); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 758 (reasoning that to modify decree provisions, change in circumstance must render provision inequitable); Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1105 (1986) (recognizing that Rule 60(b)(5) and case law require inequitable consequence to justify modification).

87. *Rufo*, __ U.S. at __, 112 S. Ct. at 759-60, 116 L. Ed. 2d at 886. The movants in *Rufo* anticipated the increase in prison population at least four years prior to the requested modification at issue. *Id.* at __, 112 S. Ct. at 756, 116 L. Ed. 2d at 881. The movants conveniently waited for the jail to be essentially completed before requesting to double-bunk, therefore preventing resolution of the problem by simply increasing the number of cells to be built. *Id.*

88. *See Swift*, 286 U.S. at 114-15 (requiring changes warranting modification to be unforeseen); *Twelve John Does*, 861 F.2d at 298 (denying modification because overcrowding problem was anticipated years before requested modification and therefore showed movants' bad faith); *Carey*, 706 F.2d at 964 (opining that unforeseen changes that render decree inequitable are basis for modification); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 755 (1986) (discussing grant modification upon showing of unforeseen obstacles); Martin A. Schwartz, *Modification of Institutional Reform Decrees*, N.Y. L.J., Mar. 17, 1992, at 3 (explaining that unforeseen factual changes which make decrees unworkable will justify modification). The dissent in *Rufo* recognized that if the movants had moved for an additional increase in the number of cells prior to

institutional-reform consent decrees should receive deference makes this "test" biased against private parties and does not foster equitable results.[89] The majority established the deferential standard not only because government officials are qualified to assess the situation, but also because it would be unfair to force new officials to comply with agreements made by past officials.[90] However, it would also be unfair to force private parties, such as the inmates of Suffolk County Jail, to give up judgments for which they have fought and waited nineteen years.[91] Finally, in promulgating its flexible test, the majority recognized the importance of narrowly tailored modifications that do not attempt to rewrite the consent decree; yet, the majority allowed modification of the decree's main provision which not only redrafted the decree but essentially revoked it.[92]

Justices O'Connor, Stevens, and Blackmun pointed out potential improvements to cure the weaknesses in the majority opinion.[93] Most importantly,

---

completion of the jail, then the problem at issue could have been avoided. *Rufo*, __ U.S. at __, 112 S. Ct. at 772, 116 L. Ed. 2d at 901 (Stevens, J., dissenting).

89. *See Rufo*, __ U.S. at __, 112 S. Ct. at 764, 116 L. Ed. 2d at 891 (reasoning that new officials may not agree to compliance of terms set by previous officials); *see also* Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (granting deference to district court judges); *Twelve John Does*, 861 F.2d at 301 (denying modification without granting deference to prison officials); Lisa Simotas, *In Search of a Balance: AIDS, Rape, and the Special Needs Doctrine*, 66 N.Y.U. L. REV. 1881, 1923 (1991) (noting inequities owing to excessive deference to government); Martin A. Schwartz, *Modification of Institutional Reform Decrees*, N.Y. L.J., Mar. 17, 1992, at 3 (recognizing importance of Justice O'Connor's argument that government institutions should not be granted deference in matters other than day-to-day decisions).

90. *See Rufo*, __ U.S. at __, 112 S. Ct. at 764, 116 L. Ed. 2d at 891 (reasoning that new officials may be burdened by compliance of terms set by previous officials).

91. *Twelve John Does*, 861 F.2d at 302 (forcing institution to comply with decree obligations); *Ruiz*, 811 F.2d at 862-63 (refusing to take away rights for which prisoners had fought); *see Swift*, 286 U.S. at 118 (noting that it would be unfair to small businesses to modify decree and thereby take away movants' duty to uphold promises); *see also* Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1110 (1986) (noting Cardozo's argument that courts should not easily modify provisions parties have litigated many years to receive); Bruce Fein, *Loosening the Ties of Consent Decrees*, LEGAL TIMES, Feb. 3, 1992, at 22 (discussing majority's notion that compliance may be onerous to future governmental officials).

92. *See Twelve John Does*, 861 F.2d at 301 (refusing to modify single-cell provision as it was important element of the decree's remedy); *Carey*, 706 F.2d at 959 (stating that when modifying decree's central provision, strict standard should be used to prevent elimination of decree goals); *Kearney*, 734 F. Supp. at 566 (denying modification of consent decree's central purpose); *see also* Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1026-27 (1986) (recognizing that modification should be used to "fine-tune" consent decrees, not to rewrite them); Martin A. Schwartz, *Modification of Consent Decrees*, N.Y. L.J., Mar. 17, 1992, at 3 (noting that modification should not have effect of rewriting decree).

93. *See Rufo*, __ U.S. at __, 112 S. Ct. at 765, 768, 116 L. Ed. 2d at 892, 896 (O'Connor, J., concurring and Stevens, J., dissenting) (listing problems with majority opinion). *See gener-*

these Justices recognized that the central purpose or provision of institutional consent decrees should not be sacrificed through the modification process without courts applying a strict test.[94] The dissenting Justices also realized that to rule justly on the request to modify, the Court must adopt a flexible test that takes into account the movant's prior history.[95] For example, the dissenters noted that the movants in *Rufo* had a history of noncompliance and had chosen to wait to request modification until the crowding problem was essentially incurable.[96] The dissent further recognized that the movants failed to request modification as soon as they anticipated the changes and, therefore, should have been subject to a "heavier burden" of proof as to their good faith motives and efforts.[97] The dissent also understood the importance of giving deference to the well-reasoned opinions of

---

ally Martin A. Schwartz, *Modification of Institutional Reform Decrees*, N.Y. L.J., Mar. 17, 1992, at 3 (discussing arguments in concurring and dissenting opinions of *Rufo*).

94. *See Twelve John Does*, 861 F.2d at 301 (refusing to modify single-cell provision as it was important element of decree's remedy); *Carey*, 706 F.2d at 959 (arguing that when modifying decree's central provision, strict standard should be used to prevent elimination of decree goals); *Kearney*, 734 F. Supp. at 566 (denying modification of consent decree's central purpose); *see also* Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1026-27 (1986) (explaining that modification should be used only to "fine-tune" consent decrees); Martin A. Schwartz, *Modification of Consent Decrees*, N.Y. L.J., Mar. 17, 1992, at 3 (noting that modification should not have effect of rewriting decree).

95. *See, e.g., Dowell*, __ U.S. at __, 111 S. Ct. at 637-38, 112 L. Ed. 2d at 729-31 (realizing that decree's goals had been reached via movant's compliance); *Twelve John Does*, 861 F.2d at 300 (finding that movant had not made good-faith attempt to comply and therefore modification denied); *Carey*, 706 F.2d at 959-60, 969 (granting modification because movants showed good faith in past and decree was unworkable); *Nelson*, 659 F.2d at 422 (citing movant's good prior history as reason to extend decree deadlines via modification of consent decree); *Kearney*, 734 F. Supp. at 565 (stating poor past history of compliance as reason to deny modification); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 753 (noting that classic modification test considers movant's good faith in prior dealings); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1022 (1986) (stating that prior history/good faith is usually considered in decree modification decisions). The history of non-compliance, decree violations, and attempts at abandonment give essential insight into the motives of the movants. *Id.*

96. *See Rufo*, __ U.S. at __, 112 S. Ct. at 772, 116 L. Ed. 2d at 901 (Stevens, J., dissenting) (recognizing movants' poor compliance history and denying modification).

97. *See Swift*, 286 U.S. at 114-15 (requiring changes warranting modification to be unforeseen); *Twelve John Does*, 861 F.2d at 298 (denying modification because overcrowding problem was anticipated years before requested modification and therefore showed movant's bad faith); *Carey*, 706 F.2d at 964 (opining that unforeseen changes that render decree inequitable are basis for modification); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 755 (discussing granting of modification upon showing of unforeseen obstacles); Martin A. Schwartz, *Modification of Institutional Reform Decrees*, N.Y. L.J., Mar. 17, 1992, at 3 (noting that unforeseen factual changes which make decrees unworkable will justify modification).

district court judges who have extensive knowledge of the cases and parties involved.[98] Finally, the dissent appreciated that future litigants will be reluctant to enter into consent decrees with governmental institutions if these institutions can so easily escape their duties.[99]

The Supreme Court should have implemented a flexible test that strikes a balance between Justice Cardozo's strict test and the majority's overly flexible one.[100] The proper flexible test should first examine the movant's prior history to determine if the movant has made a good-faith attempt at compliance.[101] Second, the requested modification should be analyzed in light of the central purpose of the decree; and, if the requested modification might

---

98. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 688 (1978) (recognizing that trial judges have years of experience with problems at hand and deserve deference); *Twelve John Does*, 861 F.2d at 300-01 (concluding that district court judge who supervised decree for considerable length of time deserves special deference); *Ruiz*, 811 F.2d at 860 (stating decision to modify consent decree properly rests with district court judges); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 755 (discussing district court's power to modify consent decrees); Martin A. Schwartz, *Modification of Institutional Reform Decrees*, N.Y. L.J. Mar. 17, 1992, at 3 (noting that heightened deference should be given to district court judges who have overseen institution in past). The decisions of these judges should not easily be overturned as they are based on prior history of the parties as witnessed by the judge. *Hutto*, 437 U.S. at 688.

99. *See Rufo*, __ U.S. at __, 112 S. Ct. at 772, 116 L. Ed. 2d at 901 (Stevens, J., dissenting) (noting future ramifications of majority decision); *Twelve John Does*, 861 F.2d at 301-02 (refusing modification in order to preserve integrity of consent decrees); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 756 (discussing possibility that flexible test would discourage voluntary settlement of litigation); Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1125 (1986) (listing efficiency and reliance on judgments as benefits which encourage settlement through consent decrees).

100. *See generally Dowell*, __ U.S. at __, 111 S. Ct. at 630, 633-36, 112 L. Ed. 2d at 715, 719-22 (permitting modification after applying flexible test that considered movant's prior history and decree's central purpose); *Carey*, 706 F.2d at 969 (applying appropriate flexible standard which did not jeopardize central purpose of decree); *Nelson*, 659 F.2d at 429 (granting modification upon application of flexible test that considered movant's good or bad faith); *see also* Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1029-30 (1986) (discussing various versions of flexible modification test put forth by lower federal courts). *See generally* Jean F. Rydstrom, Annotation, *Construction and Application of Rule 60(b)(5) of Federal Rules of Civil Procedure Authorizing Relief from Final Judgment Where Its Prospective Application is Inequitable*, 14 A.L.R. FED. 309, 313-15 (1991) (discussing use of flexible test in modification of judgments).

101. *See, e.g.*, *Twelve John Does*, 861 F.2d at 300 (movant's good faith attempt to comply not found and therefore modification denied); *Carey*, 706 F.2d at 959 (granting modification because movants showed good faith in past and decree was unworkable); *Nelson*, 659 F.2d at 422 (citing movant's good prior history as reason to extend decree deadlines via modification of consent decree); *Kearney*, 734 F. Supp. at 562 (giving poor past history of compliance as reason to deny modification); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 753 (noting that classic modification test considers movant's good faith in prior dealings); Note, *The Modification of Consent*

affect the central purpose or provision of the decree, then the strict test should be applied.[102] To grant modification, the movants should prove a significant change in law or fact that renders the decree inequitable.[103] This change should not have been foreseen by the movants upon entrance into the decree; if the change was anticipated, the movants should satisfy a heavier burden to show that the decree was entered into and acted upon in good faith.[104] After the decree is entered, if the movants anticipate a change, the movants should be required to make every effort to resolve developing problems to keep future modifications to a minimum.[105] Therefore, modification should be granted only if the decree provisions prove to be truly inequitable, making compliance illegal, virtually impossible, or a hindrance to the goals of the decree.[106]

Decrees in Institutional Reform Litigation, 99 HARV. L. REV. 1020, 1022 (1986) (stating that prior history/good faith is usually considered in decree modification decisions).

102. *See Twelve John Does*, 861 F.2d at 301 (refusing to modify single-cell provision as it was important element of decree's remedy); *Carey*, 706 F.2d at 959 (arguing that when modifying decree's central provision strict standard should be used to prevent elimination of decree goals); *Kearney*, 734 F. Supp. at 566 (denying modification of consent decree's central purpose); *see also* Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1105 (1986) (discussing requirements of Rule 60(b)(5)); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1026-27 (1986) (recognizing that modification should not be used to rewrite consent decrees); Martin A. Schwartz, *Modification of Consent Decrees*, N.Y. L.J., Mar. 17, 1992, at 3 (explaining that modification should not rewrite decree).

103. FED. R. CIV. P. 60(b)(5); *Rufo*, __ U.S. at __, 112 S. Ct. at 760, 116 L. Ed. 2d at 886; *see Ruiz*, 811 F.2d at 860 (requiring more than burden to warrant modification); *Kearney*, 734 F. Supp. at 563 (noting that Rule 60(b)(5) requires that consent decrees be inequitable in order to justify modification); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 757 (elaborating on what is inequitable under Rule 60(b)(5)); Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1105 (1986) (discussing requirements of Rule 60(b)(5)).

104. *See Swift*, 286 U.S. at 114-15 (requiring changes warranting modification to be unforeseen); *Twelve John Does*, 861 F.2d at 298-99 (denying modification because overcrowding problem was anticipated years before requested modification and therefore showed movant's bad faith); *Carey*, 706 F.2d at 967 (opining that unforeseen changes that render decree inequitable are basis for modification); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 755-56 (1986) (discussing modification upon showing of unforeseen obstacles); Martin A. Schwartz, *Modification of Institutional Reform Decrees*, N.Y. L.J., Mar. 17, 1992, at 3 (noting unforeseen factual changes which make decrees unworkable will justify modification).

105. *Rufo*, __ U.S. at __, 112 S. Ct. at 772-73, 116 L. Ed. 2d at 901-02 (Stevens, J., dissenting).

106. *See Twelve John Does*, 861 F.2d at 301 (denying modification because consent decree was still workable); *Carey*, 706 F.2d at 970-77 (allowing modification because implementation of decree was impossible and decree goal could not be reached without adjusting decree); *Kearney*, 734 F. Supp. at 566 (refusing modification because implementation of decree was not impossible or illegal); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Struc-*

If modification is granted, the modification should be narrowly tailored to accommodate the changed circumstance.[107] If modification decisions are appealed, deference should be given to the district court judges who are familiar with the facts, circumstances, and parties to the litigation.[108] Finally, appellate review should only determine whether the district court abused its discretion, not whether the appellate court would have reached the same conclusion as the district court.[109]

In *Rufo*, the Supreme Court adopted a flexible consent decree modification test that was overly indulgent of governmental institutions. The Court too frequently grants undue deference to the government and its powerful institutions. Apparently, it is easier for the Court to rule against the "little guy" than defy the strong arm of the government. Granting deference to governmental institutions renders them virtually autonomous. This autonomy has all too often allowed institutions to abuse their discretion, which is exactly why *Rufo's* original inmate-petitioners lived in deplorable conditions and were forced to sue to have their rights acknowledged.

---

tural Reform Litigation, 1986 U. ILL. L. REV. 725, 757-60 (elaborating on what is inequitable under Rule 60(b)(5)); Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1105 (1986) (discussing requirements of Rule 60(b)(5) for modification of decree).

107. *See Twelve John Does*, 861 F.2d at 301 (refusing to modify single-cell provision as it was important element of decree's remedy); *Carey*, 706 F.2d at 969 (arguing that when modifying decree's central provision, strict standard should be used to prevent elimination of decree goals); *Kearney*, 734 F. Supp. at 565 (denying modification as it would destroy consent decree's central purpose); *see also* Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1024-25 (1986) (arguing that modification should be used only to "fine-tune" consent decrees); Martin A. Schwartz, *Modification of Consent Decrees*, N.Y. L.J., Mar. 17, 1992, at 3 (warning that modification should not rewrite decree).

108. *See, e.g.*, *Hutto*, 437 U.S. at 688 (recognizing that trial judges have years of experience with problems at hand and deserve deference); *Twelve John Does*, 861 F.2d at 300-01 (concluding that district court judge who supervised decree for considerable length of time deserves special deference in deciding modification issues); *Ruiz*, 811 F.2d at 860 (stating that modification decisions properly rest with district court judges); *see also* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 755 (1986) (discussing district court's power to modify consent decrees); Martin A. Schwartz, *Modification of Institutional Reform Decrees*, N.Y. L.J., Mar. 17, 1992, at 3 (noting heightened deference should be given to district court judges who have previously overseen institution).

109. *Rufo*, __ U.S. at __, 112 S. Ct. at 765, 116 L. Ed. 2d at 892 (O'Connor, J., concurring). Under this proposed flexible standard, the movants in *Rufo* clearly would not have been granted modification as they had an extremely poor compliance history, the modification went to the heart of the decree's central purpose, the decree was not shown to the unworkable, the problems were foreseen, and the district court did not abuse its discretion in denying modification. *See id.* at __, 112 S. Ct. at 768-73, 116 L. Ed. 2d at 896-902 (delineating reasons why movants' request for modification should have been denied) (Stevens, J., dissenting). This test would also help to preserve interest in consent decrees as a reliable form of settlement, unlike the majority test which discourages settlement. *Id.* at __, 112 S. Ct. at 772, 116 L. Ed. 2d at 901 (Stevens, J., dissenting).

The persons served by governmental institutions—the disabled, the poor, the victims of discrimination, and the incarcerated—are generally weak. For protection, these citizens turn to their government. However, *Rufo* illustrates that frequently it is that very government which has caused the harm. As a last resort, these victims look to the judicial system for assistance, only to discover that the courts defer to the government and its institutions which are the source of the evil. Consequently, these victims are trapped in a vicious cycle from which there appears no escape. Unless the Supreme Court and the entire judicial system abandon the deferential standard, this cycle is inevitable. When the government fails, the courts have no alternative but to take a more active role in formulating appropriate relief. The late Robert F. Kennedy encouraged such activism when he noted that:

> [e]very time we turn our heads the other way when we see the law flouted — when we tolerate what we know to be wrong — when we close our eyes and our ears to the corrupt because we are . . . too frightened — when we fail to speak up and speak out — we strike a blow against freedom and decency and justice.[110]

Christy J. Lindsay

110. SUZY PLATT, RESPECTFULLY QUOTED 28 (Congressional Quarterly Inc. 1992).