

The Politics of Prison Crowding

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The dramatic growth in interest over prison crowding is typically regarded as simply a product of the rapid increase in prison populations and corresponding space shortages. Upon examination, however, it appears that many of the complaints being directed at prisons do not relate directly to increased population densities. This Comment argues that other factors have fueled the crowding debate as well. The Author suggests that the intensity of the prison crowding debate is due in part to changes in the definition of crowding, and he attempts to identify the forces responsible for this changing definition. He concludes that although all participants in prison policy have an interest in relieving crowded conditions, they also rely on the underlying perception of crowding in order to accomplish their institutional goals. This analysis suggests several policy implications. Most importantly, even as prison populations fall, the perception of prison crowding may remain or become exaggerated. In addition, because the debate now focuses on crowding, the term may be used to include or mask other serious defects in the prison system. Prison managers may be misdiagnosing—or intentionally misstating—the sources of current prison problems because of the ease of attributing difficulties to crowding. Accordingly, the Comment concludes, many of the programs being funded by the legislatures to combat crowding may be unsuccessful because they are ill-suited to the underlying problems.

INTRODUCTION

There may be limits [to prison capacity], but they're not like a brick wall. . . . [They're] more like the elastic in underwear: They just make it slightly more uncomfortable with each expansion.

—Franklin Zimring¹

Over the past decade, prison crowding² has occupied a central place in the criminal justice debate. In 1987, forty-six states and the Federal

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1. N.Y. Times, Apr. 25, 1988, at A1, col. 5.

2. I use the term "crowding" here to denote what is commonly referred to in the literature as "overcrowding." The term "overcrowding" is redundant at best, since crowding already refers to a higher level of social density than is desired. At worst, the term begs one of the central questions posed by this Comment—namely, at what point does a prison's population become so great that the risks to prisoners' health and safety outweigh society's demand that the prisoners be punished, or that the prisons simply become administratively unmanageable.

Bureau of Prisons reported serious crowding problems.³ Complaints by prisoners and administrators alike have grown more intense each year as the increase in prison populations continue to outstrip the addition of new prison beds.

Policymakers and scholars have warned that current trends threaten to overwhelm existing prisons with unprecedented violence, health problems, and administrative chaos. Accordingly, they have urged crisis measures to reduce crowding. Many states have made extraordinary efforts to limit inmate admissions and to expand the number of available prison beds through construction, expansion, or renovation.⁴

Despite the widespread concern about prison crowding, however, several fundamental questions about crowding remain unanswered. This Comment investigates the scope, causes, and nature of prison crowding by beginning with the simplest question of all: what is crowding?

This Comment concludes that, contrary to popular assumptions, crowding is a deceptively elusive concept. It appears not to be a simple function of population per space provided. Prison population densities now considered unacceptable in some jurisdictions are identical to those found acceptable at other times and in other places. This fact raises important questions about the stability of current definitions of crowding and suggests that there is more to the crowding debate than merely the increased number of people in prison. No one—including prison administrators—knows how crowded America's prisons are.

The standards used to define crowding are extremely fluid and often bear little if any relation to our underlying concerns about crowding: increasing violence, health problems, and administrative chaos. Indeed, even with unprecedented population densities, many prisons currently classified by courts as "overcrowded" are not exceptionally violent or unhealthy.⁵ This analysis suggests that courts themselves may be partially responsible for the "increase" in crowding because they have

3. Every state except North Dakota, Mississippi, West Virginia, and Utah reported prison populations that equalled or exceeded the lowest of three different measures of capacity. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1987, at 5 (Apr. 1988) (Table 8) [hereinafter PRISONERS IN 1987]. The National Prison Project reports that the entire prison systems of 10 jurisdictions are operating under court orders or consent decrees and that 30 other states or territories have at least one institution under order or decree due to crowding. Crowding litigation is pending in eight other jurisdictions, including three not counted among the previous 40. NATIONAL PRISON PROJECT, STATUS REPORT: THE COURTS AND PRISONS, at i (Dec. 1988) [hereinafter STATUS REPORT].

4. See *infra* notes 12-16 and accompanying text. Some state corrections budgets have experienced dramatic increases. For example, the Texas corrections budget nearly doubled in five years. Lacayo, *Our Bulging Prisons*, TIME, May 29, 1989, at 28, 30. State legislatures are currently considering outlays of more than \$10 billion over the next six years. *Id.*

5. See *infra* notes 31-48 and accompanying text.

crafted definitions of crowding that are largely detached from the concerns underlying this concept.

This is not to say that some prisons are not in fact crowded or that prisons classified as crowded do not pose serious health, safety, and management risks. Complaints about prison crowding may reflect legitimate concerns about prison conditions. It is not at all clear, however, that where these inadequate conditions are present, increases in prison populations are responsible. The label "crowding" may be an inaccurate proxy for the actual concerns animating the current debate. Indeed, efforts to alleviate crowding may be diverting attention and funding from the true sources of problems in the nation's prisons.⁶

In demonstrating that changing definitions of crowding have contributed to the notion that prisons are crowded, this Comment examines the political forces responsible for determining crowding policy and examines their role in the corrections debate. Strikingly, it concludes that there is no active participant in the "debate" with an institutional interest in contesting the *perception* of crowding. Crowding, it appears, has given all sides of the corrections debate a useful vehicle for pursuing their individual agendas.

Prison administrators, prison employees, and legislators advocating the current prison building program benefit institutionally from the perception of crowding. Prison administrators benefit because this perception supports their demands for more personnel, larger budgets, and stricter controls over prisoners, and because it permits them to escape blame for prison disturbances. Prison guards and their unions view crowding as a lever to trigger increased hiring. Even legislators who advocate "law and order" profit from the perception of crowding because it creates a "window of opportunity" for passing legislation to build more prisons and to control prisoners more strictly.

On the other hand, prisoners embrace the perception of crowding as an opportunity to reduce their sentences. Prisoners' rights advocates depend upon crowding to get into court to pursue other improvements in prison conditions. Prison reformers benefit from the perception of crowding because it offers them a "hook" for advocating, among other things, alternatives to prison, reduced sentences, early releases, decriminalization of certain crimes, or abolition of prisons generally. Thus, for all practical purposes, there is no politically active faction disputing the crowded condition of prisons. Rather, each participant in the formulation of prison policy has an institutional interest in preserving the image that prisons are "overcrowded."

Based upon this finding, this Comment draws three legal and policy

6. See *infra* notes 279-305 and accompanying text.

conclusions. First, even if prison populations fall, the perception of prison crowding may remain and become exaggerated. Crowding standards, in theory, should reflect careful balancing of society's punishment goals and management capacity against prisoners' basic rights to protection of their health and welfare. Courts and legislatures, however, are not able to balance those values adequately since *both* sides of the "debate" have an interest in having facilities declared overcrowded. As a result, the crowding debate induces courts and legislatures to set lower and potentially unrealistic standards for determining prison crowding.

Second, prison managers have an interest in institutionalizing crowding that may affect the way they run their prisons. Rather than allowing populations to fall as new prisons are constructed, managers might employ subtle techniques, such as accelerated processing and inmate transfers, to maintain existing population levels. This would ensure that all prisons remained "crowded," thereby guaranteeing a high level of future appropriations.

Third, because the debate now focuses on crowding, the term may be used in place of or even to mask other serious defects in the prison system. Prison managers may be misdiagnosing—or intentionally misstating—the sources of current prison problems because of the ease of attributing difficulties to crowding. Accordingly, many of the programs currently funded by legislatures to combat crowding may be unsuccessful because they are ill-suited to the true, underlying problems.

Part I of this Comment explores the concept of crowding and demonstrates that its elements are susceptible to social construction. Part II investigates the origins of the current perception of crowding. It traces the history of prison population trends and court responses. It then considers recent court decisions on crowding and reveals the slipperiness of the logic of these legal opinions. Part III analyzes the current crowding debate. It demonstrates that each of the key parties involved in the prison crowding debate has an incentive to construct and perpetuate the perception of crowding and thereby further its political agenda. Part IV contemplates several possible implications of the foregoing analysis and suggests that political conditions make it unlikely that the crowding "crisis" will go away.

In sum, it could be that the recent proliferation of prison crowding cases has been, to some extent, a self-fulfilling prophecy. If this is true, this Comment suggests that courts should abandon their current focus on prison population density and establish a standard for conditions of confinement that is more closely tied to the actual operations of prisons and the objectives of prisoners' lawsuits. The Comment concludes by recommending that future research concentrate on formulating an alternative standard for evaluating prison conditions in order to depoliticize existing

legal analysis and better address the legitimate concerns of the nation's prison population.

I

CROWDING AND THE DEFINITION OF PRISON CAPACITY

[The process of calculating prison capacity] is analogous to the practice of John Dewey's Texas farmer, who weighed his pigs by putting them on one end of a plank that was balanced in the middle, placing rocks on the plank's other end until it was level, and then guessing the weight of the rocks.⁷

A. The Scope of the Current Debate

Indicators of a prison population crisis are everywhere. In the past fifteen years, America's prison population has grown at an unprecedented rate and in numbers far greater than corresponding increases in the total design capacity of America's prisons.⁸ In absolute numbers, the nation's incarcerated population is at an all-time high; there are almost 630,000 people in state and federal prisons⁹—more than three times as many as in 1970.¹⁰ As of 1985, there were 150,000 more prisoners than America's prisons were designed to accommodate.¹¹

7. M. SHERMAN & G. HAWKINS, *IMPRISONMENT IN AMERICA* 29 (1981).

8. The prison population has more than doubled in this period. In 1970, the prison population in the United States was 196,441. 1 J. MULLEN, K. CARLSON & B. SMITH, *AMERICAN PRISONS AND JAILS: SUMMARY FINDINGS AND POLICY IMPLICATIONS OF A NATIONAL SURVEY* 151 (1980). By 1985, that population had grown to 503,601. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *PRISONERS IN 1985*, at 1 (June 1986). Today, there are over 628,000 state and federal prisoners. Lacayo, *supra* note 4, at 28.

Between 1973 and 1986, year end populations increased by 300,000. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925-86*, at 15 (May 1988) [hereinafter *HISTORICAL STATISTICS*] (204,211 to 503,794). By contrast, a review of the Criminal Justice Institute's *Corrections Yearbooks* reveals that state and federal governments added only 140,000 prison beds during this period. CRIMINAL JUSTICE INSTITUTE, *CORRECTIONS YEARBOOK 1981*, at 18 [hereinafter *CORRECTIONS YEARBOOK* [date]]; *CORRECTIONS YEARBOOK 1982, supra*, at 18; *CORRECTIONS YEARBOOK 1983, supra*, at 24; *CORRECTIONS YEARBOOK 1984, supra*, at 22; *CORRECTIONS YEARBOOK 1985, supra*, at 22-23; *CORRECTIONS YEARBOOK 1986, supra*, at 19; *CORRECTIONS YEARBOOK 1987, supra*, at 23; *CORRECTIONS YEARBOOK 1988, supra*, at 25. Moreover, the lag has increased each year. From 1972 to 1977, only 23,000 beds were added even though populations increased by 81,000. From 1978 to 1980, only 7,000 new beds were added to accommodate 61,000 new inmates. Funke, *The Economics of Prison Crowding*, in 478 *ANNALS* 86, 87 (1985). Ms. Funke's article is part of a special volume entitled *Our Crowded Prisons*, published by the American Academy of Political and Social Sciences [hereinafter *ANNALS*].

9. Lacayo, *supra* note 4, at 28. This does not include the additional 150,000 convicted felons who are being temporarily detained in local jails, *id.*, or the 85,000 children in juvenile facilities, J. IRWIN & J. AUSTIN, *IT'S ABOUT TIME: SOLVING AMERICA'S PRISON CROWDING CRISIS* 7 (1987).

10. 1 J. MULLEN, K. CARLSON & B. SMITH, *supra* note 8, at 151.

11. As of 1985, 500,000 inmates occupied space designed for 350,000. Funke, *supra* note 8, at 87.

The connection between crowding and increased prison populations seems self-evident: if populations are growing more rapidly than capacity, then prisons must be getting crowded. The force of this logic has encouraged many legislators to "do something" about prison crowding. In the past five years, the federal and state governments have constructed 220 new prisons¹² and have expanded or renovated over 500 existing prisons,¹³ providing a total of over 120,000 new prison beds.¹⁴ Between 1979 and 1983, corrections spending grew faster than any other category of state government spending.¹⁵ Several states have adopted alternative procedures for punishing criminals in order to stem the rate of incarceration.¹⁶

Courts, too, have taken an active role in addressing crowding, ordering at least forty jurisdictions to reduce or restrict prison populations.¹⁷ Several courts have imposed caps on prison populations or ordered emergency releases to ease crowding.¹⁸ All of these actions have drawn further media attention to the debate; between 1973 and 1988, the number of articles about prison crowding in six major newspapers increased by

12. CORRECTIONS YEARBOOK 1983, *supra* note 8, at 23 (31 prisons built in 1982); CORRECTIONS YEARBOOK 1984, *supra* note 8, at 22 (34 built in 1983); CORRECTIONS YEARBOOK 1985, *supra* note 8, at 22 (34 built in 1984); CORRECTIONS YEARBOOK 1986, *supra* note 8, at 23 (37 built in 1985); CORRECTIONS YEARBOOK 1987, *supra* note 8, at 22 (40 built in 1986); CORRECTIONS YEARBOOK 1988, *supra* note 8, at 25 (44 built in 1987).

13. CORRECTIONS YEARBOOK 1983, *supra* note 8, at 24 (103 prisons renovated in 1982); CORRECTIONS YEARBOOK 1984, *supra* note 8, at 22 (96 renovated in 1983); CORRECTIONS YEARBOOK 1985, *supra* note 8, at 23 (61 renovated in 1984); CORRECTIONS YEARBOOK 1986, *supra* note 8, at 19 (90 renovated in 1985); CORRECTIONS YEARBOOK 1987, *supra* note 8, at 23 (129 renovated in 1986); CORRECTIONS YEARBOOK 1988, *supra* note 8, at 25 (67 renovated in 1987).

14. In 1982, the rated capacity of the prisons of the fifty states and the federal government was 362,451. CORRECTIONS YEARBOOK 1983, *supra* note 8, at 21. In 1987, rated capacity was 484,205, a net increase of 121,754. CORRECTIONS YEARBOOK 1988, *supra* note 8, at 23.

15. NATIONAL CONF. OF STATE LEGISLATURES, RECENT TRENDS IN STATE CORRECTIONS SPENDING 7 (Dec. 1985).

16. See JOINT COMM. FOR REVISION OF THE PENAL CODE, CAL. LEGISLATURE, PRISON OVERCROWDING: EMERGENCY MEASURES AND ALTERNATIVE FORMS OF PUNISHMENT 17-59 (1984) (surveying alternatives to incarceration); *id.* at 65-78 (cataloging emergency overcrowding measures and ongoing alternative punishment programs in 42 states).

17. STATUS REPORT, *supra* note 3, at i. To give some sense of the extent of prison litigation, one researcher found that between 1975 and 1980, plaintiffs filed 527 prison lawsuits in the federal district court for the Southern District of Ohio alone. See McCoy, *The Impact of Section 1983 Litigation on Policymaking in Corrections: A Malpractice Lawsuit by Any Name Would Smell as Sweet*, in THE DILEMMAS OF PUNISHMENT: READINGS IN CONTEMPORARY CORRECTIONS 224, 229 (K. Haas & G. Alpert eds. 1986) [hereinafter DILEMMAS]. McCoy estimated that a majority of these cases involved challenges to conditions of confinement. *Id.* at 230.

18. The Bureau of Justice Statistics reports that as of 1983, eight states had taken the drastic measure of ordering emergency releases of inmates as a result of crowding, had ordered the closing of specific institutions, or had appointed receivers or special masters to operate their correctional systems. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 80 (Oct. 1983) [hereinafter REPORT TO THE NATION].

fifty percent to over 210 per year.¹⁹

As this Part demonstrates, however, unprecedented prison populations and public responses do not necessarily mean that prisons are "overcrowded." Whether a prison can accommodate an increase in its population cannot be determined simply by counting floor tiles or beds. Rather, the answer may depend in large part on the configuration of the sleeping units, the composition of the population, the types of programs provided, and the levels of staffing. In addition, appropriate definitions of crowding and optimal prison conditions cannot be derived in a moral and political vacuum.²⁰ Whether a prison is "too" crowded depends largely upon how harsh or uncomfortable society wishes prison to be. These judgments depend more upon social and ethical choices than upon specific numbers. Thus, in order to understand the crowding debate, we first must consider what we mean by crowding and how this relates to our definition of prison capacity.

B. What Is Crowding

Crowding is a real psychological and physiological phenomenon. Studies have uniformly found that subjects placed together in a confined space over a period of time exhibit stressful behavior and experience related deterioration of physical and mental health. This is true in both prison and nonprison settings.²¹ But individuals in a densely populated environment do not always feel crowded; the level of perceived crowding depends upon conditions other than spatial density.²² For example, the level of density among spectators at a tennis match is very high, yet spectators rarely complain of crowding.²³ Crowding feelings will also vary

19. These figures are based upon an index search of articles on prison crowding in the *Atlanta Constitution*, the *New York Times*, the *Washington Post*, the *Miami Herald*, the *Los Angeles Times*, and the *St. Louis Post-Dispatch*.

20. M. SHERMAN & G. HAWKINS, *supra* note 7, at 25.

21. In fact, most clinical research concerning crowding and its effects has not concerned prisons. One researcher estimated that no more than 5% of clinical research had been collected from prisons. See Gaes, *The Effects of Overcrowding in Prison*, in CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 95, 105 (M. Tonry & J. Singer eds. 1985). Much of the data used by prison researchers derives from these nonprison settings. See, e.g., A. BAUM & S. VALINS, ARCHITECTURE AND SOCIAL BEHAVIOR: PSYCHOLOGICAL STUDIES OF SOCIAL DENSITY vii (1977) (homes and dormitories); Calhoun, *Population Density and Social Pathology*, 206 SCI. AM. 139 (1962) (laboratory rats); Cox, Paulus, McCain & Karlovac, *The Relationship Between Crowding and Health*, in 4 ADVANCES IN ENVTL. PSYCHOLOGY 271, 274-79 (A. Baum & J. Singer eds. 1982) (review of animal and non-prison human studies); Dean, Pugh & Gunderson, *Spatial and Perceptual Components of Crowding: Effects on Health and Satisfaction*, 7 ENV'T & BEHAV. 225, 236 (1975) (ships); Dean, Pugh & Gunderson, *The Behavioral Effects of Crowding: Definitions and Methods*, 10 ENV'T & BEHAV. 417, 431 (1978) (ships); Walker & Gordon, *Health and High Density Confinement in Jails and Prisons*, 44 FED. PROBATION 53 (1980) (military barracks).

22. Stokols, *On the Distinction Between Density and Crowding: Some Implications for Future Research*, 79 PSYCHOLOGICAL REV. 275, 275 (1972).

23. Note that the unique conditions present in prisons may dramatically affect the sense of

according to individual expectations. Some individuals appear to be able to tolerate higher concentrations of persons within a limited amount of space than others. To some extent, these differences are sociologically conditioned.²⁴ Urban residents, for example, tend to have lower expectations of personal space than rural residents.²⁵ A facility's management may also alter expectations.²⁶

In the prison context, studies indicate that crowding may be occasioned by human presence independent of the actual space available.²⁷ Thus, individuals in relatively small, isolated cells feel less crowded than individuals in large, barracks-type facilities who enjoy objectively more square feet of space per prisoner.²⁸ Thus, in some cases, density may

crowding, thereby calling into question the efficacy of relying too greatly upon nonprison studies. Gaes, *supra* note 21, at 105. For example, laboratory research typically involves brief periods of confinement of several unfamiliar participants (often college students). By contrast, prisons house familiar cohabitants for protracted periods of time in a far less benign setting.

24. In his summary of crowding research, Gaes notes that individual perceptions of crowding depend upon a subject's (1) perception of his or her ability to alter the level of crowding; (2) crowding "history"; (3) gender; and (4) socioeconomic status. *Id.* at 103.

25. Leger, *Perception of Crowding, Racial Antagonism, and Aggression in a Custodial Prison*, INT'L J.L. & PSYCHOLOGY 167, 172 (1988).

26. A recent study found that an identical population level in a single prison may result in a dramatically different number of sick calls depending upon prisoners' expectations concerning personal space. That study measured the number of sick calls in a prison before and after a sudden decline in the inmate population. It found that six months later, when the population increased to its original level, sick call rates rose far above the original number. Fry, *Continuities in the Determination of Prison Overcrowding Effects*, 16 J. CRIM. JUST. 231, 235 (1988). This may indicate that after six months at a lower population density, prisoners had developed a greater expectation of personal space.

27. See, e.g., Paulus, Cox, McCain & Chandler, *Some Effects of Crowding in a Prison Environment*, 5 J. APPLIED SOC. PSYCHOLOGY 86, 91 (1975) ("[S]ome of the data suggest that the social-density factor and not spatial-density factor is the major variable contributing to these effects [associated with crowding]."). For definitions of these two different types of density, see *infra* note 32.

28. For example, one seminal study compared the perceptions of crowding of inmates in one-person cells with those of dorm inmates, finding that inmates in the single units had a lower perception of crowding. D'Atri, *Psychophysiological Responses to Crowding*, 7 ENV'T & BEHAV. 237, 242-44 (1975) (finding the mean pulse rates for both black and white inmates were higher in those inmates housed in dormitories than in those housed in single occupancy cells). Another study found that stress levels (measured by blood pressure) bore a direct relationship to the number of inmates in a living unit. Paulus, McCain & Cox, *Death Rates, Psychiatric Commitments, Blood Pressure, and Perceived Crowding as a Function of Institutional Crowding*, 3 ENVTL. PSYCHOLOGY & NONVERBAL BEHAV. 107, 112-13 (1978) (finding that inmates housed in three and six-person cells felt significantly more crowded and had higher blood pressure levels than inmates in two-person cells). See also Cox, Paulus & McCain, *Prison Crowding Research: The Relevance of Prison Housing Standards and a General Approach Regarding Crowding Phenomena*, 39 AM. PSYCHOLOGIST 1148, 1154-55 (1984) (finding that open dormitories are associated with higher rates of illness complaints, "perceived crowding," and other pathologies); Gaes, *supra* note 21, at 134 (concluding that prisoners housed in large open dormitories are more likely to visit clinics and have high blood pressure than prisoners in other housing arrangements and that prisons that contain dormitories have somewhat higher assault rates than do other prisons).

These researchers hypothesized that the greater the number of fellow prisoners with whom an

have little to do with "crowding"; some individuals will feel crowded in any prison setting other than solitary confinement.²⁹

Prison crowding, then, is a condition that is often defined by its symptoms. Those who condemn high prison population densities blame them for producing increased stress and violence and for undermining administrative efforts to maintain order or provide essential services. The presence or absence of these conditions, many argue, determines whether a prison is crowded. This Section demonstrates that the presence of unacceptable prison conditions does not necessarily mean that crowding is the cause. In fact, despite repeated efforts, research has failed to establish an unambiguous link between increases in prison population and changes in levels of prison violence or illness.³⁰ Although these conditions—as well as administrative failures in providing services—may be present in prisons with increased populations, it is not clear that the population increases are to blame.

1. *Inmate Violence*

Based on laboratory findings that crowding increases aggression, several researchers in the late 1970s employed linear regression techniques to examine the relationship between rising prison populations and traditional indicia of aggression, such as inmate violence and official "incidents." Some of these researchers hoped to identify some objective point at which crowding levels resulted in inmate violence or in disruption of the facility.³¹ Yet, despite some early claims to the contrary, their studies have on the whole failed to establish an unambiguous relation between spatial density, social density,³² or inmate perceptions of crowd-

inmate must share space, the greater the opportunities for personality clashes, intimidation, and attacks. In addition, differences in personal habits may be exacerbated by racial tensions. Finally, as a practical matter, prisoners in multi-occupant settings are subject to greater risk of violence. Prisoners who are forced to share sleeping accommodations are more susceptible to beating, rape, and assault.

29. See Cox, Paulus & McCain, *supra* note 28, at 1153. One commentator has noted that some prisoners would require a solitary retreat even in "ordinary" prisons. Toch, *Warehouses for People?*, in ANNALS, *supra* note 8, at 58, 60. Cf. Ellis, *Crowding and Prison Violence: Integration of Research and Theory*, 11 CRIM. JUST. & BEHAV. 277, 288 (1984) ("Because individuals interpret . . . given social density levels in different ways . . . , it seems important not to simply assume that variations in a structural variable (social density) are invariably associated with particular kinds of variations in psychological states . . .").

30. See *infra* notes 31-48 and accompanying text.

31. See, e.g., Cox, Paulus & McCain, *supra* note 28, at 1150-56; Gaes & McGuire, *Prison Violence: The Contribution of Crowding Versus Other Determinants of Prison Assault Rates*, 22 J. RES. IN CRIME & DELINQ. 41 (1985); Megargee, *The Association of Population Density, Reduced Space, and Uncomfortable Temperatures with Misconduct in a Prison Community*, 5 AM. J. COMMUNITY PSYCHOLOGY 289 (1977); Nacci, Teitelbaum & Prather, *Population Density and Inmate Misconduct Rates in Federal Prisons*, 41 FED. PROBATION 26 (1977).

32. Megargee, *supra* note 31, at 290-91, defines these terms. Spatial density is the amount of

ing,³³ and increases in inmate violence.³⁴

Several studies on prison crowding tied increases in inmate aggression to increases in population density. However, those studies failed to include important explanatory variables such as age, prison management, and racial tensions.³⁵ Other, more recent, studies that include such variables appear largely to "explain" earlier anomalous findings. A study by Robert Leger found that racial tensions were primarily responsible for the perception of crowding, especially among groups that are in the minority in prison. "Density," he concluded, "added virtually no explained variance."³⁶ Similarly, Ekland-Olson and others identified the age of the inmate population, not crowding, as the primary source of variations in inmate misconduct rates.³⁷ Yet another researcher, in an exhaustive review, noted that increases in density may reflect a more punitive policy among lawmakers and prison officials generally, which may itself account for increases in stress-related incidents.³⁸ He concluded that no study directly supported a finding that existing population densities were responsible for increases in assaults.³⁹ At most, the studies suggested that existing levels of density act as an "intensifier" of stressful conditions.⁴⁰

Anecdotal evidence further clouds the purported relationship between prison population densities and inmate aggression. For example, the Texas prison system has experienced an *inverse* relationship between population density and prison violence. Between 1973 and

space per occupant in a given housing unit; social density is simply the number of people in a given area.

33. The perception of crowding is the subjective belief of prisoners that they are "crowded." For an explication of this term, see *supra* notes 21-29 and accompanying text.

34. J. FREEDMAN, CROWDING AND BEHAVIOR 83-88 (1975); Ekland-Olson, Barrick & Cohen, *Prison Overcrowding and Discipline Problems: An Analysis of the Texas Prison System*, 19 J. APPLIED BEHAV. SCI. 163 (1983); Ellis, *supra* note 29, at 283.

35. See, e.g., Cox, Paulus & McCain, *supra* note 28; Megargee, *supra* note 31 (finding that population density and amount of personal space were significantly correlated with both the number and rate of disciplinary violations); see also McCain, Cox & Paulus, *The Relationship Between Illness Complaints and Degree of Crowding in a Prison Environment*, 8 ENV'T. & BEHAV. 283, 286 (1980) (correlating illness complaints with population density).

36. Leger, *supra* note 25, at 177; see also J. FREEDMAN, *supra* note 34, at 83-88 (finding no consistent relation between density and aggressiveness).

37. Ekland-Olson, Barrick & Cohen, *supra* note 34, at 174 (arguing that population increases result in the incarceration of more youths and that these youths—being more predisposed to violence—produce an effect that is mistakenly attributed to crowding).

38. Gaes, *supra* note 21, at 112.

39. *Id.* at 142-43. The review used the American Correctional Association's minimum standard of 60 square feet per inmate as its benchmark for capacity.

40. *Id.* at 141; see also R. Atlas, *Violence in Prison: An Effect of Crowding?* 1 (Feb. 24, 1983) (unpublished manuscript on file with Author) (concluding that "social and spatial density had no relationship with the rate or frequency of prison assaults" at four Florida correctional institutions). Mr. Atlas prepared this paper for the 28th Annual Southern Corrections Conference, at Tallahassee, Florida.

1983, Texas had the most crowded prisons in the nation, with ninety percent of all inmates celled in multioccupant units that allowed them less space than the American Correctional Association's minimum standard of sixty square feet per inmate.⁴¹ In addition, Texas had one of the nation's highest proportions of inmate populations housed in units of fifty or more prisoners.⁴² Yet throughout this period, Texas maintained a far lower rate of prison violence than did Michigan, California, and other states with comparable prison populations but lower prison population densities. Strikingly, as Texas built more prisons to reduce crowding, the level of violence *increased*. In 1984 and 1985, Texas prisons were less "crowded" but more violent than at any time in the system's recent history.⁴³

2. Inmate Health

As discussed earlier, keeping individuals together in a confined space over a period of time tends to produce stressful behavior and physical and mental deterioration in those confined. In the late 1970s, a series of studies examined the effect of population increases upon inmate illnesses and complaints.⁴⁴ Like the research into prison violence, these studies attempted to establish a direct link between the existing spatial and social densities of prisons and the illness and death rates of prisoners.

The results of these studies, however, are markedly inconclusive.⁴⁵ Several studies comparing increases in density to morbidity found no consistent relationship.⁴⁶ The few studies that do find an unequivocal relation between inmate mortality or morbidity and population density appear to suffer from serious methodological flaws. Several of these stud-

41. J. DIJULIO, *GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT* 74 (1987).

42. *Id.*

43. *Id.* at 76. Tellingly, in the seminal Supreme Court case considering the constitutionality of placing two inmates in a single prison cell, the plaintiff failed to establish any increase in the rate of violence after double celling began. See *Rhodes v. Chapman*, 452 U.S. 337, 349 n.15 (1981).

44. See, e.g., McCain, Cox & Paulus, *supra* note 35; Paulus, McCain & Cox, *supra* note 28; Walker & Gordon, *supra* note 21.

45. See, e.g., D'Atri, Fitzgerald, Kasl & Ostfeld, *Crowding in Prison: The Relationship Between Changes in Housing Mode and Blood Pressure*, 43 *PSYCHOSOMATIC MED.* 95, 102-03 (1981); Farrington & Nuttall, *Prison Size, Overcrowding, Prison Violence, and Recidivism*, 8 *J. CRIM. JUST.* 221 (1980); Megargee, *Population Density and Disruptive Behavior in a Prison Setting*, in *PRISON VIOLENCE* 135, 141-42 (A. Cohen, G. Cole & R. Bailey eds. 1976); Paulus, Cox, McCain & Chandler, *supra* note 27, at 90-91; Twaddle, *Utilization of Medical Services by a Captive Population: An Analysis of Sick Call in a State Prison*, 17 *J. HEALTH & SOC. BEHAV.* 236, 247 (1976). G. Gaes, *The Effect of Spatial and Architectural Housing Variations on Inmate Clinic Utilization Rates* 18 (July 1982) (unpublished manuscript on file with Author; Mr. Gaes is the chief of the research division for the Federal Bureau of Prisons).

46. See, e.g., Cox, Paulus & McCain, *supra* note 28, at 1149 (comparing American prison densities and prison illness rates).

ies, for example, rely upon aggregate data for entire prison systems rather than for individual prisons.⁴⁷ When the numbers are disaggregated by institution, the relation between these rates varies considerably. Indeed, one researcher found an *inverse* relationship between prison populations and their reported death rates.⁴⁸ Thus, as with inmate violence, the data does not bear out the asserted linkages between population increases and inmate morbidity.

3. Prison Management

The last principal objection to crowding—that it overtaxes the abilities of prison officials to provide essential services—is not a crowding issue per se. Although underprovision of services is obviously related to population increases, the breaking point of a prison's ability to operate depends upon factors other than population or physical space. Indeed, the key variable in the provision of services may be funding rather than the specific population within the confined space. For example, a badly underfunded prison may be unable to provide essential services even when it is half-empty. Likewise, a prison with an unlimited budget might adequately serve a population level much greater than its original design capacity.

Thus, the nexus between determinations of crowding based on underprovision of services and those based on actual population levels is extremely loose. In many of the cases where a court based its finding of inadequate care on crowding, such inadequacies pre-dated any major increases in population density. For example, in the seminal crowding case of *Pugh v. Locke*, the district court noted that "even if the inmate population were reduced to design capacity, the system would still be woefully understaffed."⁴⁹ Most other cases dealing with the impact of crowding on management contain similar statements.⁵⁰

47. See, e.g., L. GREENFELD, PRISON POPULATION AND DEATH RATES (1982) (examining data from over 500 prisons across the United States); H. LEBOWITZ & T. POSPICHAL, FEDERAL AND STATE INMATE DEATHS, 1972-1978 (1979) (examining data from the federal prison system); T. Carr, The Effects of Crowding on Recidivism, Cardiovascular Deaths, and Infraction Rates in a Large Prison System (1980) (unpublished Ph.D. dissertation, Ga. State Univ., on file with Author) (examining data from the Georgia state prison system).

48. L. GREENFELD, *supra* note 47.

49. 406 F. Supp. 318, 325 (M.D. Ala. 1976), *aff'd and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part per curiam sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978). The court blamed several of the prison's problems in part on factors wholly distinct from populations themselves, such as "the physical structure of the buildings themselves." *Id.* at 323.

50. See, e.g., Newman v. Alabama, 503 F.2d 1320, 1330-31 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); French v. Owens, 538 F. Supp. 910, 913-15, 926 (S.D. Ind. 1982) (describing in detail the infirmities of the 59-year-old prison before considering its present overcrowding), *aff'd in part, vacated and remanded in part*, 777 F.2d 1250 (7th Cir. 1985), *cert. denied*, 479 U.S. 817 (1986); Gates v. Collier 423 F. Supp. 732, 739 (N.D. Miss. 1976) (cataloging the numerous orders

Thus, crowding is typically a label for—or, at most, an intensifier of—underprovision of services or other pre-existing conditions. This is a critical distinction. For reasons discussed in Part IV, it is dangerous to treat crowding as synonymous with underprovision of services, since this may lead to misdirected reforms and failure to address legitimate concerns.

In sum, despite familiar claims that crowded prisons have produced dramatic increases in prison violence, illness, and hostility, modern research has failed to establish any conclusive link between current prison spatial and social densities and these problems. Similarly, in the major cases in which courts have found that crowding has impaired the provision of essential services, such inadequacies have persisted throughout the institutions' history, not merely as a consequence of recent population increases. The state of current prison research cautions against drawing sweeping conclusions about what constitutes crowding or about the responsibility of population levels for current problems in our nation's prisons.

C. *Defining Prison Capacity*

How many people can the prison hold? I have to respond, "Well, that depends."

—William C. Collins, Chief Counsel to the Washington State Department of Corrections⁵¹

There is no objective method for determining with precision the point at which increases in prison populations produce crowding. The ability of a prison to withstand population increases depends on numerous factors other than the amount of space per inmate. This fact, however, has not prevented standard-setting bodies from establishing "capacity" figures. Predictably, such figures are remarkably inconsistent.⁵² Most definitions of prison capacity do not even purport to reflect

concerning prison conditions issued prior to the current escalation in inmate population), *aff'd and remanded with directions per curiam*, 548 F.2d 1241 (5th Cir. 1977).

51. Collins, *Response*, 12 N.Y.U. REV. L. & SOC. CHANGE 339, 342 (1983-84). Mr. Collins' remarks were published as part of a colloquium entitled "The Prison Overcrowding Crisis" [hereinafter N.Y.U. COLLOQUIUM].

52. This is neither new nor surprising. One study of the history of prison crowding has concluded that "the American concept of capacity has been so flexible—a charitable adjective—as to render it useless for historical comparisons." M. SHERMAN & G. HAWKINS, *supra* note 7, at 28. In 1931, the National Commission on Law Observance and Enforcement (Wickersham Commission) concluded that prison populations exceeded design capacity by 19%. *Id.* at 27-28. Relying on the data from five years later, a study by Frederick Haynes concluded that in the majority of American prisons, the population was 50-100% above normal capacity. F. HAYNES, *THE AMERICAN PRISON SYSTEM* 265 (1939). However, actual prison populations increased by only 5% between 1931 and 1936, suggesting that one or both of the crowding figures is grossly incorrect. HISTORICAL STATISTICS, *supra* note 8, at 15.

empirical judgments about the demographic composition of inmate populations, the measurable psychological effects of certain density levels, and the trends in inmate violence, or normative judgments about the tolerable level of inmate discomfort in light of the penological objectives of prison.⁵³ Other definitions reflect these judgments in only a fragmented or indirect way. Nationally, measurements of prison crowding derive from largely inconsistent criteria, reflecting disparate goals and different concepts of crowding. As a result, definitions of prison capacity have often proved to be functionally meaningless.

This Section explores the methods that prison officials and courts use to define prison capacity, demonstrating that there is no uniform method that yields predictable criteria for finding prison crowding. As a result, a given facility may be labelled crowded in one jurisdiction but not in another.

1. *Prison Officials' Definitions*

Prison crowding is usually defined on the basis of one of two criteria: design capacity or rated capacity. These terms, however, are amorphous, varying from jurisdiction to jurisdiction and even over time. Neither definition of capacity is based upon a reliable judgment about a prison's actual ability to handle its current population levels effectively.

a. *Design Capacity*

Design capacity represents the actual number of inmates that a prison's architects planned for it to hold. In virtually every state, this number is expressed in terms of minimum floor space per inmate. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended that prisons provide inmates with single rooms having a floor area of at least eighty square feet.⁵⁴ Shortly thereafter, the Federal Bureau of Prisons⁵⁵ and the National Clearinghouse for Criminal Justice Planning and Architecture⁵⁶ each offered a different, lower standard. The American Correctional Association, however, adopted the lowest—and more frequently cited—benchmark requiring a minimum of sixty square feet of space per prisoner.⁵⁷ Two federal district courts have adopted this standard as part of their remedies for constitu-

53. See *infra* notes 69-84 and accompanying text.

54. See NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE ON CORRECTIONS 358 (1973).

55. See 1 A. RUTHERFORD, PRISON POPULATION AND POLICY CHOICES: PRELIMINARY REPORT TO CONGRESS 11 (1977) (75 square feet per prisoner).

56. See *id.* (70 square feet per prisoner).

57. See AMERICAN CORRECTIONAL ASS'N, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 2-4129 (2d ed. 1981); 1 J. MULLEN, K. CARLSON & B. SMITH, *supra* note 8, at 80 ("No standard-setting body has recommended less than 60 square feet of floor space per inmate.").

tional violations by state prisons.⁵⁸

However, as discussed earlier a prison's capacity—that is, the point at which prisoners experience the psychological and physiological effects called “crowding”—is a function not merely of the space provided, but also of psychological and environmental factors. The level of perceived crowding will vary depending upon conditions other than mere spatial density.⁵⁹ The variety of factors involved in determining crowding underscores the difficulty of establishing uniform, objective criteria to address this complex and ultimately quite elusive problem. Perhaps it is for this reason that there is no consensus as to the minimum square footage per prisoner required to avoid “crowding.”⁶⁰ This may also explain in part why almost every state has ignored the “minimum” spatial requirements dictated by its own measure of design capacity.⁶¹

The reluctance of states to adhere to rigid floor-space requirements is understandable. In practical terms, prisoners are unaffected by most states' small deviations from the required standard; no studies have found a statistically significant difference in crowding indicia between prisons that provide fifty-five square feet per inmate and those that provide sixty square feet.⁶² Prison administrators concede that these standards are fairly arbitrary because many factors other than floor space affect crowding, including the layout and operations of a prison. In fact, some researchers have concluded that floor space, standing alone, has virtually no impact on crowding.⁶³

Existing standards of design capacity appear particularly inappropriate because they do not reflect the dramatic variance among models of prison facility.⁶⁴ The awkwardness of a uniform design capacity for

58. See *Battle v. Anderson*, 447 F. Supp. 516, 526 (E.D. Okla.), *aff'd*, 564 F.2d 388 (10th Cir. 1977); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 987 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980).

59. See *supra* notes 24-29 and accompanying text.

60. As the author of *Stateville: The Penitentiary in Mass Society*, James Jacobs, has concluded, “Any cap is arbitrary. A judge would be hard pressed to explain why a few inmates more would be unacceptable.” Angelos & Jacobs, *Prison Overcrowding and the Law*, in *ANNALS*, *supra* note 8, at 100, 109.

61. Of the 34 states reporting in 1987, 30 were operating above maximum design capacity. PRISONERS IN 1987, *supra* note 3, at 5 (Table 8). And even those states that keep their prison populations within reported statewide design capacities currently fail to operate every prison within its individual design capacity.

62. See, e.g., Gaes, *supra* note 21, at 110 (“[Sixty feet] is not a magical number below which there is base and indecent living and above which there is luxurious comfort.”).

63. See, e.g., G. Gaes, *supra* note 45, at 8 (evaluating cells ranging from 43 square feet to 88 square feet and finding no adverse effects of spatial density on reported inmate complaints).

64. H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY: THE AMERICAN CRIME PROBLEM* 337-46 (3d ed. 1959) (describing variance among models of prisons). America's prison systems reflect the product of two competing models of prisons developed in the early nineteenth century. One evolved from the Eastern State Penitentiary in Philadelphia, which emphasized full-time solitary confinement and provided ninety-six square feet of floor space per inmate. *Id.* at 339.

these various models is revealed when one considers that under most design capacity standards, a lone prisoner who spends most of the day outside his fifty square foot cell would be "crowded," whereas two inmates who are locked down for most of the day in their 120 foot cell would not.

Not surprisingly, then, despite its prevalence in crowding debates and newspaper articles, design capacity has had little direct impact on prison operations.⁶⁵ Prison officials have treated it as a mutable figure; some states have changed design capacity seemingly at will to comport with fluctuations in prison populations. For example, although Texas prisons were originally designed for single-celling,⁶⁶ "official" capacity is now based upon double-celling.⁶⁷ Even those states that do rely on a fixed design capacity generally use it as a benchmark for calculating a different capacity figure: rated capacity.⁶⁸

b. Rated Capacity

Rated capacity is the highest number of inmates that a facility can house while providing a minimum level of safety and services. Thus, even among prisons of the same physical size and design, rated capacity may vary depending on the manner in which they are operated. For example, theoretically at least, it would be possible for one prison to house three times as many inmates as another prison of the same size with no increase in crowding—simply by having inmates sleep in shifts: three inmates could sleep in the same bed for eight hour turns as long the

The other model derives from the Auburn Penitentiary, in which inmates were placed in solitary confinement only at night and thus were deemed to need much less (approximately one-fourth as much) floor space. *Id.* at 340. See generally AMERICAN CORRECTIONAL ASS'N, AMERICAN PRISONS FROM THE BEGINNING: A PICTORIAL HISTORY 85 (1983). Today's prisons reflect variations on these models: some provide large communal sleeping areas, while others provide day areas and double-bunk sleeping areas. See 3 J. MULLEN & B. SMITH, AMERICAN PRISONS AND JAILS: CONDITIONS AND COSTS OF CONFINEMENT 69 (1980) (Table 3.11 reveals that in 1978, 73% of America's inmates were housed in dormitories where more than ten prisoners shared a room).

65. Design capacity, however, has had a profound *indirect* impact on prison management. Design capacity is currently used to trigger funding and staff increases, and it also serves as a basis for many "rated capacity" standards that affect prison management. See *infra* notes 174-76 and accompanying text.

66. See *Ruiz v. Estelle*, 503 F. Supp. 1265, 1277-78 (S.D. Tex. 1980), *aff'd in part, rev'd in part, and remanded*, 679 F.2d 1115 (5th Cir.), *modified on reh'g per curiam*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). The terms "single-celling" and "double-celling" (or "double-bunking") simply refer to the number of prisoners per cell.

67. J. DI IULIO, *supra* note 41, at 75. Other jurisdictions have been even more brazen, raising design capacity outright to correspond to current prisoner populations. Telephone interview with Anthony Newland, Assistant Deputy Warden, Vacaville State Prison, Vacaville, California (Mar. 18, 1989) [hereinafter Newland Interview]; 3 J. MULLEN & B. SMITH, *supra* note 64, at 42.

68. In 1981, for example, California prison officials determined that the "operating" (or real) capacity of the system was 120% of design bed capacity. See *infra* notes 76-80 and accompanying text.

prison could adequately provide activities to occupy them during the remaining sixteen hours (and, of course, as long as no need arose to confine all inmates simultaneously). On the other hand, if a prison is locked down twenty-four hours a day, then even partial double-celling is likely to increase dramatically the perception of crowding. Rated capacity, then, may vary with a prison's physical configuration, staffing patterns, available services, and program design.

Because of the numerous variations in prison operations, rated capacity has proved difficult to determine⁶⁹ and easy to manipulate.⁷⁰ Michael Sherman and Gordon Hawkins, in their discussion of Stateville Penitentiary in Illinois, offer a striking example of the manipulation of rated capacity.⁷¹ They note that rated capacity at Stateville changed to accommodate the actual prison population at any given time. Stateville was originally designed and built to hold 1,392 inmates—one sixty-square-foot cell for every prisoner.⁷² Yet only ten years after it opened, the prison housed 3,952 inmates.⁷³ Even so, during the next fifty years, no court found Stateville to be crowded. At the time of a federal government survey in 1978, prison officials gave rated capacity as 2,700, a figure that coincidentally matched a court ordered ceiling.⁷⁴ Ironically, since Stateville's actual population was 2,678 prisoners, it was operating *under*

69. As early as 1937, the Bureau of Census abandoned the practice of assessing prison crowding due to the "difficulty in defining 'normal capacity.'" The Bureau acknowledged:

In the absence of a standard formula for the determination of normal capacity of a penal institution, it is likely, for example, that one institution with 1,000 cells and 2,000 prisoners may report a normal capacity on the basis of one man to a cell making it appear that the institution is badly overcrowded, with population equal to 200 percent of its capacity, while another institution, of the same size and population, may report normal capacity on the basis of two men to a cell, with the result that no overcrowding would be indicated.

M. SHERMAN & G. HAWKINS, *supra* note 7, at 31.

The situation today is remarkably unchanged. The disclaimer currently used by the Bureau of Justice Statistics is virtually identical to that used 50 years ago by the Bureau of Census:

The extent of crowding in the Nation's prisons is difficult to determine precisely because of the absence of uniform measures of defining capacity. A wide variety of capacity measures are [sic] in use among the 52 reporting jurisdictions . . .

. . . .

Of the 52 reporting jurisdictions, 34 supplied rated capacities, 45 provided operational capacities, and 36 submitted design capacities.

PRISONERS IN 1987, *supra* note 3, at 4.

70. For example, a study commissioned by the federal government that examined the four years preceding 1978 concluded that in several jurisdictions, crowding was seldom reported. Apparently, this is because the number of prisoners bunked in a cell at the time the study began became, by definition, that cell's capacity. See 3 J. MULLEN & B. SMITH, *supra* note 64, at 43. For another striking example, see Gottfredson, *Institutional Responses to Prison Crowding*, in N.Y.U. COLLOQUIUM, *supra* note 51, at 259, 267 (reporting that administrators often redefine prison capacity by including housing in tents, quonset huts, portable cells, prison chapels, gymnasiums, classrooms, corridors, and even discharged troop carriers, as part of the prison's "capacity").

71. M. SHERMAN & G. HAWKINS, *supra* note 7, at 31-32.

72. *Id.* at 31.

73. *Id.*

74. *Id.* at 31-32.

capacity at that time, even though it housed nearly twice its original design capacity.⁷⁵

Rated capacity figures may be manipulated on the system-wide level as well as in individual institutions. For example, although California has set rated capacity as 120% of "design bed capacity,"⁷⁶ its prison population has remained consistently between 150% and 170% of design capacity since 1983.⁷⁷ Those who participated in setting the 120% figure now acknowledge that its selection was largely arbitrary.⁷⁸ Moreover, despite maintaining populations consistently above this level, California's prisons have seen violent incidents, illness, disruptive acts, and escapes drop to a historic low.⁷⁹ As a result, at least one of the officials who helped set the 120% figure has recommended that California's Blue Ribbon Commission on Inmate Management raise rated capacity to an even higher percentage of design capacity.⁸⁰

Thus, many prisons currently called "overcrowded" have held more prisoners in the past without raising any concern.⁸¹ Moreover, what one state defines as crowded, other states may consider acceptable.⁸² Even

75. *Id.* at 32. There were no structural additions to Stateville between its construction and the time of the court order that could rationally account for the increase in rated capacity. *Id.* at 31.

76. CALIFORNIA DEP'T OF CORRECTIONS, 1989-1994 FACILITIES MASTER PLAN 2-6 (Jan. 1989).

77. CALIFORNIA DEP'T OF CORRECTIONS, 1989-1994 FACILITIES MASTER PLAN UPDATE 3 (June 1989) (graph).

78. Telephone interview with Brian Taugher, a Special Assistant Attorney General, State of California, and a member of the California Blue Ribbon Commission on Inmate Population Management (Feb. 9, 1989) [hereinafter Taugher Interview].

79. BLUE RIBBON COMMISSION ON INMATE POPULATION MANAGEMENT, FINAL REPORT 38 (forthcoming Jan. 1990).

80. Mr. Taugher supports setting rated capacity at 160% of design capacity. Taugher Interview, *supra* note 78.

The definition of crowding offered by John Manson, former Commissioner of the Connecticut Department of Corrections illustrates how rated capacity is often no more than an educated, and somewhat personal, guess: "You might consider crowding as a situation that develops when an institution reaches 90% of its rated capacity, an arbitrary figure at best, but I think one that may be acceptable." Manson, *Response*, in N.Y.U. COLLOQUIUM, *supra* note 51, at 285, 285.

The Oklahoma state prison system provides another example of the mutability of rated capacity. In 1973, following a disastrous riot, Oklahoma adopted a "Master Plan for Corrections" authored by the National Clearinghouse for Criminal Justice Planning and Architecture. At that time, Oklahoma's prisons were designed to house 2,300 prisoners. The plan estimated that these prisons could accommodate approximately 2,600 inmates at most. Nevertheless, by 1977, the inmate population had swelled to 4,500. The Director of Corrections then determined that the "critical capacity" of the system was in fact 4,570 prisoners. Shortly thereafter, the Attorney General ruled that the Corrections Department was *required* to accept prisoners even after the prisons had reached "critical capacity." See Giari, *In Oklahoma, Building More Prisons Has Solved No Problems*, 25 CRIME & DELINQ. 450, 451-52 (1979).

81. See Jacobs, *The Politics of Prison Expansion*, in N.Y.U. COLLOQUIUM, *supra* note 51, at 209, 213.

82. *Id.*; see also M. SHERMAN & G. HAWKINS, *supra* note 7, at 38-43 (noting that similar levels of crowding provoke different reactions in different states' systems); Sherman, *Prisons in the*

different prisons within the same state have different definitions of capacity.⁸³ In short, no one, including our prison managers, can define the capacity of America's prisons.⁸⁴

2. The Courts' Definitions

The slipperiness of "official" prison capacity figures has prompted some courts to set figures of their own. Three federal courts have ordered state prisons not to allow space per prisoner to fall below sixty square feet.⁸⁵ Other court orders, such as those concerning New York's Westchester County Jails, have effectively limited populations by prohibiting multiple celling, floor mattresses, and other practices that expand population beyond a certain level.⁸⁶ Some courts have simply placed absolute caps on prison populations.⁸⁷

These court orders, however, merely add another layer of confusion to efforts to determine what constitutes crowding. As one commentator has noted, even the Supreme Court is inconsistent: those prisons in which the Court found the conditions of confinement to be constitutionally acceptable were not substantially better than those prisons in which the Court found the conditions unacceptable, making it difficult to artic-

Theater of American Justice, in DILEMMAS, *supra* note 17, at 30, 46 (asserting that prison crowding problems exist in different degrees and ways in the various states).

83. See Jacobs, *supra* note 81, at 213.

84. Sherman and Hawkins provide perhaps the best illustration of rated capacity's slipperiness. On the one hand, the various states calculated that their rated capacities were only 4,300 inmates below actual population levels in the aggregate. On the other hand, given a fixed standard that would provide each inmate with *either* a single room or 60 square feet of space, calculations show that the states would have to release 45,000 inmates to meet this standard. The conclusion:

If one plays the game of rated capacity, in which the rules are so flexible, the aggregate picture of the state prisons is not so bad: the system is overcrowded by only 1.7 percent. If, however, one plays by fixed rules and combined capacity measures, then the system is in some sense ten times more overcrowded.

M. SHERMAN & G. HAWKINS, *supra* note 7, at 36.

85. Ramos v. Lamm, 520 F. Supp. 1059, 1062 (D. Colo. 1981); Battle v. Anderson, 447 F. Supp. 516, 526 (E.D. Okla.), *aff'd*, 564 F.2d 388 (10th Cir. 1977); Palmigiano v. Garrahy, 443 F. Supp. 956, 987 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980). Cf. Gates v. Collier, 423 F. Supp. 732, 743 (N.D. Miss. 1976) (requiring a minimum of 50 square feet per inmate), *aff'd and remanded with directions per curiam*, 548 F.2d 1241 (5th Cir. 1977).

86. Vasquez v. Gray, 523 F. Supp. 1359, 1365 (S.D.N.Y. 1981); see also Ruiz v. Estelle, 503 F. Supp. 1265, 1288 (S.D. Tex. 1980) (ordering end to triple-celling and routine housing of two inmates in 45 and 60 square-foot cells), *rev'd in relevant part*, 679 F.2d 1115, 1148 (5th Cir.), *modified on other grounds on reh'g per curiam*, 688 F.2d 266 (5th Cir. 1982), *cert denied*, 460 U.S. 1042 (1983).

87. See, e.g., French v. Owens, 538 F. Supp. 910, 927 (S.D. Ind. 1982) (capping population at Indiana Reformatory at Pendleton), *aff'd in relevant part*, 777 F.2d 1250, 1251-53 (7th Cir. 1985), *cert. denied*, 479 U.S. 817 (1986). Courts have also placed such limits on local jail populations. See, e.g., Jones v. Diamond, 636 F.2d 1364, 1376 (5th Cir. Jan. 1981) (directing district court to impose cap on population at Jackson County Jail in Pascagoula, Mississippi), *cert. dismissed*, 453 U.S. 950 (1981); Inmates of Allegheny County Jail v. Wecht, 565 F. Supp. 1278, 1297 (W.D. Pa. 1983) (ordering reduction in population at jail in Pittsburgh, Pennsylvania); Benjamin v. Malcolm, 495 F. Supp. 1357, 1365 (S.D.N.Y. 1980) (capping population at Rikers Island jail in New York City).

ulate a standard of crowding.⁸⁸ Thus, rather than resolving the capacity debate, court orders only further obscure the meaning of capacity.

3. *Conclusions*

Currently no clearly appropriate measure of prison capacity exists. Some states have based capacity on original design, current population levels, operational capacity (that is, the prison's potential capacity if its uninhabited space were converted to housing prisoners), or staffing ratios; others have used more numerical criteria such as square feet per inmate, prisoners per cell, or some hybrid of the two.⁸⁹ Nevertheless, few of these states appear to adhere to any of their own standards. The question remains: if no one knows what crowding is, why is everyone so sure that it is the source of the crisis?

II

THE EMERGENCE OF CROWDING

[T]here's a pervasive sense of crisis, and we're not very clear what the crisis means.

—Norval Morris⁹⁰

In light of the slippery nature of "crowding," the number of decisionmakers convinced that America's prisons are overcrowded is striking. This Section explores the source of this uproar over crowding. It argues that, to some extent, the "crisis" follows from objective events such as increases in prisoner populations and the courts' greater receptiveness to lawsuits challenging conditions of confinement. This Section explains how the focus on crowding came into being and how subsequent events developed and perpetuated the current emphasis on population densities.

A. *Prison Densities and Crowding*

There has almost never been a time in our history when critics have not condemned the nation's prisons as too crowded.⁹¹ As one would

88. Call, *Recent Case Law on Overcrowded Conditions of Confinement: An Assessment of Its Impact on Facility Decisionmaking*, in DILEMMAS, *supra* note 17, at 238, 239 ("[B]ecause the conditions of confinement in [cases where the Court found no constitutional violation] were not substantially better than the conditions found unconstitutional in some prior cases, it is difficult to assess the present problem.").

89. See *supra* notes 64-84 and accompanying text. Texas, for example, has adopted a hybrid standard that fails to meet the American Correctional Association's standards in every respect. Texas defines rated capacity in terms of two inmates per cell and dorm capacity in terms of forty square feet per inmate. J. DI IULIO, *supra* note 41, at 75 (Table 2.21 note b).

90. Morris, *Closing Address*, in N.Y.U. COLLOQUIUM, *supra* note 51, at 349, 350.

91. At the end of the eighteenth century, Thomas Eddy, a prison inspector, complained of overcrowding. T. EDDY, AN ACCOUNT OF THE STATE PRISON OR PENITENTIARY HOUSE, IN THE

expect, movements to reduce crowding have frequently coincided with increases in prison population.⁹² Yet changes in the level of concern about crowding are not indissolubly linked with changes in actual prison populations.

Movements to alleviate prison crowding often have not coincided with changes in prison population. Several major construction and anticrowding reform movements occurred during periods of relative population stability. For example, in 1931, the National Commission on Law Observance and Enforcement blamed overcrowded conditions for hardening criminals,⁹³ and thereby launched a significant decarceration movement. During the five years preceding this movement, however, populations had increased by only five percent.⁹⁴ It was not until the period from 1936 to 1939—after the movement had stalled—that there was a sudden increase in prison populations.⁹⁵ Similarly, in the early 1970s, the Federal Bureau of Prisons embarked on a major prison building program,⁹⁶ and some states initiated large-scale decarceration,⁹⁷ despite remarkably little change in prison population growth.⁹⁸

Likewise, prison crowding complaints have occasionally been ignored during periods of prisoner population expansion. For example, a dramatic influx of new inmates between 1936 and 1939 contributed to a fifty percent increase in prison population during the 1930s. In 1939, a major study of prisons concluded that serious overcrowding was one of two main evils of the American penal system.⁹⁹ Notwithstanding these developments and despite earlier reform efforts, there was little or no significant campaign for prison construction or prison reform during this

CITY OF NEW YORK 38 (New York 1801). Gustave de Beaumont and Alexis de Tocqueville echoed this complaint in the nineteenth century. G. DE BEAUMONT & A. DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* 48 (1964) (first published in 1833). This same criticism of prison crowding has appeared periodically throughout the twentieth century. See *supra* notes 17-19 and accompanying text. As Sheldon Messinger has stated: "Prisons in the United States have been crowded, most of the time, for about two hundred years." Messinger, *Response*, in N.Y.U. COLLOQUIUM, *supra* note 51, at 111, 113.

92. See, e.g., F. HAYNES, *supra* note 52, at 32.

93. NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, *REPORT ON PENAL INSTITUTIONS, PROBATION AND PAROLE* 170 (1931 & photo. reprint 1987).

94. HISTORICAL STATISTICS, *supra* note 8, at 15.

95. From 1936 to 1939, prison populations increased by 25% (from 145,038 to 179,818), or three times the average rate of growth over any previous three-year period. *Id.*

96. W. Nagel, *An American Archipelago: The United States Bureau of Prisons* 4 (June 25, 1974) (address to the National Institute on Crime and Delinquency), *reprinted in Prison Construction Plans and Policy: Hearings Before the Subcomm. on Courts, Civil Liberties, and Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. app. at 388, 393 (1975).

97. See A. SCULL, *DECARCERATION* 45-46 (2d ed. 1984).

98. From 1950 to 1970, prison populations rose by only 18% (166,165 to 196,441), or one-third the average rate of growth over any given 20-year period. HISTORICAL STATISTICS, *supra* note 8, at 15.

99. F. HAYNES, *supra* note 52, at 265.

period.¹⁰⁰

Thus, although there is surely a relationship between increases in prison population and movements related to prison conditions, there is not an exclusive or inevitable causal link. Rather, it appears that concern about prison crowding depends upon normative and political conditions as well as actual population increases. The following Section explores the forces that have produced the current growth in prison populations. It also explores the political changes both in and by the courts that have contributed to concerns about prison crowding.

B. *The Origins of Modern Crowding*

America's prison population experienced unprecedented growth during the 1970s and early 1980s; the average prison population increased more in the ten years between 1975 and 1985 than it had in all of the preceding fifty years combined.¹⁰¹ Many social ills have been blamed for this growth—everything from increased criminality among baby boomers¹⁰² to the growth of the drug trade.¹⁰³ In contrast, this Section argues that the primary causes of increasing prison populations after 1970 were largely political. During the 1970s, changes in attitudes

100. These conclusions are limited somewhat by the fact that they focus on national trends. The relation between reform movements and their sources is peculiarly difficult to determine and summarize. See F. Zimring & G. Hawkins, *Trends in Prison Population in the United States: Five Theories in Search of Facts* 15 (Earl Warren Legal Institute Working Paper No. 11, June, 1989). Although state trends do not lend themselves to aggregate conclusions, individual cases support this view as well. Recall, for example, that Stateville Penitentiary in Illinois remained at three times its design capacity without a serious crowding challenge in court. It was not judicially deemed crowded until 1975, at which time its population had already declined by one-third. See *supra* notes 71-75 and accompanying text.

Likewise, only shortly after the opening of Ossining prison (Sing Sing) in 1826, contemporary observers complained that its cells were too small to handle the number of prisoners housed in them. See, e.g., D. DIX, *REMARKS ON PRISONS AND PRISON DISCIPLINE IN THE UNITED STATES* 45 (Boston 1845). Cf. M. SHERMAN & G. HAWKINS, *supra* note 7, at 30 (noting that double-celling at Sing Sing began at the outset of the prison's history). It was not until the 1920s, however, after nearly a century of double-celling, that any serious challenge was made to crowding at Sing Sing. Thus, Dr. Orlando F. Lewis, then General Secretary of the Prison Association of New York, wrote that "in 1825, the convicts were already being housed two in a cell. The campaign, nearly a century later, for the permanent abolition of Sing Sing, was based largely upon the pernicious 'doubling up' of prisoners in these viciously small cells, in a great, damp bastille-like structure." O. LEWIS, *THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776-1845*, at 110-11 (1967) (originally published in 1922).

101. HISTORICAL STATISTICS, *supra* note 8, at 15 (from 240,593 to 465,236 versus from 91,669 to 240,593).

102. See, e.g., Blumstein, Cohen & Miller, *Demographically Disaggregated Projections of Prison Populations*, 8 J. CRIM. JUST. 1, 8-9 (1980); Ekland-Olson, Barrick & Cohen, *supra* note 34, at 168, 171-72.

103. See, e.g., *Mayor Urges Legalizing Some Drugs*, Chicago Daily L. Bull., Sept. 30, 1988, at 1, col. 5; Moss, *Panel Wants Drugs Legal*, A.B.A. J., Jan. 1, 1988, at 16; Wise, *County Bar Panel Proposes Repeal of Anti-Drug Laws: Majority Report Would Remove Penalties*, N.Y.L.J., Sept. 8, 1987, at 1, col. 3.

towards prisoners, sentencing policies, and the expanded role of courts all contributed to the rapid growth of prison populations.

1. *Criminal Justice Policy*

Contrary to common understanding, the great rise in prison populations was not precipitated by an increase in crime or in the number of individuals in the crime-prone age group. Victimization studies and official data reveal that from 1975 to 1985, a period in which prison populations doubled, crime rates were actually declining.¹⁰⁴ Moreover, during the largest period of prison population increases, the population of eighteen- to twenty-four-year-old males increased by only ten percent.¹⁰⁵ Other factors, then, must explain the dramatic increase in prison populations in the late 1970s and early 1980s.

The primary source of the rise in prison populations was a dramatic change in criminal justice policies: specifically, a shift to policies that mandated that convicted criminals be incarcerated, and incarcerated for longer periods of time.¹⁰⁶ Prior to 1970, prison administrators were better able to adjust prison populations through flexible parole criteria.¹⁰⁷ As prison populations increased, parole boards frequently advanced parole dates or took slightly greater risks with parole candidates in order to ease the burden on a prison.¹⁰⁸ However, animated by both conservative concerns about leniency to criminals and liberal complaints about the risk of inequity due to parole board discretion, several states attempted to curb this discretion by adopting so-called "determinate sentencing laws."¹⁰⁹ Indeed, the movement away from parole board discre-

104. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *HOUSEHOLDS TOUCHED BY CRIME*, 1985, at 1-2 (June 1986).

105. The data do not bear out the claims of Blumstein, Cohen & Miller, *supra* note 102, at 8-9, 18-23, that the increased prison populations of the 1970s came about because the baby boom generation reached its crime-prone years (ages 15 to 24). In fact, the number of individuals between the ages of 15 and 24 increased only 10% between 1975 and 1985, yet prison populations doubled in that same time period. *HISTORICAL STATISTICS*, *supra* note 8, at 15 (240,593 to 465,236). Moreover, if demographics alone had fueled the growth in prison populations, one would have expected both crime rates and incarceration to drop as the baby boomers passed into middle age. Instead, while crime rates have fallen consistently since 1981, *see HOUSEHOLDS TOUCHED BY CRIME*, *supra* note 104, at 1 (figure 1), prison populations increased 50% in this decade, *see PRISONERS IN 1987*, *supra* note 3, at 1 (table 1).

106. As of 1986, 37 states had mandatory prison sentencing. *See REPORT TO THE NATION*, *supra* note 18, at 72 (table). In Michigan alone, the legislature considered more than 50 mandatory sentencing bills between 1973 and 1979. Johnson, *Response*, in N.Y.U. COLLOQUIUM, *supra* note 51, at 249, 251.

107. While Governor of California, Ronald Reagan demonstrated this flexibility, reducing the population from 28,000 to 17,000 in two years and restoring it to 29,000 the following year. *See Hughes, Discussion*, in N.Y.U. COLLOQUIUM, *supra* note 51, at 133, 133 (remarks of John Irwin).

108. Blumstein, *Planning for Future Prison Needs*, 1984 U. ILL. L. REV. 201, 208.

109. Between 1975 and 1982, more than 35 states enacted statutes requiring minimum terms of incarceration for specific crimes. *REPORT TO THE NATION*, *supra* note 18, at 71. For an excellent

tion was so great that between 1975 and 1982, ten states abolished their parole boards entirely.¹¹⁰

California's determinate and minimum sentencing laws were typical. These statutes established minimum prison sentences for given offenses and prescribed mandatory prison terms for felonies involving a deadly weapon or for multiple felony offenses.¹¹¹ California did not, however, immediately authorize additional funding to corrections to accommodate the projected increase in daily populations. Similarly, New York passed several laws during this period imposing mandatory prison sentences for drug users and sellers,¹¹² recidivists,¹¹³ and violent offenders,¹¹⁴ all without providing any accompanying increase in corrections appropriations.¹¹⁵

Improved techniques for identifying parole violators dramatically increased the number of parolees returned to prison and exacerbated the effects of eroded parole board discretion on prison crowding. In California, for example, the vast majority of parole violations today stem from

review of the nationwide impact of determinate sentencing laws, see S. SHANE-DUBOW, A. BROWN & E. OLSEN, *SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT* (1985).

110. REPORT TO THE NATION, *supra* note 18, at 71.

111. See Act of Sept. 20, 1976, ch. 1139, §§ 271, 273, 1976 Cal. Stat. 5061, 5139-56 (codified as amended at CAL. PENAL CODE §§ 1168-1170.6 (West 1985 & Supp. 1989)). The California Blue Ribbon Commission on Inmate Population Management found that between 1976 and 1985, California enacted 18 bills and the voters approved one ballot initiative that together increased inmate bed-years by 12,710. BLUE RIBBON COMM'N ON INMATE POPULATION MGMT. (COMMITTEE III), *SENTENCING REVIEW* 4 (draft Feb. 9, 1989). These measures included determinate sentences, mandatory sentences, and sentence enhancements for repeat offenders. *Id.* at Attachment A.

112. Act of May 8, 1973, ch. 276, §§ 9, 19, 1973 N.Y. Laws 371, 375, 380-82 (codified as amended at N.Y. PENAL LAW §§ 70.00(2)-(3), 220.00-43 (McKinney 1987 & 1989)). See *People v. Broadie*, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 471 (1975) (upholding sentences under these provisions over objections based on the cruel and unusual punishment clause).

113. Act of May 8, 1973, ch. 277, § 9, 1973 N.Y. Laws 393, 397-98 (codified as amended at N.Y. PENAL LAW § 70.06 (McKinney 1987 & Supp. 1989)).

114. Act of July 20, 1978, ch. 481, § 3, 1978 N.Y. Laws 848, 850-51 (codified as amended at N.Y. PENAL LAW § 70.02 (McKinney 1987 & Supp. 1989)).

115. Jacobs, *supra* note 81, at 211. The situations in Maryland, Michigan, and other states were identical. Due to changes in parole and sentencing patterns, the average length of prison stay in Maryland increased by 50% between 1975 and 1979—an increase greater than any five-year increase in the preceding forty-five years. S. GOTTFREDSON & R. TAYLOR, *THE CORRECTIONAL CRISIS: PRISON POPULATIONS AND PUBLIC POLICY* 5-8 (1983) (available from the National Criminal Justice Reference Service). Likewise, in Michigan, a statewide referendum in 1981 abolished "early parole" and "good time" allowances on minimum sentences for the majority of prisoners in the system, resulting in an aggregate one-year increase in average sentence served. Johnson, *supra* note 106, at 251.

The effect of these laws on prison resources was compounded by a simultaneous movement toward budget-cutting. These statutes passed during a period of unprecedented fiscal restraint at the state level. For example, the voters of both California and Massachusetts approved initiatives that dramatically reduced property taxes, causing correspondingly dramatic reductions in revenues available for spending on corrections. See *infra* notes 156-58 and accompanying text.

illegal drug use that is detected by testing procedures not available ten years ago.¹¹⁶ By 1987, forty-three percent of all prison admissions for felonies were for parole violations,¹¹⁷ most of which involved drugs.¹¹⁸ Overall since 1977, California has seen a sixfold increase in the percentage of parolees who are returned to custody for violating the terms of their release.¹¹⁹

The absence of a relief valve in the rest of the criminal justice machinery compounded the impact of restricting parole board discretion. Parole board members are better insulated from political pressures than legislators, administrators, and—in states where judges are elected—even the courts.¹²⁰ Faced with strong public pressure to get tough on crime and keep convicted criminals imprisoned, these political actors allowed prison populations to swell and forced prisons to exceed their previously determined physical “capacities.” Thus, political pressures rather than increased crime rates led to the increase in prison populations.

This effect—larger prison populations—became widely publicized, due in significant part to a simultaneous movement in the lower federal courts to confront prison conditions, a movement that adopted crowding as its centerpiece. The following Section analyzes the role that the courts played in bringing the issue of crowding to the forefront of the prison policy debate.

2. *The Courts and Crowding*

As noted, American prison populations have almost always been labelled “crowded.”¹²¹ To some extent, the current emphasis on prison crowding stems from the aggressive role that courts have taken in hearing prison cases and declaring prison conditions unconstitutional on the grounds of “crowding.”¹²²

Prior to the 1960s, federal and state courts followed a general policy of refusing to entertain eighth and fourteenth amendment claims by pris-

116. Brian Taugher, a member of the California Blue Ribbon Commission on Inmate Population Management, reports that parole officers administered 470,000 drug tests to parolees in 1987, more than 10 times the number administered in 1967. Taugher Interview, *supra* note 78; see also BLUE RIBBON COMM'N ON INMATE POPULATION MGMT. (COMMITTEE II), PAROLE VIOLATORS 6 (draft Feb. 9, 1989) (“What has not been determined is whether substance abuse in parole violators is increasing, or if sophisticated technology for drug testing and increased supervision by parole agents is discovering more incidents of drug use by parolees.”) [hereinafter PAROLE VIOLATORS].

117. PAROLE VIOLATORS, *supra* note 116, at 1.

118. *Id.* at 6.

119. *Id.* at 1.

120. Blumstein, *supra* note 108, at 208.

121. See *supra* note 91 and accompanying text; see also Angelos & Jacobs, *supra* note 60, at 101.

122. Angelos & Jacobs, *supra* note 60, at 101.

oners.¹²³ The so-called "hands-off doctrine" grew out of a judicial judgment that courts lacked standards for determining how uncomfortable citizens wished their prisons to be, or for assessing fairly the managerial trade-offs required of prison administrators.¹²⁴

Several developments beginning in the late 1960s, however, convinced some lower federal courts to begin entertaining prison litigation. A decade of experience in implementing school desegregation orders had given federal judges confidence in both their authority and capacity to reform the operations of complex public institutions in order to protect constitutional rights.¹²⁵ "Public law" precedents encouraged reformers to reconsider the federal courts as a forum for challenging state prison policy.¹²⁶

Recognizing the possibilities of institutional litigation, lawyers seeking prison reform, like those seeking school desegregation, relied upon the remedial provisions of 42 U.S.C. § 1983.¹²⁷ Initially, court-appointed attorneys who were compensated from the federal treasury handled most of these cases. But in the 1970s, courts began to require that defendant states pay the reasonable attorneys' fees and costs of successful plaintiff prisoners.¹²⁸ Congress later codified this practice in the Civil Rights Attorney's Fees Awards Act of 1976.¹²⁹ Not surprisingly, the possibility of "reimbursement for the costs of the lawsuit plainly encouraged the growth of prison litigation for the remainder of the decade."¹³⁰

Buoyed by the new receptiveness of courts to institutional litigation, by the resources necessary to pursue large-scale legal actions, and by greater societal recognition of prisoners' rights and the shabby conditions of many state prisons, the newly formed National Prison Project (NPP)

123. See Gottfredson & McConville, *Introduction to AMERICA'S CORRECTIONAL CRISIS* 1, 6 (S. Gottfredson & S. McConville eds. 1985).

124. Robbins, *Federal Courts and State Prison Reform*, in 2 PRISONERS' RIGHTS SOURCEBOOK 125, 126 (I. Robbins ed. 1980).

125. The desegregation orders grew out of the Supreme Court's ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954).

126. For a seminal discussion of the evolution of the public law doctrine, see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

127. Congress enacted this provision into law in the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13. Section 1983 allows injured parties to sue any person, including public officials, "who, under color of any [state] statute," has deprived them of "any rights, privileges, or immunities secured by the Constitution." For a discussion of § 1983's modern revival, see *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

128. L. YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM 6 (1989).

129. Pub. L. No. 94-559, 90 Stat. 2641 (amending 42 U.S.C. § 1988).

130. L. YACKLE, *supra* note 128, at 6; see also Percival & Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, LAW & CONTEMP. PROBS., Winter 1984, at 233, 239 ("Court awards of attorney fees to public interest plaintiffs are designed to encourage public interest litigation, as Congress and the courts repeatedly have reaffirmed.").

brought lawsuits alleging that conditions of confinement violated the eighth amendment proscription against cruel and unusual punishment.¹³¹ NPP, a coalition of seasoned ACLU and NAACP desegregation litigators, challenged the most egregious prison conditions.

In the earliest of these cases, involving Arkansas and Alabama prisons, it was probably the notorious conditions that caused the courts to abandon the traditional hands-off doctrine. Although crowding was a central concern of these courts, the continuing increases in population were not so much a *source* of the problems as a stark example of the official callousness of the state systems that accepted new inmates when their prisons could not even provide existing populations with basic nutrition, medical care, sanitation, and pest control.¹³² The lower federal courts held that—based on the totality of the circumstances—the conditions in these prisons constituted cruel and unusual punishment in violation of the eighth amendment and ordered a halt to further admissions until they were corrected.¹³³

With the success of this litigation, prisoners and their advocates brought lawsuits against prisons that had significantly lower population densities. By 1983, courts had declared unconstitutional the entire prison systems of seven states, and one or more prisons in twenty-one other states were operating under a court order or consent decree.¹³⁴

131. The National Prison Project began in 1972, when several members of the American Civil Liberties Union (ACLU) and the NAACP Legal Defense Fund (LDF) joined forces with offices in Washington, D.C.

132. See, e.g., *Pugh v. Locke*, 406 F. Supp. 318, 329-32 (M.D. Ala. 1976), *aff'd and remanded sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part per curiam sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978); *Newman v. Alabama*, 349 F. Supp. 278, 285-86 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975). For an elaborate description of crowding and related inadequate care in Alabama's prisons, see the account of Chief Judge Frank Johnson (the presiding district court judge in both lawsuits) in Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903 (1976); see also L. YACKLE, *supra* note 128, at 256. For a striking example of "unfit" conditions, see *French v. Owens*, 538 F. Supp. 910, 913, 923 (S.D. Ind. 1982), *aff'd in relevant part*, 777 F.2d 1250, 1251-53 (7th Cir. 1985), *cert. denied*, 479 U.S. 817 (1986), where the judge implied that prison housing conditions fell below even the standards imposed on *animal owners* by the Indianapolis municipal code and stated that prison density exceeded that allowed in animal shelters.

133. See, e.g., *Holt v. Sarver*, 309 F. Supp. 362, 382-83 (E.D. Ark. 1970), *aff'd and remanded*, 442 F.2d 304 (8th Cir. 1971); *Pugh v. Locke*, 406 F. Supp. at 328-30, *aff'd in relevant part sub nom. Newman v. Alabama*, 559 F.2d at 288. In the latter case, the court simply ordered a halt to further admissions until prison officials had corrected the constitutional violations. *Id.* at 332, *aff'd in relevant part sub nom. Newman v. Alabama*, 559 F.2d at 288.

For an argument that the eighth amendment should not extend to conditions of confinement and that its framers did not intend it to prohibit even torture, if sanctioned by statute, see Granucci, "Nor Cruel and Unusual Punishments Inflicted": *The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

134. REPORT TO THE NATION, *supra* note 18, at 80. Although some state courts have found prisons and jails overcrowded on state constitutional or statutory grounds, they have played a far less significant role than the federal courts in pushing forward conditions of confinement suits.

Between 1978 and 1981, the Supreme Court heard three cases on prison and jail conditions on appeal from lower federal courts. These cases—*Hutto v. Finney*,¹³⁵ *Bell v. Wolfish*,¹³⁶ and *Rhodes v. Chapman*¹³⁷—ultimately have permitted the lower courts to exercise broad authority in ordering prisons to reduce crowding.

Hutto first articulated the “totality of conditions” standard. There, the Court approved the lower court’s examination of crowding in conjunction with inmate diet, violence, vandalism, and personnel and upheld its conclusion that, “*taken as a whole*, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment.”¹³⁸ On its face, the totality of conditions test appeared to place courts in the position of judging the appropriate level of punitiveness in prisons. To avoid this result, lower federal courts considered the totality of conditions only where crowding was *not* already present.¹³⁹ For example, in the *Bell v. Wolfish* litigation, a federal district court declared that the double-celling of inmates in a New York pretrial detention facility designed for single-celling violated the due process clause,¹⁴⁰ even though the facility was less than two-years-old and, in the words of the court of appeals, “represented the architectural embodiment of the best and most progressive penological planning.”¹⁴¹ Similarly, in the *Rhodes v. Chapman* litigation, a federal district court ruled that double-bunking in the newly constructed Southern Ohio Correctional Facility violated the proscription against cruel and unusual punishments,¹⁴² despite the court’s finding that the prison was “unquestionably a top-flight, first class facility” with low levels of violence and adequate medical care, food, and sanitation.¹⁴³

Although the Supreme Court reversed the judgments of the lower courts in both cases and declared that there is no per se constitutional

135. 437 U.S. 678 (1978).

136. 441 U.S. 520 (1979).

137. 452 U.S. 337 (1981).

138. *Hutto*, 437 U.S. at 687 (emphasis added).

139. One possible explanation of the courts’ receptiveness to crowding claims is that in comparison to the more amorphous trade-offs in prison services, spatial capacity involves precise figures and appeals to common notions that confined areas—such as elevators and banquet rooms—have identifiable limits. Moreover, as discussed earlier, more sophisticated standards, involving factors other than mere physical space, have not proved to be more effective, and may only increase the opportunities for manipulation of institutional capacity.

140. *United States ex rel. Wolfish v. United States*, 428 F. Supp. 333, 337 (S.D.N.Y. 1977), *aff’d in relevant part sub nom. Wolfish v. Levi*, 573 F.2d 118, 126 (2d Cir. 1978), *rev’d sub nom. Bell v. Wolfish*, 441 U.S. 520, 530-43 (1979).

141. *Wolfish v. Levi*, 573 F.2d at 121.

142. *Chapman v. Rhodes*, 434 F. Supp. 1007 (S.D. Ohio 1977), *aff’d*, 624 F.2d 1099 (6th Cir. 1980), *rev’d*, 452 U.S. 337 (1981).

143. *Id.* at 1009, 1013-18.

prohibition against double-bunking,¹⁴⁴ it left open the possibility that crowding might be unconstitutional in some cases. Thus, while calling the conditions of confinement condemned in *Hutto* "unquestioned and serious deprivations of basic human needs," the Court nevertheless recognized that other, less severe conditions, "alone or in combination, may deprive inmates of the minimal civilized nature of life's necessities" and constitute cruel and unusual punishment.¹⁴⁵

In spite of these holdings, and perhaps buoyed by the Supreme Court's language of possibility, lower federal courts evaluating prison conditions after *Wolfish* and *Chapman* continued to exhibit a preoccupation with crowding.¹⁴⁶ Several courts adopted stringent, multipart crowding standards.¹⁴⁷ In *Toussaint v. Rushen*, for example, a federal court ordered California prison officials to ensure not only that no prisoner be double-celled for more than thirty days in any one-year period, but also that such double-celling occur only in cells having at least 50 square feet of space and two beds.¹⁴⁸

As a result of these successes, the number of lawsuits brought by inmates challenging prison crowding increased dramatically during the

144. *Bell v. Wolfish*, 441 U.S. at 542 ("We disagree . . . that there is some sort of 'one man, one cell' principle lurking in the Due Process Clause of the Fifth Amendment."); *Rhodes v. Chapman*, 452 U.S. at 348 ("These general considerations [related to double celling] fall far short in themselves of proving cruel and unusual punishment . . .").

145. *Chapman*, 452 U.S. at 347. Commentators have amplified this suggestion. See, e.g., Herman, *Institutional Litigation in the Post-Chapman World*, in N.Y.U. COLLOQUIUM, *supra* note 51, at 299, 310-11. Since *Chapman*, in fact, at least one district court has concluded that overcrowding in and of itself constitutes cruel and unusual punishment. See *Union County Jail Inmates v. Scanlon*, 537 F. Supp. 993, 1004-05, 1008-09 (D.N.J. 1982), *rev'd sub nom.* *Union County Inmates v. Di Buono*, 713 F.2d 984 (3d Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984).

146. Call, *supra* note 88, at 243, 247. For examples of fairly broad interpretations of the eighth amendment's application to crowding after *Wolfish*, see *Gross v. Tazewell County Jail*, 533 F. Supp. 413, 419 (W.D. Va. 1982) (finding unconstitutional overcrowding with only a passing citation to *Wolfish*); *Hendrix v. Faulkner*, 525 F. Supp. 435, 524, 527 (N.D. Ind. 1981) (finding unconstitutional overcrowding while distinguishing *Wolfish* and stating that there "the court specifically reserved judgment in cases presenting different facts"), *aff'd in relevant part sub nom.* *Wellman v. Faulkner*, 715 F.2d 269, 274 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984); *Larceau v. Manson*, 507 F. Supp. 1177, 1190 (D. Conn. 1980) (finding unconstitutional overcrowding of pretrial detainees while distinguishing *Wolfish* and stating that this finding "in no way contravenes" the Supreme Court), *aff'd in relevant part*, 651 F.2d 96, 103-05 (2d Cir. 1981); *Capps v. Atiyeh*, 495 F. Supp. 802, 814-15 (D. Or. 1980) (finding unconstitutional overcrowding while distinguishing *Wolfish* and calling it "not controlling here"), *vacated and remanded per curiam*, 652 F.2d 823 (9th Cir. 1981).

147. See, e.g., *Lareau v. Manson*, 651 F.2d 96, 104-05 (2d Cir. 1981) (basing determinations of crowding in pretrial detention facilities on four factors: (1) the actual square footage per inmate; (2) the location of the inmates' beds; (3) the amount of time inmates are allowed away from their bunks and the amount of space they enjoy during these periods; and (4) the duration of confinement). See generally Thornberry & Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313, 322-24 (1983).

148. *Toussaint v. Rushen*, 553 F. Supp. 1365, 1385 (N.D. Cal. 1983), *aff'd in relevant part sub nom.* *Toussaint v. Yockey*, 722 F.2d 1490, 1492 (9th Cir. 1984).

late 1970s.¹⁴⁹ John Conrad, an expert witness for the ACLU in several prison cases, reports that the NPP adopted a policy of deliberately framing cases in terms of crowding—regardless of its underlying grievances with a given prison—in order to capitalize on judicial receptiveness to these claims.¹⁵⁰

Court orders and prison increases therefore formed a symbiotic relationship that fostered the public perception of prison crowding. As populations grew, courts found more instances and more reasons for issuing crowding orders. The receptiveness of lower federal courts to crowding claims raised public consciousness about prison conditions. Furthermore, orders that threatened to produce wholesale releases of prisoners spawned widespread concern about crime and intensified legislative resolve to maintain mandatory sentencing schemes. These fueled further population increases and perpetuated the cycle. Court orders, then, helped produce—and give meaning to—population increases, and by doing so placed prison crowding on the national agenda.

III

THE POLITICIZATION OF "CROWDING"

*The real crowding crisis is political . . .*¹⁵¹

Changes in criminal justice policies together with judicial receptiveness to prisoners' lawsuits explain some but not all of the rapid and prolonged growth of the prison crowding debate. This Section argues that, in large part, political conditions now drive the current debate on prison crowding. The debate has entered a new phase as political actors—facing state budget constraints and changes in the political and bureaucratic environments—have embraced the perception of prison crowding as a means to accomplish their particular political goals. This Section contends that all of the political actors involved in prison policy—legislators, administrators, reformers, lawyers, and prisoners—have found that the perception of crowding is consistent with their political objectives. This is not to say that intolerable levels of prison crowding do not exist or that

149. See generally Fair, *The Lower Federal Courts as Constitution-Makers: The Case of Prison Conditions*, 7 AM. J. CRIM. L. 119 (1979); J. GOBERT & N. COHEN, *RIGHTS OF PRISONERS* § 1.02 (1981). The same held true for local jails: of the 2,664 jails responding to a National Sheriffs' Association survey conducted in 1982, 285 reported being under court order at least in part because of crowding, 423 had been under such orders in the recent past, and 529 were parties to pending suits concerning crowding. K. KERLE & F. FORD, *THE STATE OF OUR NATION'S JAILS* 43, 45, 51 (1982).

150. Telephone interview with John Conrad, former Director of the California Department of Corrections and Special Master in the Texas and Alabama prison lawsuits in federal district court (May 8, 1989) [hereinafter Conrad Interview].

151. Angelos & Jacobs, *supra* note 60, at 111; see also Jacobs, *supra* note 81 (describing "expansion politics").

the political actors' claims about prison conditions are not genuine. Rather, it suggests that although these actors might not have created the perception of prison crowding, they now have an interest in perpetuating it.¹⁵² The implications of this conclusion are discussed in Part IV.

A. Prison Administrators and Personnel

No one disputes that *actual* prison crowding poses difficult management problems for prison administrators. These include food and medical shortages, risks to staff, and sanitation concerns. The *perception* of crowding, however, is beneficial to prison administrators, offering an effective method of attaining their management objectives. Even those inside the corrections field have argued that prison officials, like all bureaucrats, have an institutional commitment to perpetual organizational growth.¹⁵³ For these officials, the crowding debate has offered unprecedented opportunities. For example, the perception that crowded prisons pose the threat of riots or early releases may explain the rapid increases in funding of state corrections agencies. Between 1973 and 1983, when crowding entered the judicial and popular arena with a vengeance, direct fiscal outlays for operating prisons tripled, reaching over \$5.5 billion.¹⁵⁴ Thus, prison officials have an incentive to promote the perception of crowding. Indeed, as one criminologist noted: "[Periods of overcrowding] may have more to do with the concerns of prison personnel about operating prisons than they have to do with concerns about accomplishing the various punishment goals ascribed to prisons."¹⁵⁵

1. Advantages of the Perception of Crowding

The perception of crowding offers three primary advantages to prison administrators: (1) it furnishes a basis for obtaining greater resources from the legislature; (2) it permits them to exercise greater con-

152. For a valuable discussion of how political actors can construct and expand public perceptions of social problems, see M. SPECTOR & J. KITSUSE, *CONSTRUCTING SOCIAL PROBLEMS* 1-22 (1987).

153. See, e.g., W. Nagel, *supra* note 96, at 4. Nagel, a former prison administrator himself, notes that because the role of the Federal Bureau of Prisons is to build and operate prisons, the "success" of its administrators is directly tied up with perpetuating the perceived need for more and more prisons. For example, in 1972 the Bureau called for building more than 35 new federal prisons in the next decade, more than double the current number at that time. This call came even though many scholars and authorities were seriously questioning—even rejecting—the desirability of building any more prisons at all. Moreover, this call came at the end of a six-year period in which federal prison populations had actually *declined*. See *HISTORICAL STATISTICS*, *supra* note 8, at 15 (21,040 in 1965 to 20,948 in 1971).

154. Austin & Krisberg, *Incarceration in the United States: The Extent and Future of the Problem*, in *ANNALS*, *supra* note 8, at 17.

155. Messinger, *supra* note 91, at 113.

trol over their institutions; and (3) it provides them with an excuse for accidents or incidents that occur within their prisons.

a. Crowding Litigation as a Method of Obtaining Resources

In the 1970s, state corrections and other departments encountered unprecedented budget constraints, caused in part by citizen tax revolts.¹⁵⁶ Voters concerned about bloat in government budgets routinely defeated bond issues for prison construction.¹⁵⁷ And legislatures, faced with a shrinking pool of resources, demonstrated great unwillingness to release money for historically unpopular prison expenditures.¹⁵⁸

The perception of crowding has helped to produce a dramatic reversal. A recent survey by the National Conference of State Legislatures found that between 1979 and 1983, state spending for corrections throughout the nation grew forty-five percent in real terms—almost three times faster than total state spending.¹⁵⁹ This increase was greater than that in any other category of state services.¹⁶⁰ For example, spending for education rose only five percent in real terms during the same period.¹⁶¹ One study concluded that this increase resulted directly from the

156. Citizen tax revolts resulted in both California's Proposition 13, CAL. CONST. art. XIII A, and Massachusetts' Proposition 2 1/2, MASS. GEN. LAWS ANN. ch. 59, § 20A (West 1988), which cut local tax revenues by 12% and 10%, respectively. See Comment, *A New Generation of State Tax and Expenditure Limitations*, 22 HARV. J. ON LEGIS. 269, 273 (1985) (authored by Justin Hughes and Garth Reiman); Angiolillo-Bent, *Effects of Massachusetts's Proposition 2 1/2 on Property Tax Administration and Reform*, in TAX AND EXPENDITURE LIMITATIONS: HOW TO IMPLEMENT AND LIVE WITHIN THEM 167, 168 (J. Rose ed. 1982).

Similar tax revolts occurred in at least 16 other states. See ALASKA STAT. § 37.07.020 (1988); COLO. REV. STAT. § 24-75-201.1 (1988); DEL. CONST. art. VIII, § 6(b)-(d) (adopted 1980); GA. CONST. art. VII, § 3 (1961, amended 1980); IDAHO CODE §§ 67-6801 to -6803 (1989); LA. REV. STAT. ANN. §§ 47:5001 to :5010 (West Supp. 1989); ME. CONST. art. IX, § 14 (1819, amended 1984); MONT. CODE ANN. § 17-8-106 (1987); NEV. REV. STAT. § 353.213 (1986); OKLA. CONST. art. X, § 23 (1907, amended 1985); OR. REV. STAT. ANN. § 291.355 (1986); R.I. GEN. LAWS § 35-3-7(5) (1988); TENN. CONST. art. II, § 24 (1870, amended 1978); UTAH CODE ANN. §§ 59-177-101 to -112 (1987); VA. CONST. art. X, § 9 (1919, amended 1970); WASH. REV. CODE ANN. §§ 43.135.010-901 (1983). See generally Comment, *supra*.

Antitax sentiment ran so high in Michigan that voters there recently recalled two state senators who voted for a tax increase. Blumstein, *supra* note 108, at 207.

157. Blumstein, *supra* note 108, at 207.

158. In the 1960s, California prison officials were instructed to keep a low profile in order to gain approval of a prison building bond measure. The Governor's campaign for the measure emphasized that the proceeds from the bonds would go toward building colleges; the campaign's promotional literature did not mention that half of the proceeds would go towards building prisons. Telephone interview with James W.L. Park, staff member of the California Senate's Committee on Prison Construction and Operations and former assistant to Sen. Robert Presley, Chairman of California's Senate Committee on Corrections (Apr. 5, 1989) [hereinafter Park Interview].

159. RECENT TRENDS, *supra* note 15, at 1.

160. *Id.* at 7, 10. The other categories were education, social services, and transportation.

161. *Id.* Spending on education increased 38.5% in actual dollars; the price level increased 33.4% at the same time.

"crowding crisis."¹⁶² This study examined capital expenditures in fourteen states that had prison systems under court orders to reduce crowding. It found that capital expenditures for prisons, as a proportion of the total state budget, increased in twelve of these states; in eight of them, the proportion more than doubled.¹⁶³

As one scholar noted in regard to New York State: "Whatever fiscal obstacles corrections may meet in 'normal times' are not apparent during the current crowding crises."¹⁶⁴ As a result, the New York Corrections Department has seen substantial increases in its operating and capital budgets during the past fifteen years despite cutbacks in almost every other state program.¹⁶⁵

Consistent with their bureaucratic objectives, prison administrators "are more comfortable asking for more money" than requesting population reductions.¹⁶⁶ Corrections officials themselves have confirmed this. John Manson, former Commissioner of the Connecticut Department of Corrections, has stated that the first institutional response to prison crowding is to "clainor for more staff."¹⁶⁷

Prison litigation makes it easier for administrators to obtain additional funding. For example, following the court's decision in *Holt v. Sarver*,¹⁶⁸ the Arkansas corrections budget increased sixfold.¹⁶⁹ Likewise, following *Pugh v. Locke*,¹⁷⁰ court-ordered improvements were responsible for \$35 million, or two-thirds, of the resulting increase in the

162. Harriman & Straussman, *Do Judges Determine Budget Decisions? Federal Court Decisions in Prison Reform and State Spending for Corrections*, 43 PUB. ADMIN. REV. 343 (1983); see also M. HARRIS & D. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 24-26 (1977) (noting that funds available for corrections have increased significantly in the "wake of litigation").

163. Harriman & Straussman, *supra* note 162, at 346 (Table 2).

164. Jacobs, *supra* note 81, at 224.

165. N.Y. STATE COALITION FOR CRIMINAL JUSTICE, 1983-84 CRIMINAL JUSTICE BUDGET: ANALYSIS AND QUESTIONS (1983). Similarly, the California Department of Corrections has grown prodigiously throughout the 1980s. Between fiscal years 1981 and 1989, its operating budget grew at an annualized rate of more than 20%. Compare Budget Act of 1988, ch. 313, § 2, slip at 41, 324 (item 5240-001-011) (\$1,414,178,000 appropriated by legislature, reduced to \$1,413,960,000 by governor) with Budget Act of 1980, ch. 510, § 2, 1980 Cal. Stat. 1069, 1218 (item 393) (\$318,840,853 appropriated).

166. Irwin, *Response*, in N.Y.U. COLLOQUIUM, *supra* note 51, at 275, 275. Prison officials rely on the threats of both riots and court-ordered early releases to "break loose" money for prison improvements. See *infra* notes 204-206 and accompanying text.

167. Manson, *supra* note 80, at 285.

168. 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd and remanded*, 442 F.2d 304 (8th Cir. 1971).

169. M. Feeley & R. Hanson, What We Know, Think We Know, and Would Like to Know About the Impact of Court Orders on Prison Conditions and Jail Crowding 15 (Oct. 15, 1986) (unpublished manuscript on file with author) (citing M. HARRIS & D. SPILLER, *supra* note 162, at 111). The authors prepared this paper for the meeting of the Working Group on Jail and Prison Crowding, Committee on Research on Law Enforcement and the Administration of Justice, National Academy of Sciences.

170. 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd and remanded sub nom. Newman v. Alabama*,

Alabama corrections budget.¹⁷¹ Some penologists have even suggested that shrewd prison officials may intentionally use crowding lawsuits to obtain greater funding.¹⁷² Whether or not this is true, at the very least, prison officials have no budgetary interest in contesting the perception of crowding.¹⁷³

In many cases, administrators need not even invoke the security risks of crowding or the assistance of the courts, because they receive *automatic* resource increases as prison populations rise. For example, the California Department of Finance has established formulas for automatically increasing staff and funding for state prisons when their populations exceed an established capacity limit.¹⁷⁴ Beyond the initial increase, California prisons receive funding for each incremental rise in population.¹⁷⁵ One might expect such automatic increases to create financial resistance in the legislature against continuing rises in prison populations, yet the legislature accepts administrators' claims that crowded prisons are more economical. Officials reason that incarcerating additional bodies does not increase fixed costs, and it causes operating costs to rise only slightly. As one official explains, "Within limits it seems like you are serving more inmates for the same amount of money."¹⁷⁶ Since prison crowding creates the impression of greater efficiency, the automatic funding increases that accompany it, at least for now, seem secure.

559 F.2d 283 (5th Cir. 1977), *rev'd in part per curiam sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978). The literature sometimes refers to this case as *James v. Wallace*.

171. M. Feeley & R. Hanson, *supra* note 169, at 15.

172. Angelos & Jacobs, *supra* note 60, at 111. William C. Collins, Chief Counsel to the Washington State Department of Corrections, has implied that administrators may have an incentive to avoid even successful defenses of crowding suits: In winning a case, the state may "lose the war If a prison has been established as constitutional, albeit overcrowded, a legislature may refuse to spend more for new beds or to approve new diversion techniques whereas such actions may be taken quickly if a threatened court order lurks in the background." Collins, *supra* note 51, at 341. In this regard, it is worth noting that the state of Alabama offered no defense in the *Pugh v. Locke* crowding litigation. After a week of testimony in the plaintiffs' case-in-chief, the state's chief trial attorney, Robert S. Lamar, Jr., requested a conference in chambers after which he announced publicly that "the overwhelming majority of the evidence . . . shows that an Eighth Amendment violation has and is now occurring [sic] to inmates in the Alabama Prison System. On that theory, the Defendants have nothing further to offer the Court and at this time rest.'" L. YACKLE, *supra* note 128, at 14.

173. Mr. Collins also notes that "sometimes the [state defendant] wants to lose, since sometimes losing is the only way a correctional administrator can get the money he needs to run a proper program." Collins, *supra* note 51, at 342.

174. Each prison submits an "Overcrowding Package" to the Department of Finance that includes a proposed capacity and proposed staffing requirements once capacity is exceeded. Proposed capacity levels vary among prisons—ranging from 100% to 140% of design capacity. Telephone interview with Marty Ewing, Principal Program Budget Analyst, California State Department of Finance (Apr. 17, 1989).

175. *Id.*

176. Taugher Interview, *supra* note 78.

b. *The Perception of Crowding as a Hook to Increased "Control"*

A prison administrator gains prestige with his colleagues not only from having a large budget but also from running a "tight ship."¹⁷⁷ Although one might expect higher prison populations to yield a greater number of management difficulties and to produce more violence and prison incidents, the contrary—within reasonable limits—appears to be true. Ironically, in studies of three state prison systems, John DiIulio found that prisons with the highest inmate-to-staff ratios were the most orderly: a lower, rather than a higher, level of staffing was associated with greater order.¹⁷⁸

It is not entirely clear why "reasonably" crowded prisons¹⁷⁹ tend to have fewer management problems. DiIulio suggests that the quality of life in prisons depends not on the level of crowding but on the quality of guard training and the ingenuity of management.¹⁸⁰ The phenomenon of crowded yet orderly prisons may also occur because crowded conditions encourage prisons to incorporate inmates into daily operations more fully, providing useful distractions and a sense of authority that reduces prison tension.¹⁸¹

Another explanation of this phenomenon is that prison administrators may use "crowding" and "understaffing" to justify confining inmates for longer periods of time, which reduces the opportunities for prison incidents.¹⁸² Specifically, administrators of crowded or understaffed facilities may reduce the amount of time they allow prisoners in common areas, where contact between rival groups is most likely. In extreme circumstances, extremely large prison populations may justify locking down inmates for more than twenty-one hours per day.¹⁸³ In the long term,

177. Jacobs, *supra* note 81, at 212.

178. J. DI IULIO, *supra* note 41, at 76.

179. That is, prisons that are over "capacity" yet still have cells available to diffuse violent or potentially disruptive situations.

180. J. DI IULIO, *supra* note 41, at 95 ("[T]he quality of prison life varies according to the quality of prison management."). Nationally, implementation of training programs for prison personnel has intensified over the past five years. See, e.g., *Correctional Policy: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 60 (1983) (testimony of Allen F. Breed, Director, National Institute of Corrections) (describing the establishment of a national training site for corrections staff at the National Academy of Corrections at Boulder, Colorado); *id.* at 6 (statement of Norman A. Carlson, Director, Federal Bureau of Prisons) (describing the National Academy of Corrections and the Federal Law Enforcement Training Center in Glynnco, Georgia).

181. J. DI IULIO, *supra* note 41, at 111-13 (describing the use in Texas prisons of building-tenders (BTs), who were "inmates selected by the administration to assist correctional officers in running the cellblocks").

182. Johnson, *supra* note 132, at 912; see also J. JACOBS, *supra* note 81, at 43 ("Crowded conditions [in Illinois in the 1940s and 1950s] meant that the average inmate was confined with two other men in a tiny cell from 3:00 P.M. to 7:00 A.M.").

183. See Giari, *supra* note 80, at 454.

such extreme procedures are likely to increase prison difficulties;¹⁸⁴ in the short term, however, they create the appearance of control and thereby enhance the administration's reputation. Thus, crowded prisons permit administrators to exercise (and project) greater control over prison operations.

c. *"Crowding" as an Excuse*

Finally, the perception of crowding offers a convenient scapegoat for other shortcomings of correctional administration. As Gerald Gaes has suggested, the outcry against crowding may be due less to its actual impact than to its political simplicity.¹⁸⁵ Crowding is an easy explanation for prison disturbances because "[i]t is much simpler to count the number of inmates above some design capacity than to scrutinize procedures, reexamine management and fiscal policies, or change habitual responses to existing conditions."¹⁸⁶ Despite scientific evidence to the contrary,¹⁸⁷ prison managers have blamed overcrowding for a variety of ills, including rapes, riots, hostage taking, and other assaults. In short, "correctional administrators . . . often blame their failure to meet minimum standards of humane treatment on crowded conditions; this explanation is more appealing than poor or indifferent administration."¹⁸⁸

2. *Prison Guards*

An often overlooked subset of the prison administration—prison guards—deserves special consideration because of its particularly active role in the crowding debate. During the 1970s, the prison officers union emerged as a powerful force in state government. Between 1971 and 1978, the number of corrections staff in this country increased nearly fifty percent.¹⁸⁹

Prison officers unions have always been active politically since changes in criminal justice policies may increase or reduce their ranks and affect their safety. It is not surprising, then, that because of the threat of layoffs, state employees unions were some of the strongest opponents of the decarceration movement of the 1960s.¹⁹⁰ Public employee

184. Newland Interview, *supra* note 67.

185. Gaes, *supra* note 21, at 97.

186. *Id.*

187. See *supra* notes 31-48 and accompanying text.

188. Angelos & Jacobs, *supra* note 60, at 106. For a general discussion of institutional tendencies to blame management problems on "nonreactive conditions"—that is, conditions beyond anyone's control—see M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 244-76 (1979).

189. Clear, Harris & Record, *Managing the Costs of Corrections*, PRISON J., Spring-Summer 1982, at 3, 10, 52 n.15.

190. See, e.g., CAL. STATE EMPLOYEES ASS'N (CSEA), *WHERE HAVE ALL THE PATIENTS GONE* (Jan. 1972); H. SANTISTEVAN, *OUT OF THEIR BEDS AND INTO THE STREETS* (1975).

unions may attempt to further their agendas by publicizing individual incidents of ex-prisoner violence, disruptions of public order, and loss of property value.¹⁹¹ In California, there is evidence that their efforts influenced Governor Reagan's administration to scale back dramatically its decarceration plans.¹⁹²

With the movement toward more punitive sentencing, the number of prison officers in America has increased dramatically; this, in turn, has increased the power of their unions. Some states have adopted union-sponsored measures that institutionalize automatic staff increases based upon prison admissions by giving prisons a certain number of dollars per new inmate or establishing minimum inmate-staff ratios.¹⁹³ As the former Commissioner of the Connecticut Department of Corrections acknowledged in 1983, even where increases are not automatic, "[in]ore often than not, institutions are able to add custody staff in proportion to the higher number of inmates."¹⁹⁴

One commentator concluded that the Texas Department of Corrections (TDC) and its employees have acquired a great deal of power and influence from the rapid growth in Texas prison populations.¹⁹⁵ As inmate populations grew from 16,000 in 1975 to 37,000 in 1983, the size and budget of the TDC correspondingly doubled.¹⁹⁶ Similar phenomena have occurred across the country. Two indications of the power of prison unions have been their ability to *reduce* inmate/staff ratios despite dramatic population increases¹⁹⁷ and to command large salary increases.¹⁹⁸ With more members and higher salaries, of course, come

(published by the American Federation of State, County, and Municipal Employees (AFSCME)). For a general discussion of the impact of local government employees on their employers, see E. BANFIELD & J. WILSON, *CITY POLITICS* 210-16 (1963).

191. S. COHEN, *FOLK DEVILS AND MORAL PANICS* 91-101, 111-38 (1972).

192. See Chase, *Where Have All the Patients Gone?*, *HUM. BEHAV.*, Oct. 1973, at 14, 16 (noting the CSEA's political involvement in the establishment of a state senate select committee to investigate the administration's plan to close all but two of the state's mental hospitals in the late 1960s and early 1970s).

193. For example, the California Corrections and Peace Officers Association sponsored the program described at *supra* notes 174-75 and accompanying text. Park Interview, *supra* note 158.

194. Manson, *supra* note 80, at 285.

195. Alpert, Crouch & Huff, *Prison Reform by Judicial Decree: The Unintended Consequences of Ruiz v. Estelle*, in *DILEMMAS*, *supra* note 17, at 258, 263.

196. *Id.*

197. Inmate-to-staff ratios fell in 30 states between January, 1983 and January, 1988. Compare *CORRECTIONS YEARBOOK* 1983, *supra* note 8, at 46-47 with *CORRECTIONS YEARBOOK* 1988, *supra* note 8, at 45-46. In 1987 alone, 25,884 new correctional officers were hired by 49 agencies, with six jurisdictions hiring over 1,000 each. *Id.* at 44-45. In this same five-year period, however, the nation's prison inmate population increased by nearly 160,000. Compare *CORRECTIONS YEARBOOK* 1983, *supra* note 8, at 1 (395,802 inmates) with *CORRECTIONS YEARBOOK* 1988, *supra* note 8, at 1 (554,636 inmates).

198. Between January, 1983 and January, 1988, increases in the entry level salaries of prison guards exceeded 20% in 22 states. Compare *CORRECTIONS YEARBOOK* 1983, *supra* note 8, at 48

additional dues and greater lobbying power. Accordingly, neither the power obtained by prison unions from the perception of crowding, nor their interest in perpetuating that perception, shows any sign of diminishing in the near future.

In sum, prison administrators and their employees have strong political, financial, and administrative interests in maintaining and perpetuating the perception of crowding.

B. Supporters of Prison Expansion

Legislators, like the public they represent, do not have a uniform opinion about prison policy. Many legislators believe, either secretly or publicly, that incarceration should be curtailed or dramatically reduced.¹⁹⁹ Public sentiment that favors getting tough on crime, however, has influenced a majority of legislators in thirty-two states and the federal government to vote for the construction of new prisons.²⁰⁰ Indeed, prison building advocates unable to get proposals through committee only ten years ago are now able to pass proposals several times more ambitious.²⁰¹ In 1982 and 1983, states spent nearly \$3 billion to expand or improve prison capacity;²⁰² over the next six years, they are considering outlays of \$10 billion.²⁰³

The crowding issue has been an essential ingredient in changing legislative attitudes toward prison building because of the political risks associated with the purported effects of crowding: rioting and criminals on the streets. James Jacobs reports that "[i]n New York, the awful spectre of Attica, and its destructive impact on [Governor] Nelson Rockefeller's political ambitions, has given correctional officials a special advantage for lobbying."²⁰⁴ Jacobs concludes that to protect themselves

with CORRECTIONS YEARBOOK 1988, *supra* note 8, at 45-46. In 1987 alone, the average salary for entry level officers increased 5.6%. *Id.* at 45.

199. "There are a lot of rational legislators who realize that we can't keep building forever, but it would be political suicide for them to oppose a prison construction bill." Park Interview, *supra* note 158.

200. CORRECTIONS YEARBOOK 1988, *supra* note 8, at 26-27.

201. Park Interview, *supra* note 158.

202. Austin & Krisberg, *supra* note 154, at 16-17. California alone has embarked upon a \$3 billion spending program over 10 years; in a five-year period, Michigan increased its prison system's capacity by 5,500 beds—building three large prisons and three smaller ones, adding new units to existing prisons, and converting several other public buildings into prisons. Johnson, *supra* note 106, at 251. The state of Washington spent over \$310 million on new prison and jail construction and renovation during the early 1980s. Even more recently, Senator Dole of Kansas proposed that the federal government spend \$6 billion in grants to fund state prison construction. Sherman, *supra* note 82, at 45.

203. Lacayo, *supra* note 4, at 30.

204. Jacobs, *supra* note 81, at 216. "Attica" refers to the infamous riots at New York State's Attica Correctional Facility in 1971. For an exhaustive account of the riots, see generally THE N.Y. STATE SPECIAL COMM'N ON ATTICA, ATTICA: THE OFFICIAL REPORT (1972).

from the political fallout of prison riots, "Governors want to be in a position to say, 'I provided everything that was requested; the Department of Corrections consistently underestimated its capacity requirements.'" ²⁰⁵ One member of California's Blue Ribbon Commission on Inmate Management agrees that advocates of prison construction "used the spectre of riots and attacks on prison guards to get the legislature moving," even though these advocates knew that there was no proven link between the relevant population density levels and inmate violence. ²⁰⁶ Although concern about riots has begun to subside, legislators are still sensitive to the argument that crowded conditions may result in dangerous criminals being placed back on the street. For example, New York Mayor Edward Koch lobbied successfully for more jail construction funds during a period of fiscal austerity by raising the prospect that court-ordered releases of prisoners would return hardened criminals to the streets of his city. ²⁰⁷

Not only does crowding make legislators politically vulnerable if they fail to act, but also if they do respond, they are vulnerable to those on whom they rely to determine whether crowding exists—prison administrators. Prison administrators have an institutional interest in supporting prison building. ²⁰⁸ The New York Department of Correctional Services, for example, was one of the most forceful advocates of prison expansion in the state. ²⁰⁹ As part of an unsuccessful effort to gain approval of a prison construction bond measure, the Department's commissioner and his staff toured the state giving speeches, engaging in debate, and making television appearances in support of the bond measure. ²¹⁰ Predictably, the Department frequently invoked the risks of crowding; in particular, the Department's public relations task force emphasized early release or community treatment of violent criminals as undesirable alternatives to building more prisons. ²¹¹

The prison bureaucracy both contributes to and benefits from prison construction. In California, the building and planning division of the corrections department swelled from only three people in the early 1970s

205. Jacobs, *supra* note 81, at 216; see also N.Y. Times, Aug. 27, 1986, at A20, col. 4 (discussing the political fallout from the 1985 Oklahoma State Penitentiary riot).

206. Taugher Interview, *supra* note 78.

207. N.Y. Times, Dec. 10, 1983, at A1, col. 1 ("I am faced with the choice of releasing prisoners into city streets . . . The only real and the only responsible choice is to build more jails.").

208. W. Nagel, *supra* note 96, at 4. New prisons provide opportunities for promotion, more money for implementing programmatic changes, and increased prestige within the state bureaucracy. For a discussion of the institutional interests of prison administrators, see *supra* notes 153-188 and accompanying text.

209. Jacobs, *supra* note 81, at 210.

210. *Id.* at 221.

211. *Id.* at 222.

to over 300 today.²¹² The state's budget for prison building has quadrupled in this period.²¹³ This growth shows no sign of abating: the current budget contains proposals to build more than a dozen new prisons in 1989 and 1990.²¹⁴

Finally, a new source of political pressure for building is emerging from the private sector and local communities.²¹⁵ Prison construction is big business: California awarded prison construction contracts worth more than \$650 million in 1987.²¹⁶ Accordingly, the number of prison building firms in the state has increased dramatically.²¹⁷ Elsewhere, firms have even built and operated their own prisons for the state.²¹⁸ Private companies also provide over \$200 million in services and programs to existing prisons.²¹⁹ The extent to which private actors engage in lobbying is unclear, but one commentator has surmised that such lobbying would be consistent with "the public's demand for longer sentences" and that such lobbying could "result in the improvement of prison conditions."²²⁰ Local governments have seen the same economic potential in prison building. The lure of big money has changed how many towns view the possibility of new prisons in their backyards. In the past, these towns opposed prison construction; now they actively solicit it, often in hopes of reviving a depressed local economy.²²¹

The strength of these political forces is apparent when one considers

212. Park Interview, *supra* note 158; Telephone interview with Jolaine Beers, Administrative Assistant for the Planning and Construction Division of the California Department of Corrections (Sept. 18, 1989) [hereinafter Beers Interview].

213. GOVERNOR'S BUDGET, 1989-90: STATE OF CALIFORNIA, at YAC-1 (1989); see also GOVERNOR'S BUDGET SUMMARY, 1989-90: STATE OF CALIFORNIA 99 (1989).

214. Park Interview, *supra* note 158.

215. Mullen, *Corrections and the Private Sector*, PRISON J., Autumn-Winter 1985, at 1 (discussing the implications of private sector involvement in the corrections industry). Crowding plays a role even in this phenomenon. For one example, see Logan & Rausch, *Punish and Profit: The Emergence of Private Enterprise Prisons*, 2 JUST. Q. 303 (1985) (arguing for private prisons on the ground of overcrowding).

216. CORRECTIONS YEARBOOK 1988, *supra* note 8, at 26.

217. Kitchell Construction Corporation, the largest prison building contractor in California, estimates that the number of firms in the prison building industry has tripled since 1980.

The number of prison consulting contracts in California rose from 6 in 1985 to 21 and 20 in 1986 and 1987, respectively. Likewise, the number of construction contracts awarded rose from 6 in 1984 to 42 in 1986. Beers Interview, *supra* note 212. Even more strikingly, the number of personnel in the Planning and Construction Division has grown from 9 in 1983 to 229 presently. *Id.*

218. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889, 896 (1987) (stating that approximately 24 adult prisons are currently under construction or operated by private firms).

219. Camp & Camp, *Correctional Privatization in Perspective*, PRISON J., Autumn-Winter 1985, at 14, 18.

220. Savas, *supra* note 218, at 898.

221. Elected officials from the towns of Avinall, Delano, Corchoran, and Cresette City have actively lobbied the California legislature to obtain new prisons for their cities. In 1988, several cities formed an organization called the Association of Cities with Prisons. One of its purposes is to discuss prison expansion. Park Interview, *supra* note 158.

that most researchers strongly disfavor the current building policy.²²² Remarkably, prison construction has proceeded at unprecedented rates despite overwhelming scientific evidence that current conditions do not pose the threat of riots or require large scale early releases²²³ and that building programs may be counterproductive.²²⁴ Some studies have concluded, without refutation, that even with the current prison building program, annual increases in prisoner populations will continue to outstrip increases in prison beds.²²⁵ Others have found, even more ominously, that new construction will only tend to increase the number of prison admissions.²²⁶ Nevertheless, as of 1982, 700 prisons and jails were under construction or proposed for construction in this country.²²⁷

As penologist James Jacobs concludes, all roads in the prison crowding debate seem to lead to prison building:

The crowding litigation, the court decrees, the consent agreements, the caps, the threats of contempt, and the efforts to coax money out of the legislatures have had a profound and unsettling effect on the administration of the nation's jails and prisons. . . . Almost every state is examining or has undertaken a prison-expansion program. Construction of new facilities, renovation of existing institutions, and the acquisition of . . . other facilities for prison purposes have vastly increased the nation's prison infrastructure.²²⁸

Thus, the perception of crowding appears to serve the interests of legislators and others who favor prison building by furnishing a "reason" for increased prison construction.

C. Prison Reformers

Not all legislators support prison construction; in fact, many support prison reforms and alternatives. These legislators, together with the

222. Studies have condemned new prison construction as prohibitively expensive, *see, e.g.*, J. IRWIN & J. AUSTIN, *supra* note 9, at 9-11; Funke, *supra* note 8, at 93; likely only to fuel further crowding, *see, e.g.*, M. SHERMAN & G. HAWKINS, *supra* note 7, at 14; Zimring, *Sentencing Reform in the States*, in REFORM AND PUNISHMENT 101, 118 (M. Tonry & F. Zimring eds. 1983); or incapable of resolving current crowding, *see, e.g.*, Angelos & Jacobs, *supra* note 60, at 112; Gottfredson, *supra* note 70, at 268.

223. *See supra* notes 35-48 and accompanying text.

224. *See supra* note 222.

225. *See, e.g.*, Gottfredson, *supra* note 70, at 268 (finding that at Maryland's rate of prison growth, the state could build a new 1,000-bed facility every year and never meet new demand, let alone relieve existing demand).

226. 1 J. MULLEN, K. CARLSON & B. SMITH, *supra* note 8, at 27 (concluding that capacity may drive population and not vice versa); W. NAGEL, THE NEW RED BARN: A CRITICAL LOOK AT THE MODERN AMERICAN PRISON 148-49 (1973) (concluding that continued prison construction reduces pressure on legislatures to develop alternatives).

227. NAT'L MORATORIUM ON PRISON CONSTRUCTION, NEW UPDATE ON JAIL AND PRISON CONSTRUCTION (June 4, 1982).

228. Angelos & Jacobs, *supra* note 60, at 111-12; *see also* Jacobs, *supra* note 81, at 209, 240.

reformers who share their views, have argued that the crowding crisis presents an important opportunity to reduce prison populations and introduce more liberal punishment alternatives.²²⁹ These reforms include decarceration efforts, such as decriminalization, sentence reduction, good time credits, and selective incapacitation, as well as alternatives to incarceration such as restitution, community service, probation, and parole. The prison crowding crisis in many ways has reinvigorated the ailing enterprise of prison reform and given it a much broader base of support.

1. *The Rhetoric of Prison Reform*

In the early 1970s, several influential works concluded that most rehabilitative treatments had no, or at least no consistent, impact on prisoners' subsequent criminality.²³⁰ Simultaneously, a strong conservative reaction against liberal treatment policies began to advocate measures, such as longer prison terms and mandatory prison sentences,²³¹ based on a retributive rather than a rehabilitative theory of criminal justice.²³² Following the collapse of the rehabilitation theory of the 1970s, prison reformers lacked a theoretical basis with which to justify their proposed alternatives.²³³

229. Putting it succinctly, one prison reformer stated: "The prison overcrowding crisis . . . is a great opportunity." Kaufman, *Response*, in N.Y.U. COLLOQUIUM, *supra* note 51, at 125, 125. Mr. Kaufman is the Director of the Prison Overcrowding Project, Center for Criminal Justice Research.

230. See, e.g., D. LIPTON, R. MARTINSON & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* 522-32 (1975); Feinberg & Grambsch, *Appendix: An Assessment of the Accuracy of "The Effectiveness of Correctional Treatment,"* in *THE REHABILITATION OF CRIMINAL OFFENDERS* 119 (L. Sechrest, S. White & E. Brown eds. 1979); Greenberg, *The Correctional Effects of Corrections: A Survey of Evaluations*, in *CORRECTIONS AND PUNISHMENT* 111, 140 (D. Greenberg ed. 1977); Martinson, *What Works?—Questions and Answers about Prison Reform*, PUB. INT., Spring 1974, at 22, 25-27 (Spring 1974). See generally Greenberg & Humphries, *The Co-optation of Fixed Sentencing Reform*, 26 CRIME & DELINQ. 206 (1980).

231. See *supra* notes 104-19 and accompanying text.

232. For evidence of this anticrime/propunishment sentiment, see Skogan, *On Attitudes and Behaviors*, in *REACTIONS TO CRIME* 19, 22-23 (D. Lewis ed. 1981):

Since 1971, the Gallup Organization and the National Opinion Research Center (1980) have monitored people's opinions about government spending in ten major areas, including cities, education, health, defense, space, foreign aid, and crime. They have been asked if "too much" or "too little" has been spent on those, or if spending has been "just about right." Over that decade, crime has had the most support for more spending [and] has also been the most unwavering of the list; while public enthusiasm for other issues has waxed and waned . . . , the proportion thinking that government does not spend enough on crime has remained constant at about 70%.

See generally D. FOGEL, *WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS* (1975); E. VAN DEN HAAG, *PUNISHING CRIMINALS* (1975); A. VON HIRSCH, *DOING JUSTICE* (1976); J. WILSON, *THINKING ABOUT CRIME* (1975).

233. For an excellent historical analysis of the rise and fall of the rehabilitation movement, see D. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1980).

As early as 1978, however, some of these same reformers identified the potential of increased prison populations as a new justification for alternatives.²³⁴ Edith Flynn, for example, speculated that the tension and violence produced by crowding might "finally force the development and implementation of plans for prison population reduction and for deinstitutionalization."²³⁵ Reformers who once ignored the issue of prison crowding later began to call it "the most important issue facing the criminal justice system today."²³⁶ Indeed, at least in the reform literature, prison crowding appears to have displaced rehabilitation as the primary justification for prison alternatives.²³⁷

Several advocates of alternatives have modified their positions in order to capitalize on the conservative reform movement and the crowding crisis, recommending for example that alternatives be combined with "selective" incapacitation.²³⁸ Selective incapacitation theorists argue that given the scarcity of prison resources, prison cells should be reserved for only the most dangerous and intractable offenders. These reformers have thus attracted support for alternatives to incarceration on the ground that such alternatives would free up prison space to incarcerate dangerous offenders for longer periods of time.²³⁹ Advocates of probation and parole have also modified their rhetoric to capitalize on the current crowding emphasis.²⁴⁰

The adoption of the crowding crisis by reformers is understandable. Although crowding as a justification lacks the permanence of rehabilita-

234. Scull, *Community Corrections: Panacea, Progress or Pretence?*, in *THE POWER TO PUNISH* 146, 159-60 (D. Garland & P. Young eds. 1983) ("[T]he significance of the revolt against excessive 'leniency' towards criminals . . . affects the very substance of community 'alternatives' to imprisonment, and impels decarceration here to assume a guise quite different from [the earlier deinstitutionalization movement]—and one that is much more heavily interventionist in character.").

235. Flynn, *Classification for Risk and Supervision—A Preliminary Conceptualization*, in *PRISONS PAST AND FUTURE* 131, 133 (J. Freedman ed. 1978).

236. Blumstein, *Response*, in N.Y.U. COLLOQUIUM, *supra* note 51, at 115, 115; *see also* Flynn, *supra* note 235, at 134 (recommending selective incapacitation be incorporated into past and proposed alternatives as a method of reducing prison crowding). Compare Conrad, *The Penal Dilemma and Its Emerging Solution*, 31 *CRIME & DELINQ.* 411, 412 (1985) (basing his call for increased use of probation on the "Hobbesian anarchy" in our "[o]vercrowded prisons") with Conrad, *The Uses of Criminology: Complaint from an Ungrateful Curmudgeon*, in *THE NEW AND THE OLD CRIMINOLOGY* 20, 21 (E. Flynn & J. Conrad eds. 1978) (referring to community-based corrections in terms of rehabilitation).

237. As one commentator wryly puts it, "[r]ecent assessment efforts, combined with the increasing need to alleviate prison and jail overcrowding, have led to some shifts in strategy." Harris, *Strategies, Values, and the Emerging Generation of Alternatives to Incarceration*, in N.Y.U. COLLOQUIUM, *supra* note 51, at 141, 145.

238. A. VON HIRSCH, *supra* note 232, at 110.

239. *See, e.g.*, P. GREENWOOD & A. ABRAHAMESE, *SELECTIVE INCAPACITATION* 27 (1982); M. MOORE, S. ESTRICH, D. MCGILLIS & W. SPELMAN, *DANGEROUS OFFENDERS* 96-107 (1984); Gottfredson & Gottfredson, *Selective Incapacitation?*, in *ANNALS*, *supra* note 8, at 135-49.

240. *See, e.g.*, Conrad, *supra* note 236.

tive ideals—since, by definition, the need for reform would disappear once crowding ended—it has proved to be a more politically effective tool for prison reform than its predecessor. Rather than depending upon speculative notions of human behavior and vague measurements of success, crowding poses a clear problem that can be affected in an immediate, observable way. Crowding is a particularly powerful basis for appealing to legislatures, since legislative bodies tend to react to crisis rather than to broad systematic proposals.²⁴¹

Thus, many reformers have attempted to lay claim to the crowding “crisis,” defining it not as too little space, but as too many prisoners. They argue that diverting some prisoners from incarceration will alleviate the crisis. The attractiveness of this logic may be responsible for the ubiquity of crowding arguments in the reform literature.²⁴²

2. *The Revitalization of Reform*

The intensity of concern over the prison crowding crisis has produced unprecedented support for decarceration or alternatives to incarceration for nondangerous offenders. The American Bar Association, the American Correctional Association, the National Council on Crime and Delinquency, and numerous federal government commissions have called for greater use of community sanctions.²⁴³ In practice, there is an increasing reliance on alternative sentencing programs in response to court orders concerning crowded prisons.²⁴⁴ The relatively low cost of alternatives has increased legislators’ willingness to consider them. By

241. See generally J. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 99-105 (1984).

242. Nearly every piece written in this decade on alternatives to incarceration has stated that one of the primary benefits of such alternatives would be to ease prison crowding. See, e.g., G. NEWMAN, *JUST AND PAINFUL: A CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS* 5 (1983); J. PETERSILIA, *EXPANDING OPTIONS FOR CRIMINAL SENTENCING* 1 (1987); Newton, *Sentencing to Community Service and Restitution*, 11 CRIM. JUST. ABSTRACTS 435, 435-37 (1979); Schmitt, *Alternative Sentencing: A Proposed State Model*, 12 J. LEGIS. 225, 226 (1985) (“Current problems facing the American prison system aggravate the inadequacies of penal incarceration . . . American prisons are seriously overcrowded.”); von Hirsch & Gottfredson, *Selective Incapacitation: Some Queries About Research Design and Equity*, in N.Y.U. COLLOQUIUM, *supra* note 51, at 11, 38 (“The unrestricted imprisonment of felons will simply overwhelm the prisons.”).

By contrast, 20 years ago, essays on alternatives to incarceration rarely, if ever, raised prison crowding and related conditions as a reason for pursuing alternatives. See, e.g., Best & Birzon, *Conditions of Probation: An Analysis*, 51 GEO. L.J. 809, 809 (1963) (“Basic to modern penology are the premises that society as a whole profits most from a rehabilitation and reformation of the criminal offender . . .”).

243. Austin & Krisberg, *The Unmet Promise of Alternatives to Incarceration*, 28 CRIME & DELINQ. 374, 374-75 (1982).

244. *Id.* at 408; see also R. MATHIAS & D. STEELMAN, *CONTROLLING PRISON POPULATIONS: AN ASSESSMENT OF CURRENT MECHANISMS* (1982). For an example of recent legislation, see the Texas Community Corrections Act, TEX. CODE CRIM. PROC. ANN. art. 42.121, § 3.10 (Vernon Supp. 1989).

1979, nearly all states had statutory provisions authorizing restitution, and almost a third authorized community service work orders.²⁴⁵ For example, during a period of rapid prison population growth, Michigan attempted to ease the political pressure on judges to expand incarceration by encouraging broader use of restitution and community service.²⁴⁶

Decarceration advocates have also rallied around the issue of prison crowding, advocating decriminalization, shorter prison terms, early releases, and even abolition of prisons.²⁴⁷ Alfred Blumstein, for example, has suggested that crowded conditions require directly limiting prison sentences based on projections of prison capacity.²⁴⁸ Both judicial and legislative efforts to bring about early release or sentence reductions have already taken effect. During 1983, fifteen states or state courts ordered early releases.²⁴⁹

Legislatures have pursued a variety of other decarceration strategies, including population caps, accelerated parole, and reduced prison sentences.²⁵⁰ Minnesota, for example, proposed a "capacity budget" in its sentencing schedule.²⁵¹ Under this procedure, prison terms would have been fixed and could not have been increased unless other terms were simultaneously reduced.²⁵² Other states have manipulated good time credits in order to reduce prison populations.²⁵³

245. REPORT TO THE NATION, *supra* note 18, at 73.

246. Johnson, *supra* note 106, at 251. Mr. Johnson was Director of the Michigan Department of Corrections and a member of the Board of Governors of the American Correctional Association. In 1982, Congress enacted a provision for restitution by federal convicts. See REPORT TO THE NATION, *supra* note 18, at 73.

247. See, e.g., K. KRAJIK & S. GETTINGER, OVERCROWDED TIME: WHY PRISONS ARE SO CROWDED AND WHAT CAN BE DONE 25-42 (1982); *Overcrowding in State Prisons & County Jails: Hearings Before the Senate Institutions, Health & Welfare Comm.*, N.J. Legis. 24, 29-30, 38-41, 43-47, 54-55 (Feb. 18, 1982).

248. Blumstein, *supra* note 236, at 117.

249. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1983, at 7 (Apr. 1984) (Table 15) [hereinafter PRISONERS IN 1983].

250. Gaes, *supra* note 21, at 96. It is interesting to note that Michigan's Prison Overcrowding Emergency Powers Act, MICH. COMP. LAWS ANN. §§ 800.71-.79 (West 1982 & Supp. 1989), followed a series of lawsuits which had caused the state to enter into a consent decree to limit crowding. See Johnson, *supra* note 106, at 251-52.

251. MINN. SENTENCING GUIDELINES COMM'N, PROPOSED MINNESOTA SENTENCING GUIDELINES (1980).

252. *Id.* Although the capacity budget was not adopted, Minnesota's program is nonetheless related to "capacity." See MINN. STAT. ANN. § 244.09(3) (West Supp. 1989) ("In establishing the sentencing guidelines, the commission shall take into substantial consideration . . . the capacities of local and state correctional facilities.").

253. See, e.g., NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES OFFICE OF PROGRAM DEVELOPMENT AND RESEARCH, POTENTIAL EFFECT ON PRISON POPULATION OF CREDITING GOOD TIME AGAINST MINIMUM SENTENCES (1983). In 1982, Illinois released over 3,000 prisoners by granting multiple 90-day good-time awards until the Illinois Supreme Court invalidated that practice. PRISONERS IN 1983, *supra* note 249, at 4. Texas also recently lengthened the time credit for inmate good behavior. Angelos & Jacobs, *supra* note 60, at 112.

The most systematic state effort to force decarceration is Michigan's Prison Overcrowding Emergency Powers Act.²⁵⁴ Under this act, if the corrections commission declares that overcrowding exists, the Governor must lower every prisoner's minimum sentence and thus accelerate the parole eligibility of all prisoners. Between January of 1981 and April of 1984, this procedure was invoked six times.²⁵⁵ Similarly, Georgia's parole board granted "accelerated releases" to more than 1,500 prisoners in 1983 in order to reduce overcrowding.²⁵⁶

Reformers have even garnered support from corrections officials concerned that excessive population levels may force them to accept inmates who are clearly inappropriate for their prisons.²⁵⁷ And they have convinced others that reform is the only way out of the overcrowding cycle. For example, Norval Morris has stated: "I think all we can do is to support alternatives to imprisonment, struggle for the imposition of lesser sentences generally, and work on earlier release and halfway house processes."²⁵⁸

In sum, the perception of crowding may be a valuable means for those who oppose either the punitiveness of imprisonment or the current management of prison to gain and maintain support for their proposals. Seasoned by the lessons of the past, reformers today are less concerned with inspiring a philosophical revolution in punishment than they are with leading an effective reform movement based on a workable strategy for alleviating a pressing public problem.

3. Prisoners' Rights Advocates and Prisoners

Finally, crowding has proved to be an effective tool for prisoners' rights advocates who desire massive institutional reform and for prisoners who simply wish to be released. Early prison reform efforts frequently concentrated on discrete issues such as prisoners' rights to religious freedom or freedom of expression.²⁵⁹ Although these cases helped to erode the notion that prisoners do not have rights, they had little impact on the overall management of institutions. As one reformer noted, "the problems of a prison that require reform . . . are interrelated to such an extent that it is difficult to single out specific issues, direct curative efforts toward them, and then expect any kind of fundamental

254. MICH. COMP. LAWS ANN. §§ 800.71-.79 (West 1982 & Supp. 1989).

255. PRISONERS IN 1983, *supra* note 249, at 4.

256. *Id.*

257. S. GOTTFREDSON & R. TAYLOR, *supra* note 115, at 6.

258. Morris, *supra* note 90, at 355.

259. See, e.g., Cruz v. Beto, 405 U.S. 319 (1972) (holding that Buddhist prisoners must be afforded the same access to prison chapels as are Jews, Catholics, and Protestants); Procunier v. Martinez, 416 U.S. 396 (1974) (affirming district court's invalidation of prison mail censorship regulations on a first amendment basis).

change in the environment of the institution."²⁶⁰ Crowding, however, has become a lever for consolidating several prisoner complaints into a single action. Indeed, its very breadth may be the most effective feature of crowding litigation.

a. Prisoners' Rights Advocates: The Threat of Crowding Suits and Orders as a Means to Improve Other Conditions

Crowding litigation has become the most successful form of prison lawsuit in the 1980s²⁶¹ both because courts have become so receptive to crowding claims and because states incur such great expense defending against them. Not only do crowding lawsuits allow prisoners' advocates to challenge every facet of a prison's operation—threatening intrusive and protracted litigation—but also they allow courts to take an active role in managing the prison in the name of granting relief. Because of these features, crowding litigation has become a popular method of addressing all manner of prisoners' grievances—ironically, without regard for the actual level of crowding or the expected effect of such litigation upon crowding.

The crowding standard articulated in *Rhodes v. Chapman* rejected any notion of a fixed minimum amount of living space to which a prisoner is constitutionally entitled.²⁶² Rather, the standard set by *Rhodes* and contemporaneous Supreme Court cases was whether crowding, in combination with related "deprivations of basic human needs," constituted a violation of the eighth amendment's proscription against cruel and unusual punishment.²⁶³

Because high population density alone does not violate the eighth amendment, courts applying *Rhodes* must determine if the high population density has led to inadequate medical care, unsanitary conditions, insufficient recreational facilities, substandard meals, or increased prison violence. Thus, in order to establish or refute the fact that crowding has led to unconstitutional conditions, both plaintiffs and defendants in prison litigation must assemble a battery of evidence, including testimony by corrections officials, inmates, penological experts, psychologists, doc-

260. Nathan, *Response*, in N.Y.U. COLLOQUIUM, *supra* note 51, at 333, 334. Mr. Nathan served as Special Master for federal district courts in cases involving individual prisons in Ohio, Georgia, and New Mexico, and the entire prison system in Texas.

261. *See supra* notes 121-50 and accompanying text.

262. 452 U.S. 337 (1981).

263. *Id.* at 347; *see supra* notes 144-45 and accompanying text. Prudential concerns may have motivated the Court's decision somewhat. Had it adopted a constitutional minimum of 60 square feet per inmate, the Court effectively would have declared that approximately two-thirds of the nation's prisoners at that time were confined in unconstitutional conditions. 1 J. MULLEN, K. CARLSON & B. SMITH, *supra* note 8, at 61.

tors, and public health professionals.²⁶⁴ In one yearlong case involving the crowded conditions of Texas prisons, over 349 witnesses testified and 1,565 exhibits were admitted, all of which consumed 160 trial days.²⁶⁵

If the threat of such protracted and expensive litigation fails to persuade recalcitrant officials to enact proposed reforms, prisoners' advocates may also remind them of the federal courts' willingness to employ potent and intrusive orders to remedy any violations found. By the end of 1981, prisons in thirty-six states and territories were operating under court orders or were engaged in litigation likely to result in orders to reduce crowding.²⁶⁶ According to the National Prison Project, forty-two jurisdictions were operating under court orders or consent decrees related to prison crowding at the end of 1988.²⁶⁷ In many cases, courts have appointed special masters to oversee compliance with their orders; these masters hear and investigate complaints and make regular reports to the court.²⁶⁸ Finally, some courts have actually ordered the closing of prisons altogether unless or until they undertook certain drastic reforms.²⁶⁹

Because of the costliness, complexity, and potentially far-reaching consequences of crowding litigation, defendant states have strong incentives to settle crowding cases before they go to trial. States are understandably reluctant to incur the expense, negative publicity, and potential loss of policymaking discretion that come with litigation. Settlement may allow a state to reserve some flexibility before the heat of litigation hardens its position. These considerations prompted one prominent state corrections official to concede that "the *threat* of judicial intervention may well be a better motivating factor than the actual court order."²⁷⁰ Thus, in many cases, corrections systems have settled with plaintiffs in the early stages of crowding litigation.²⁷¹ Even systems that have not

264. Angelos & Jacobs, *supra* note 60, at 106.

265. Ruiz v. Estelle, 679 F.2d 1115, 1127 (5th Cir.) (referring to trial court proceedings reported at 503 F. Supp. 1265 (S.D. Tex. 1980)), *modified on reh'g per curiam*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983).

266. Gottfredson, *supra* note 70, at 260.

267. STATUS REPORT, *supra* note 3, at i.

268. See, e.g., McMurry v. Phelps, 533 F. Supp. 742, 774 (W.D. La. 1982); Ruiz, 503 F. Supp. at 1389-90.

269. See, e.g., Ramos v. Lamm, 485 F. Supp. 122, 169-70 (D. Colo. 1979) (staying order requiring closure of Colorado State Penitentiary at Canon City provided that immediate steps were taken to provide for basic human needs of inmates), *aff'd in relevant part*, 639 F.2d 559, 583-84 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

270. Collins, *supra* note 51, at 340. Mr. Collins was Senior Assistant Attorney General of Washington State and in charge of the Corrections Division of the Office of the Attorney General when he made this statement.

271. The National Prison Project reports that 16 jurisdictions have entered into consent decrees to reduce crowding in at least one prison; in at least three more states, prisons are operating under consent decrees related to other conditions. STATUS REPORT, *supra* note 3, at 1-6.

been sued may have voluntarily accelerated releases or taken other measures to forestall anticipated litigation.²⁷²

Ironically, prisoners' rights advocates are not convinced that these suits actually reduce prison crowding.²⁷³ Even so, they argue that crowding litigation is worthwhile as a method of obtaining court management of prison conditions *even if* it does not alleviate crowding. For example, Alvin Bronstein, Director of the ACLU-affiliated National Prison Project, has stated:

Litigation . . . is not, of course, the real answer; it's not going to solve all or most of our population problems. It may, in fact, result in prison expansion. . . . Litigation, however, can and has improved conditions. It improves the quality of life for prisoners, and . . . exposes the sordid conditions in our prisons to public scrutiny.²⁷⁴

Bronstein and other advocates have recognized that crowding litigation has a unique ability to force prison management to make concessions in areas of prison life unrelated to the problems of "crowding" *per se*. It is no surprise, then, that crowding complaints have been the predominant basis for lawsuits brought by prisoners' rights advocates.

b. • Prisoners: Crowding as a Way Out

The irony of prison crowding is even more evident when one considers the claims of prison inmates themselves. Many inmates admit that in filing lawsuits they are less concerned with crowding *per se* than with gaining early releases or harassing the administration. One former prisoner and current prisoners' rights advocate states candidly: "Oddly enough, the majority of prisoners could not care less about overcrowding, although they complain about it plenty."²⁷⁵

Not surprisingly, the number of complaints has risen in proportion to the success of crowding litigation. In 1970, for instance, state prisoners filed just over 2,000 civil rights petitions—challenging crowding and other conditions of confinement—in federal district court.²⁷⁶ During 1983, an estimated 21,420 inmates were released early in an effort to alleviate crowding in state prisons.²⁷⁷ The following year, state prisoners

272. See Angelos & Jacobs, *supra* note 60, at 101.

273. One former prisoners' rights litigator has candidly expressed his doubts: "[A]re prisons more crowded now, as a result of litigation, or less crowded? I don't know the answer." Turner, *Response*, in N.Y.U. COLLOQUIUM, *supra* note 51, at 329, 331.

274. Bronstein, *Response*, in N.Y.U. COLLOQUIUM, *supra* note 51, at 323, 324.

275. Cobb, *Home Truths About Prison Overcrowding*, in ANNALS, *supra* note 8, at 73, 74.

276. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1985, at 482 (1986) [hereinafter 1985 SOURCEBOOK] (Table 5.22).

277. PRISONERS IN 1983, *supra* note 249, at 8. This figure does not even include releases of pretrial detainees. In November of 1983, for example, the federal court in Manhattan ordered the release of more than 600 inmates from New York City jails in order to "ease overcrowding." Most of these inmates—some of them facing felony charges—were set free after paying just 10% of their

filed more than 18,000 civil rights petitions in federal court.²⁷⁸ The implication is obvious to anyone, and certainly to prisoners: crowding suits mean early release.

D. Conclusion

In sum, it appears that no one in the crowding debate has an interest in dispelling the perception of crowding. Legislators on both sides of the aisle see crowding as a way to achieve their policy objectives. Administrators view crowding as an opportunity to increase control over prisoners, gain access to scarce resources, and shift blame for problems in correctional institutions. Prisoners and prison reformers value crowding as a means to obtain early releases, improve prison conditions, and gain advantages in bargaining with prison administrators.

The prison crowding "debate," then, is a misnomer: there is no debate. No constituency has an institutional interest in challenging extremely fluid crowding statistics. Indeed, with building and funding formulas focused solely on spatial densities or staffing ratios, the underlying conditions that crowding statistics represent are unlikely to be reconsidered.

The only parties with an institutional interest in challenging the perception of crowding are other government agencies fighting for limited public funds. However, they have neither the expertise nor the authority to challenge these crowding figures. Moreover, no agency has the incentive to develop this expertise and authority, since even a "successful" challenge will not guarantee that agency the funds that would otherwise have gone to corrections. Even a coalition of agencies would have difficulty overcoming the powerful corrections lobby that has a superior command of the administrative and budgetary needs of prisons.

None of this is to say that current population levels at some prisons have not created management problems or increased the risk of stress-related behavior by inmates. It suggests, however, that there are strong incentives for actors connected with marginally crowded prisons to be especially sensitive to population increases and to advance the perception of crowding by drawing upon developed and sophisticated lobbying machinery. This increased sensitivity to crowding, together with the institutionalization of crowding in the political debate, has several implications. These are discussed in the following Section.

bail; the rest went home on no bail. Shenon, *12% of Those Freed on Low Bail Fail to Appear*, N.Y. Times, Dec. 2, 1983, at A1, col. 2.

278. 1985 SOURCEBOOK, *supra* note 276, at 483 (Table 5.22).

IV

IMPLICATIONS OF THE POLITICS OF CROWDING

The politics of crowding suggest that all participants in the corrections debate have an institutional interest in perpetuating the perception of a crowding crisis and fostering the current, incomplete understanding of actual prison conditions. Specifically, these political actors may (1) overestimate the scope of prison crowding; (2) institutionalize crowding by divorcing actual prison conditions from the standards that trigger crowding "relief" policies and funding; and (3) misdiagnose the sources of prison problems and thereby direct scarce prison resources towards alleviating crowding when other infirmities in the corrections process are to blame.

A. Overestimating Crowding

In recent years, courts have tended to define crowding more loosely, often requiring no evidence of actual crowding-related stress or inability to provide essential services.²⁷⁹ Prison officials appear to have acquiesced in these loose definitions. There is no hard evidence that current levels of crowding in many of the facilities under court order threaten the health and safety of inmates or pose serious management problems.²⁸⁰ Indeed, many facilities currently deemed "crowded" today have operated without serious incident at substantially higher populations in the past.²⁸¹

Part of the disparity between perceived levels of crowding and objective conditions exists because all sides in most crowding debates have an interest in having facilities declared crowded. Another part stems from the ease with which capacity data may be manipulated. Litigants often convince courts to define prison capacity at increasingly lower population levels; prison administrators then accede to these unnecessarily stringent definitions. The true level of crowding, then, may be exaggerated because the standards no longer bear a close relation to concerns about inmate management or inmate discomfort. Rather, the "debate" may be perpetuated even after current levels of crowding have subsided because of ongoing adjustments in the definition of capacity.

279. See, e.g., *Lareau v. Manson*, 651 F.2d 96, 108-09 (2d Cir. 1981) (prisoners' rights are violated when they must endure double bunking and crowded day rooms for more than 30 days); *Gross v. Tazewell County Jail*, 533 F. Supp. 413, 416, 420 (W.D. Va. 1982) (jail population greatly exceeding design capacity is unconstitutional); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1286 (S.D. Tex. 1980) (space less than fifty square feet per inmate should occasion careful judicial scrutiny); *Gates v. Collier*, 423 F. Supp. 732, 743 (N.D. Miss. 1976) (failure to provide 50 square feet of living space per inmate is a prima facie eighth amendment violation), *aff'd and remanded with directions per curiam*, 548 F.2d 1241 (5th Cir. 1977).

280. See *supra* notes 21-50 and accompanying text.

281. See *supra* notes 35-43 and accompanying text.

B. Institutionalization of Crowding

As a corollary, prisons do not have a strong interest in reducing crowding below those levels at which they are entitled to enhanced funding. There is already evidence that increasing prison capacity may in fact yield higher prison populations.²⁸² For example, programs designed by the California Youth Authority to reduce incarceration and crowding actually caused an increase in the total number of persons incarcerated.²⁸³ Some California counties used state subsidies designed to promote "community corrections" to fund local detention centers: that is, the counties actually *expanded* the use of these detention centers just to get the benefits of the subsidies.²⁸⁴ California's subsidies have merely shifted incarceration to the county level.²⁸⁵ A similar program in Minnesota may have increased prison populations by causing local facilities to cut back dramatically on paroles and discharge.²⁸⁶

Given the possibility of gaining greater funding by operating prisons above capacity, corrections officials have an incentive to maintain prison populations at artificially high levels. Most obviously, corrections officials could ask legislatures to restrict such population-reducing programs as indeterminate sentencing, probation, and parole. Yet there are several, even more subtle, ways in which corrections officials could manipulate prison populations without necessarily provoking objections by prison reformers.²⁸⁷

For example, one prison administrator has acknowledged that certain California prisons have been able to maintain populations above rated capacity by accelerating transfers from local jails or accepting the transfer of low security inmates from other prisons.²⁸⁸ California prison officials believe that they must keep their prison populations above rated capacity in order to retain key personnel.²⁸⁹ Thus, these officials transfer parole violators and other short-term inmates between prisons in order to

282. See, e.g., 2 K. CARLSON, *AMERICAN PRISONS AND JAILS: POPULATION TRENDS AND PROJECTIONS* 53-56 (1980).

283. Austin & Krisberg, *supra* note 243, at 392-93.

284. E. LEMERT & F. DILL, *OFFENDERS IN THE COMMUNITY* 79-98 (1978).

285. Austin & Krisberg, *supra* note 243, at 397.

286. *Id.* at 397-402; see also P. LERMAN, *COMMUNITY TREATMENT AND SOCIAL CONTROL* 130-31 (1975) (examining the California Youth Authority between 1964 and 1971 and finding that reductions in commitments of wards to state facilities simply resulted in an increase in average lengths of stay and therefore a fairly stable population over time).

287. It has been a common practice among some correction departments to delay taking custody of felony offenders by remanding them to local probation departments. Jacobs, *supra* note 81, at 235. One locality reportedly took 52 days to complete a presentence examination report, ostensibly in an effort to ease crowding by delaying the transfer of convicted inmates to state prison. See Bolduc, *Jail Crowding*, in *ANNALS*, *supra* note 8, at 47, 53.

288. Newland Interview, *supra* note 67.

289. *Id.*

maintain "adequate" (that is, excess) capacity. This ensures that all prisons remain "crowded," which in turn guarantees future appropriations. Moreover, such techniques have little impact on the prisoners involved because any individual short-term inmate is unlikely to experience more than one transfer. Accordingly, reformers are unlikely to object to such transfers, especially since the transfers ultimately advance their efforts to accomplish the reforms that the crowding issue allows them to achieve.

C. *Misdirection of Corrections Funding*

The greatest danger of the politics of crowding is that it may obscure or stifle debate over serious prison problems. As noted, overcrowding is often blamed, without strong foundation, as the underlying cause of rapes, riots, hostage taking, and assaults in prison.²⁹⁰ As one author has noted, the crowding "explanation" may be so prevalent not because it is accurate but because it is so easily identified.²⁹¹ In the process, other sources of prison disturbances are obscured. Put another way,

[w]hen crowding and its manifestations are treated synonymously, other underlying problems may be concealed. Consider two institutions, each with a five-hundred-bed capacity. Institution A has seven hundred men and institution B has five hundred. If institution A has twice as many assaults as B, overcrowding may be blamed. Yet the difference may result from management policies, a difference in the propensity to violence of each institution's inmates, or a failure of institution A's custodial staff to control violence.²⁹²

California's prisons provide a striking example of how crowding may be mistakenly identified as the source of problems in a prison system. As noted, the primary cause of increases in California's prison populations has been a dramatic rise in parole board revocations. By 1987, more than thirty percent of all parolees were returned to prison as a result of revocation, up from a mere three-and-one-half percent in 1977.²⁹³ These revocations accounted for forty-three percent of all felon admissions in 1987.²⁹⁴ Because the vast majority of these parole violators serve less than six months,²⁹⁵ a significant proportion of California's prison population is now confined for terms measured in months rather

290. Gaes, *supra* note 21, at 97.

291. *Id.*

292. *Id.*

293. PAROLE VIOLATORS, *supra* note 117, at 2. Drug use played a part in nearly 55% of these revocations. *Id.* at 6. This may be due to improved drug detection techniques. Parole officers administered 470,000 drug tests to parolees in 1987, more than 10 times the number administered in 1967. See *supra* note 116.

294. PAROLE VIOLATORS, *supra* note 117, at 1.

295. *Id.* at 7. By statute, the maximum sentence that can be imposed is 12 months. *Id.*

than years. Yet nearly all of the intake processing and programs of California's prisons (as opposed to jails) were designed for inmates who would be incarcerated for more than one year.²⁹⁶ Effective training, counseling, and work programs cannot be, or at least have not been, developed for short-term prisoners.²⁹⁷ Accordingly, most prisoners in the California system are idle.²⁹⁸ Those who attribute all prison problems to crowding alone, or understaffing and underprogramming related to crowding, have misdiagnosed (or mischaracterized) the situation. The true cause of problems is just as likely to be the inadequate fit between programs and inmates.

The misdiagnosing of prison problems is not without precedent. The riot at Sing Sing prison in January, 1983 was frequently attributed to overcrowded conditions. The participants, however, posit a different reason—idleness. Interviewed after the riot, the president of the local prison officers union cited the ninety percent idleness rate as the prison's biggest problem, a diagnosis that suggests a lack of adequate programming.²⁹⁹ The rioting inmates too "were virtually unanimous in their complaints about the lack of programs to fill their time and improve the quality of their lives."³⁰⁰ Despite this evidence, legislators consistently blamed crowding for the Sing Sing riot.³⁰¹ Rather than address the roots of the problem—the idleness of prisoners—the legislature reflexively responded to the riot with a \$1.4 billion prison construction program.³⁰² Once a building program is initiated, moreover, it becomes increasingly difficult for a legislature to reverse its course.

Reformers may be guilty of mischaracterization as well. For example, the National Prison Project ("NPP"), as a matter of strategy, raised crowding issues in all of its prison litigation for the past ten years. In the

296. *Id.* at 8. Likewise, the "crowding crisis" in local jails may have resulted not only from an increase in absolute numbers of inmates but also from increases in numbers of inmates the jails are not equipped to handle—convicted felons serving lengthy terms. State laws normally require that convicted felons be transferred immediately from jail to prison upon sentencing. Due to crowding, however, some state prison officials now delay taking new prisoners into custody. Indeed, New Jersey governors promulgated emergency executive orders suspending the law that requires immediate transfers of convicted felons to prisons. See *Union County Inmates v. Di Buono*, 713 F.2d 984, 987-88 & n.4 (3d Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984).

297. For example, the optometry program at the Vacaville state prison requires 18 months of training. Due to the reduction in the number of long-term inmates, the optometry program is consistently undersubscribed, operating at only 20% of its capacity in 1988. Newland Interview, *supra* note 67. Moreover, despite the high percentage of drug-related parole revocations, see *supra* note 294, only one California prison has a mandatory drug treatment program. *PAROLE VIOLATORS*, *supra* note 117, at 7.

298. Newland Interview, *supra* note 67.

299. L. KURLANDER, REPORT TO GOVERNOR MARIO M. CUOMO: THE DISTURBANCE AT OSSINING CORRECTIONAL FACILITY, JAN. 8-11, 1983, at 78 (1983).

300. *Id.* at 79.

301. *Id.* at 30-75.

302. Jacobs, *supra* note 81, at 210.

case of *Ramos v. Lamm*,³⁰³ the NPP focused its attack on crowding even though, in the opinion of its own experts, the real source of the prison's problems was its deteriorating physical plant.³⁰⁴ According to at least one expert, reducing the population in the prison at issue had little or no direct effect on inmate discomfort.³⁰⁵

The great concern arising out of all of this is that more spending on prisons may lessen population densities without addressing underlying problems. This risk will remain as long as crowding is a reliable method of gaining money or forcing reforms. Understandably, administrators and reformers may be reluctant to look too far beyond current indicia of crowding.³⁰⁶ Rather, they are likely to continue to solicit funds to build more prisons, hire more personnel, and offer more of the same outmoded programs, even though these expenditures ultimately will not resolve the real problems in prisons today.

Thus, not only may the extent of crowding be exaggerated, but also crowding may be institutionalized in the political debate at these exaggerated levels. This may result in a misallocation of scarce resources among social institutions. Perhaps more disturbingly, it may not improve prison conditions after all.

CONCLUSION AND RECOMMENDATION FOR FURTHER INQUIRY

Crowding and capacity are fluid concepts. They vary across time, jurisdictional boundaries, and even individuals. Although dramatic increases in prison populations have furnished some basis for increased concern about prison crowding, factors other than manageability and inmate discomfort have shaped the current crowding debate. Specifically, the receptiveness of courts to crowding claims is partially to blame for increases in the public perception of crowding because these lawsuits have furnished the basis for playing a political numbers game. As participants in the corrections debate have discovered, the fixation of courts and state officials with crowding has given all sides of the debate hooks for pursuing their individual agendas.

The principal shapers of prison policy, recognizing the advantages of the perception of crowding, have a common interest in perpetuating this perception in ways that are subtle and difficult to detect. Indeed, crowding has become detached from any objective analysis of prison conditions to the extent that funding and hiring are determined by capacity

303. 485 F. Supp. 122 (D. Colo. 1979), *modified and remanded*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

304. Conrad Interview, *supra* note 150.

305. *Id.*

306. As Michael Sherman has warned, "Once the money starts to flow, its original intent to relieve overcrowding could easily be lost." Sherman, *supra* note 202, at 46.

limits. As correctional budgets increase and the ranks of prison guards swell, the power of corrections departments to institutionalize crowding appears unlikely to diminish. Likewise, with crowding's potential to speed prison reforms and increase outside control over prison administrators, the number of crowding-based lawsuits is likely to escalate.

The principal concern raised by this Comment is that the current crowding debate has lost sight of its original purposes: namely, to preserve the security of inmates in their living units and to ensure manageable facilities. Courts have allowed the broad label of "overcrowding" to obscure these values in the mistaken belief that capacity figures provide a reliable method of measuring the quality of prison conditions. In fact, the courts' focus on crowding has only inspired political actors to focus the prison conditions debate almost exclusively around the wrong measurements: capacity and population numbers that are largely divorced from actual conditions.

The foregoing analysis suggests a need to restructure the inquiry in prison lawsuits. One possible solution is to fashion standards functionally related to the primary concerns of prison policy: privacy, security, and manageability. The courts would thus focus upon the amount of time that inmates have an opportunity for privacy, the number of units that are available for inmates who fear for their safety, and specific standards for nutrition, medical care, staff training, and sanitation.

Another solution is simply to introduce greater rigor in the formulation of capacity figures, in the hope that this would reduce the opportunities for political manipulation. Courts could require state corrections departments to make individual determinations of the capacity of each prison, determinations based upon more sophisticated criteria than are currently used. These criteria might include: space per inmate, configuration of housing units, availability of diversionary programs, ratio of staff to inmates, average length of involuntary confinement per day, and age, security classification, and demographic composition of the prison population. These and other proposals should be the subject of future inquiries into the depoliticization of crowding. There should be ample time to investigate further the uses and potential reform of crowding data. Given the present political configuration, prison "crowding" may be with us for a long time to come.