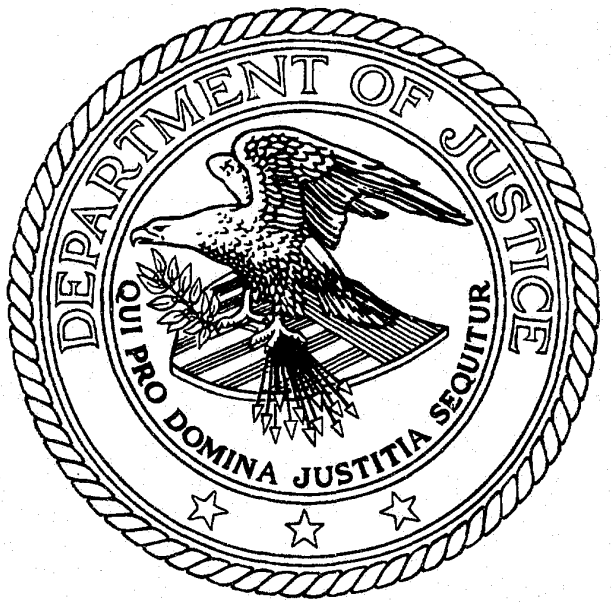
U.S. Department of Justice
Washington, D.C. 20530

Prison Crowding and Court-Ordered Population Caps

Report to the President

1990



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PREFACE TO MARCH 1991 PRINTING

Last March, Attorney General Dick Thornburgh transmitted this report to President Bush in response to the President's specific request in his May 1989 violent crime initiative.

Although a year has elapsed, the report's analysis and conclusions continue to be timely, and we have decided now to print it for general release on the occasion of the *Attorney General's Summit on Law Enforcement Responses to Violent Crime: Public Safety in the Nineties.*

In this printing we have included an Addendum to the report, providing the most current prison population figures available. This Addendum is found at the end of the report, following the two appendices, and we urge you to refer to it as you read the report.

March 1991

Office of the Attorney General
Washington, D. C. 20530

March 14, 1990

The Honorable George Bush
President of the United States
Washington, D.C. 20500

Dear Mr. President:

Last May, when you announced your violent crime initiative, you declared that one of the primary purposes of government is to protect citizens and their property. Your initiative was designed to increase the certainty of apprehension, prosecution, and punishment to deter crimes of violence, and included proposals to strengthen federal, state, and local laws, to step up enforcement, and to hold violent criminals fully accountable for their acts.

One important part of your violent crime initiative was your call for the expansion of prison capacity. As of December 31, 1989, the federal prison population had reached 59,049, an increase of over 9,100 in one year. The number of inmates actually housed in federal facilities at year-end 1989 was 53,348 (the rest being housed under contract with state, local, or private facilities), which places the federal prison system at approximately 164% of rated capacity. You proposed that an additional $1 billion be appropriated for federal prison construction, bringing the total 1990 budget to about $1.4 billion. Congress has since appropriated these funds, and the Department of Justice has augmented them by approximately $377 million in excess funds transferred from the asset forfeiture fund in 1988 and 1989. The resulting construction will increase federal capacity by about 24,500 beds, a figure representing roughly 75% of existing capacity.

In your initiative, you also asked me to conduct a review of the role of court orders and consent decrees in prison crowding situations, including an assessment of the scope of judicial authority in formulating and issuing such orders, the impact of such orders on the operation of prison systems and public security, and non-judicial means of addressing prison crowding. Pursuant to your direction, the Department has prepared this report, and I am pleased to transmit it to you today.

Sincerely,

Dick Thornburgh
Attorney General

EXECUTIVE SUMMARY

Our nation's federal and state prisons have experienced a dramatic increase in incarcerated offenders. This increase in inmate population is an indication that more criminals, many of whom have committed violent or drug-related offenses, are being caught and punished. The criminal justice system is working: People who break the law are paying the price.

The inmate population of federal and state prisons, which has been increasing for over 15 years, has seen an average annual increase of over 8% since 1980 (more than doubling as a consequence) and has completely taken off in the last two years. The total federal and state population reached a record 627,561 men and women at the end of 1988. That record was immediately eclipsed in the first six months of 1989, when federal population increased by 9.6% and state population by 7.1%, resulting in a total of 673,565 inmates as of June 30, 1989. This was an increase of about 1,800 prisoners per week. State prison population nationally in midyear 1989 was 618,847, representing an estimated 125% of average capacity.

Year-end 1989 figures for federal inmate population show that this sharp increase in the federal prison system is not abating. As of December 31, 1989, there were 59,049 prisoners under federal jurisdiction, the largest figure in Bureau of Prisons history and an increase of 18.3% over the previous year. Of these federal prisoners, 53,348 were actually housed in federal facilities, the remainder being held under contract with state, local, or private institutions. The rated capacity of those federal facilities was 32,494, putting population at about 164% of capacity.

Both the federal government and the states have embarked upon major efforts to address this increase in prison population. The President's violent crime initiative, announced last May, called for an increase of $1 billion in funding for construction and renovation of additional prison space in the federal system, bringing the total 1990 budget to $1.4 billion. This money has been appropriated by the Congress, and the Department of Justice has supplemented it with approximately $377 million in excess funds from the asset forfeiture fund in 1988 and 1989. The new federal funding is expected to result in 24,500 additional prison beds, an increase from current capacity of about 75%.

Similarly, the states, as of May 1989, had construction of 63,452 new beds underway, secured funding for 78,094 more, and requested funding for an additional 72,190. Between 1980 and 1985, state and local spending on corrections increased by 42% in real terms, and between 1985 and 1988 increased by 43%, unadjusted for inflation.

Crowding in state prisons has forced many states to "back up" prisoners in local jails, thereby increasing the population of those jails. From 1978 to midyear 1988, local jail capacity increased an estimated 39%, while jail population increased by about 117%. Increased jail crowding at the state level has also had an effect on the ability of the U.S. Marshals Service to

find detention space for pretrial detainees and other persons in the Marshals' custody -- a number that has increased by almost 150% in five years and by 32% in FY89 alone -- about three-quarters of whom have to be placed in local jails. As a result of crowding in local jails, over 600 jails have terminated or severely restricted the use of their facilities by persons in custody of the Marshals.

What are some of the reasons for this increase in prison and jail population? First, the increased use of illegal drugs nationwide has had a significant effect. Not only have arrests for drug-related crimes increased rapidly but there are also large numbers of inmates who were under the influence of illegal drugs when they committed crimes that otherwise were not drug-related. A survey taken in 1986 found that about 35% of state inmates reported having been under the influence of illegal drugs at the time of the offense and about 43% having used drugs daily during the month preceding the offense. One-third of inmates confined for *violent* offenses were under the influence of drugs at the time of their offense and nearly 40% had been using drugs daily in the month preceding the offense. Among juveniles and young adults confined in state delinquent institutions nationwide in 1987, nearly 40% were under the influence of drugs at the time of the offense and nearly 60% had used drugs in the month preceding the offense. In the last quarter of 1988, between 54% and 82% of male arrestees for serious crimes in 14 cities tested positive for the use of illicit drugs.

Second, recidivists are a major source of criminal activity nationally. About 82% of state prisoners in a recent survey had prior convictions. Almost 20% of the inmates had at least 6 prior sentences to probation, jail, or prison. Nearly two-thirds of all state prisoners had current or prior convictions for violent offenses. These were only the convictions; undoubtedly, these inmates were responsible for other unreported or unsolved offenses as well.

Third, the growth in inmate population is also a reflection of the American public's increased frustration with criminal behavior and its demand for appropriate punishment. This represents the continuation of a trend that started in the 1970's, following the more lenient attitude toward punishment that was prevalent in the 1960's notwithstanding the high crime rate during that period. Recent sentencing reforms that make prison mandatory for certain crimes and repeat offenders, specify presumptive sentence lengths, and limit the discretion of judges and parole boards are among the means by which elected officials have tried to ensure that crime is punished appropriately.

The result is that, since 1980, 6 states have increased their prisoner counts by at least 150% and 18 states and the District of Columbia have experienced growth in excess of 100%. As of June 30, 1988, the entire adult corrections departments of eight states were under court order or consent decree to relieve prison crowding, and only 13 states and the federal Bureau of Prisons had not even one facility under court order or decree for crowding or other conditions.

The Role of the Courts

In his violent crime initiative, the President directed the Attorney General to conduct a review of the role of court orders and consent decrees in prison crowding situations, including an assessment of the scope of judicial authority in formulating and issuing such orders, the impact of

such orders on the operation of prison systems and public security, and non-judicial means of addressing prison crowding.

The court orders and consent decrees under which individual institutions and entire systems are laboring are the outgrowth of large numbers of lawsuits -- many brought or assisted by the National Prison Project of the ACLU Foundation -- over conditions of confinement in general and "overcrowding" in particular since the late 1960's. The National Prison Project, incidentally, claims to have participated in litigation in 5 states in which the entire prison system is now under court order or consent decree, in 21 states and the District of Columbia with at least one "major" institution under order or decree, in 4 states that have been released from court jurisdiction, and in 5 states with litigation pending (4 of which already have a "major" institution under order or decree).

A word about the term "overcrowding" is appropriate at this point. We do not think that this term is particularly apt; "overcrowded" facilities simply house more prisoners than called for under the design or rated capacities, whereas the relevant standard should be whether the excess population has resulted in constitutionally deficient conditions. While it would be more precise to speak of these "overcrowded" prisons as having "population in excess of rated capacity" -- or to say they are "above optimal population" -- we will reluctantly use the term "overcrowded" in its now-standard sense. This usage will enable us to address the legal arguments in judicial opinions on their own terms.

-- Cruel and Unusual Punishments

The relevant constitutional analysis of "overcrowded" prisons turns on an understanding of the Eighth Amendment's prohibition of cruel and unusual punishments. *Rhodes v. Chapman*, decided in 1981, was the Supreme Court's leading case on the constitutionality of prison overcrowding, holding that double celling and similar means of housing inmates in overcrowded prisons are not *per se* unconstitutional under the Eighth Amendment.

The Eighth Amendment, the Court stated, prohibits punishments that, while "not physically barbarous, 'involve the unnecessary and wanton infliction of pain,' or are grossly disproportionate to the severity of the crime." Judicial judgment in Eighth Amendment cases should be informed by "objective factors," found in history, the common law, and the actions of state legislatures. These sources reflect the "evolving standards of decency" that are at the core of the Eighth Amendment.

The Court held that, under the Eighth Amendment, prisoners' conditions of confinement may be cruel and unusual if they result in an "unquestioned and serious deprivation of basic human needs" or deprive inmates of the "minimal civilized measure of life's necessities." It is not enough for inmates to show that their conditions of confinement fall below standards or guidelines published by professional corrections or health organizations. These "generalized opinions of experts" are less important in assessing contemporary standards of decency than the public's attitude toward the punishment. The Court concluded that "the Constitution does not mandate comfortable prisons." Considerations of comfort and prison environment in general were more appropriate for the legislature and prison authorities, so long as minimal constitutional standards

were met.

Courts sometimes use a "totality of the circumstances" analysis to find constitutional violations in overcrowding cases based on the aggregation of overall prison conditions, without a showing that some particular necessity of life -- food, shelter, health care, or personal security -- is constitutionally inadequate. We believe, however, that *Rhodes v. Chapman* supports only a narrow version of the totality analysis, and agree with those courts that have considered the totality of *related* circumstances bearing on whether each of these necessities individually has been adequately provided.

-- *Limits on Remedial Authority*

Even if a federal court finds that prison conditions are cruel and unusual, the court still should be guided in the remedial phase by three basic limitations on remedial authority articulated by the Supreme Court in a line of cases over the past two decades. A population cap is a permissible remedy only if consistent with these limitations.

First, the Supreme Court has held that a remedy must be narrowly tailored to fit the nature and extent of the constitutional violation. Once the court has found specific constitutional violations under the foregoing analysis, its remedial authority is limited to ordering that the specific violations be cured. The court must order the least intrusive remedy, absent recalcitrance by the authorities in complying with previous narrower orders. A cap on inmate population may be ordered only if there is a showing that the imposition of a cap will result in curing the specific offending conditions; that is, there must be a causal connection between overcrowding and the existence of those conditions.

Second, the remedy must be designed to restore the inmates to the position they would have been in absent the violation. If an order capping population requires early release of inmates, it is doubtful that the order can be said to restore those inmates to incarceration under constitutional conditions; instead, the order effectively frees them from confinement.

Third, the Supreme Court requires that a remedy take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. This requirement of "deference" applies especially strongly in the prison context, where the Court has said that the authorities are better able to run prisons than the courts, and that courts should leave prison management to the political branches of government. Population caps tend to interfere in the management of individual institutions and often in the management of entire prison systems. Caps significantly limit the discretion of prison officials in decisions on housing additional inmates; a cap in one institution often forces the shifting of prisoners to another institution, and sometimes even results in their early release.

These three limitations on remedial authority apply as well to court-appointed special masters, who often are not simply monitors for the court, as they properly may be, but rather are minutely involved in the details of day-to-day prison management. By one account, there were 9 states whose entire prison systems were operating under the watch of a special master in 1988. Masters also served in seven states where individual institutions were under court order and in ap-

proximately 65 jail systems.

-- Modification of Consent Decrees

Many population caps are imposed through consent decrees that prison authorities enter into in pre-trial settlement of litigation. Some of these decrees contain caps that the authorities have consented to even though the prison conditions are not below constitutional minima; in such cases, a cap could not have been imposed after trial because federal courts may impose a remedy upon states only if there has been a violation of federal law.

State officials who seek to modify a decree to eliminate such a cap on the ground that the cap is "non-remedial" -- that it is not a cure for an actual constitutional violation -- are likely to encounter difficulty because of a statement in a recent Supreme Court decision that courts are not barred from entering a consent decree that provides broader relief than the court could have awarded after trial.

While several subsequent lower court opinions have taken the Supreme Court's statement at face value and have denied efforts to modify non-remedial decrees, there is a minority view that what the Court meant is narrower. One federal court of appeals has held that a court may *enter* a non-remedial consent decree, but that all contested court orders made to *enforce* or *modify* such a decree may not go beyond the court's own remedial power. The implication is that if the officials who originally consented to the order, or their successors who did not consent, ask the court to modify its order by eliminating a non-remedial provision (such as, perhaps, a population cap), the court may not refuse on the basis of the earlier consent decree. We do not think that states subject to non-remedial population cap are likely to succeed on this theory, however, unless the Supreme Court itself speaks to the matter.

Effects of Population Caps

When federal judges impose caps on inmate population, they place considerable stress on a prison system that is already under severe strain. A cap on the population of an individual prison often requires a wholesale systemwide shift of inmates and resources, including the "back up" of state prisoners in local jails, which aggravates the already severe nationwide shortage of jail space for both federal and state unsentenced prisoners; sometimes, the result is simply to exacerbate overcrowding in other facilities. A cap on an entire system typically requires more extreme measures, ranging from an expansion of supervised probation to emergency early releases.

Unlike elected officials and prison administrators, who are charged with budgeting, policymaking, and providing for the physical security of the general public, courts have a mandate to look at individual rights in the context of an individual lawsuit. But individual lawsuits may have a broad effect on a prison system and on the public at large; court orders formulated out of concern with inmate rights often make it more difficult to incarcerate newly convicted offenders and accordingly more difficult to ensure public safety. Such orders interfere with an important goal of incarceration -- incapacitation -- removing violent or predatory offenders from society and preventing them from committing additional crimes. In 1988 alone, almost 6 million violent crimes were committed against Americans 12 years of age or older, and almost 2.3 million household

burglaries. Over 20,000 murders were committed in that one year.

The effects on the public of crime and the fear of crime can be felt in the decisions that Americans make every day. We double- and triple-lock our doors and fear to venture outside at night. We keep our children away from playgrounds that are overrun with drug dealing. Crime and the fear of crime are a particularly heavy burden on law-abiding citizens in many poor and minority areas, especially in the inner cities. Education is fraught with difficulty not because the lessons are too challenging but because gangs are terrorizing school children. Employment evaporates when crime chases away employers. Crime is an obstacle hindering the efforts of the law-abiding poor to learn and work their way out of poverty.

Our focus on these court orders should not obscure the responsibility of government at all levels to respond to the increased prison and jail population. The federal government has taken the lead in construction and renovation of additional prison space, and many states are making good progress on that front. More needs to be done.

Non-Judicial Responses to Prison Crowding

Construction and renovation of additional prison and jail space is absolutely essential. It is costly, but several methods of containing costs are available, such as the transfer of prison design plans consistent with correctional strategy, modular construction of shorter-term facilities, "lease-purchase," or even the use of inmate labor (although this sometimes results in *higher* costs). To some extent, underutilized military facilities may be available for housing inmates. There should also be further study of the feasibility and effectiveness of private management or ownership of prison facilities.

In addition, better management techniques may be effective in handling crowded prisons. Programs that engage inmates in productive use of their time, particularly prison employment, not only teach inmates useful skills but also reduce the opportunities for anti-social behavior. Drug testing and treatment programs may help to break the cycle of drug use and crime by holding offenders accountable for their illegal behavior and by encouraging them to stop using drugs. A reduction in drug use can make prison management far easier.

As an interim measure pending completion of the construction or renovation of additional prison space, governments should consider the use of effective intermediate sanctions -- short of incarceration but greater than unsupervised probation -- for those non-dangerous offenders who can serve their sentences outside prison without threat to the community. Certain intermediate sanctions -- for example, intensive supervision programs -- may, if properly used, allow careful supervision of these non-dangerous offenders, while leaving prison space available for the violent and predatory offenders who must be incarcerated in order to protect the public safety.

In addition, grievance procedures, ombudsmen, internal and external audits, or public inspections may allow some inmates to have their legitimate complaints addressed without resort to litigation and may help prison management understand systemic problems before they result in litigation. These processes are not a solution to prison crowding, but they may help to reduce management problems in crowded prisons.

Finally, the Justice Department's Bureau of Prisons is an example of an overcrowded prison system that has been able, through effective management, to keep prison conditions above constitutional minima and thereby to avoid judicial intervention. In Appendix B, we explain the reasons for our success. Not all of our experience is transferrable to state and local facilities, but the Department has provided and will continue to provide advice and assistance to corrections officials nationwide in an effort to help them solve the problems they are encountering.

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INTRODUCTION

This report has been prepared at the request of the President as part of his violent crime initiative announced on May 15, 1989. The President's initiative, recognizing that a primary purpose of government is to protect citizens and their property, is designed to increase the certainty of apprehension, prosecution, and punishment to deter crimes of violence. The initiative includes proposals to strengthen federal, state, and local laws, to step up enforcement, and to hold violent criminals fully accountable for their acts.

An important part of the violent crime initiative calls for the expansion of prison capacity. As of June 30, 1989, federal prison population was 54,718, an increase of almost 4,800 or 9.6% in only six months. By December 31, 1989, federal population had reached 59,049, putting the total 1989 increase at over 9,100 or 18.3%. The number of inmates actually housed in federal facilities at year-end 1989 was 53,348, placing the federal prison system at approximately 164% of rated capacity. In addition, the number of persons in the custody of the U.S. Marshals Service as of September 30, 1989, was 13,644, an increase of 32% during FY89 and almost 150% over five years. The President's violent crime initiative proposed that an additional $1 billion be appropriated for federal prison construction, bringing the total 1990 budget to about $1.4 billion. This increased funding was signed into law in November. It has been augmented by approximately $377 million in excess funds transferred from the asset forfeiture fund in 1988 and 1989. The resulting construction will increase federal capacity by about 24,500 beds, a figure representing about 75% of existing rated capacity. To supplement new construction, the President has directed the Secretaries of Defense and Education and the Administrator of General Services to work with the Attorney General to identify suitable properties and facilities for conversion to federal prison use.

Judicial involvement, by court order and consent decree, in establishing caps on inmate population, has seriously curtailed the ability of state and local officials to manage prisons, jails, and entire corrections systems effectively. It has also adversely affected public safety. (Significantly, however, the federal prison system has not been subject to such court orders.) Accordingly, the President has directed the Attorney General to conduct a review of the role of court orders and consent decrees in prison crowding situations, including an assessment of the scope of judicial authority in formulating and issuing such orders, the impact of such orders on the operation of prison systems and public security, and non-judicial means of addressing prison crowding.

This report has been prepared pursuant to the President's direction. It concludes, in brief:

* The Constitution and Supreme Court decisions impose limits on the authority of federal courts to order caps on prison population. The courts have an obligation to respect these limits. Unnecessary judicial intervention not only interferes with the ability of prison officials to manage crowded prisons and prison systems but may even threaten public safety by making it more difficult to incarcerate violent and predatory offenders and prevent

recidivism.

* Judicial self-restraint, while essential, is not the complete answer to crowded facilities. Governments at all levels have a responsibility to build adequate space to house the increasing population of offenders. Fulfilling this responsibility through construction and renovation is of the utmost importance.

* Effective prison management is also critical. With proper management, the expanded prison space may be adequate to house inmate populations in excess of rated capacity both safely and constitutionally.

* As a temporary measure while additional prison space is being built, it may well be necessary to use certain intermediate sanctions short of incarceration but more severe than unsupervised probation for those non-dangerous offenders who can be adequately monitored outside prison without threat to the community.

I.

BACKGROUND: PRISON CROWDING AND JUDICIAL INTERVENTION

The Increase in Prison Populations

On September 10, 1989, the Department of Justice announced a dramatic increase in state and federal prison population during the first six months of 1989, a trend that has since been confirmed on the federal side through the end of 1989. The Attorney General called the increase "an indication that more criminals, many convicted of drug-related offenses, are being caught and punished." The criminal justice system, he declared, is working. "People who break the law do pay the price." [1/] These are the hard facts:

* The nation's state and federal inmate populations grew by 42,477 inmates in 1988 to reach a record 627,561 men and women under the jurisdiction of federal and state correctional authorities. [2/]

* During the first half of 1989, the state and federal inmate population increased by a record 7.3% to reach a total of 673,565 men and women. The number of federal prisoners increased by 9.6% to 54,718, and the number of state prisoners increased by 7.1% to 618,847. At this rate of growth, the number of prisoners is increasing by about 1800 per week. [3/]

* By December 31, 1989, the total federal inmate population had risen to 59,049, an increase of about 18.3% over year-end 1988, again a new record. [4/]

* Since 1980, the federal inmate population has grown by about 34,700, or 142%, and the state inmate population has grown by about 314,000, or 103%. [5/]

1/ U.S. Department of Justice, Bureau of Justice Statistics, *Prison Population Jumps 7.3 Percent in Six Months*, Sept. 10, 1989, at 1 (press release).

2/ *Id.* at 4; *see* U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 1988*, April 1989, at 1 ("Bureau of Justice Statistics Bulletin") (study of unadjusted figures). Some prisoners "under the jurisdiction" of the federal or state authorities are housed in outside facilities; thus, the actual numbers of federal prisoners incarcerated in federal facilities or of each state's prisoners in its own facilities may be lower.

3/ *Prison Population Jumps 7.3 Percent in Six Months*, *supra* note 1, at 1-2.

4/ These figures from the Bureau of Prisons include federal inmates housed in non-federal facilities.

5/ *See* U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 1980*, May 1981, at 2 ("Bureau of Justice Statistics Bulletin").

* As of December 31, 1989, federal prisons were operating at an estimated 164% of rated capacity, resulting in a shortfall of capacity to house almost 21,000 inmates. As of June 30, 1989, the latest date for which accurate population figures are available, state prisons were operating at an estimated 125% of average capacity (*i.e.*, the average of highest and lowest reported capacities), resulting in a shortfall of capacity for about 123,000 inmates. [6/]

* Between 1983 and year-end 1988, estimated prison capacity increased at a slower rate (35%) than prison population (43%). [7/]

* State-sentenced inmates have been housed in locally operated jails, thus increasing the populations of those institutions. From 1978 to midyear 1988, local jail capacity increased an estimated 39%, while jail population increased by about 117%. [8/]

* Local jail capacity has had a direct impact on the ability of the U.S. Marshals Service to house pretrial detainees and other persons in the Marshals' custody. The number of such persons has increased by almost 150% in five years and by 32% in FY89 alone to a total of 13,644 as of September 30, 1989, about three-quarters of whom must be housed in local jails. As a result of local jail overcrowding, over 600 jails have terminated or severely restricted the use of their facilities by persons in custody of the Marshals. [9/]

* Many states have made serious efforts to address crowding in prisons and jails through increased spending. Per capita state and local spending for corrections increased by 42% in real terms between 1980 and 1985 and by 43% (unadjusted for inflation) between 1985 and 1988. [10/]

6/ The federal figures are based upon the number of federal inmates actually housed in federal facilities (53,348) and rated capacity (32,494). The state figures, in contrast, are based upon the number of state prisoners under the jurisdiction of state authorities and the average capacities of state facilities. *See Prison Population Jumps 7.3 Percent in Six Months*, *supra* note 1, at 4; *Prisoners in 1988*, *supra* note 2, at 2. Rated capacities and actual inmate counts are not available for all states. We have used year-end 1988 figures for the states' average capacities, because we do not have reliable figures for June 30, 1989; figures on capacity are compiled only at year-end and are not available instantaneously. We note that, as of May 1989, states had construction of 63,452 new beds underway, secured funding for 78,094 more, and requested funding for an additional 72,190. To the extent states had any of this capacity available in the first half of 1989, the degree of overcrowding cited in the text would be slightly lower.

7/ *Prisoners in 1988*, *supra* note 2, at 5; U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 1985*, June 1986, at 5 ("Bureau of Justice Statistics Bulletin").

8/ *See* U.S. Department of Justice, Bureau of Justice Statistics, *Census of Local Jails 1988*, February 1990, at 6 ("Bureau of Justice Statistics Bulletin").

9/ These figures from the U.S. Marshals Service include pretrial detainees, convicted prisoners awaiting sentence, certain sentenced prisoners being held locally, prisoners who are witnesses in judicial proceedings, certain violators of parole, and anyone else in custody of the Marshals.

10/ U.S. Department of Justice, Bureau of Justice Statistics, *Report to the Nation on Crime and Justice* 120 (2d ed. 1988); U.S. Department of Commerce, Bureau of the Census, *Government Finances in 1987-1988* 6 (January 1990).

The Connection between Drug Use and Crime

An important cause of the increase in prison population is the increase nationwide in illegal drug use, which is often linked directly to acts of crime. This link goes well beyond the commission of drug-related crimes such as possession, sale, or manufacture. Drug-abusers are among the most active perpetrators of other criminal acts, and users commit more crimes during periods when they are using drugs frequently than during periods of lesser drug use. [11/] Between 54 and 82 percent of male arrestees for serious crimes in 14 cities in the last quarter of 1988 tested positive for the use of illicit drugs. At least 45% of the arrestees who were charged with violent or income-generating crimes tested positive for use of one or more drugs. [12/]

Among state prison inmates nationwide in 1986, approximately 35% reported they were under the influence of an illegal drug at the time of the offense for which they were imprisoned; 43% had been using drugs daily in the month preceding their offense; and 52% had used drugs at some time in the month preceding their most recent offense. One-third of inmates confined for *violent* offenses were under the influence of drugs at the time of their offense and nearly 40% had been using drugs daily in the month preceding the offense. [13/] A similar survey of juveniles and young adults confined in state delinquent institutions nationwide revealed that 39.4% were under the influence of drugs at the time of the offense and nearly 60% had used drugs in the month preceding the offense. [14/]

This link between drugs and crime is particularly significant because of the dramatic increase in drug use. One indicator of increased use is the increase in drug-related arrests. Between 1979 and 1988, arrests for drug violations nationally increased by 107%, while arrests for possession of illicit drugs grew by 83% and arrests for sale or manufacture of drugs increased by 213%. [15/]

Recidivism

Repeat offenders are responsible for much of the nation's crime. Approximately 95% of offenders incarcerated in state prisons in this country had been convicted of violent crimes or had prior sentences as adults or juveniles to probation or incarceration. More than one half of the

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11/ Graham, *Controlling Drug Abuse and Crime: A Research Update*, U.S. Department of Justice, National Institute of Justice, March/April 1987, at 2 ("Research in Brief"); *see generally* Gropper, *Probing the Links Between Drugs and Crime*, U.S. Department of Justice, National Institute of Justice, February 1985 ("Research in Brief").

12/ U.S. Department of Justice, National Institute of Justice, *Drug Use Forecasting (DUF) Fourth Quarter 1988*, June 1989, at 3, 1 ("Research in Brief"). The figures given in the text and in the following paragraph would be considerably higher if they included use of alcohol, which plainly is not an illegal drug.

13/ Innes, *State Prison Inmate Survey, 1986: Drug Use and Crime*, U.S. Department of Justice, Bureau of Justice Statistics, July 1988, at 3 ("Special Report").

14/ Beck, Kline & Greenfeld, *Survey of Youth in Custody, 1987*, U.S. Department of Justice, Bureau of Justice Statistics, September 1988, at 7 ("Special Report").

15/ U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States 1988* 167-68 (1989); U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States 1979* 186-88 (1980).

remainder were convicted drug traffickers or burglars. Nearly 20% of inmates have had at least 6 prior sentences to probation, jail, or prison. [16/]

Nearly 62% of state prison inmates have been confined previously. If the definition of recidivist is expanded to include prior sentences to probation, nearly 82% of state prisoners are recidivists. In addition, nearly two-thirds of state prisoners have current or prior convictions for *violent* crimes. [17/]

It is estimated that by 1990 the 270,000 persons released from state prisons in 1987 will accumulate about 811,000 new arrest charges. By 1990, an estimated 112,000 of these 1987 releases will be back in prison after arrest for a new crime. [18/]

Changes in Sentencing Policies and Practices

Recent sentencing reforms nationally have used statutory and administrative changes to clarify the aims of sentencing, reduce disparity by limiting judicial and parole discretion, [19/] provide a system of penalties that is more consistent and predictable, and provide sanctions consistent with the severity of the crime. Changes have included making prison mandatory for certain crimes and for recidivists, specifying presumptive sentence lengths, requiring sentence enhancements for offenders with prior felony convictions, limiting parole discretion through parole guidelines, and introducing sentencing guidelines. [20/]

These changes in sentencing laws and practices appear to have affected the size of prison populations. In the 1960's, despite a soaring crime rate, there was a decline in the total federal and state population of inmates sentenced to more than one year. Following a marked shift in public attitudes toward punishment of crime that began in the 1970's and continues today, prison population increased dramatically. [21/] The average annual increase in the 1980's has been more

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16/ Innes, *Profile of State Prison Inmates, 1986*, U.S. Department of Justice, Bureau of Justice Statistics, January 1988, at 2, 4 ("Special Report").

17/ *Id.* at 4, 2.

18/ This estimate is based on a 3-year follow-up of prisoners released from prison in 11 states in 1983 and tracked through state and Federal Bureau of Investigation rap sheets. *See generally* Beck & Shipley, *Recidivism of Prisoners Released in 1983*, U.S. Department of Justice, Bureau of Justice Statistics, April 1989 ("Special Report").

19/ The percentage of state and federal prison releases effected by a discretionary decision of a parole board declined from about 72% in 1977 to about 40% in 1988. U.S. Department of Justice, Bureau of Justice Statistics, *Probation and Parole 1988*, November 1989, at 4 ("Bureau of Justice Statistics Bulletin").

20/ Sentencing guidelines provide a sentence range with the specific sentence to be based on factors such as the severity of the offense and the criminal history of the offender. As of 1985-86, at least 13 states used sentencing guidelines with other states considering adoption. (Federal sentencing guidelines went into effect on November 1, 1987.) Mandatory sentencing laws were in force in 46 states. *Report to the Nation on Crime and Justice*, *supra* note 10, at 91.

21/ *See* Langan & Greenfeld, *The Prevalence of Imprisonment*, U.S. Department of Justice, Bureau of Justice Statistics, July 1985, at 1 ("Special Report"); Langan, Fundis, Greenfeld & Schneider, *Historical Statistics on Prisoners* (continued...)

than 8% per year. Since 1980, 6 states have increased their prisoner counts by at least 150% and 18 states and the District of Columbia have experienced growth in excess of 100%. [22] Perhaps not coincidentally, as of June 30, 1988, the entire adult corrections departments of eight states were under court order or consent decree to relieve prison crowding, and only 13 states and the federal Bureau of Prisons had not even one facility under court order or decree for crowding or other conditions. [23]

Judicial Involvement in Establishing Population Limits and Other Standards for Prison Conditions

Judicial intervention in prisons may be widespread, but it is relatively recent; for many years, the judiciary had refused to become involved in setting constitutional standards for conditions of confinement in prisons. [24] It was not until the late 1960's and early 1970's that the judiciary gradually began to lose its inhibitions. A combination of reasons might be given for this change: a more liberal judiciary, encouraged by the Supreme Court's broad-based efforts at societal reform and already well schooled in the use of institutional injunctions; the corresponding allure of public law litigation as a means of restructuring governmental institutions and in particular the involvement of the National Prison Project of the ACLU Foundation; [25] a variety of Supreme Court decisions making it easier to sue state officials in federal court; greater militancy among inmates, sometimes manifesting itself in riots; an increased emphasis among professionals on the importance of prison reform; the social upheaval in society at large; and a change in public attitudes toward severe prison conditions.

Whatever the reasons for the new activism regarding prisons, the development of the law in this area took a course common in institutional litigation: The courts began with those institu-

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21/ (...continued)
in State and Federal Institutions, Yearend 1925-86, U.S. Department of Justice, Bureau of Justice Statistics, May 1988, at 15 (population peaked in 1961 and declined until 1967, when it leveled out until 1973).

22/ *Prisoners in 1988*, *supra* note 2, at 1, 3.

23/ American Correctional Ass'n, *1989 Directory: Juvenile & Adult Correctional Departments, Institutions, Agencies & Paroling Authorities* xvi (1989). In addition, Nevada's adult corrections department was under court order relating to mental health services, and Oklahoma's juvenile corrections department was also under court order. Alabama's adult corrections department has been released from the court's jurisdiction since June 30, 1988.

24/ *See Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 139 (1977) (Marshall, J., dissenting) (quoting *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871)) ("There was a time, not so very long ago, when prisoners were regarded as 'slave[s] of the State,' having 'not only forfeited [their] liberty, but all [their] personal rights . . . .'").

25/ Since the early 1970's, the National Prison Project has represented inmates or filed amicus briefs in numerous lawsuits over prison conditions. Its April 1989 status report claims credit for having participated in litigation in 5 states in which the entire prison system is under court order or consent decree, in 21 states and the District of Columbia with at least one "major" institution under order or decree, in 4 states that have been released from court jurisdiction, and in 5 states with litigation pending (4 of which already have a "major" institution under order or decree). Nat'l Prison Project, *Status Report: The Courts and the Prisons*, April 17, 1989. We do not vouch for the figures in the status report; certain portions of the report are several years out-of-date, and in at least one instance the report incorrectly states that a prison is under court order when the case cited actually denied relief.

tions having the most horrendous conditions and established precedents and legal doctrines that later came to be used to intervene in even the relatively benign institutions.

Among the earliest cases to achieve judicial intervention were those in the Arkansas prison system, one of which much later reached the Supreme Court on two fairly narrow points. [26] The Court's description of the conditions leading to the original district court decisions was chilling. The Court stated that "[t]he routine conditions that the ordinary Arkansas convict had to endure were characterized . . . as 'a dark and evil world completely alien to the free world.'" [27] Inmates had to work 10 hours a day in the fields, six days a week, using mule-drawn tools and tending crops by hand. They worked in all kinds of weather, whenever the temperature was above freezing, and sometimes had to work in light clothing or without shoes. They lived in barracks, and inmate assaults were common; homosexual rapes were so common that some inmates, rather than sleep, spent the night "clinging to the bars nearest the guards' station." Inmates were punished by lashing with a long, broad leather strap. A hand-cranked device known as the "Tucker telephone" was used "to administer electrical shocks to various sensitive parts of an inmate's body." Most guards were "trusties" armed with guns, who physically abused and even murdered other inmates or demanded bribes to permit the inmates to obtain medical care. [28]

With the success of a few lawsuits like this in the lower courts, prison litigation expanded dramatically in the 1970's. By 1978, there were well over 8,000 pending lawsuits regarding conditions in federal and state adult correctional systems, and at least 82 facilities were under court order or decree. [29] Of these 82, the issues giving rise to the court orders or decrees were overcrowding (26), staff practices (19), health (18), sanitation (11), food (12), medical care (21), due process (20), and access to courts (14). [30] Other issues covered by the orders ran the gamut from racial discrimination and brutality to constructive work opportunities, visitation, and prison programs. [31] Some courts were even granting relief based on the *totality* of conditions at a prison without finding that any particular condition in itself violated the Constitution. [32]

26/ *See Hutto v. Finney*, 437 U.S. 678, 681 n.2 (1978) (listing early district court decisions). The narrow points were whether the District Court could place a limit of 30 days on punitive isolation, and whether two awards of attorneys' fees against the state were consistent with state sovereign immunity.

27/ *Id.* at 681 (quoting *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971), an earlier opinion in the litigation).

28/ *Id.* at 681-82 & nn.3-6.

29/ 3 U.S. Department of Justice, National Institute of Justice, *American Prisons and Jails* 32, 33 (1980). The statistics do not distinguish between pretrial detainees and convicted inmates.

30/ *Id.* at 32.

31/ *Id.* at 262. The "other" issues raised in the 8,000 pending cases were equally diverse. *Id.* at 263.

32/ *See, e.g., Laaman v. Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977). The District Court began its legal analysis by stating that the "prison is not marked by barbaric and shocking physical conditions, and there is no flagrantly abusive conduct by the guards or administration. The prison is not overcrowded . . . . The food is nutritionally adequate, and . . . the personal hygiene needs of the prisoners can be met. The inmates are permitted outdoors for exercise. Medical services are available to some extent. In sum, New Hampshire felons are adequately warehoused." *Id.* at 306. The court nevertheless concluded that, while no single condition violated the Constitution, "exposure to the cumulative effect" of the conditions did. *Id.* at 322-23.

By the late 1970's and early 1980's, inmates and advocates of prisoner rights were challenging, often successfully, the constitutionality of prison conditions that paled in comparison with those in the early cases and were rather tame even in their own right. In two notable cases, both centering on allegations of overcrowding, the Supreme Court had to step in to restore a measure of common sense to this area of law. In *Bell v. Wolfish*, pretrial detainees had successfully challenged at least 20 practices or conditions -- some as minor as inadequate telephone service and a ban on personal typewriters -- at the Metropolitan Correctional Center in Manhattan, a federal short-term facility catering primarily to persons awaiting trial. Unlike the "familiar image of a jail," this facility had no "barred cells, dank, colorless corridors, or clanging steel gates"; it had "the most advanced and innovative features of modern design of detention facilities." [33/] The Supreme Court reversed the lower court's holding that "double-bunking" in this facility violated the detainees' due process rights: "We disagree . . . that there is some sort of 'one-man-one-cell' principle lurking in the Due Process Clause . . . ." [34/]

In 1981, prisoner-rights advocates met another roadblock in *Rhodes v. Chapman.* [35/] *Rhodes*, a challenge to double celling, was a classic "test case"; the Southern Ohio Correctional Facility was described as a "modern, 'top-flight, first-class facility,' built in the early 1970's at a cost of some $32 million." [36/] The Supreme Court frustrated the hopes of the prisoner-rights advocates for a broad decision against double celling, observing that "restrictive and even harsh" prison conditions "are part of the penalty that criminal offenders pay for their offenses against society." [37/]

But even these two cases hardly made a dent in litigation over prison conditions. Statistical surveys have shown that, in 1983, 314 of 3,338 local jails nationally were under court order for overcrowding and 376 for "other conditions" [38/] and that, in 1984, a total of 166 of 694 prisons were under court order for overcrowding or any of a variety of other reasons. [39/] In 1988, 37 states, the District of Columbia, and two cities had either an entire adult or juvenile correctional

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33/ 441 U.S. 520, 525 (1979).

34/ *Id.* at 542.

35/ 452 U.S. 337 (1981).

36/ *Id.* at 365 (Brennan, J., concurring in the judgment).

37/ *Id.* at 347 (majority opinion).

38/ 5 U.S. Department of Justice, Bureau of Justice Statistics, *Census of Local Jails, 1983* 2 (1988). Recent figures for June 30, 1988, show that 404 of 3,316 jails were under state or federal court order or consent decree to limit the number of inmates; 412 jails were under order or decree for specific conditions of confinement. There is considerable overlap between those two groups of jails. *See Census of Local Jails 1988, supra* note 8, at 7-8.

39/ The reasons were overcrowding (123), medical facilities and services (122), administrative or punitive segregation (98), staffing patterns (96), food service (95), education and training (94), disciplinary or grievance policies (95), and other reasons (120), including recreation facilities, mail or visitation policies and practices, fire hazards, counseling programs, discrimination on the basis of race or sex, and inadequate or nonexistent law library resources. U.S. Department of Justice, Bureau of Justice Statistics, *1984 Census of Adult Correctional Facilities*, August 1987, at 17; *id.* at 6 (number of prisons).

department or at least one individual institution under court order. [40/]

These court orders, and in particular the caps on inmate population, have had a profound impact on the ability of prison officials to manage prisons and prison systems effectively, and on the ability of the U.S. Marshals Service to provide for the temporary detention of those in their custody. Even more important, court orders limiting the numbers of convicts who can be incarcerated have had a serious adverse effect upon public safety. Both results are avoidable. Public officials and prison authorities should employ the means they possess to respond effectively to prison crowding, including the use of improved management techniques. Most important of all is a continued commitment to construct and renovate sufficient additional prison and jail space to house these inmates. But at the same time, the lower federal courts should not continue to stretch the limits that the Supreme Court has imposed on their authority to order population caps.

40/ *1989 Directory, supra* note 23, at xvi.

II.

SCOPE OF FEDERAL COURTS' AUTHORITY TO ORDER POPULATION CAPS

This chapter of the report is divided into three parts. The first is an analysis of how *Rhodes v. Chapman* limits substantive cruel-and-unusual-punishment claims in prison litigation, with particular reference to prison population. The focus will be on convicted inmates only, since the problems of overcrowding are less severe for pretrial detainees, who are ordinarily incarcerated for a shorter time. Second, we explain our understanding of the limits on the power of federal courts [1/] to impose population caps, based upon the Supreme Court's jurisprudence of equitable remedies. Finally, we look at the problems that state authorities may encounter in seeking modification of consent decrees that give inmates broader relief than they could have obtained at trial.

In our analysis of the Constitution and the controlling Supreme Court decisions, we will note some points as to which certain lower court judges disagree with our views. Such disagreement is to be expected whenever the Supreme Court sets forth its decisions in broad principles. We will explain, however, why we believe that our analysis represents a sound interpretation of the law. [2/]

A. The Scope of the Cruel and Unusual Punishments Clause

The Eighth Amendment, which prohibits the infliction of cruel and unusual punishments, [3/] is not limited to the specific punishments thought to be cruel and unusual in 1791, but neither is it an open-ended authorization for federal judges to strike down any punishments with which they are uncomfortable. Rather, it prohibits punishments that, while "not physically barbarous, 'involve the unnecessary and wanton infliction of pain,' or are grossly disproportionate to the severity of the crime." [4/]

1/ The focus of our analysis in this report is on the federal courts, since the vast majority of litigation over conditions of confinement has occurred in those courts. We note, however, that similar litigation has also been brought in the state courts. According to the National Prison Project, the entire state prison system in Alaska, one institution in California, and one in West Virginia are under state court order for overcrowding and other conditions; a second institution in West Virginia is under state court order for conditions other than overcrowding. *Status Report: The Courts and the Prisons*, *supra* ch. I note 25, at 1, 5.

2/ Thus, for example, our extensive discussion of the opinion in *Inmates of Occoquan v. Barry*, 844 F.2d 828 (D.C. Cir. 1988), *reh'g en banc denied*, 850 F.2d 796 (D.C. Cir. 1988) (6-5 vote), is based on our view that it provides the better legal analysis, recognizing that other judges have differed. (See the discussion and cases cited in the two opinions dissenting from denial of rehearing *en banc*.)

3/ U.S. Const. amend. VIII. The Supreme Court has held that the Eighth Amendment applies to the states through the Fourteenth Amendment. *Rhodes v. Chapman*, *supra*; *Robinson v. California*, 370 U.S. 660 (1962).

4/ *Rhodes v. Chapman*, 452 U.S. at 346 (citations omitted).

Application of the Eighth Amendment to a particular punishment inevitably requires the exercise of judicial judgment. But such "judgment should be informed by objective factors to the maximum possible extent." [5] The Court has found objective factors in history, the common law, and the actions of state legislatures. [6] It treats these sources as reflections of "evolving standards of decency" [7] that the Eighth Amendment requires courts to implement.

Rhodes v. Chapman is the principal Supreme Court decision applying these general principles to the punishment represented by conditions of confinement in prison. [8] The Court held that, under the Eighth Amendment, such conditions "must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment." [9] Citing its previous decisions, the Court noted that the denial of medical treatment in prison can be cruel and unusual because it may result in torture or, more commonly, in pain without any penological purpose; [10] and that brutally oppressive prison conditions may be cruel and unusual because they may result in "unquestioned and serious deprivation of basic human needs." [11] Other prison conditions might also be cruel and unusual under contemporary standards of decency if -- but only if -- they deprive inmates of the "minimal civilized measure of life's necessities." [12] As the Court of Appeals in *Inmates of Occoquan v. Barry* phrased it, "[T]he 'deprivations' that trigger Eighth Amendment scrutiny are deprivations of *essential human needs*." [13]

In deciding whether prison conditions comport with contemporary standards of decency, a court may not seek the requisite "objective" factors in the testimony of experts regarding the professional standards for prison conditions issued by organizations such as the American Correctional Association. Professional standards "simply do not establish the constitutional minima;

5/ *Id.*

6/ *See id.* at 346-47; *see also Penry v. Lynaugh*, 109 S. Ct. 2934, 2953-55 (1989) (execution of the mentally retarded not categorically prohibited by the Eighth Amendment because not cruel and unusual in 1791 and not in conflict with objective evidence of contemporary standards found in state legislation, actions of sentencing juries, or common law); *Stanford v. Kentucky*, 109 S. Ct. 2969, 2975-77 (1989) (execution of minors).

7/ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

8/ The Eighth Amendment analysis in *Rhodes* applies only to prisoners who have been incarcerated after conviction. The proper analysis for pretrial detainees is whether conditions of detention -- including "double-bunking" -- amount to punishment prior to an adjudication of guilt, in violation of the Due Process Clause. *Bell v. Wolfish*, 441 U.S. at 535-37. "Not every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense, however." *Id.* at 537.

9/ 452 U.S. at 347. *See also Whitley v. Albers*, 475 U.S. 312, 319 (1986) (restoring order after prison riot) ("obduracy and wantonness" characterize cruel and unusual conduct, "whether that conduct occurs in connection with establishing conditions of confinement" or otherwise); *Cody v. Hilliard*, 830 F.2d 912, 913 (8th Cir. 1987) (*en banc*), *cert. denied*, 108 S. Ct. 1078 (1988) (double celling).

10/ 452 U.S. at 347 (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)).

11/ *Id.* (citing *Hutto v. Finney*, 437 U.S. 678 (1978)).

12/ *Id.*

13/ 844 F.2d 828, 836 (D.C. Cir. 1988) (emphasis modified). The opinion for the 2-1 majority was written by Judge Kenneth W. Starr, now the Solicitor General of the United States.

rather, they establish goals recommended by the organization in question." [14] "[G]eneralized opinions of experts" are less important in determining contemporary standards of decency than the attitude of the public toward a particular punishment. [15] In other words, "it is decency -- elementary decency -- not professionalism that the Eighth Amendment is all about." [16]

In *Rhodes v. Chapman*, the Court specifically considered whether double celling was cruel and unusual punishment. In holding that it was not, the Court indicated that double celling at the prison did not lead to an increase in violence among inmates or to deprivations of essential food, medical care, or sanitation. It did lead to limits in work hours and delays in receiving education, but those conditions "do not inflict pain, much less unnecessary and wanton pain; deprivations of this kind simply are not punishments." [17] The Court also rejected the District Court's reliance on five additional factors -- that inmates were serving long terms; that the facility was 38% above its design capacity; that studies had recommended at least 50-55 square feet of living space per inmate (double-celled inmates shared 63 square feet); that inmates spent most of their time in their cells with their cellmates; and that double celling was not temporary. While these concerns may "reflect an aspiration toward an ideal environment for long-term confinement," double celling under such conditions does not inflict "unnecessary or wanton pain" and is not "grossly disproportionate to the severity of crimes warranting imprisonment." [18] The Court concluded that "the Constitution does not mandate comfortable prisons," and that the considerations relied upon by the District Court were more appropriate for the legislature and prison authorities. [19]

Some lower court decisions since *Rhodes v. Chapman* have interpreted that case narrowly and, we believe, incorrectly as turning upon the "top-flight, first-class" conditions at the particular facility. [20] In our view, the lower court decision most accurately capturing the essence of the Supreme Court's analysis is the Court of Appeals' opinion in *Occoquan*. We will therefore discuss the case in some detail.

In *Occoquan*, the District Court made extensive findings of fact respecting "deficiencies" in conditions at the prison. It first found that "environmental conditions" -- *i.e.*, housing, food, inmate classification, inmate programs, inmate supervision, and punitive segregation -- were flawed. As to housing, it found that the minimum standard of floor area per inmate should be 95 square feet,

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14/ *Bell v. Wolfish*, 441 U.S. at 544 n.27.

15/ *Rhodes v. Chapman*, 452 U.S. at 348-49 n.13.

16/ *Occoquan*, 844 F.2d at 837.

17/ *Rhodes v. Chapman*, 452 U.S. at 348.

18/ *Id.* at 348-49. In a footnote, the Court declared that "[t]he question before us is not whether the designer of [the facility] guessed incorrectly about future prison population, but whether the actual conditions of confinement at [the facility] are cruel and unusual." *Id.* at 349-50 n.15.

19/ *Id.* at 349.

20/ *See, e.g., French v. Owens*, 777 F.2d 1250, 1252-53 (7th Cir. 1985), *cert. denied*, 479 U.S. 817 (1986); *Toussaint v. Yockey*, 722 F.2d 1490, 1492 (9th Cir. 1984); *Reece v. Gragg*, 650 F. Supp. 1297, 1302-03 (D. Kan. 1986); *Palmigiano v. Garrahy*, 639 F. Supp. 244, 256-57 (D.R.I. 1986).

under American Public Health Association (APHA) guidelines. [21] It noted excessive noise under American Correctional Association (ACA) and Occupational Safety and Health standards and inadequate lighting under APHA standards. The District Court further noted various problems with fly infestation and poor mattress conditions. Together, these housing conditions created serious physical and mental health risks. As to food, the District Court detailed numerous shortcomings but stated that expert testimony did not suggest any imminent harm to inmates.

The District Court criticized Occoquan's use of dormitories for a population that included maximum- as well as minimum-security inmates. The court stated that inmates who were violent or needed psychiatric care should be identified and segregated from the general population. Furthermore, Occoquan did not provide adequate programs, and idleness could lead to increased tension and violence. Similarly, the supervision of inmates was insufficient; patrols were infrequent and irregular and officers suffered from obstructed vision owing to double bunking. As for punitive segregation, the court criticized Occoquan for mixing inmate classifications and failing to provide adequate programs and exercise. Finally, the District Court criticized various conditions relating to fire safety, medical care (including use of inadequately trained personnel), and mental health care.

Looking to the totality of the circumstances, the District Court analyzed the cumulative effect of all the defective conditions it had enumerated. Because "virtually every facet of the Occoquan system [was] at or beyond the breaking point," [22] the court felt it necessary to impose a population cap on the prison, as follows: Population was to be reduced from approximately 1,950 inmates by at least 100 a month until the prison reached the cap of 1,281. [23]

On appeal, the Court of Appeals criticized the District Court's "totality of the circumstances" analysis, finding it lacking any determination that the various "'deficiencies' and shortfalls -- alone or in combination -- rose to the level of deprivation of the 'minimal civilized measure of life's necessities.'" [24] Because the Court of Appeals could not ascertain from the District Court's opinion whether conditions merely violated "sound correctional practice" or were actual deprivations of constitutional magnitude, it reversed and remanded to the District Court. [25]

The Court of Appeals distilled what we think are the important themes of the Supreme

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21/ *Inmates of Occoquan v. Barry*, 650 F. Supp. 619, 620 (D.D.C. 1986), *rev'd*, 844 F.2d 828 (D.C. Cir. 1988). The summary of the District Court's opinion in this paragraph and the next comes from 650 F. Supp. at 621-30.

22/ 650 F. Supp. at 631.

23/ *See Occoquan*, 844 F.2d at 829.

24/ *Id.* at 839.

25/ *Id.* Following a trial upon remand, the District Court found violations of the Eighth Amendment in the housing conditions, fire safety, and health care, but not in the food services, employment, or educational programs and drug treatment. *Inmates of Occoquan v. Barry*, 717 F. Supp. 854, 865-68 (D.D.C. 1989). The court continued to believe that overcrowding had caused the systemic problems at Occoquan, but it declined to order a population cap. *Id.* at 868-69. Instead, it ordered the defendants to submit a report stating how they proposed to correct the violations in the areas of sanitation, bathroom facilities, fire safety, health care, and staffing. *Id.* at 869-70.

Court's decision in *Rhodes v. Chapman*, which was "manifestly more than a narrow decision establishing the limited principle that double celling *per se* does not work a violation of the Eighth Amendment." [26] First, *Rhodes* "rearticulated the recurring theme of judicial caution in the area of institutional conditions litigation." In addressing problems of prisons in America, judges must realize that these problems are "complex and intractable" and are "not readily susceptible to resolution by decree." The administration of prisons is "'peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial,'" and it is questionable whether courts are "competen[t] to decree sweeping modifications in prison conditions" in the context of litigation. [27]

Second, the emphasis in *Rhodes* on objective factors in Eighth Amendment analysis means that federal courts must focus not on professional standards for prison conditions but upon the public's attitude toward those conditions. Frequently, prison conditions do not meet professional standards, but these "deprivations" are not necessarily of constitutional significance. When federal courts look to professional standards instead of to essential human needs, they tend to enter the "forbidden domain of prison reform." [28]

Finally, *Rhodes* does not support the position that the "totality of the circumstances" at a prison may violate the Constitution in the absence of a showing that specific conditions deprive inmates of the "minimal civilized measure of life's necessities." Conditions relating to food, shelter, health care, and personal security -- "life's necessities" -- must be analyzed "with specificity" to determine whether various deficiencies, alone or in combination, denied the inmates "essential mainstays of life." [29] Thus, we believe the "totality of the circumstances" analysis, properly understood, requires consideration of all the related conditions that bear on whether each necessity has been adequately provided. [30] Unrelated conditions that do not individually fall below the requirements of the Eighth Amendment should not be cumulated to find unconstitutionality on the totality of circumstances. [31]

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[26] 844 F.2d at 835.

[27] *Id.* at 835-36 (quoting *Bell v. Wolfish*, 441 U.S. at 548).

[28] *Id.* at 837.

[29] *Id.* at 839.

[30] *See Toussaint v. McCarthy*, 801 F.2d 1080, 1107 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *Union County Jail Inmates v. DiBuono*, 713 F.2d 984, 999 (3d Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984); *Hoptowit v. Ray*, 682 F.2d 1237, 1246-47 (9th Cir. 1982).

[31] *See Toussaint v. McCarthy*, 801 F.2d at 1107; *Walker v. Mintzes*, 771 F.2d 920, 925 (6th Cir. 1985); *Wellman v. Faulkner*, 715 F.2d 269, 275 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984). We recognize that dictum in *Hutto v. Finney*, 437 U.S. at 687 ("taken as a whole," conditions in the isolation cells were cruel and unusual), and Justice Brennan's concurrence in *Rhodes*, 452 U.S. at 363 (even if no single condition of confinement unconstitutional in itself, "exposure to the cumulative effect of prison conditions" may be cruel and unusual punishment), have led some lower courts to take a broader view of the "totality of the circumstances" analysis. *See, e.g., Doe v. District of Columbia*, 701 F.2d 948, 957 (D.C. Cir. 1983) (separate statement of Edwards, J.); *Ruiz v. Estelle*, 679 F.2d 1115, 1139-40 & n.98 (5th Cir.), *modified*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983) (conceding, however, that "generalized and 'vague conclusion'" about totality was insufficient); *Palmigiano v. Garrahy*, 639 F. Supp. at 256-57.

To sum up the rules of substantive liability under the Eighth Amendment, double celling is not *per se* unconstitutional and must be judged under standards for cruel and unusual punishment based on the facts in any individual case. Prison conditions in general do not constitute cruel and unusual punishment unless they represent a wanton and unnecessary infliction of pain or deprive inmates of essential human needs. A prison's failure to comply with standards or guidelines promulgated by a professional organization is not in itself a failing of constitutional magnitude. Finally, as will be discussed next, while courts assuredly have authority to remedy violations of the Constitution, they lack authority to engage in prison reform by curing conditions that, while perhaps harsh, meet constitutional minima.

B. The Scope of Federal Courts' Equitable Remedial Powers

Some judges who order population caps try to justify these remedies as falling within the courts' broad powers in equity, and in support of their orders quote Supreme Court dicta that "the scope of [federal courts'] equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." [32/] But, in so doing, these judges fail to pay sufficient heed to the limitations that the Court has placed upon the use of equitable remedies in institutional litigation challenging "deficient" practices. The Court's core message has been that federal courts must narrowly tailor equitable remedies to fit the specific constitutional violations they have found; we believe that this "core message, to put it simply, trumps the broad rhetoric that [these judges] understandably feature[]." [33/]

Limitations on Equitable Remedial Authority

The fundamental principles limiting the scope of the federal courts' equitable remedial powers were articulated by the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*, in upholding the power of a district judge to impose busing as one element of a remedy for state-sponsored school segregation. The Court stated that "judicial powers may be exercised only on the basis of a constitutional violation" and that their exercise must be calculated "to correct . . . the condition that offends the Constitution"; in other words, "the nature of the violation determines the scope of the remedy." [34/] The scope of judicial remedial authority is not congruent with the scope of state official authority to run state institutions. Whereas state officials have plenary power to formulate and implement policy to deal with institutional conditions, broad judicial authority to address such conditions exists only when there has been a constitutional violation and the local authority has defaulted in its obligation to cure the violation. [35/]

The Court restated elements of these limitations in subsequent decisions, [36/] and then

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32/ *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15 (1971).

33/ *Occoquan*, 844 F.2d at 844.

34/ 402 U.S. 1, 16 (1971).

35/ *Id.*

36/ *See, e.g., Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976); *Rizzo v. Goode*, 423 U.S. 362, 378 (1976); *Milliken v.* (continued...)

summed them up in *Milliken v. Bradley* ("*Milliken II*"), another school-desegregation case:

> Application of those "equitable principles," we have held, requires federal courts to focus upon three factors. In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to "the *condition* alleged to offend the Constitution . . . ." Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. [37]

These "'fundamental limitations on the remedial powers of the federal courts'" [38] apply not only to school-desegregation cases but to all cases in which broad equitable relief is sought, including prison litigation. [39]

In addition, the Court has made clear that federal courts may not avail themselves of the "breadth and flexibility" of equitable remedies unless the state or local authorities are "[i]n default" of their "affirmative obligations." [40] Because those authorities have the "'primary responsibility for elucidating, assessing, and solving'" the problems that arise in their efforts to ensure full compliance with the Constitution, [41] it is only after they have been "found wanting at the remedial stage" [42] -- that is, after they have failed to comply with less intrusive orders -- that a court may be justified in imposing more rigorous and intrusive orders upon the state or local authorities.

It was such a default that appears to have provided the ground for the Supreme Court's approval of a sweeping remedy in *Hutto v. Finney*. In *Hutto*, when state prison officials continually failed to achieve compliance with the District Court's earlier and less intrusive orders, that

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36/ (...continued)
Bradley, 418 U.S. 717, 744-45 (1974) ("*Milliken I*"). *See also Austin Independent School District v. United States*, 429 U.S. 990, 991 (1976) (Powell, J., concurring).

37/ 433 U.S. 267, 280-81 (1977) (emphasis in original; citations omitted).

38/ *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 399 (1982) (quoting *Hills v. Gautreaux*, 425 U.S. at 293).

39/ The suggestion that they are peculiarly related to school-desegregation cases is mistaken. This much is clear from *Swann* itself as well as from later decisions. *See Swann*, 402 U.S. at 15-16 ("a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right"). *Accord*, *General Bldg. Contractors Ass'n*, 458 U.S. at 399 (employment); *Hills v. Gautreaux*, 425 U.S. at 294 (housing discrimination); *Occoquan*, 844 F.2d at 841 n.18 (prison conditions) (citing *Hutto v. Finney*, 437 U.S. at 687 n.9). *Cf. Rizzo v. Goode*, 423 U.S. at 378 (police conduct).

40/ *Swann*, 402 U.S. at 16, 15.

41/ *Milliken II*, 433 U.S. at 281 (emphasis omitted) (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955)).

42/ *Occoquan*, 844 F.2d at 842.

court was justified going beyond those orders: "If [the officials] had fully complied with the court's earlier orders, the present time limit might well have been unnecessary. But taking the long and unhappy history of the litigation into account, the [district] court was justified in entering a comprehensive order to insure against the risk of inadequate compliance." [43/]

Limitations on Remedies in Prison Litigation

Frequently, prison lawsuits challenge not simply one or two particularly onerous conditions but instead a broad array of conditions, ranging in seriousness from allegations of brutal violence to allegations of uninspired mess-hall fare. Presented with such an array of allegations, some courts decide to pursue a global approach: they view the totality of these conditions as "the" condition of confinement (warranting "a" remedy), rather than as a number of distinct conditions, each of which may be harsh or unpleasant but not in itself cruel or unusual. The decision to pursue a global remedy often results in the removal of control over the day-to-day operation of the prison from the prison authorities. It is, however, precisely this global approach to which the fundamental limitations on the remedial powers of federal courts are directed.

The first such limitation, which requires federal courts to tailor a remedy narrowly to fit the nature and extent of the constitutional violation, imposes several subsidiary requirements in prison litigation. To begin with, the court must determine the nature and extent of the violation. As noted in our discussion of the important themes of *Rhodes v. Chapman*, we believe a court may not find a violation based upon the totality of unrelated conditions when those conditions individually meet constitutional minima; the court must find that some specific condition is cruel and unusual. This finding is a precondition to *any* equitable relief, [44/] since a federal court's power is to "bring the prison into compliance with the Constitution," not to make prison life more pleasant for the inmates. [45/] For example, it was not sufficient that the District Court in *Occoquan* had detailed numerous "deficiencies" with the prison facilities and ways in which they failed to meet the standards of professional organizations. Absent a finding of a specific violation, the District Court had no authority to enter a remedial order at all.

Even if a court finds specific violations, its remedial authority is limited to ordering that those violations be cured. More precisely, the court's order may require prison officials to do only what is necessary to bring the prison into *minimal* compliance with the Constitution. [46/] This "narrow tailoring" ensures both that the remedy will be "related to 'the condition alleged to offend

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[43/] 437 U.S. at 687. *See Occoquan*, 844 F.2d at 842.

[44/] *See Milliken II*, 433 U.S. at 282 ("decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation"). A constitutional violation -- *i.e.*, a violation of federal law -- is also necessary because a federal court may not enjoin state officials from violating state law. *See Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984).

[45/] *Occoquan*, 844 F.2d at 842.

[46/] *Hoptowit v. Ray*, 682 F.2d at 1247 ("the remedy may be only so much as is required to correct the specific violation"); *Ruiz v. Estelle*, 679 F.2d at 1145 ("a court can order only relief sufficient to correct the violation found"); *accord*, *Union County Jail Inmates v. DiBuono*, 713 F.2d at 1001.

the Constitution'" [47] and that the court will go no further than necessary to bring the prison into compliance with the Constitution. Thus, a court may not require that unconstitutional prison conditions be improved to the level of professional standards if those standards exceed constitutional minima; to order more than minimal compliance would be to enter the forbidden territory of prison reform.

The requirement that relief be narrowly tailored, however, is more than simply a limit on the *quantity* of relief; it is also a limit on the *nature* of relief. The remedy for a prison condition that constitutes cruel and unusual punishment must be directly related to the improvement of that condition. For example, if a court found that prison officials' deliberate indifference to essential medical treatment of inmates violated the Eighth Amendment, [48] it could not order that educational programs be established in the prison, because there could be no causal connection between the lack of such programs and the constitutionally deficient condition. [49] Similarly, we believe that, in order to justify a cap on prison population, a court must not only be unable to devise a narrower remedy for the specific conditions that violate the Eighth Amendment but must also trace a causal connection between overcrowding and the violations; [50] in other words, it must show that imposition of a population cap will result in curing the offending conditions. We agree with the Eighth Circuit that, absent such a causal connection, a population cap may be unjustified despite findings that double celling has had a negative impact on prison programs and services: "Whatever the merits of these findings, there has been no showing . . . that the elimination of double-celling will alleviate these problems to any perceptible degree." [51]

A causal connection will, of course, depend on the conditions existing at a particular prison. But a recent Justice Department study raises doubt that any necessary causal connection exists between overcrowding at a prison and increases in violence or other deficient conditions of constitutional magnitude. The study, based on the 1984 Prison Census, shows that high-density maximum-security prisons had about the same homicide rate as low-density prisons and a lower

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47/ *Milliken II*, 433 U.S. at 280 (emphasis omitted) (quoting *Milliken I*, 418 U.S. at 738).

48/ *See Estelle v. Gamble*, 429 U.S. 97 (1976).

49/ In *Milliken II*, the Supreme Court approved a remedy that included the use of mandatory remedial educational programs for school children who had been subject to an unlawful condition -- *de jure* school segregation. While this aspect of the remedy was not identical with the nature of the violation (unlawful assignment of students), the Court agreed with the District Court that "the need for the educational components flowed directly from constitutional violations" by officials, 433 U.S. at 282, and were necessary to restore the victims of discriminatory conduct to the position they would have been in absent that conduct. *Id.* Both the Court, *id.* at 287, and Justice Powell in concurrence, *id.* at 292, emphasized the "uniqueness, and the consequent limited precedential effect of much of the Court's opinion."

50/ *See Occoquan*, 844 F.2d at 842 ("an approach commensurate with Supreme Court precedent would have sought to identify the conditions causing the constitutional violation and order those conditions remedied"). *Cf. Hutto*, 437 U.S. at 88 (footnotes omitted) ("The order [limiting punitive isolation to 30 days] is supported by the interdependence of the conditions producing the violation. The vandalized cells and the atmosphere of violence were attributable, in part, to overcrowding and to deep-seated enmities growing out of months of constant daily friction. The 30-day limit will help to correct these conditions.").

51/ *Cody v. Hilliard*, 830 F.2d at 914 (District Court found that double celling had a "negative impact on all programs and services" and resulted in "crisis management" with respect to food, laundry, and medical services, as well as plumbing and electrical wiring).

rate than moderate-density prisons. Both inmate-on-inmate assaults and institutional disturbances were most frequent at the lowest-density prisons. [52] Moreover, federal prisons have not been subject to court orders requiring relief of cruel and unusual conditions, despite prison population well in excess of capacity. This federal experience and the data analyzed in the study illustrate the difficulty of proving a causal connection in any individual case. [53]

The second major limitation on the federal courts' remedial authority found in *Milliken II* is that an order may do no more than to restore the plaintiffs to the position they would have been in absent the constitutional violation. In prison litigation, this limitation, much like the nature-and-scope limitation, requires that courts restrict their orders to curing the specific conditions that violate the Eighth Amendment. But the requirement that remedial orders be restorative has broader implications: it raises the possibility that certain orders capping population may be improper even if a causal connection seems apparent. While orders in prison litigation requiring officials to cure unconstitutional conditions -- such as the failure to maintain even a minimal level of sanitation -- are proper because they may realistically be said to restore inmates to the position they would have been in, some of the more severe orders capping a prison's population are different. To the extent that these orders require that current population be reduced through early release of inmates, they can hardly be thought to be restorative; rather than restoring such inmates to incarceration without overcrowding, these orders effectively free them from incarceration.

The third limitation on the courts' remedial authority is that remedial orders must take into account the interests of government and prison officials in managing their own affairs within constitutional limits. We understand this rule mandating deference to local authorities to have both a "positive" and a "negative" aspect: a court reviewing a remedial order must show *more* deference to the authorities and, we believe, somewhat *less* deference to the lower court.

Deference to prison authorities is not a new concept in the Supreme Court's prison jurisprudence. It is black-letter law that in a constitutional challenge to prison regulations, "the relevant inquiry is whether the actions of prison officials were 'reasonably related to legitimate penological interests.'" [54] The reason for this deferential standard, the Court has explained, is that,

> [i]n our view, such a standard is necessary if "prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations." * * * [A contrary] rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court some-

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52/ Innes, *Population Density in State Prisons*, U.S. Department of Justice, Bureau of Justice Statistics, December 1986, at 6-7 ("Special Report") (examining information on over 180,000 housing units at 694 state prisons).

53/ *Cf. Cody*, 830 F.2d at 915 ("Prison violence is . . . not a recent development and occurs with similar frequency in institutions that do not double-cell. There is nothing in the record to show the comparable number of incidents of violence at [the prison] before and after double-celling. Accordingly, there is no evidentiary basis for a conclusion that double-celling has caused an increase in such incidents . . . .").

54/ *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1879 (1989) (quoting *Turner v. Safley*, 482 U.S. 78 (1987)).

where would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration." [55]

Similar reasons exist for the deference to prison officials that is required in the formulation of remedial orders. The courts, "in carrying out their remedial task, . . . are not to be in the business of running prisons." [56] Deference is necessary not only because administrators usually know better than judges how to run prisons but also because running correctional facilities is a matter for the legislature and executive, not the judiciary. [57] Absent recalcitrance at the remedial stage, courts must recognize the "primary responsibility" that officials have for ensuring that the prisons are in compliance with the Constitution and must order the least intrusive remedy possible. [58]

Some judges have attempted to justify population caps on a basis superficially resembling this deference. For example, the dissent in *Occoquan* argued that "a population ceiling would . . . be less intrusive of local correctional administration than injunctions relating to specific conditions" because, unlike such injunctions, which may require later judicial intervention, a population ceiling "can normally be a one-time remedy, requiring little, if any, further interference by the courts . . . ." [59] But this argument proves too much; it would be even less "intrusive" in this sense to shut down the prison entirely, since *no* further judicial interference would be necessary. Moreover, the dissent's approach is hardly deferential, since determining how many prisoners should be incarcerated at a facility at any time, and how those prisoners should be housed, is no less a part of administering a prison than imposing rules of conduct, setting leisure hours, or fixing the mess-hall menu. Imposing a population cap significantly limits the discretion of prison officials in decisions involving the housing of additional inmates, and, depending on the nature of the order, may force those officials to make a set of decisions not previously necessary respecting early release or transfer of convicted prisoners.

Population caps also intrude upon the ability of state and local officials to run the larger prison *system*. A cap "directly implicates decisions with which the political process is charged. Such fundamental decisions as how many prisons to build and how large to build them -- basic decisions regarding the allocation of public resources -- are simply outside the domain of federal

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55/ *Turner v. Safley*, 482 U.S. at 89 (citations omitted).

56/ *Occoquan*, 844 F.2d at 841.

57/ *See Bell v. Wolfish*, 441 U.S. at 548.

58/ *Occoquan*, 844 F.2d at 841-42 (quoting *Milliken II*, 433 U.S. at 281). *See also Hoptowit v. Ray*, 682 F.2d at 1247 (court may order more intrusive remedy "only when there is a record of past constitutional violations and violations of past court orders"); *Ruiz v. Estelle*, 679 F.2d at 1145-46 ("[T]his remedy should begin with what is absolutely necessary. If these measures later prove ineffective, more stringent ones should be considered."). *Accord*, *Kendrick v. Bland*, 740 F.2d at 438-39.

59/ *Occoquan*, 844 F.2d at 856 (Harold H. Greene, D.J., dissenting).

courts." [60] In addition, the imposition of a cap at a particular prison may solve that prison's problems only at the expense of other prisons as officials try to shift "excess" prisoners to other facilities to avoid having to release them prematurely.

The requirement of deference applies to court-appointed special masters and similar officials, as well as to judges. In one case, arising out of judicial intervention in the Alabama prison system, the District Court appointed a 39-member Human Rights Committee with power to inspect prison facilities and records, interview inmates, review plans to implement the court's decree, and "take any action" necessary to accomplish its purpose. The Court of Appeals reversed and remanded for appointment of a single individual with power to monitor but not to interfere in daily prison operations. [61] In addition, Department of Justice policy is that masters should be used only "where decisions are (1) routine, (2) large in number, (3) minimally connected to the substantive issues in a case, and (4) not sufficiently difficult or significant to require a constitutional or legislative officer." [62]

In our view, judicial deference to state and local authorities has a "negative" aspect as well in the somewhat lessened deference owed the conclusions of a district court. While technically a court reviewing a remedial order applies the standard of "abuse of discretion" and must defer to the findings of the district court unless they are "clearly erroneous," nevertheless a reviewing court should give close scrutiny to the remedy to ensure that it is not more intrusive than necessary to cure the violations. [63] "Other than appellate review, few effective external controls check the district court's power." [64] *Occoquan* and *Cody v. Hilliard* support our position that the Supreme Court's limitations on federal courts' remedial authority require this close scrutiny on appeal. In *Occoquan*, the Court of Appeals scrutinized the fact findings, read the District Court's term "deficiencies" narrowly, interpreting it not to be synonymous with "constitutional violations," and criticized the District Court for engaging in prison reform instead of constitutional adjudication. In *Cody*, the Eighth Circuit also closely examined the District Court's analysis and, with respect to double celling of inmates in protective custody, chastised the District Court for "merely

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60/ *Id.* at 842-43 (majority opinion). Correspondingly, unwarranted judicial intervention encourages prison authorities to use the courts as a means of extracting prison-improvement funds from the legislature that would not otherwise be forthcoming. *Cf. Milliken II*, 433 U.S. at 293 (Powell, J., concurring in the judgment) (litigation has become "largely a friendly suit" between plaintiffs and school board, which have "now joined forces apparently for the purpose of extracting funds from the state treasury").

61/ *See Newman v. Alabama*, 559 F.2d 283, 288-90 (5th Cir. 1977), *rev'd in part on other grounds sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978). *See also Kendrick v. Bland*, 740 F.2d 432, 438 (6th Cir. 1984) (authorizing appointment of "monitor" to "observe [prison authorities'] conduct and thereby permit the federal court to oversee compliance with its continuing order").

62/ United States Attorneys' Manual § 1-12.100 (Guidelines on the Use of Masters).

63/ The definitions of "abuse of discretion" vary widely, "'ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance,'" *Toussaint v. McCarthy*, 801 F.2d at 1088 (quoting Friendly, *Indiscretion about Discretion*, 31 Emory L.J. 747, 762-63 (1982)), and the scope of review is "'directly related to the reason why [a particular] category or type of decision is committed to the trial court's discretion in the first instance.'" *Id.* (quoting *United States v. Criden*, 648 F.2d 814, 817 (3d Cir. 1981).

64/ *Toussaint v. McCarthy*, 801 F.2d at 1089.

substitut[ing] its 'judgment for that of officials who have made a considered choice.'" [65]

Of course, the broader point is that *all* courts should pay close heed to the limits on their remedial powers:

> In this setting of institutional conditions litigation, courts must, as the Supreme Court has said time and again, craft remedies with extraordinary sensitivity. Here, courts work in an arena that represents a crossroads where the local political branches of government meet the Article III branch and the higher commands of the Constitution. [66]

This extraordinary sensitivity is the reason a court may not impose a population cap without careful analysis of all the foregoing factors, and it helps to explain why a cap should be thought of as "a last resort remedy" that is not to be used "as a first step." [67]

C. Modification of Consent Decrees that Exceed the Limits of Judicial Power to Impose Population Caps

There is considerable doubt that state institutions subject to a population cap under a consent decree can obtain modification of the decree on the ground that the cap was "non-remedial," *i.e.*, not designed to cure a constitutional violation and therefore beyond the power of the court to impose after trial. [68] Broad language in a recent Supreme Court opinion has made such modification unlikely, and only one subsequent lower court decision has suggested a narrow reading of that language.

In the following discussion of the issue of modification, we do not consider the general question of when consent decrees may be modified, a subject about which much has been written. [69] There are many circumstances in which a state may be justified in seeking modification of a decree

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65/ *Cody*, 830 F.2d at 915 (quoting *Whitley v. Albers*, 475 U.S. at 322). *Cf. Plyler v. Evatt*, 846 F.2d 208, 212 (4th Cir.), *cert. denied*, 109 S. Ct. 241 (1988) (district court's failure to modify consent decree to permit double celling in new facilities in light of unanticipated population increase was abuse of discretion and certain fact findings were clearly erroneous).

66/ *Occoquan*, 844 F.2d at 844.

67/ *Id.* at 843 (quoting counsel at oral argument).

68/ We note in passing that, because there typically has been no adjudication in these cases, a state may encounter problems in demonstrating that provisions of a decree exceed constitutional requirements. If the decree contains an explicit acknowledgment that the relief may be in excess of constitutional requirements, that might be interpreted as a waiver of the state's objection. *See Duran v. Carruthers*, 885 F.2d 1485, 1489 (10th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3468 (U.S. 1990). If it contains no such acknowledgment, the court might still accept the provisions of the decree as sufficiently related to the constitutional violations alleged, particularly if consent has been given without any findings of fact. *See, e.g., id.* at 1489-90 (provisions "[a]rguably . . . relate to, or tend to vindicate, federally protected rights"); *Kozlowski v. Coughlin*, 871 F.2d 241, 245 (2d Cir. 1989) (challenged "relief is 'firmly rooted in federal law'").

69/ *See generally Kozlowski v. Coughlin, supra* (discussing authorities); Welling & Jones, *Prison Reform Issues for the Eighties: Modification and Dissolution of Injunctions in the Federal Courts*, 20 Conn. L. Rev. 865, 870-83 (1988).

when the operation of the decree "is no longer equitable" or there is "any other reason justifying relief from the operation" of the decree. [70] For example, a change in circumstances or in controlling law, or simply experience with the operation of the decree, may support modification. [71] It also may be equitable for a court that has had jurisdiction over a prison or prison system for more than a few years to consider whether modification or even termination of the decree is appropriate, particularly if there has been substantial compliance, [72] both because courts should not maintain jurisdiction over state institutions in perpetuity and because a subsequent failure to comply may expose to contempt sanctions the very officials who managed to bring the system into compliance earlier. These issues are beyond the scope of our discussion; instead, we consider here only whether state officials who no longer wish to be bound by a decree that they or, more typically, their predecessors once agreed to can seek modification on the ground that the decree exceeds constitutional requirements. [73]

The Supreme Court recently stated in *Local No. 93, Firefighters v. City of Cleveland* that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." [74] A consent decree has a hybrid nature; it is not only a judgment but also a contract between the parties. Yet, because "a federal court is more than a 'recorder of contracts' from whom the parties can purchase injunctions," the decree must spring from and serve to resolve a dispute within the court's subject matter jurisdiction, come within the general scope of the pleadings, and further the

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70/ Fed. R. Civ. P. 60(b)(5),(6).

71/ *See, e.g., Newman v. Graddick*, 740 F.2d 1513, 1521 (11th Cir. 1984) (remand to allow consideration of modification in light of *Rhodes v. Chapman*); *Nelson v. Collins*, 659 F.2d 420, 425 (4th Cir. 1981) (*en banc*) (modification permitted in light of *Rhodes* and *Bell v. Wolfish*). *See also Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) (modifying litigated school desegregation injunction because of change in racial composition of school population); *System Federation No. 91 v. Wright*, 364 U.S. 642, 647 (1961) (modification may be appropriate "if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen"); *Kozlowski v. Coughlin*, 871 F.2d at 247 (experience with decree); *Plyler v. Evatt*, 846 F.2d at 211 (changed circumstances respecting prison population required that double celling be permitted at new facilities); *Donovan v. Robbins*, 752 F.2d 1170, 1182 (7th Cir. 1984) (experience is component of modern standard for modification).

72/ *See Newman v. Graddick*, 740 F.2d at 1519-20 (total compliance unnecessary); *Washington v. Penwell*, 700 F.2d 570, 572 (9th Cir. 1983) (substantial compliance). *But see Battle v. Anderson*, 708 F.2d 1523, 1539 (10th Cir. 1983), *cert. dismissed*, 465 U.S. 1014 (1984) (despite full compliance, court refused to terminate jurisdiction, because it believed prison officials' "attitudes" had not sufficiently changed; however, the court subsequently affirmed the dismissal of claims based on prison conditions, *Battle v. Anderson*, 788 F.2d 1421, 1429 (10th Cir. 1986)).

73/ Any number of reasons unrelated to the merits may have existed for consenting to such a decree. The officials may have been hoping to extract additional funding from the legislature, trying to bind successors they did not trust, or simply trying to spare themselves the personal embarrassment of a trial. *See Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986) (consent decree may be "a ploy in another struggle"). A state's voluntary and permanent relinquishment of its police power raises constitutional questions beyond the scope of this discussion. *See, e.g., Stone v. Mississippi*, 101 U.S. 814, 820 (1879) (state public officials "can govern according to their discretion . . . while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances'").

74/ 478 U.S. 501, 525 (1986) (employment discrimination class action).

objective of the law upon which the complaint was based. [75]

The Court's statement that a decree may provide broader relief than available at trial poses a serious problem for state officials who wish to seek modification of the decree to eliminate a "non-remedial" population cap. Several subsequent decisions in the lower courts have taken a broad view of the Supreme Court's language, including two that involved prison population issues. [76] But the Fifth Circuit in *Lelsz v. Kavanaugh*, [77] a case *not* involving prisons, has read that language more narrowly, and we will summarize its analysis, without intending to suggest that the decision represents more than a minority view of current law.

Lelsz was a class action filed against officials of the Texas Department of Mental Health and Mental Retardation, alleging widespread abuses of mentally retarded patients and advocating their rehabilitation in the "least restrictive alternative" setting as a minimum standard of care. A federal district court order purported to enforce a consent decree between the class and the state by requiring the state to furlough a specified number of class members from institutional to "community care" centers by a certain date.

The class argued on the basis of *Local No. 93* that the order was proper because a federal court is not barred from enforcing a consent decree that provides broader relief than the court could have awarded after trial, but the Fifth Circuit rejected that argument. It interpreted the language in *Local No. 93* to address only the *entry* of a consent decree and not a court's own, different order *enforcing or modifying* the decree over the objection of a party. In the latter case, a court would no longer have the consent of the parties to rely on and instead would have to "fall back on its inherent jurisdiction." The court would then be faced with the Supreme Court's own acknowledgment that a court cannot modify a decree inconsistently with underlying law. [78]

The Fifth Circuit also stated that permitting enforcement of a consent decree that does not redress a constitutional violation allows a court to award relief on what amounts to a state law claim against a nonconsenting state, in violation of the Eleventh Amendment. [79] That is, the consent decree itself does not represent a federal right that *can* be enforced against the state

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75/ *Id.*

76/ *See Duran v. Carruthers*, 885 F.2d at 1491 (affirming denial of motion to vacate, *inter alia*, decree provision banning double celling); *Badgley v. Santacroce*, 800 F.2d 33, 38 (2d Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987) (considering civil contempt for violation of cap); *cf. Kozlowski v. Coughlin*, 871 F.2d at 244-45 (decree concerned prisoners' visitation rights, where remedy was held to be related to constitutional violation). *See also* Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 Colum. L. Rev. 1796, 1809-10 (1988).

77/ 807 F.2d 1243 (5th Cir.), *reh'g en banc denied*, 815 F.2d 1034 (5th Cir.) (7-7 vote), *cert. dismissed*, 483 U.S. 1057 (1987).

78/ 807 F.2d at 1252. The Fifth Circuit cited a part of the opinion in *Local No. 93*, 478 U.S. at 527-28 (discussing *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561 (1984)), in which the Supreme Court distinguished between entry of a decree by consent and an attempt to modify the decree over the objections of one party.

79/ 807 F.2d at 1252 (citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984) ("*Pennhurst II*")).

despite the Eleventh Amendment. [80] Plainly, those aspects of the decree that do redress constitutional violations may be enforced, but a court does not thereby obtain pendent jurisdiction to enforce non-remedial aspects of the decree. [81]

In addition, the Fifth Circuit noted the Supreme Court's statement in *Local No. 93* that a consent decree must spring from and serve to resolve a dispute within the court's subject matter jurisdiction, and concluded that *Local No. 93* would not apply at all if a district court had no jurisdiction because of a state's Eleventh Amendment immunity. The court in *Lelsz* held that the state had not knowingly and intentionally waived its Eleventh Amendment immunity, because the controlling Supreme Court decision making that immunity clear had not yet been rendered when the waiver was supposed to have occurred. [82] Waiver is, of course, a serious problem for any state seeking to resist enforcement of a decree. Despite the quasi-jurisdictional nature of the Eleventh Amendment, the defense may be waived by a state's failure to assert it at trial and on direct review, [83] and a state's consent to a decree is itself sometimes considered a waiver, [84] assuming that the state legal officer has the legal authority under state law to bind the state to the terms of the decree. [85]

As we have noted, the decision in *Lelsz* represents the minority view, and one other court has criticized the Fifth Circuit's distinction between entry and enforcement or modification as "untenable." [86] Several circuits, however, have not had the opportunity to consider how *Local No. 93* affects the modification of a non-remedial decree. Whatever their conclusion, the issue may ultimately have to be given further refinement by the Supreme Court.

80/ If a consent decree that was not based on federal rights were transformed into a federal right simply by virtue of its being a federal judgment, that would give consent decrees "a life of their own virtually outside the law." *Id.* at 1253.

81/ *See id.* at 1252. The Fifth Circuit itself has clarified that *Lelsz* does not bar enforcement of provisions based on federal law. *See Ibarra v. Texas Employment Comm'n*, 823 F.2d 873, 877 (5th Cir. 1987); *Lelsz v. Kavanaugh*, 824 F.2d 372, 373 (5th Cir. 1987).

82/ 807 F.2d at 1253 (citing *Pennhurst II*, *supra*). We note that, for purposes of modifying prison caps, this is the second possible basis for a claim of a change in law, the first being *Rhodes v. Chapman* for older decrees.

83/ *See Patsy v. Bd. of Regents*, 457 U.S. 496, 515 n.19 (1982) (since Eleventh Amendment is sufficiently jurisdictional in nature, it may be raised for the first time on appeal, but because it may be waived, it need not be raised and decided by Supreme Court on its own motion).

84/ *See Kozlowski v. Coughlin*, 871 F.2d at 244.

85/ *See Washington v. Penwell*, 700 F.2d at 573 (Oregon attorney general could not bind legislature to appropriate funds); *cf. Morgan v. South Bend Community School Corp.*, 797 F.2d 471, 477-78 (7th Cir. 1986) (lack of authority to settle claim). *But see Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 678 F.2d 470, 475 (3d Cir.), *cert. denied*, 459 U.S. 969 (1982).

86/ *Kozlowski v. Coughlin*, 871 F.2d at 244.

III.

IMPACT OF COURT-ORDERED POPULATION CAPS ON PUBLIC SAFETY AND PRISON OPERATIONS

Public Safety and Public Protection

Court-ordered population caps have an adverse effect on public safety. Americans count on an effective criminal justice system to police our streets, deter crime, prosecute offenders, and punish the guilty. When we vigorously enforce the law we achieve a number of related goals: we get offenders off the streets and prevent them from committing crimes; we direct those in need of drug treatment to help they might not have sought on their own; and we declare that offenders will be held accountable for their illegal actions.

Failure to achieve these goals compounds the costs of crime. Those costs involve more than simply dollars and cents; the physical and emotional trauma of crime victims, which is perhaps the primary cost of crime, is difficult to value in such terms. [1/] In 1988, according to the National Crime Survey, there were 35.8 million crimes committed against American households or individuals aged 12 or older, including 5.9 million violent crimes (rape, robbery, simple assault, or aggravated assault) and almost 2.3 million household burglaries. [2/] There were also more than 20,000 murders in 1988. [3/] Violent crime and the fear of crime affect our decisions about where to live, where to send our children to school, and where to let them play. In many poor minority areas, crime and fear exact a heavy toll on the economic, educational, and social conditions required for realizing the American promise of advancement through personal effort. Elderly residents in inner cities may be virtually imprisoned in their homes by the fear of crime. School children skip after-school activities that might keep them after dark, and walk directly home from school with their heads down for fear that their innocent glances might be misunderstood as hostile by neighborhood gangs. Businesses desert crime-infested neighborhoods, often leaving unemployment and increased poverty in their wake. [4/]

1/ Direct outlays for crime, including criminal justice, private security, and victim costs were estimated at $100 billion in 1983. These estimates understate the actual costs, because they do not account for pain and suffering by victims or the increased risk of death at the hands of criminals. Zedlewski, *Making Confinement Decisions*, U.S. Department of Justice, National Institute of Justice, July 1987, at 2 ("Research in Brief"). One study that took these intangibles into account estimated annual victim costs alone at almost $93 billion in 1985 dollars. Cohen, *Pain, Suffering, and Jury Awards: A Study of the Cost of Crime to Victims*, 22 Law and Soc'y Rev. 537, 539 (1988).

2/ U.S. Department of Justice, Bureau of Justice Statistics, *Criminal Victimization 1988*, October 1989, at 3. The figures include both completed and attempted crimes.

3/ *Crime in the United States 1988*, *supra* ch. I note 15, at 47 (murder figure includes non-negligent manslaughter).

4/ *See* Stewart, *The Urban Strangler: How Crime Causes Poverty in the Inner City*, Pol'y Rev., Summer 1986, at 6.

Numerous studies have concluded that the risk of punishment and the costs to the offender associated with committing crimes do deter criminal behavior. [5/] Strong criminal sanctions not only deter but also incapacitate offenders. Estimates from the past three decades of research place the incapacitative effects of imprisonment at between 10% and 30% of potential crimes. [6/] Incapacitation is clearly of great importance to public safety, since most prisoners have committed other crimes, and will likely commit others when released. Almost 82% of state prisoners in a recent study had been previously sentenced to incarceration or probation, many of these for violent crimes, [7/] and a study of inmates' self-reported crimes found that those convicted had committed numerous other crimes for which they had escaped detection or punishment. [8/] Another study estimated that 68,000 of 108,580 persons released from prisons in 11 states in 1983 were rearrested within three years and charged with more than 326,000 new felonies and serious misdemeanors, including about 50,000 violent offenses. [9/]

The states bear the ultimate responsibility for incarcerating offenders, but court-ordered prison population caps, to the extent they make incarceration for a serious offense less likely or reduce the length of time served, weaken the deterrent and incapacitative effects of incarceration and may result in an increase in crimes committed. As one example, in an effort to comply with a court order, Florida has instituted an early-release program. A recent study of that program by a Florida newspaper looked at a sampling of almost 4,000 inmates who had been released early during a two-year period. It found that almost one-fourth were rearrested during that same period at a time when they would otherwise have been in prison. The 950 inmates rearrested were charged with committing 2,180 new crimes, including 11 murders or attempted murders, 63 armed robberies, 6 sexual assaults, 7 kidnapings, 104 aggravated assaults, 199 burglaries, and 451 drug offenses. The study found that 33 inmates were released early, rearrested, convicted, incarcerated, released early again, rearrested again, convicted again, incarcerated again, released early a third time, and rearrested a third time, all within the two-year period studied. In fact, the inmate whose 1972 lawsuit led to the court order now says that the population cap is too low and urges that the prison system be allowed to house more inmates. As the authors observed about the program, "Early release [credit] has nothing to do with good behavior. * * * Inmates don't need to work for it or to perform heroic deeds. They get it simply because they are in a prison system that is forbidden by federal court order from crowding cells." [10/]

5/ *See generally* Nagin, *General Deterrence: A Review of the Empirical Evidence*, in *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* 95-139 (A. Blumstein, J. Cohen & D. Nagin eds. 1978).

6/ Visher, *Incapacitation and Crime Control: Does a Lock 'Em Up Strategy Reduce Crime?*, 4 Justice Q. 513 (1987). One recent study estimated the incapacitative effect of incarceration -- the "prevented crime rate" or rate of additional reported crimes that would have occurred had the inmates been free in the community -- to be between 17.9% and 34.7% for burglaries and between 20.5% and 42.5% for robberies in 1982. *See* 1 *Criminal Careers and "Career Criminals"* 124 (A. Blumstein, J. Cohen, J. Roth & C. Visher eds. 1986) (discussing study).

7/ *See* p. 6, *supra*.

8/ *See Making Confinement Decisions*, *supra* note 1, at 3-4 (discussing 1982 Rand Corporation study).

9/ *Recidivism of Prisoners Released in 1983*, *supra* ch. I note 18, at 1.

10/ Vosburgh & Holton, *8 Taps and Computer Decides Who Gets Out*, Orlando Sentinel, August 14, 1989, at A-1; (continued...)

Even in states without early release programs, population caps have had an effect on prosecutors, who are acutely aware of the problem of prison crowding. In a 1986 survey of prosecutors, with 225 responding, 24% ranked prison crowding and 15% jail crowding as the most significant problem in their criminal justice system. [11/] Prosecutors have continued to seek indictments of violent offenders, despite prison overcrowding, but in jurisdictions where options other than prison are available for certain non-violent offenders, prison caps may put prosecutors under pressure to limit their recommendations of lengthy incarceration to only the most serious offenders and to acquiesce in non-incarcerative sanctions even if not the most appropriate sentence for the particular offender.

In addition, some judges have altered their sentencing practices in response to inmate population increases. In a survey taken in 1983, 15 of 31 state judges chosen for their knowledge of the effects of prison crowding reported that overpopulation had been a factor in the sentencing decisions of felony court judges in their states. Some indicated that judges were trying to use alternatives to incarceration, although others noted a resistance to any changes in sentencing based on prison population. [12/] To the extent judges have to consider prison crowding, they are able to give less weight to the most appropriate sanction based upon the conduct of the individual offender.

Finally, the effects of crowding have been felt throughout the entire law enforcement system, from the agent in the field to the police officer on the beat. When lesser offenders are given probation because jail or prison space is lacking, law enforcement tends to avoid committing resources to these "futile" cases out of concern that the more serious cases will go unprosecuted. The result for the public is anger, frustration, and more victimization.

Prison Operations

Court-ordered population caps also have a harmful effect on the operation of prisons. These caps have added substantial stress to a corrections system that was already severely strained. Caps imposed on a single prison have often required a systemwide shift of inmates and resources in response. Moreover, population caps are rarely the only aspect of court orders. Frequently, overcrowding is little more than a legal fulcrum on which the lever of judicial intervention rests, and the resulting population caps are accompanied by wide-ranging court orders seeking to

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10/(...continued)
see Vosburgh & Holton, *Release Outrages Inmate Whose Suit Started It All*, Orlando Sentinel, August 13, 1989, at A-15 ("I have a 20-year-old daughter in Orlando. I don't want no creepo-weirdo-sexo getting out in Orlando and going after her."); Vosburgh & Holton, *Florida Prison Failure Churns Out Crime Before Its Time*, Orlando Sentinel, August 13, 1989, at A-12. A follow-up study conducted in October 1989, eight months later, found that the number of early releases who were rearrested during the period in which they would otherwise have been in prison had risen from about one-fourth of those studied to slightly over 31%. Vosburgh, *Florida's Early Releases: Flood of Rearrests May Sink Crowded Prisons*, Orlando Sentinel, December 17, 1989, at A-1.

11/ H. Nugent, & J. McEwen, *Prosecutors' National Assessment of Needs*, U.S. Department of Justice, National Institute of Justice, August 1988, at 3 ("Research in Action").

12/ Finn, *Judicial Responses to Prison Crowding*, 67 Judicature 318, 322-23 (1984).

respond to a broad array of conditions of confinement. Often in these cases, the courts appoint special masters or other "quasi-executive officers" responsible to the court to oversee compliance not only with the cap but with all aspects of the order. [13]

Special masters are appointed by the court and serve as agents of the court in the construction and implementation of remedies. Their power and its limitations are defined by the court in an order of reference, subject to the very general guidelines in Rule 53 of the Federal Rules of Civil Procedure. The scope of a master's involvement in a prison system therefore depends on the basis for the lawsuit that led to his appointment. Thus, some court orders and the resultant masterships are involved with a specific policy, procedure or condition, such as medical care or discipline in a specific institution. Others relate to a single issue that stretches across a number of institutions. Of greater concern, the continued misunderstanding of the "totality of the circumstances" doctrine [14] encourages courts to issue broad orders, and the masters appointed pursuant to those orders can become minutely involved in all aspects of correctional policy, ranging from the minimum allowable temperature of the food to the maximum number of days an inmate can be sentenced to segregation.

Like the orders on which they are founded, masterships sometimes appear to be without end. Although courts usually indicate a willingness to suspend the mastership when the system has been brought into substantial compliance with the order, the court often defers to the master's judgment on compliance. [15] As a result, some masterships have lasted as long as ten years. [16] It is therefore hardly surprising that the far-reaching and prolonged involvement of masters in the operation of prisons has heightened uneasiness about the involvement of courts in the management of institutions. [17]

The involvement of the courts in the management of prisons tends to interfere in long-term policymaking, and in budgeting and planning for the construction and renovation of prison space, which often requires two budget cycles. Courts are not institutionally designed to consider the long term; they are set up not to determine systemwide policy or to plan future operations but only to decide individual cases and individual rights. When the courts impose requirements and procedures on a prison, they do so from outside the prison system, often with insufficient concern for its budgets, personnel, programs, and security, all of which are critical elements of corrections.

In some cases, the courts have required administrators to adhere to population ceilings, even though the administrators lacked the resources and support to do so. The District of

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[13] The appointment of a master is no longer a rarity. By one account, there were 9 states whose entire prison systems were operating under the watch of a special master in 1988. Masters also served in seven states where individual institutions were under court order and in approximately 65 jail systems. B. Porter, *Order by the Court: Special Masters in Corrections* 4 (1988).

[14] *See* p. 15, *supra*.

[15] *Order by the Court*, *supra* note 13, at 26.

[16] *Id.* at 9-10.

[17] U.S. Department of Justice, National Institute of Corrections, *Handbook for Special Masters -- Judicial Version* 19 (1983).

Columbia offers an extreme example. Last June, the District defeated a legal challenge to construction of a new facility. With four facilities operating under court-ordered population limits at the time, the District was housing more than 2,700 prisoners in federal prisons and prisons in other states. In addition, the District was paying approximately $14,000 per day in fines for exceeding the population caps. These and other factors raised the 1986 cost estimate of $50 million for the new prison facility to more than $85 million. [18/]

Dade County's correctional facilities had an influx of Cubans from the Mariel boatlift in 1980. In less than a year, the county found itself in contempt of a federal court order to reduce inmate population. The county was faced with an ultimatum: if it could not reach the court-ordered limit within 60 days, it would be required to pay a fine of $1,000 per day. Through an agreement with federal Bureau of Prisons officials, the county reduced its jail population to the court-ordered limit by the 60th day. However, the next day its jail population exceeded the limit and continued to do so for the next four years. [19/]

Corrections administrators have looked to various forms of pre-trial and post-conviction release in their efforts to relieve prison crowding and to comply with any population limits that a court may have ordered. Responses to a recent survey indicate that their approaches have ranged from the use of intensive supervision in jail parole programs to a system that permits the sheriff to release an inmate on recognizance when the population reaches a specified level. [20/] Other strategies have included modification of "good-time" earnings rates, dynamic sentencing guidelines schemes that adjust sentencing to prison capacity, and various early release mechanisms such as sentence rollbacks, accelerated parole consideration, and even emergency releases, occasionally by executive commutation. [21/]

State prison systems have also resorted to "backing up" state-sentenced inmates in locally operated jails. At the end of 1988, 17 states reported a total of 14,314 state prisoners held in local jails because of crowding in state facilities. The number of state prisoners held locally because of crowding increased by 18.5% over that of year-end 1987. Overall, 2.5% of the state prison population was confined in local jails on December 31, 1988, because of prison crowding. [22/]

18/ Walsh, *D.C. Appeals Court Clears Way for Building of Prison Here; Panel Refuses to Block Gallinger Demolition*, Wash. Post, June 9, 1989, at A1.

19/ U.S. Department of Justice, Bureau of Justice Statistics, *Our Crowded Jails: A National Plight*, June 1988, at 7.

20/ Guynes, *Nation's Jail Managers Assess Their Problems*, U.S. Department of Justice, National Institute of Justice, August 1988, at 3 ("Research in Action").

21/ In 1985, 19 states reported nearly 19,000 early releases under one or more of these approaches. *Report to the Nation on Crime and Justice*, *supra* ch. I note 10, at 109; *see also* U.S. Department of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States 1985*, December 1987, at 48.

22/ *Prisoners in 1988*, *supra* ch. I note 2, at 3. Not surprisingly, this backup often shifts crowding to another level. *See, e.g., New York Considers Releasing Inmates*, N.Y. Times, March 30, 1989, at B4 (city corrections commissioner claimed city was "running out of rooms and options" because of backup of state prisoners).

Additionally, states have limited population growth through an expansion of probation. Intensive supervision and electronic surveillance of those offenders have increasingly been used by community supervision agencies. Between 1987 and 1988, the number of offenders electronically monitored nearly tripled and programs were operated by 33 states in 1988. 23/

In short, states have been forced to adopt a variety of approaches to respond to court-mandated prison population caps. Some of these approaches have been thoughtful, prudent, and valuable; some, unfortunately, have not. The judicial focus on individual cases in isolation, without regard to systemwide or long-term repercussions, makes it more difficult to address prison crowding coherently.

23/ Schmidt, *Electronic Monitoring of Offenders Increases*, U.S. Department of Justice, National Institute of Justice, January/February 1989, at 2 ("NIJ Reports").

IV.

NON-JUDICIAL MEANS OF ADDRESSING PRISON CROWDING

Litigation, the threat of litigation, and the aftermath of litigation have been the dominant forces in American corrections for 20 years. Yet, for all involved and for society itself, litigation over prison conditions is an undesirable method for addressing problems. First, litigation requires the expenditure of considerable money and resources, which often could be better used in attempting to correct the problems that are the subject of the litigation. Agency and institution administrators are forced to spend substantial amounts of time on the litigation, which takes them away from their normal duties. Second, the adversary process may actually slow change by putting officials on the defensive and encouraging them to defend the status quo rather than implementing needed changes. If officials are discouraged from initiating major improvements while the case is pending, these improvements could be delayed for years. Third, court orders, even consent decrees, are frequently inflexible and unrealistically narrow. A population cap on a state prison may simply exacerbate overcrowding in other institutions in a system or in county jails.

This chapter will consider how prison administrators and public officials can avoid litigation over prison conditions. One of the most important approaches for this Administration involves expanding prison capacity. Other approaches involve improving prison management and programs to alleviate some of the negative effects of crowding, or using intermediate non-incarcerative sanctions as an alternative to unsupervised probation during periods in which new construction is not on line. Finally, several workable alternatives to litigation may be available.

Expansion of Correctional Capacity

The most direct method of reducing prison crowding without litigation is to increase prison construction. In 1988, federal and state correctional departments constructed 42 new facilities and 16,914 new prison beds at a cost of approximately $1.1 billion. Renovations and additions increased the total number of new beds to 29,022. [1/] For 1989-90, proposed construction costs are estimated at $3 billion for 120 new facilities and 76,000 new prison beds. [2/] As of May 1989, states had construction of 63,452 new beds underway, secured funding for 78,094 more, and requested funding for an additional 72,190. The Administration strongly supports states' expansion of their prison capacity and will further the expansion by providing funds and technical assistance for the design and planning of new or enlarged state prisons, although the responsibility for building them remains with the states. The Administration also supports the expansion of local jail capacity and will continue its assistance under the Cooperative Agreement Program, through which federal funds are awarded to local governments for construction and renovation of jail space in

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1/ G. Camp & C. Camp, *The Corrections Yearbook 1989* 25 (1989) (Criminal Justice Institute).

2/ Herrick, *Five Correctional Systems Seek $1 Billion*, 13 Corrections Compendium 11 (December 1988).

return for guaranteed bedspaces for the temporary use of persons in custody of the U.S. Marshals Service.

On the federal side, at the President's initiative, Congress has appropriated for FY 1990 approximately $1.4 billion for federal prison construction, increased by about $377 million in excess asset forfeiture funds in 1988 and 1989. The resulting construction is expected to add about 24,500 new beds in federal prisons -- an increase of about 75% over existing rated capacity. A part of this funding is likely to be used in expanding federal jail capacity, both by adding detention cells in federal prisons and by constructing additional Metropolitan Correctional Centers, which serve as federal jails in large cities.

Because expenditures for corrections construction are high and place a substantial burden on government budgets, federal, state, and local jurisdictions are considering innovative methods for reducing costs, while still producing institutions that can be operated safely and economically. Examples of such innovative methods are as follows:

* Under an amendment to the Comprehensive Crime Control Act of 1984, [3] state and local governments with correctional needs may obtain surplus federal lands and buildings at no cost. Surplus lands and buildings now include military bases closed under the Base Closure and Realignment Act. [4] Conversion of surplus federal properties is an Administration priority.

* A direct supervision design whereby corrections officers are stationed inside housing units with direct contact with inmates has been shown to reduce maintenance and construction costs. [5]

* Well-planned inmate labor programs can lower construction costs as well as provide valuable training and work experience for inmates. Several states have developed inmate labor programs to build correctional facilities. One such program in South Carolina cost 30 to 50 percent less than using private contractors or civilian labor. Another benefit is that inmates develop marketable skills and good work habits. [6] Prison authorities should be aware, however, that the use of inmate labor will not always decrease costs and at times may even increase costs.

3/ Pub. L. No. 98-473, title II, § 701, 98 Stat. 2129, (codified at 40 U.S.C. § 484(p) (Supp. V 1987)).

4/ Pub. L. No. 100-526, 102 Stat. 2623 (1988). *See also* National Defense Authorization Act for Fiscal Year 1989, Pub. L. No. 100-456, § 2819, 102 Stat. 2119 (1988) (Commission on Alternative Utilization of Military Facilities to be created to consider which underutilized military facilities could be used to house nonviolent prisoners or to treat nonviolent drug abusers); National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 2832, 103 Stat. 1660 (1989) (sense of Congress that Secretary of Defense should give priority to use as prisons and drug treatment facilities).

5/ Nelson, *Cost Savings in New Generation Jails: The Direct Supervision Approach*, July 1988, at 4-6 (published by U.S. Department of Justice, National Institute of Justice).

6/ Carter & Humphries, *Inmates Build Prisons in South Carolina*, December 1987, at 2, 6 (published by U.S. Department of Justice, National Institute of Justice).

* Modular construction -- use of prefabricated concrete units -- also may reduce costs. This fast-track approach enables completion of site preparation while the building components are poured and formed elsewhere. [7] An alternative form of modular construction employs steel cargo containers once used to ship bulky cargo. Using these containers, a 23-bed facility in Loudoun County, Virginia, was constructed in 13 working days at a total cost of $96,398. [8]

* "Lease-purchase" -- essentially, buying on installment -- enables state or local governments to raise capital funds quickly for construction of correctional facilities without increasing general obligation indebtedness through traditional financing methods. [9]

* Private management and ownership allows governments to pay for prison space through a contract fee, which comes out of annual appropriations and not from a debt-based capital budget. The merits of privatization remain hotly controverted.

* The transfer of existing prison design plans to new uses may help reduce design costs and speed the construction process, despite additional costs associated with adapting and altering the plans to the new use. It is important, however, that the design be consistent with the correctional strategy and programs at the new institution. [10]

Renovation and conversion of existing facilities may also be a cost-effective means of providing more prison space. This may be true even if the expected life of the renovated or converted facility is short, so long as renovation costs are sufficiently low, but whether renovation, conversion, or new construction is most beneficial will depend on the requirements in a particular case, a wide variety of financial considerations, and the availability of existing buildings.

Improved Prison Management and Programs

With effective prison management and high-quality programs in place, prison authorities may be able to counteract the negative effects of crowding and to administer the institutions under safe and constitutional conditions, thereby avoiding litigation.

A recent study of crowding in America's prisons established that effective management is

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7/ DeWitt, *Florida Sets Example with Use of Concrete Modules*, March 1986, at 1-5 (published by U.S. Department of Justice, National Institute of Justice).

8/ Stowell, *Prefab Jail Winning Praise*, The Free Lance - Star (Fredericksburg, VA), August 11, 1989, at 28.

9/ DeWitt, *California Tests New Construction Concepts*, U.S. June 1986, at 6-7 (published by U.S. Department of Justice, National Institute of Justice); *see generally* Chaiken & Mennemeyer, *Lease-Purchase Financing of Prison and Jail Construction*, November 1987 (published by U.S. Department of Justice, National Institute of Justice).

10/ *See generally* Quinlan, *From Arizona to South Carolina: Transfer of a Prison Design Model*, January 1990 (published by U.S. Department of Justice, National Institute of Justice). The National Institute of Justice's Construction Information Exchange has been created to make possible the transfer of information about successes from one corrections agency to another.

a key element in addressing problems presented in crowded facilities. [11] Effective managers are able to mitigate the negative effects of crowding through resourcefulness, communicating well with staff and inmates, and being carefully attuned to the prison environment.

One management technique that may be effective is unit management, a decentralized approach to corrections. It has been implemented in most federal correctional facilities and in a growing number of state correctional systems. Unit management divides a large institutional population into smaller and independent treatment- or personality-related groups, each under the supervision of a unit manager. The unit manager, as a department head, reports to the warden through the associate warden, thus keeping the organizational chain of command small, and allowing staff concerns and inmate problems to be addressed more easily. Unit management permits more staff to have offices in the housing areas, easily accessible to inmates. Because inmates are housed in different units and are identified with staff assigned to their units, a degree of unit pride and esprit de corps often develops. Experience has been that negative incidents are fewer and that both staff and inmates feel more comfortable and secure within a unit management structure.

A number of programs may also be effective in crowded prisons. For example, prison industries have proven over time to be particularly helpful, because they help to accustom inmates to the expectations and responsibilities of real-world jobs and to provide a productive way for inmates to spend time in which they would otherwise be idle. Some prison industry programs are so-called State Use Industries (SUI), which are operated by the prisons to produce goods and services for state and local governments. Increasingly, however, there are Private Sector Prison Industries (PSPI) programs, which are operated by private companies employing inmates to produce goods and services for sale on the open market. More and more, businesses are looking to prisons to address labor-shortage problems caused by demographic and social trends. In January 1987, there were 38 private-sector prison industry programs employing inmates of 26 prisons in 14 state correctional systems and two county jails. [12]

Education and training programs may also help to counteract the problems caused by prison crowding. Prisons have a disproportionate number of inmates with poor education. Whereas 85% of 20- to 29-year-old American males have completed high school, only about 40% of all jail and prison inmates are high school graduates. [13]

Finally, because the link between the use of illegal drugs and crime continues in prison, drug testing and treatment programs can help to break the cycle of drug use and crime by holding

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11/ *See generally* G. Camp & C. Camp, *Management of Crowded Prisons*, January 1989, at 43-47 (published by U.S. Department of Justice, National Institute of Corrections).

12/ *See* Auerbach, Sexton, Farrow & Lawson, *Work in American Prisons: The Private Sector Gets Involved*, May 1988, at 16 (published by U.S. Department of Justice, National Institute of Justice).

13/ 1 D. Bellorado, *Making Literacy Programs Work*, June 1986, at 2 (published by U.S. Department of Justice, National Institute of Corrections).

offenders accountable for their illegal behavior and by encouraging them to stop using drugs. [14] A reduction in drug use by inmates can have a dramatic effect on management of crowded facilities. The President has proposed legislation that would require states to adopt drug testing programs in their criminal justice systems as a condition of receiving federal criminal justice funding.

As for drug treatment, programs vary in quality and treatment methods. Effective programs match the treatment strategy to the user's particular psychological and drug dependency problems. Such programs offer a range of social services, counseling, medical treatment and job training to the addict, either directly or through cooperation with other agencies. [15]

Development and Use of Effective Intermediate Sanctions

Overcrowding forces many jurisdictions to choose between the sanction of imprisonment on the one hand, which exacerbates overcrowding, and unsupervised probation or no sanction at all on the other. Offenders involved in violent predatory crime and large-scale drug traffickers should be imprisoned, both to take them off the streets for significant periods of time and to deter other potential offenders. Although such sentences will put a strain on the prison system, the demands of justice and domestic security require them. Certain other non-dangerous offenders, however, during periods in which construction of new prison space continues, can be dealt with in ways that put less strain on the prison system, through intermediate sanctions that are more stringent and effective than unsupervised probation or no sanction at all.

Various states are using one or more intermediate sanctions, of which we will give some examples. We intend this list as a catalog and do not necessarily endorse any of them. Indeed, for some sanctions, the verdict is still out on whether they are effective, and it may yet be concluded that they are not.

Intensive supervision programs. "ISP's" are intensified, surveillance-oriented, community corrections programs with certain common elements: Probation officers have multiple weekly face-to-face contacts with offenders, collateral contacts with employers and family members, and frequent arrest checks. Monitoring activities concentrate on specific behavioral regulations governing curfews, drug use, travel, employment, and community service. Violations are often swiftly identified, and penalties are severe in response to new arrests and non-compliance with program conditions. ISP's may enable the authorities to reduce recidivism by keeping track of offenders who might otherwise be placed on unsupervised probation. The Department of Justice is providing grants to test the effectiveness of ISP's as an alternative to unsupervised probation for some offenders and as a means of protecting public safety. [16]

14/ Although over 50% of all inmates in state prisons in 1986 had used drugs in the month before they committed the offense (*see* p. 5, *supra*), only 11.1% of state prison inmates are involved in any kind of drug treatment or rehabilitation program. Chaiken, *In-Prison Programs for Drug-Involved Offenders*, July 1989, at 5-6 (published by U.S. Department of Justice, National Institute of Justice).

15/ *See generally* White House, *National Drug Control Strategy* 35-44 (September 1989) ("*Strategy I*").

16/ White House, *National Drug Control Strategy* 25 (January 1990) ("*Strategy II*"); U.S. Department of Justice, (continued...)

Home confinement or house arrest programs. These programs are a relatively new form of "intensified" supervision. The term "home confinement" applies to any judicially or administratively imposed condition requiring the offender to remain in his or her residence for any portion of the day. Enforcement techniques range from random, intermittent contacts by a supervision officer to continuous electronic monitoring, a technique that has expanded rapidly in recent years. While empirical evaluation studies are under way in several states, there is currently no significant research to document the success or failure of home confinement. The Department of Justice is continuing to monitor these studies to determine the effectiveness of home confinement.

Pre-release and work-release programs. These programs, which are widely used throughout the United States, conditionally release offenders from state correctional institutions to work at gainful employment or to take part in vocational or educational training in the community while serving the final portion of their sentence. It is of utmost importance that the public safety not be jeopardized by using these programs to convert incarcerative sanctions into non-incarcerative sanctions, and they are certainly not appropriate for offenders serving life terms. These programs may, however, be appropriate to reintegrate into community life certain non-dangerous offenders who are near the end of their prison terms. While there are no systematic descriptive studies of pre-release programs and little careful research regarding program effectiveness, it is a widely held view in state corrections that pre-release programs reduce recidivism and are less costly than continued incarceration.

Residential community corrections programs. "RCC's" are programs that house adult offenders who are ordered by criminal justice authorities to reside in a facility as a formal part of a sanction or supervision strategy. They are minimum-security facilities operated independently of a jail or prison, with security based more on program procedures and staff supervision than on physical restrictions. RCC's allow residents to leave the facility during the day for work, education, or community programs. Most programs stress inmate accountability. Selected state studies of the impact of RCC's on offender recidivism have demonstrated positive results, but no comprehensive research has been done on the effectiveness of the newer control-oriented RCC programs.

Shock incarceration programs. Popularly known as boot camps, these programs are creating interest among more and more states, although results are still preliminary. Boot camps may be able to "bring a sense of order and discipline to the lives of youthful, non-violent first-time offenders, and perhaps serve as a deterrent against future crimes." [17/] All programs are relatively brief; most last three to four months. All are designed for offenders who have not yet served time in a state prison. They stress strict discipline, obedience, regimentation, drill and ceremony, and physical conditioning, including manual labor. Participants are expected to learn teamwork and develop improved self-respect. They are housed separately from the general prison

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16/(...continued)
Bureau of Justice Assistance, *FY 1988 Report on Drug Control* 92-94. *See also* Byrne, Lurigio & Baird, *The Effectiveness of the New Intensive Supervision Programs*, 2 Research in Corrections 1 (September 1989).

17/ *Strategy I, supra* note 15, at 25.

population, although in some programs they are within sight and earshot of general population inmates.

Community service and public work. These requirements are often imposed in conjunction with intensive probation, house arrest, or heavy fines. If they are to be effective, there must be a means of enforcing community service orders and appropriate supervision of the work performed.

Restitution programs. Restitution requires the offender to provide financial repayment or, in some jurisdictions, services in lieu of monetary restitution, for the losses incurred by the victim. Use of these programs holds the offender accountable, not only to society in general, but to the victim. Critical elements of effective programs include aggressive follow-up to ensure collection, a means to encourage compliance, and sanctions for non-compliance.

Suspension of or ineligibility for public benefits and licenses. This may be an effective means of holding drug offenders accountable for their actions. [18/] The Anti-Drug Abuse Act of 1988 authorizes the suspension of eligibility for federal benefits for individuals convicted of a federal or state offense of distribution or possession of controlled substances. [19/] In 1986, states authorized suspension of such rights and benefits as the right to serve on a jury (31 states), the right to own firearms for a period of time (31 states), the right to hold public office (23 states), the right to vote (11 states), and eligibility for public employment (6 states), [20/] and the trend is clearly in this direction. Other benefits that might be suspended include student loans, grants, and government contracts.

Alternatives to Litigation

One other non-judicial means of addressing prison crowding is to provide alternatives to litigation by attempting to respond to inmate complaints in their incipiency through dispute-resolution procedures or even by permitting pre-emptive handling of problems before they occur. The following discussion mentions a few methods that some corrections authorities have found helpful in identifying and addressing legitimate inmate complaints and systemic problems before they degenerate into litigation. [21/]

Grievance procedures. Various kinds of grievance procedures were used in at least 41 state

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18/ *Id.*

19/ Pub. L. No. 100-690, § 5301, 102 Stat. 4310 (1988).

20/ U.S. Department of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 1986*, February 1989, at 6 ("Bureau of Justice Statistics Bulletin").

21/ Plainly, many inmates use litigation as a means of harassment, or at best as a hobby. *See, e.g., Free v. United States*, 879 F.2d 1535 (7th Cir. 1989). Grievance procedures are unlikely to deter or weed out frivolous claims brought by inmates intent upon abusing the court system. The result of this abuse is a tremendous waste of resources in the judiciary and the United States Attorneys' offices. Consideration of an appropriate remedy for this abuse, however, is beyond the scope of this report.

prison systems in 1986. [22] These procedures tend to address individual problems, rather than the major systemic problems that are usually at the root of litigation over prison conditions. However, even if a grievance system can resolve only individual complaints, it may serve a valuable role in helping to manage a crowded facility by providing inmates with an outlet for concerns and frustrations which, if not addressed, would further add to the stress of the crowded environment.

In addition, a grievance process, if properly structured, may provide useful systemic information. For example, the Washington State Department of Corrections gathers information regarding all informal complaints and formal grievances on a computer, and the central grievance coordinator's office reviews all of them. From both the computerized data and the personal observations of key staff, cumulative reports are prepared identifying trends and apparent problem areas.

Interest in grievance procedures peaked around 1980 with the enactment of the Civil Rights for Institutionalized Persons Act (CRIPA), [23] which requires the Attorney General to adopt minimum standards for state prison grievance procedures. The procedures are optional for the states and localities, but when the Attorney General (or applicable federal district court) determines that grievance procedure meets the minimum standards, the court may continue an inmate's § 1983 action for at most 90 days to require the inmate to exhaust certain administrative remedies. In practice, this incentive for participation is usually insufficient; only six states' systems have been certified under CRIPA, along with three jails. [24]

Ombudsman. An ombudsman is an individual appointed specifically to investigate inmate complaints. As of 1986, 15 systems had an ombudsman or equivalent official in place. [25] While some ombudsman's offices operate from inside the correctional agency, more typically they are totally independent of the agency. However, there is a tension between increased independence and an effective relationship with the institution and its operations. The ombudsman often deals with individual inmate grievances; nevertheless, this can often enable him to perform the important function of making more general observations about the operations of a prison based on the nature and substance of individual inmate complaints.

Internal audits. An audit is an administrative mechanism involving periodic inspections designed to identify problems when the correctional agency has well developed policies and procedures, post orders, and other written directives in place. The function of the audit is to determine the extent to which these policies, procedures, orders, and directives are being followed. Auditors tend to function independently of the individual institutions in a prison system and to be

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22/ Hunzeker, *Inmate Grievance Procedures*, 11 Corrections Compendium 9 (March 1987).

23/ Pub. L. No. 96-247, 94 Stat. 349 (1980), (codified at 42 U.S.C. § 1997 *et seq.* (1982)).

24/ In addition, applications from three more states and one jail are pending. Twelve other states have applied, but eight have been denied and four applications are inactive. One reason for these small numbers is that both statute and regulations require that inmates participate in the grievance resolution process; only nine states currently permit inmate participation. In addition, administrators may be reluctant to allow outside review; currently, only twelve states have such review.

25/ *Inmate Grievance Procedures*, *supra* note 22, at 9.

answerable directly to the agency head or other high-level official. The theory is that the auditors should have sufficient authority to complete their tasks and that the prison system should be in a position to respond to the greatest extent possible to the findings of the audit. In some states, audits are performed by officials known as inspectors general, who also conduct ad hoc inspections and investigations.

External audits. These audits, as the name suggests, are conducted by persons outside the prison system. The principal external review system currently in effect is the accreditation process run by the American Correctional Association. [26/] The ACA, through its Commission on Accreditation, has adopted comprehensive sets of standards for adult correctional institutions and for other types of facilities and programs. The accreditation process takes 12 to 18 months, and culminates with an inspection by a team of trained auditors. Accreditation, if granted, lasts for three years. As of mid-1989, approximately 300 institutions have contracted with ACA to participate in the accreditation process, up by about 100% from 1979. [27/]

Professional standards such as those of the ACA are generally more stringent than constitutional minima. Prison systems that participate in the accreditation process should understand that a failure to meet ACA standards does not necessarily indicate inadequacies of constitutional magnitude. But the effort to meet ACA standards may nonetheless be useful in making it more likely that the prison system will at least reach constitutional minima.

The accreditation process gives an agency an additional incentive to review its basic operating policies and procedures in an effort to meet the professional standards. In addition, the agency must develop documentation to show that the policies and procedures are being followed. This may force an intensive self-examination and provide an agency with a great deal of information about itself that it did not previously know.

An advantage of external audits is that they are conducted by teams of experienced auditors, who can provide an independent, non-adversarial evaluation. Since these auditors frequently have evaluated many facilities, they can bring a broader perspective than is available within an agency. On the other hand, internal audits have certain advantages over external ones. The internal auditors may know the prison system better than external inspectors, and internal audits may appear less adversarial to prison employees and engender greater cooperation.

Public inspections. Public inspection agencies exist in at least one state (New York), which has created a separate agency charged with developing and enforcing standards for both prisons and jails. This state agency, the New York State Commission of Correction, conducts routine inspections of state prisons on approximately an annual basis and has the power to conduct inves-

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26/ The other major accreditation program is operated by the National Commission of Correctional Health Care (NCCHC), which is a continuation of a program begun by the American Medical Association. Although not covering the range of issues addressed by ACA standards, NCCHC's Standards for Health Care in Prisons address a topic (health care) that is almost inevitably part of major litigation over conditions. The actual accreditation process is similar to that of ACA.

27/ Report to the Delegate Assembly of the American Correctional Association, 119th Congress of Corrections, August 1989, at 14.

tigations following inmate deaths, in response to complaints, or in other emergency situations. While the Commission has statutory power to go to court to enforce compliance with its regulations, it has never had to do so with state facilities, despite a large increase in prison population in recent years. [28/]

Public-agency inspections have many of the same advantages of external audits, of which they are a subgroup. In addition, these inspections may help the prison authorities to resolve their problems by offering technical assistance and another experienced perspective. Finally, the public-agency report may carry greater weight with legislatures than an internal report of a corrections agency.

28/ New York State prison population increased by about 125% between December 31, 1980 and June 30, 1989, and increased by about 15% during the final year of that period. *See Prison Population Jumps 7.3 Percent in Six Months*, *supra* ch. I note 1, at 4-5.

CONCLUSION

The dramatic increase in prison population indicates that more criminals, more violent criminals, more drug offenders, are being caught and punished. We firmly support the removal of these predatory criminals from the streets as a means of protecting public safety. But incarceration also creates on-going societal responsibilities:

* The Administration has taken a leadership role in the funding of about 24,500 additional prison beds for the federal prison system, representing an increase of approximately 75% over existing rated capacity, and in funding additional temporary detention space for both federal and state inmates through the Cooperative Agreement Program. We commend the states and localities for their own efforts at construction and renovation, and urge them to continue to give priority to funding the creation of new prison and jail beds.

* Corrections departments should consider necessary improvements in prison management to increase the likelihood of meeting constitutional minimum standards and avoiding judicial intervention. We will provide technical assistance to any state or local department wishing to draw upon our reservoir of managerial experience and know-how.

* Public officials should develop effective intermediate sanctions to enable prison authorities -- on an interim basis during construction of new prison space -- to manage overcrowding by reserving existing prison space for those offenders who would threaten the public safety if not incarcerated. Prison crowding should not provide the impetus for early release of violent predatory criminals or major drug traffickers.

The difficulties of administering overcrowded prisons are daunting enough without unnecessary intervention by federal courts and their appointed special masters. While the courts have an important role in ensuring that prison conditions do not deprive inmates of the "minimal civilized measure of life's necessities," courts do not have a license to reform the "restrictive and even harsh" conditions that are "part of the penalty that criminal offenders pay for their offenses against society." The Supreme Court has made it clear that the minimum standards established by the Constitution are modest. The Constitution does not prohibit double celling. It does not prohibit crowding. It does not mandate comfortable prisons.

Even when prison conditions do not meet constitutional minima, federal courts do not possess unlimited power to impose remedies. The Supreme Court has held that remedies must be narrowly tailored to cure the specific condition that violates the Constitution. Population caps are rarely justifiable and should be only as a last resort; there is ordinarily a narrower remedy available to cure a specific sub-constitutional condition.

Insofar as population caps prevent incarceration of violent and predatory criminals, they are a serious threat to public safety. Crime is a social pathology of the highest order. The public has

a limited ability to stop crime and can avoid crime only at great cost. Governments have an obligation to ensure public safety by building sufficient prison space to house those who need incarceration. Courts have an obligation not to make matters worse by imposing caps on prison population unless it is clear that those caps are essential to curing unconstitutional, barbaric prison conditions.

APPENDIX A

RECOMMENDATIONS AND POSSIBLE STRATEGIES

This report has already identified numerous strategies that public officials may find effective in addressing the problem of prison crowding. A top priority for this Administration is construction or renovation of additional prison space. Among the possible strategies for construction and for containing the costs are:

* Consider the use of a direct supervision design, in which corrections officers are stationed inside housing units with direct contact with inmates.

* Consider the use of inmate-labor programs to lower construction costs as well as to provide valuable training and work experience for inmates.

* Consider the use of modular construction to reduce costs.

* Consider the use of "lease-purchase" arrangements to finance construction.

Other possible housing strategies include:

* Greater use of temporary structures to hold non-dangerous inmates for whom prison space is not yet available.

* Consider whether existing prison design plans can be economically adapted to new projects consistent with the prison's management strategy.

* Further study of the costs and benefits of contracting out to the private sector for the design, financing, building, and management of prison and jail facilities.

* Develop a national bed-space locator system that will quickly identify which beds are available in other systems to house inmates on a temporary or emergency basis. Consider whether an inter-state compact (as currently exists for probation, parole, and the reciprocal enforcement of child support orders) would be the appropriate means of implementing this system.

* Give priority to converting surplus federal property, including underutilized military bases, into state and local prisons and temporary detention facilities.

Development of better management tools for prison administrators is also of great importance. Among the possible strategies are:

* Develop a unit management program to mitigate the effects of overcrowding.

* Require all inmates who are physically and mentally able to perform work, whether maintenance of the physical plant or prison-industries work manufacturing marketable products.

* Implement drug treatment and drug testing programs to break the cycle of drug use and crime and to enable better management of crowded facilities.

* Develop internal procedures that allow inmate complaints to be heard before they degenerate into disturbances or litigation and at the same time provide authorities with systemic information identifying potential problem areas.

* Develop effective sanctions greater than unsupervised probation to permit careful supervision of non-dangerous offenders during periods in which additional prison construction is not yet complete.

Other strategies include:

* Convene a national symposium for federal and state judges on the problems of prison and jail crowding. If judges are briefed on the short- and long-term plans of the Administration -- and state or local governments -- for dealing with crowding, some of those judges may be less inclined to impose onerous population caps.

* By statute or amendment to Rule 53 of the Federal Rules of Civil Procedure, limit the special master's authority in the adminstration of a court order to prevent the master from interfering in the management or operation of a prison.

* Encourage alternatives to litigation by providing states with a real incentive to upgrade administrative remedies for prisoners. Amend the Civil Rights for Institutionalized Persons Act to lengthen the period during which exhaustion of administrative remedies would be required in § 1983 actions by state prisoners and to eliminate the specific minimum standards imposed, instead requiring exhaustion whenever the state can show the court that its remedies are fair and adequate.

APPENDIX B

THE FEDERAL PRISON SYSTEM: EFFECTIVE MANAGEMENT WITHOUT JUDICIAL INTERVENTION

The Department of Justice is charged with the responsibility for the confinement of federal offenders and the administration of the federal prison system. The Department carries out this responsibility through the Bureau of Prisons, whose director is answerable directly to the Attorney General.

The Bureau of Prisons faces a problem of crowding even more daunting than that confronting many state correctional agencies. The federal inmate population has grown by about 34,700 inmates, or 142%, since 1980. As of December 31, 1989, the population stood at 59,049, the largest figure in the history of the Bureau of Prisons. The total actually housed in federal facilities was 53,348, about 164% of rated capacity. Unlike many state agencies, however, the Bureau has successfully avoided judicial intervention. The following discussion explains how the Bureau has been able to maintain its conditions of confinement above constitutional minima despite substantial overcrowding.

Management

Foremost among the reasons for the Bureau's success is high-quality management. Courts that see professional and competent prison management are more likely to defer to the administrators' judgment. Through the years, the Bureau has emphasized several basic management tenets and practices that have contributed to its success in attaining judicial deference in prison litigation and in avoiding judicial intervention.

Credibility. The Bureau has a firm belief in placing its policies and procedures in writing. Staff are asked for their comments on policy drafts, but are required to follow policy once it is issued.

Preparedness. The Bureau tries to plan a strategy in advance for dealing both with everyday occurrences and with those that are unexpected. As an important component of the Department of Justice, the Bureau works closely with other parts of the Department in responding to emergencies such as the recent Oakdale and Atlanta disturbances, and formulates its policy in close cooperation with the Department's Office of Policy Development.

Streamlined Organization. There is only one layer of authority -- the Regional Director -- between the Warden and the Director of the Bureau, who in turn reports directly to the Attorney General. This streamlined organizational structure ensures that, when a problem arises, it can be addressed effectively and quickly.

Rotation of Top Managers. The Bureau rotates its top managers -- wardens and associate wardens -- into regional and central office positions and between individual prisons within the system. This practice provides a uniformity of operations within the Bureau.

Managerial Visits. The Bureau's top management -- the director, regional directors, assistant directors, and general counsel -- visit many institutions each year, meet with the warden and staff, and tour the facility. These visits serve to reinforce the Bureau's recognition of the importance of the institution and the staff who work there.

Use of Legal Staff. The Bureau's legal staff is expected to have a vital, interactive role not only with top management but with all Bureau staff in dealing with day-to-day legal issues.

Hiring. The Bureau's hiring process for institutional personnel is designed to screen out unqualified or corruptible applicants by requiring an integrity interview, a panel interview, a fingerprint and initial background check, a drug test, vouchering, a full field or limited background investigation, and a physical examination.

Employee Training. New prison employees undergo a three-week training program at the Federal Law Enforcement Training Center in Glynco, Georgia, which they must complete successfully. Training covers academics, self-defense, and the use of firearms. Employees also receive 40 hours of refresher training each year. Careful training enables the Bureau to operate with a smaller staff; the Bureau's inmate-to-officer ratio is 9:1, representing a far leaner staff than the average of 5:1 for all prisons in the United States.

Employee Performance Review. Staff are held to high standards, and their performance is reviewed at least annually. Employees who are found to have violated the Bureau's Standards of Employee Conduct and Responsibility are subject to disciplinary action, and sufficiently serious incidents are referred to the Bureau's Office of Internal Affairs for investigation.

Classification and Program Reviews. Shortly after arriving at a federal prison, each inmate's custody classification, security level, work assignment, recommended programs, and responsibilities are reviewed by the inmate's unit team. The inmate is present and is encouraged to participate. Each inmate is given periodic program reviews at least twice annually to assess progress and to make possible changes in classification.

Security-Designation System. Each inmate is assigned a security level based on factors that include severity of offense, percentage of time served, escape history, and pre-commitment status. A designation of an appropriate Bureau institution is then based upon these factors and other management considerations such as judicial recommendation, age, release residence area, medical health, and degree of crowding. The security-designation system enables the Bureau to maintain more homogenous populations, which can be more easily managed than undifferentiated populations.

In overcrowded prisons, it is courting disaster to confine inmates to their cells instead of providing them with useful ways of occupying their time. The Bureau of Prisons allows inmates to engage in a variety of activities, perhaps the most beneficial of which is the inmate work program. This program is designed to reduce inmate idleness, to allow the inmate to improve or develop useful job skill and work habits that will help him in post-release employment, and to ensure the completion of the activities necessary to maintain the day-to-day operation of the institution.

It is the firm policy of the Department of Justice that all sentenced inmates in Bureau facilities who are physically and mentally able to work must participate in the work program. Each such inmate is assigned to an institutional or industrial work program, or in certain cases an educational or vocational program. Ordinarily, the work day is at least seven hours. The inmate is held to standards of performance; he is expected to perform work diligently, conscientiously, and safely. An inmate may be eligible for performance pay for work performed satisfactorily or better, and may be recommended for a bonus for exceptional performance.

The industrial work program involves a work assignment in Federal Prison Industries, Inc. (UNICOR). UNICOR, a wholly owned government corporation established in 1934 as part of the Bureau of Prisons, [1/] employs over 13,000 inmates, or 39% of the working population in nearly 80 factories at over 40 prison locations. Assignments generally consist of a full-time job for which the inmate receives pay and some benefits. Inmates engage in factory work, or in basic business office, warehousing, and quality assurance functions that are generally comparable with those in private industries. The products made in UNICOR factories meet federal or other applicable standards. Sales are restricted by law to departments and agencies of the federal government. Work in UNICOR factories is extremely valuable in keeping inmates as busy as possible, while providing them with skills they can continue to use upon release. In some instances, inmates get their first exposure to the world of work, in particular its duties and responsibilities, and its rewards of pride and accomplishment.

Traditionally, UNICOR earnings have completely funded the UNICOR operation. UNICOR earnings have also been used in carrying out vocational training and general education programs, awarding inmates performance pay, and funding the inmate accident compensation programs.

In addition to work programs, almost every prison in the system provides inmates with extensive periods of time outside their cells or rooms in which they can participate in productive or recreational activities. Inmates typically are confined to their cells or rooms for only 6-8 hours a day. The Bureau also offers the opportunity for inmates to pursue their religious beliefs and to participate in a variety of vocational training programs and education programs, including Adult Basic Education, English as a Second Language, High School Equivalency (GED), occupational

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1/ The Corporation is administered by a board of directors appointed by the President to serve without compensation. The Board consists of representatives of industry, labor, agriculture, retailers, consumers, the Department of Defense, and the Attorney General.

and postsecondary courses, and college courses. Recreation programs, including physical, cultural, and hobbycraft activities, are also available.

Physical Plant

The design and maintenance of a prison's physical facilities can make a big difference in minimizing the effects of overcrowding. The Bureau employs staff architects to design institutions that enhance openness, reduce physical barriers, and enable staff to supervise inmates in the most cost-effective manner. The designs incorporate American Correctional Association standards, as well as sound correctional practices based on the Bureau's experiences. The Bureau also places great emphasis on maintenance and cleanliness at its facilities.

Health Care

Health care is indisputably an essential human need that a prison must supply, one that becomes even more important as the population size and average inmate age increase. Almost all Bureau facilities have round-the-clock, onsite medical coverage, providing inmates with prompt, comprehensive emergency medical care. Three of the Bureau's four major medical facilities are accredited by the Joint Commission on Accreditation of Healthcare Organizations, under the same standards used in accrediting community hospitals; the newest medical facility in Rochester, Minnesota, will seek initial accreditation in 1990.

While the Bureau is suffering from medical staff shortages, such shortages have not substantially compromised the quality of services. The Bureau has been able to rely on community health care resources and contract staff, and has also benefitted from the dedication and skill of its own staff and that of the U.S. Public Health Service.

Community Corrections Programs

Community Corrections Programs play a significant role in managing overcrowded prisons. During periods of serious overcrowding, as many *qualified* inmates as possible -- based upon an evaluation of the inmates' needs and the safety of the community -- are transferred from federal institutions to Community Corrections Centers prior to their release. [2/] These facilities provide more stringent sanctions and higher levels of supervision than ordinary community treatment centers, but are removed from the traditional prison setting. The Bureau sometimes uses these facilities to meet specific needs of part of the inmate population. For example, it has placed female offenders at the Geiger Correctional Facility in Spokane, Washington.

2/ This is distinct from the Bureau's practice of contracting with non-federal facilities to alleviate overcrowding. At the end of 1988, the Bureau had 880 detainees contracted out in state and local facilities. Contract facilities managed by state agencies are also used by the Bureau as specialized resources for certain population groups, such as juveniles and some protection cases.

Grievance and Claims Procedures

There are established procedures by which inmate grievances and other problems can be addressed:

Administrative Remedy Procedure. Inmates may seek formal review of a complaint relating to almost any aspect of confinement initially by the warden at the institution, with opportunity for further review at both the Regional Office and the Central Office. The administrative remedy procedure not only represents a commitment to fair treatment but may even help to reduce prison tensions by providing an outlet for inmate grievances. It can also provide information that may warn Bureau officials about possible problems in an individual prison or in the system as a whole.

Filing of Tort Claims. This procedure is used by an inmate who suffers a loss of property or a personal injury and alleges it was the result of government negligence. The Federal Tort Claims Act provides that no claim for money damages may be instituted against the United States unless the injured party first presents the claim to the appropriate federal agency for administrative action. Thus, the inmate must first submit the appropriate information to prison staff, after which an investigation is conducted, and a determination made.

Accident Compensation Claims. This procedure is used by an inmate who suffers a work-related injury in an industrial or institutional assignment. After a claim is filed, there is an investigation and then a determination by a claims examiner. Any claimant who is not satisfied with the decision may, within 30 days of issuance of the decision, request a hearing or reconsideration by writing to the Inmate Accident Compensation Committee in the Central Office.

1991 ADDENDUM:

UPDATE ON PRISON POPULATION

Since completion of *Prison Crowding and Court-Ordered Population Caps* a year ago, new figures indicate that state and federal prison populations have continued to increase dramatically.

* In 1989, state and federal inmate populations grew by 13.1%, or 82,466, to reach a record total of 710,054. [1/] By June 30, 1990, the total state and federal inmate population had grown another 6%, or 42,862, to reach 755,425, again a record. [2/]

* State and federal inmate population growth in the first half of 1990 translated into an average weekly need for approximately 1,650 additional prison beds. [3/]

* The total federal inmate population at year-end 1990 was 65,670, an increase of 11.2% over year-end 1989. The number of men in women actually held in federal facilities was 59,072, an increase of 10.7% from year-end 1989. [4/] The difference in these two totals represents the number of federal prisoners housed under contract with state, local, or private facilities. Both are new records.

* From year-end 1980 through year-end 1990, the total federal inmate population has grown by about 41,300, or almost 170%. The number of inmates actually held in federal facilities has grown by about 35,300, or over 148%. The state inmate population through June 30, 1990, had grown by about 386,000, or more than 126%. [5/]

* The rated capacity of the federal prison system rose by nearly 4,000, or 12.3%, during 1990. Since the rate of increase in capacity exceeded the rate of increase in population,

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1/ U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 1989*, May 1990, at 1 ("Bureau of Justice Statistics Bulletin").

2/ U.S. Department of Justice, Bureau of Justice Statistics, *Prison Population Grows 6 Percent During First Half of Year*, Oct. 10, 1990, at 1 (press release).

3/ *Id.*

4/ These figures from the Bureau of Prisons are as of December 31, 1990. The population of inmates actually housed in federal facilities went over 60,000 in January 1991 for the first time in the history of the Bureau of Prisons.

5/ *See* U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 1980*, May 1981, at 2 ("Bureau of Justice Statistics Bulletin"). The numbers given for inmates actually housed in federal facilities are based on a Bureau of Prisons figure of 23,783 inmates as of year-end 1980.

the federal prison system was operating at year-end 1990 at an estimated 162% of capacity, down from 164% a year earlier. [6/] However, some individual facilities continue to be operated at over 100% above capacity.

* The federal commitment to expansion of prison capacity continues. The FY91 appropriation for federal prison construction was $290.7 million, which is expected to provide about 6,175 new beds.

* The capacity of state prisons increased by between 40,000 and 60,000 during 1989. [7/]

* State prison systems continued to "back up" state-sentenced inmates in local jails. At the end of 1989, 19 states and the District of Columbia reported a total of 18,236 state prisoners held in local jails because of crowding in state facilities. This was an increase of 27.0% over year-end 1988. Overall, 2.6% of the state prison population was confined in local jails on December 31, 1989, because of prison crowding. [8/]

* Crowding at the local jail level remains an impediment to the ability of the U.S. Marshals Service to house federal detainees, particularly in areas like the Northeast. [9/] As of September 30, 1990, there were 13,745 persons in the Marshals' custody, almost two-thirds of whom had to be housed in local jails. [10/]

* The Marshals Service has had to increase its use of Bureau of Prisons facilities to house federal detainees. From 1980 to 1990, the number of detainee days in Bureau of Prisons facilities grew by about 500%. In January 1991, the Bureau of Prisons was holding about 6,000 such detainees. [11/]

February 1991

6/ These figures are from the Bureau of Prisons. With the dedication of a medium security institution and a minimum security camp at Three Rivers, Texas, on January 23, the federal prison system was operating at about 157% of capacity as of late January 1991.

7/ *Prisoners in 1989*, *supra* note 1, at 7.

8/ *Id.* at 5.

9/ For example, in October and November 1990, the U.S. Marshal in Massachusetts had to initiate a cellblock detail at the U.S. Courthouse in Boston, which lasted over six weeks, including Thanksgiving. Twice in 1990, mass arrests of drug offenders in Philadelphia had to be cancelled because of a lack of detention space.

10/ These figures are from the U.S. Marshals Service.

11/ These figures are from the Bureau of Prisons.