

# Social Movement Lessons From the US Prisoners' Rights Movement

**Jamie Harris**

Researcher

July 21, 2020

© 2020 Sentience Institute

*Edited by Kelly McNamara. Many thanks to the researchers who provided feedback or checked the citations of their work: Edward Rubin, Malcolm M. Feeley, Ronald M. Berkman, and Katherine Beckett.*

---

## Abstract

This report aims to assess (1) the extent to which the prisoners' rights movement in the United States from the 1950s onwards can be said to have successfully achieved its goals, (2) what factors caused the various successes and failures of this movement, and (3) what these findings suggest about how modern social movements should strategize. The analysis highlights the farmed animal movement as an illustrative example of the strategic implications for a variety of movements. Key findings of this report include that incremental successes of modest improvements in welfare may distract advocates' attention from more fundamental political and systemic issues and that social movements based heavily on a strategy of litigation (or perhaps any single strategy) seem to be fragile.

---



# Table of Contents

<b>Social Movement Lessons From the US Prisoners' Rights Movement</b>	<b>1</b>
<b>Abstract</b>	<b>1</b>
<b>Table of Contents</b>	<b>2</b>
<b>Introduction</b>	<b>2</b>
Summary of Key Implications	5
<b>A Condensed Chronological History of the US Prisoners' Rights Movement</b>	<b>5</b>
Early history of US prisoners' rights	5
1951-80: Prison riots, litigation victories, and the development of resistance to the prisoners' rights movement	8
1980-2003: Decreased Supreme Court support, tough-on-crime politics, harsher sentencing, and mass incarceration	29
2003-present: Increased support for prisoners' rights from conservatives	38
<b>The Extent of the Success of the US Prisoners' Rights Movement</b>	<b>44</b>
Institutional changes	44
Changes to public opinion	48
<b>Features of the US Prisoners' Rights Movement</b>	<b>48</b>
Intended beneficiaries of the movement	48
Institution	49
Advocacy	50
Society	51
Differing outcomes in the United States and Europe	52
<b>Strategic Implications</b>	<b>53</b>
Institutional Reform	53
Movement Composition	66
Messaging	68
<b>Potential Items for Further Study</b>	<b>69</b>
<b>Selected Bibliography</b>	<b>70</b>

## Introduction

The US prisoners' rights movement seeks to expand the moral circle to encompass convicted criminals. Other expansionist movements seeking expansion of the moral circle, including the farmed animal movement, can glean some strategic insight from the US prisoners' rights movement — that is, evidence on which advocacy strategies are most effective.<sup>1</sup>

This report examines the US social movements and institutional actors (collectively referred to here as the US prisoners' rights movement<sup>2</sup>) that have sought to improve the rights, protections, and wellbeing of people that have been convicted of crimes and incarcerated. That is, it focuses mostly on prisoners, rather than on pre-trial detention in jails, released prisoners, inequalities in the rates of criminal behavior and conviction, or the causes and consequences of crime. This is because advocacy for this specific group of people, who have been partly or wholly excluded from the moral circle, is of more strategic interest to the farmed animal movement than is advocacy on wider issues of rights, fairness, and justice in society as a whole, both in terms of historical comparability and research tractability. Mass incarceration and the harshness of sentencing procedures are considered briefly, as context for the changes in prisoners' rights and welfare, but are not the focus of this report. The US anti-death penalty movement, which can be conceptualized as a sub-movement of the prisoners' rights movement, has been analyzed in more depth in a separate case study by Sentience Institute.<sup>3</sup>

In comparison to Sentience Institute's case studies of the British antislavery movement, the US anti-abortion movement, and the US anti-death penalty movement,<sup>4</sup> initial review of the available historical, legal, and

---

<sup>1</sup> For a list and summary of such questions, see "Summary of Evidence for Foundational Questions in Effective Animal Advocacy," Sentience Institute, last updated December 24, 2019, <https://www.sentienceinstitute.org/foundational-questions-summaries>.

For discussion of the extent to which the farmed animal movement can learn from history, see Jamie Harris, "What can the farmed animal movement learn from history?" (May 2019), <https://www.sentienceinstitute.org/blog/what-can-the-farmed-animal-movement-learn-from-history>.

<sup>2</sup> In comparison to the focus of research items such as Ronald Berkman, *Opening the Gates: The Rise of the Prisoners' Movement* (Lexington, MA: Lexington Books, 1979) and Daniel S. Chard, "Rallying for Repression: Police Terror, 'Law-and-Order' Politics, and the Decline of Maine's Prisoners' Rights Movement," *The Sixties* 5, no. 1 (2012), 47-73, the usage in this report of the term "prisoners' rights movement" is broader in the sense that advocates who are not (and never were) prisoners are included as an important component and focus. On the other hand, issues that affect criminal justice more widely, beyond the rights and wellbeing of convicts during their periods of punishment or incarceration, are not as much of a focus.

<sup>3</sup> Jamie Harris, "Social Movement Lessons from the US Anti-Death Penalty Movement," (May 22, 2020), <https://www.sentienceinstitute.org/death-penalty>.

<sup>4</sup> Kelly Witwicki, "Social Movement Lessons From the British Antislavery Movement: Focused on Applications to the Movement Against Animal Farming" (December 2017), <https://www.sentienceinstitute.org/british-antislavery>, Jamie Harris, "Social Movement Lessons From the US Anti-Abortion Movement" (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion>, and Jamie Harris, "Social Movement Lessons from the US Anti-Death Penalty Movement," (May 22, 2020), <https://www.sentienceinstitute.org/death-penalty>.

sociological literature on the US prisoners' rights movement suggested that this topic would not be as useful for farmed animal advocates, for the following reasons:

- Much of the advocacy for prisoners' rights has come from prisoners themselves.<sup>5</sup> This substantially reduces comparability with the farmed animal movement; farmed animals' resistance to their treatment (e.g. a cow who kicks a farm worker) may cause a few human injuries and result in a very small number of animals lost in efforts to escape, but the farmed animal movement is driven by human allies.
- Much of the identified literature on the topic of prisoners' rights has focused on the effectiveness (or lack of effectiveness) of litigation by prisoners and their legal advisors. Although there has been some discussion of other forms of activism by convicts and ex-convicts,<sup>6</sup> there exists little discussion of grassroots tactics or political advocacy by allies of convicts, despite these tactics being at least somewhat common in the movement before 1980.<sup>7</sup>
- There does not seem to have been as much polling on prisoners' rights and wellbeing as there has been on topics such as the death penalty or abortion.<sup>8</sup> This makes evaluation of the successes of the prisoners' rights movement more difficult and means that some questions of strategic interest, such as the interaction of institutional change and public opinion, cannot be directly examined.

As a result, this case study is much shorter than SI's other reports. Readers are encouraged to prioritize reading those reports and to view this case study as supplementary. In other ways, however, this report uses similar methodology and framing to SI's previous social movement case studies. This report may also be

---

<sup>5</sup> See the paragraphs below beginning "Legal scholar James B. Jacobs counted...", "In the 1970s, activism from...", and "In the early 1970s, Maine saw..."

Additionally, Christopher E. Smith, *The Supreme Court and the Development of Law: Through the Prism of Prisoners' Rights* (Basingstoke, UK: Palgrave Macmillan, 2016), 1 notes that, "on October 7, 2014, the Supreme Court heard oral arguments in the case of Gregory Holt, an offender serving a life sentence in an Arkansas prison. Holt's case began with a handwritten petition he filed himself in federal court.

See also Jacqueline N. Henke, "Prisoners' Rights Activism in the New Information Age," accessed October 10, 2019, [https://hammer.figshare.com/articles/Prisoners\\_Rights\\_Activism\\_in\\_the\\_New\\_Information\\_Age/8038931](https://hammer.figshare.com/articles/Prisoners_Rights_Activism_in_the_New_Information_Age/8038931).

Ronald Berkman, *Opening the Gates: The Rise of the Prisoners' Movement* (Lexington, MA: Lexington Books, 1979), 33 notes that, "[t]hrough court-ordered changes in discipline applied to a variety of institutions, the suit that resulted in the decision was brought by prisoners of a particular institution as a result of the policies practiced in their institution. So whether the court order was an internal or external change for the inmates who brought the suit is problematic."

<sup>6</sup> Even this literature is generally less extensive than the literature on other topics examined in Sentience Institute's case studies, and much of it focuses specifically on California and New York. For discussion, see Daniel S. Chard, "Rallying for Repression: Police Terror, 'Law-and-Order' Politics, and the Decline of Maine's Prisoners' Rights Movement," *The Sixties* 5, no. 1 (2012), 47-73.

<sup>7</sup> See the strategic implication beginning "Social movements based heavily..." for discussion of the extent of grassroots activity in the US prisoners' rights movement.

<sup>8</sup> "GSS Data Explorer," National Opinion Research Center, accessed December 20, 2019, <https://gssdataexplorer.norc.umd.edu/trends/> includes a question for "Are local courts too harsh" and a question on the death penalty but no question specifically on prisoners' rights or wellbeing. Likewise, despite a large section on questions relating to the death penalty at "Death Penalty," Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>, searches for "prisoners" and "convicts" did not return results relevant to prisoners' rights or wellbeing, beyond those focused on the death penalty and on torture. Few other relevant polls were identified during the research for this report.

valuable as an application of our methodologies to a context we usually wouldn't cover, helping us understand the costs and benefits.

## Summary of Key Implications

- Litigation can improve welfare for the intended beneficiaries of a movement.
- Litigation can draw public attention to an issue.
- Litigation may have unintended negative consequences, such as entrenching and legitimizing institutions that advocates are opposed to.
- Laws and rulings that are intended to promote rights and welfare through particular mechanisms may permit the continued worsening of welfare through other mechanisms.
- Incremental successes of improving welfare may distract advocates' attention from more important political and systemic issues.
- Social movements based heavily on a strategy of litigation (or perhaps any single strategy) seem to be fragile.
- People are less willing to sanction harm against individuals than against abstract groups of beings.

## A Condensed Chronological History of the US Prisoners' Rights Movement

### Early history of US prisoners' rights

The 1689 English Bill of Rights declared that “cruell and unusuall Punishments” ought not to be inflicted<sup>9</sup> and the US Bill of Rights (created 1789), prohibited the infliction of “cruel and unusual punishments” in the Eighth Amendment.<sup>10</sup> Although there has presumably long been some concern for the wellbeing of prisoners and criminals receiving punishment, the modern interest in prisoners' rights seems to have developed towards the end of the 18<sup>th</sup> century, with publications by thinkers such as Cesare Beccaria.<sup>11</sup>

---

<sup>9</sup> “Bill of Rights [1688],” The National Archives, accessed June 27, 2019, <https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction>.

<sup>10</sup> “The Constitution of the United States,” accessed June 28, 2019, <https://constitutionus.com/>. John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 257 notes that “In 1791, when the Eighth Amendment was ratified, five state constitutions already prohibited ‘cruel or unusual punishments’ and two others prohibited merely ‘cruel’ punishments. The Eighth Amendment, however, was directly based on the Virginia Declaration of Rights, authored by George Mason, which prohibited ‘cruel and unusual punishments.’”

<sup>11</sup> Edward L. Rubin, *Soul, Self, and Society: The New Morality and the Modern State* (New York, NY: Oxford University Press, 2015), 264-5 notes that, “[t]he process of abolishing torture was triggered by the enormous influence of Cesare Beccaria’s *On Crimes and Punishments* (1964 [first published in 1764]), which argued that torture is both inhumane and inefficient.” Rubin links this to the “doctrine of negative rights,” which, “as currently understood, took shape during the eighteenth century.” More widely, this included “[f]reedom of speech, religion, and association,” as well “toleration” and the abolition of slavery. Edward Rubin added in a private email exchange, received June 16, 2020, that, “[b]oth prisoners’ rights and animal rights emerge in the crucial period at the end of the 18<sup>th</sup>, along with democracy, abolitionism, etc. Both

The US has experienced occasional prisoners' rights activism since shortly after the country's formation, such as from Quakers and the Philadelphia Society for Alleviating the Miseries of Public Prisons, which was established in 1787.<sup>12</sup>

A 19th-century Virginia Supreme Court ruling referred to convicts as, "for the time being a slave, in a condition of penal servitude to the State, and subject to such laws and regulations as the State may choose to prescribe."<sup>13</sup> The approach of the courts to prison cases before the 1960s is often referred to as "hands-off."<sup>14</sup> Before this point, prisoners rarely litigated for their rights,<sup>15</sup> because the main available legal remedy was to

---

are related to utilitarian thought, which emerged at the same time, in that they treat pain to a sentient being as an absolute wrong." Some further detail is added on pages 291-3 of *Soul, Self, and Society*.

Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 55-60 describes the anti-death penalty writings of Cesare Beccaria, Voltaire, and Joseph von Sonnenfels in the 18<sup>th</sup> century. Hammel argues that, "[t]he work of these men stands for the proposition that defining the principles of criminal justice and procedure is properly the domain of intellectual elites, be they philosophers or trained jurists. Indeed, the late 18th and early 19th centuries saw the emergence of a privileged class of Enlightenment thinkers and reformers who traveled from court to court, advising rulers who were eager to rule according to the principles of benevolent despotism... Beccaria, like other reformers, became the object of a sort of bidding war between Empress Catherine of Russia and the Habsburg Empire."

<sup>12</sup> Susan Easton, *Prisoners' Rights: Principles and Practice* (Abingdon, UK: Routledge, 2011), 99. Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 7 claims that, "[a]fter the [American] Revolution, the debate over capital punishment became more visible. Abolitionism was almost indistinguishable from the prison reform movement at this stage. Thus, some of the vocal critics of executions were associated with such groups as the Philadelphia Society for Alleviating the Miseries of Public Prisons."

<sup>14</sup> See, for example, Susan P. Sturm, "Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142 (1993), 659 and Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998), 31.

Edward Rubin comments (private email exchange, received June 16, 2020) that, "it's not quite right to say that prisoners didn't litigate for their rights before the 1960s. They did, mainly in state courts, and there was a flurry of federal litigation in the 1950s by prisoners who had escaped from Southern chain gangs."

Susan Easton, *Prisoners' Rights: Principles and Practice* (Abingdon, UK: Routledge, 2011), 36 suggests that, "[t]he courts' reluctance to step beyond the prison door from the 1940s to the early 1960s, was based in part on deference to the expertise of the prison authorities in managing the prison, partly on the fear of the floodgates opening to endless litigation if the courts become more involved in supervision, and concerns over maintaining the separation of powers between the legislature, the executive and the judiciary, and most importantly the view that, prisoners were non-persons so less worthy of the courts' attention." However, with civil rights developments and the "due process revolution," the Supreme Court under Chief Justice Warren in the 1960s and 1970s "began to take a more interventionist approach in response to prisoners' assertion of their constitutional and civil rights... A number of key cases brought prisoners within the expanding rights discourse. Cases have been brought using s 1983 of the Civil Rights Act 1871 to argue that the individual has been deprived of a right given by the Constitution. *Monroe v. Pape* 365 US 167 (1961) revived the use of the 1871 Civil Rights Act and allowed federal litigation against states for the deprivation of civil liberties, giving a basis for prisoners' rights litigation."

<sup>13</sup> *Ruffin v. Commonwealth* (1871), quoted and explained in Susan N. Herman, "Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue," *Oregon Law Review* 77 (1998), 1229.

<sup>15</sup> Susan N. Herman, "Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue," *Oregon Law Review* 77 (1998), 1229.

petition for a writ of habeas corpus, which could only result in release, rather than the improvement of conditions.<sup>16</sup> The conditions in many prisons were poor.<sup>17</sup>

Nevertheless, during the 19th and early 20th centuries, there was a move away from purely retributive systems for prisoners to systems that aimed to rehabilitate. By 1922, 44 states, Hawaii, and the federal government had introduced a parole system; 37 of those states also used indeterminate sentencing, which enabled discretion on a case-by-case basis. Only 4 states had neither parole nor indeterminate sentencing.<sup>18</sup>

In the 1941 *Ex parte Hull* case, the Supreme Court ruled that, “the state and its officers may not abridge or impair a petitioner’s right to apply to a federal court for a writ of habeas corpus” after a prisoner managed to give a habeas corpus petition to his father to file it for him.<sup>19</sup> The Sixth Circuit *Coffin v. Reichard* decision (1944) extended the right of habeas corpus and held that, “[a] prisoner retains all rights of an ordinary citizen except those expressly or by necessary implication taken from him by law, which rights include the right to personal security against lawful invasion.”<sup>20</sup> In the 1958 *Trop v. Dulles* Supreme Court decision, the Eighth

---

<sup>16</sup> Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons* (New York: Cambridge University Press, 1998), 31 note that, “[w]ith respect to procedure, claims by prisoners in federal court were necessarily based on violations of the Constitution, and the classic means of bringing such claims forward was to petition for a writ of habeas corpus. In addition, state prisoners could bring suit under the Civil Rights Act of 1871 for violation of their constitutional rights and federal prisoners could bring suit under the Constitution itself. All these causes of action, however, were regarded as inappropriate for challenging the conditions of confinement.”

Edward Rubin adds (private email exchange, received June 16, 2020) that, “the problem is that the only available remedy was habeas corpus, which is really designed to remedy defective trials. Prisoners attempted to use it for conditions of confinement because, under the old English writ system, the defendant was the warden (i.e., the form the writ was: “Warden Smith is imprisoning me improperly because my trial was unfair”). But the remedy that habeas provided was release, which is appropriate if the prisoner was unfairly convicted, but not if he was guilty, but being mistreated. The breakthrough, which was to bring actions for mistreatment under the cruel and unusual punishment clause, came after the Eighth Amendment was held applicable to the states in 1962 by being ‘incorporated’ in the due process clause.”

<sup>17</sup> Susan P. Sturm, “Legacy and Future of Corrections Litigation,” *University of Pennsylvania Law Review* 142 (1993), 659-61 summarizes that, “[c]orrectional institutions were isolated from and invisible to society. They operated as closed communities largely without public scrutiny. Inmate communication with the outside world was extremely limited. Inmates had no avenues of redress for the life-threatening abuses they endured... Violence, brutality, lack of medical care, unsanitary conditions, inadequate plumbing, lack of ventilation, and the absence of other necessities of life characterized the institutions. Many facilities were overcrowded and poorly maintained. Juvenile institutions were often oppressive and dangerous. Moreover, juveniles were frequently incarcerated in adult jails where they were routinely subjected to extreme abuse... Administrators frequently ran their institutions as fiefdoms, with little awareness of developments in legal norms or corrections administration. In some systems, dominant inmates operating as building tenders or trustees wielded supervisory, administrative, and disciplinary authority over other inmates, and engaged in violent and predatory behavior with official acquiescence. Guard brutality was a routine part of prison life. Institutions routinely segregated inmates by race, and frequently provided grossly inferior conditions, programs, and opportunities to nonwhite inmates. Decisions concerning inmate discipline and control were made arbitrarily, and inmates were prohibited from exercising basic rights of free speech and religion.

<sup>18</sup> Jennifer Edwards Walsh, *Three Strikes Laws* (Westport, CT: Greenwood Publishing Group, 2007), 4-5.

<sup>19</sup> Susan N. Herman, “Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue,” *Oregon Law Review* 77 (1998), 1239.

<sup>20</sup> Susan Easton, *Prisoners’ Rights: Principles and Practice* (Abingdon, UK: Routledge, 2011), 36. Easton summarizes other rights of prisoners at this time: “While the prison had the right to hold the convicted prisoner, it also had a duty to protect him from assault and injury. The prisoner was entitled to habeas corpus — even if lawfully held in custody — if he was deprived of a right to which he was lawfully entitled in confinement, the deprivation of which made

Amendment was used to protect an individual against excessive, unusual punishment that included the revocation of US citizenship; the Supreme Court used the Eighth Amendment for similar purposes several times in the subsequent decades.<sup>21</sup> Nevertheless, judicial decisions do not seem to have altered prison conditions until the 1960s.<sup>22</sup>

## 1951-80: Prison riots, litigation victories, and the development of resistance to the prisoners' rights movement

In 1951, prisoners in New Jersey and California rioted, demanding improved conditions and a reduction in the inhumane treatment of prisoners.<sup>23</sup> Although prison riots were not a new phenomenon,<sup>24</sup> one estimate was that, from April 1952 to September 1953, 30 prison riots “or other major disturbances” occurred, which was more than in the previous 25 years combined.<sup>25</sup>

In 1960, Caryl Chessman was executed. His books and public advocacy had encouraged international demands for clemency. His efforts may have provided “a model of how a convict could gain power through writing and education.”<sup>26</sup> Over the 1960s, there were struggles over freedom to read and write in San Quentin

---

imprisonment more burdensome than the law allows, or curtailed liberty to a greater extent than the law allows. This case created an opportunity for the federal courts to examine life inside state prisons, although they did not actively engage in the supervision of conditions until the mid-1960s.”

<sup>21</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 273-4.

<sup>22</sup> See footnote 16.

<sup>23</sup> Ronald Berkman, *Opening the Gates: The Rise of the Prisoners’ Movement* (Lexington, MA: Lexington Books, 1979), 34-9.

<sup>24</sup> Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006), 170 notes that, “U.S. prisons have a long history of being more violent and restive than prisons elsewhere. Going back at least as far back as the 1850s, American prisons periodically have been gripped by waves of riots and other disturbances, some of which dominated national headlines for days. In the early twentieth century there were several periods of major unrest immediately before and after World War I, and then again in the late 1920s and at the onset of the Great Depression. These disturbances prompted President Herbert Hoover and other public officials to push for major increases in federal spending on prisons and for a series of changes in the penal system to relieve overcrowding and other problems. Major prison unrest in the late 1920s in upstate New York prompted the state to build the ‘ultimate prison.’ In 1931, New York officials opened the world’s most expensive prison to date in Attica, which was billed as ‘paradise for convicts.’ Aside from Hoover’s federal initiative and some individual state efforts, these earlier waves of prison riots and protests did not insinuate themselves into the political fabric and public consciousness... People who were imprisoned lacked significant internal organizations to sustain their mobilizations... [P]risoners’ demands largely were related to calls for improvements in their day-to-day living conditions.”

<sup>25</sup> Eric Cummins, *The Rise and Fall of California’s Radical Prison Movement* (Stanford: Stanford University Press, 1994), 20, citing the US Congress Select Committee on Crime.

Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006), 170 notes that, “[f]rom 1950 to 1953, the country experienced more than fifty major prison disturbances, most of them in the North and West... Until the upheavals of the 1970s, this period was considered the worst ever by prison administrators.”

<sup>26</sup> Eric Cummins, *The Rise and Fall of California’s Radical Prison Movement* (Stanford: Stanford University Press, 1994), 1-64, especially 61. On pages 63-4, Cummins notes that, “Chessman had provided a precedent with his steady stream of petitions. His private war with San Quentin over access to law books, typewriters, pens, light, and the courts had engendered a tradition of jailhouse law and inflamed others with a passion for legal study and writ-writing. His

prison, where he had been imprisoned.<sup>27</sup> In that decade, some prisoners read books by far-left authors and by other radical groups, such as the Black Panther party, which may have inspired an uncompromising, revolutionary approach to social change.<sup>28</sup> Subsequently, radicalism among inmates may have reduced the mainstream credibility of the US prisoners' rights movement and encouraged repression by authorities.<sup>29</sup>

By the 1960s, court justices had changed their approach to prisoners' litigation, allowing them to litigate on prison conditions.<sup>30</sup> Legal scholar James B. Jacobs counted 66 reported federal court decisions relating to the Black Muslims (a collection of black nationalist civil rights groups such as the Nation of Islam) from 1961 to

---

smuggling techniques became legendary, instructing others in alternative publishing strategies if legal means failed.” Given the lack of footnotes, the evidence for these claims is unclear.

<sup>27</sup> Eric Cummins, *The Rise and Fall of California's Radical Prison Movement* (Stanford: Stanford University Press, 1994), 128, for example, describes how 1968 saw “an almost total breakdown in the mechanisms of reading and writing control... when efforts of custody staff and prison administration to shore up censorship came under angry fire in several successful court challenges to the prison's censorship rules and the passage of Penal Code section 2600, the ‘Convict Bill of Rights.’ More free to read and write than ever before, large groups of convicts in San Quentin launched a concerted move to replace the prison's education and library systems with secret, underground ones of their own.”

<sup>28</sup> Eric Cummins, *The Rise and Fall of California's Radical Prison Movement* (Stanford: Stanford University Press, 1994), 128-50. On page 128, for example, Cummins notes that, “[t]wo distinct prison movements began to take shape inside the walls [of San Quentin prison], each supported by separate but overlapping large groups from the Bay Area community urging them on and supplying them with reading material. One provided the germ of a moderate, reformist effort at prison unionization. The other produced both a San Quentin chapter of the Black Panther party and an ultra-leftist prison gang, the Black Guerilla Family... The object was, first, control of the yard, dominance in the convict subculture, and power against guard staff and the warden's office. But one group of inmates began to push strenuously for legislated prison reforms as well. In contrast, the opposing faction of prisoners looked far beyond San Quentin's walls, seeing its struggle as part of a national, even an international, revolutionary movement.”

Liz Samuels, “Improvising on Reality: The Roots of Prison Abolition,” in Dan Berger (ed.), *The Hidden 1970s: Histories of Radicalism* (New Brunswick, NJ: Rutgers University Press, 2010), 23-4 also emphasizes connections between prisoner activists and groups like the Black Panthers and Black Muslims.

<sup>29</sup> At various points, Eric Cummins, *The Rise and Fall of California's Radical Prison Movement* (Stanford: Stanford University Press, 1994) argues that the radical efforts and unrealistic views of the California prisoners' rights movement damaged its prospects. For example, the treatment of convicts by Californian radical groups is repeatedly described as “romanticized.” On pages 228-9, Cummins describes how the references to San Quentin prisoners as “political prisoners” eventually “lost its appeal to many,” and, “[b]y 1972 the public was deserting the Left in major numbers.” On page 219, Cummins describes an incident where “imported literature confiscated at the prisons called plainly for the killing of more guards. This enabled the Department of Corrections to argue successfully for more funding from the state legislature to finance a crackdown and to put down all forms of inmate activism, including moderate reformism.” Several other instances of repression in response to far-left activism and violence are detailed subsequently in the book.

<sup>30</sup> Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998), 37 summarize that there remained “many published decisions which relied on... the hands-off doctrine in rejecting prisoner complaints, but they became increasingly qualified and increasingly fact-dependent as the mid-1960s approached [six published cases are cited as evidence of this and they note that “[p]resumably, there are also many unpublished decisions that dismissed the prisoners' complaint.”]. To some extent, these changes may be attributed to major Supreme Court decisions in nonprison cases, most notably *Brown v. Allen*, the habeas corpus case; *Monroe v. Pape*, the Civil Rights case, and *Robinson v. California*, the Eighth Amendment incorporation case. To some extent, they may be attributed to the same changing attitudes that underlay these cases, and were about to produce the Civil Rights Act of 1964. There was, in addition, an internal dynamic in the prison cases themselves. The more the federal courts relented, the more prisoners filed complaints; the more complaints that courts received and seriously considered, the more distressing the conditions in American prisons appeared to the federal judges.”

1978. The Black Muslims filed lawsuits to secure racial and religious equality within prisons,<sup>31</sup> sometimes without external legal assistance.<sup>32</sup> At least some imprisoned Black Muslims simultaneously pushed for these rights by causing disturbances within the prison system.<sup>33</sup>

The 1964 *Cooper v. Pate* Supreme Court ruling overturned a lower court ruling that had permitted prison officials to refuse Muslim prisoners opportunities to worship. Jacobs argues that the ruling was narrow but implied that prisoners have constitutional rights and that federal courts were obligated to provide a forum for prisoners to challenge prison officials.<sup>34</sup> Though the ruling was only an anonymous per curiam opinion, written on behalf of the whole court, justices explicitly emphasized the importance of prisoners' rights in subsequent cases.<sup>35</sup> This case, brought to the Supreme Court through an appeal against a lower court ruling,

---

<sup>31</sup> James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 434.

Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006), 175 also claims that, "Black Muslims were the catalyst for a string of court decisions that gave prisoners important and unprecedented protections and rights behind bars."

However, their involvement in litigation was not spontaneous. On page 174, Gottschalk notes that from the 1950s, the Black Muslims "worked 'underground' educating new recruits and building up their organization... Writing to prisoners to educate them about the Muslim philosophy was a central activity of Black Muslims on the outside... By 1960, when they began pushing their demands more publicly, the Nation of Islam had between 65,000 and 100,000 members, many of them in prison." Gottschalk summarizes on page 171 the arguments of Desmond S. King, *Separate and Unequal: Black Americans and the U.S. Federal Government* (Oxford: Clarendon Press, 1995) as being that, "the Nation of Islam began organizing in an atmosphere that was already quite racially charged and in which the state played a more complex role than just standing in the way of Black Muslims pushing for greater religious freedom and other rights behind bars. Indeed, the state helped to politicize prisoners, especially around the issue of race." Details are provided on the following pages.

<sup>32</sup> Christopher E. Smith, *The Supreme Court and the Development of Law: Through the Prism of Prisoners' Rights* (Basingstoke, UK: Palgrave Macmillan, 2016), 1 notes that, "[i]n October 1964, the US Supreme Court, through a denial of petitioner for writ of certiorari, declined to hear a case concerning religious rights claims by Muslim prisoners in New York. Martin Sostre and other New York prisoners asserted not only that they were denied the opportunity to practice their religion, but also that they were actually placed in solitary confinement and faced other punishments for their adherence to their Islamic faith (*Sostre v. McGinnis* 1964). The prisoners filed the case themselves in 1962.

Toussaint Losier, "...For Strictly Religious Reason[s]': *Cooper v. Pate* and the Origins of the Prisoners' Rights Movement," *Souls* 15, no. 1-2 (2013), 32 notes that, "[o]n July 5, 1962, Cooper [an African American prisoner in Illinois State Penitentiary] filed *Cooper v. Pate*, without any formal legal assistance, or pro se."

<sup>33</sup> Toussaint Losier, "...For Strictly Religious Reason[s]': *Cooper v. Pate* and the Origins of the Prisoners' Rights Movement," *Souls* 15, no. 1-2 (2013), 28 notes that Thomas Cooper, an African American prisoner in Illinois State Penitentiary, "and seventeen other Muslims in segregation found ways to subvert the restrictions of their detention. According to prison records, they continued to worship together by communicating from cell-to-cell, often by taking the water out of their toilets and using the sewage pipes as a crude means of communication. They also joined each other in initiating hunger strikes and other disturbances like tossing food, utensils, and newspapers into the prison corridor." Possibly related to this ongoing struggle, Losier describes on page 20 a riot of 4 prisoners, who used broken glass as weapons, which official reports described as a "Muslim gang, stirring up the Segregation Unit."

<sup>34</sup> James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 434.

<sup>35</sup> James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 441 notes that in the *Wolff v. McDonnell*, 418 U.S. 539 (1974) case, Justice White said that "If the position implies that prisoners in state institutions are wholly without the protections of the Constitution and the Due Process Clause, it is plainly untenable. Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a 'retraction justified by the considerations underlying our penal system.' But though his rights may be diminished by the needs and

suggests that litigation from prisoners, empowered by the ongoing civil rights movement and supported by external, sympathetic lawyers, was able to drive progress on prisoners' rights.<sup>36</sup> Cooper had initially filed *Cooper v. Pate* without any legal assistance,<sup>37</sup> though the American Civil Liberties Union (ACLU) later supported him.<sup>38</sup> The success of litigation by the Black Muslims inspired other prisoner groups. For example, the Church of the New Song was begun by federal prisoners in Illinois; its "liturgy" demanded specific luxurious food items such as porterhouse steaks and called for the destruction of the prison system. Successful litigation in the Fifth and Eighth federal judicial circuits won them the same rights as adherents of traditional religions.<sup>39</sup> By the mid-1960s, the strength of the Black Muslims had begun to decline, however.<sup>40</sup>

In 1965, the US District Court for the Eastern District of Arkansas declared in *Talley v. Stephens*, a suit in equity submitted by several prisoners (so-called "jailhouse lawyers"), that some conditions at an Arkansas prison were "cruel and unusual punishment," which violated the Eighth Amendment. The court then proceeded to issue further injunctions to restructure the prison. Legal scholars Malcolm M. Feeley and Edward L. Rubin refer to this as the first time that an "American court had ever ordered a prison to change its practices or its conditions" and note that, "[w]ithin a decade of that decision, prisons in twenty-five of the fifty states and the entire correctional systems of five states had been placed under comprehensive court

---

exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."

<sup>36</sup> James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 431-4.

Likewise, Ronald Berkman, *Opening the Gates: The Rise of the Prisoners' Movement* (Lexington, MA: Lexington Books, 1979), 2 summarizes that, "the rise of the prisoners' movement can be traced to a variety of ideologies, movements and national occurrences coming together in the 1960s... The activism of the courts allowed prisoners to seek redress for institutional conditions that courts had traditionally regarded as outside their jurisdiction. The Black Muslim movement provided a paradigm for strong organizational forms and replaced the ideology of 'pathological disorder,' in which prisoners identified themselves as suffering from organic or behavioral deficiencies, with an ideology of 'collective oppression,' which opened new political vistas. Finally, the antiwar and civil rights movements revealed much about American society, particularly in relation to the position of poor and minority groups. Also, these movements created vast political energy in the populace and supplied strategies for resistance."

On page 57, Berkman adds that, "[t]he interest of the American Left in the prisoners' movement emerged slowly during the sixties. In part the interest in the prisoners grew out of an increasing interest in and awareness of disadvantaged groups in American society. Some organizations of the Left during the early period of interest concerned themselves with publicizing and criticizing the conditions that existed in prison... The Left's interest in the prisoners' movement gave impetus to the struggle inside. Outside groups engaged in propaganda and support activities in the form of defense committees for prisoners facing legal action and direct political protest activity at the prison and Department of Correction. The movement inside felt less isolated."

<sup>37</sup> See footnote 32.

<sup>38</sup> Christopher E. Smith, *The Supreme Court and the Development of Law: Through the Prism of Prisoners' Rights* (Basingstoke, UK: Palgrave Macmillan, 2016), 23.

<sup>39</sup> James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 435. Edward Rubin notes (private email exchange, received June 16, 2020) that "the Church of the New Song was an effort to take advantage of the court decisions to annoy the prison officials, not a genuine religious movement."

<sup>40</sup> Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006), 175. Gottschalk adds that, "[i]nternal feuding, the Nation of Islam's rejection of more explicitly political activities, its strident separatist stance, its disinterest in changing fundamental power relations in prison, and its failure to deliver the support it had promised to prisoners debilitated the organization. The final critical blow was the 1965 assassination of Malcolm X, a hero to many black prisoners, who was distancing himself at the time of his death from the Nation of Islam's apolitical separatist stance."

orders.”<sup>41</sup> Prison litigation at this time was sometimes supported by attorneys associated with the National Association for the Advancement of Colored People’s Legal Defense Fund (NAACP LDF), a civil rights group.<sup>42</sup>

Conservatives at this time were increasingly blaming individual criminals and permissive liberal culture for crime; these arguments were used to justify harsher treatment of convicts.<sup>43</sup> Tough-on-crime rhetoric and the Republican Party’s Southern Strategy also contributed to this trend; although US citizens have long been concerned about crime and the incidence of crime has long been a talking point of politicians,<sup>44</sup> from the

---

<sup>41</sup> Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998), 13 and 39. They add that, “[a] decade later these figures had increased to thirty-five states and nine entire prison systems. And one decade later still, in 1995 the ACLU estimated that prisons in a total of forty-one states, as well as the District of Columbia, Puerto Rico, and the Virgin Islands, had at one time or another been under comprehensive court orders, as had the entire correctional systems of at least ten states” and “at least some jails in all fifty states had been placed under court orders. Many of these orders specified such details of institutional administration as the square footage of the cells, the nutritional content of the meals, the number of times each prisoner could shower, and the wattage of light bulbs in prisoners’ cells.”

<sup>42</sup> Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006), 177 notes that, “[t]he South served as a critical though not exclusive incubator for litigated prison reform. It was where the Legal Defense and Educational Fund of the NAACP had the most cooperating attorneys interested in prison reform issues. The LDF, which represented blacks in many of the landmark civil rights cases, was the first national organization to become deeply involved in efforts to reform prisons through litigation. The LDF viewed prison litigation as part of a broader effort to expand its activities in the mid-1960s beyond explicitly racial issues. The South also had the largest concentration of segregated prisons, which gave courts, attorneys, and the Civil Rights Division of the U.S. Department of Justice an opening to challenge Southern prisons and expose their atrocious conditions.”

Christopher E. Smith, *The Supreme Court and the Development of Law: Through the Prism of Prisoners’ Rights* (Basingstoke, UK: Palgrave Macmillan, 2016), 23 also notes that the ACLU supported Cooper in the 1964 *Cooper v. Pate* case.

<sup>43</sup> Katherine Beckett and Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (Thousand Oaks, CA: Sage Publications, 2004), 50-2. Several quotes support this claim, such as Independent presidential candidate George Wallace, who argued that, “[i]f a criminal knocks you over the head on your way home from work, he will be out of jail before you’re out of the hospital and the policeman who arrested him will be on trial. But some psychologist will say, well he’s not to blame, society is to blame.” They also argue that, “[a]s early as 1965, the liberal emphasis on the root causes of crime began to weaken in the face of this conservative onslaught. Only 4 months after his election, for example, President Johnson declared in an unprecedented special message to Congress his new determination to fight crime... Toward that end, Johnson established the Law Enforcement Assistance Administration (LEAA), an agency with a mission to support local law enforcement. To coordinate law enforcement activities aimed at fighting drugs, Johnson also created the Bureau of Narcotics and Dangerous Drugs.”

<sup>44</sup> Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006), 75 summarizes that “deep public angst about crime, violence, and disorder [are not] something relatively new in American political development and in national politics. In fact, the country has an anxious past. Periodically the United States has embarked on reform movements or crusades that have fitfully contributed to the consolidation of carceral power.” Examples are provided elsewhere in the chapter, such as how, as noted on pages 65-6, “[s]oon after taking office, FDR declared war on kidnapping and expressed his wish to establish a national police force akin to Scotland Yard. In June 1933 he signed an executive order creating a special division of investigation within the Justice Department.”

1960s onwards, crime issues seem to have become more politically salient.<sup>45</sup> Increasing proportions of the public began to believe that the courts “do not deal harshly enough” with criminals from the late 1960s.<sup>46</sup>

From the late 1960s, despite the continued influence of racial nationalism on prison activists via groups such as the Black Panthers and Ku Klux Klan, prisoners began to increasingly unify across racial divides in order to seek improvement in their conditions.<sup>47</sup>

---

<sup>45</sup> Daniel S. Chard, “Rallying for Repression: Police Terror, ‘Law-and-Order’ Politics, and the Decline of Maine’s Prisoners’ Rights Movement,” *The Sixties* 5, no. 1 (2012), 50 summarizes that “[l]aw-and-order politics entered the mainstream of American political discourse with Barry Goldwater’s failed 1964 presidential bid. In his attempt to defeat Democratic candidate Lyndon B. Johnson, Goldwater capitalized on white Americans’ fears that rising crime rates and civil rights activists’ illegal direct action tactics were leading to a chaotic society governed by ‘the license of the mob and the jungle.’ Four years later, after an unprecedented spike in urban rioting, massive student-led anti-war protests, and still growing crime rates, Republican Richard Milhous Nixon rode a wave of heightened fear to narrowly defeat Democratic candidate Herbert Humphrey with a campaign centered on a promise to deliver ‘law-and-order’ to a nation fraught with social strife. In artfully produced television ads, Nixon’s steady voice, cast over haunting music and graphic images of urban riots and militant youth protests, promised to defend ‘decent citizens’ from the threat of ‘domestic violence’ posed by street criminals and leftist radicals. Nixon’s speeches and television ads conflated radical protest with street crime, and fueled a cultural discourse that interpreted both as products of Kennedy and Johnson era liberalism and an inadequate US criminal justice system. Like Goldwater, Nixon deliberately employed racially coded law-and-order rhetoric in order to appeal to urban whites fearful of increased crime rates and the perceived excesses of the black liberation struggle. As special counsel to the President, John Ehrlichman, explained of his boss’s strategy, ‘that subliminal appeal to the anti-black voter was always present in Nixon’s statements and speeches.’”

Carol S. Steiker and Jordan M. Steiker, “Lessons for Law Reform from the American Experiment with Capital Punishment,” *Southern California Law Review* 87 (2013-14), 746 summarize that, “[c]riminal justice issues proved to be a powerful component of the Southern Strategy, not least because of the ways in which concerns about crime dovetailed with resentments and fears about race. Within the realm of criminal justice issues, the death penalty was one of extremely high salience everywhere, as it worked as effective shorthand for ‘tough on crime’ politics. In the South, with its long-held fears of black-on-white violence and especially rape, the death penalty offered a particularly potent rallying cry for politicians to use to marshal support. The power of the death penalty as a political issue in the years following *Furman* is striking at all levels of government.”

<sup>46</sup> Katherine Beckett and Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (Thousand Oaks, CA: Sage Publications, 2004), 111 notes that, “[n]ational surveys also indicate a sharp increase, albeit concentrated in the late 1960s and early 1970s, in the percentage of Americans critical of their local courts. In 1965, 48.9% of respondents expressed the view that the courts in their area ‘do not deal harshly enough’ with criminals. By 1969, that percentage had increased to nearly 75%, and between 1976 and 1995, approximately 80% of respondents expressed this view. In 1994, the same year 52% of Americans identified crime as the nation’s most important problem, a record 85% also reported that the courts were not harsh enough. Since then, however, the percentage of Americans complaining about the lenience has declined, dropping to 68% in 2000.”

<sup>47</sup> Liz Samuels, “Improvising on Reality: The Roots of Prison Abolition,” in Dan Berger (ed.), *The Hidden 1970s: Histories of Radicalism* (New Brunswick, NJ: Rutgers University Press, 2010), 25 provides several examples of this, contrasting “[r]acial conflicts, such as the 1967 clash at San Quentin” to “[t]he uprisings at San Quentin in 1968 and at the Long Island branch of the Queens House of Detention in October 1970, and the work stoppages at Soledad, Folsom, and San Luis Obispo prisons in California in November of 1971.” Class-based ideologies influenced some of these efforts, such as the United Prisoners’ Union, formed in 1970. However, Samuels notes that, “[a] class-based approach did not define all of the growing prison movement, which was heavily shaped by racial nationalism... Lorenzo Komboa Ervin, a Black Panther imprisoned at Terre Haute prison in Indiana [argued that], ‘all prison officials know that if racism is surmounted, revolt is inevitable.’ Ervin considered the relationships between white radicals and black revolutionaries essential in dismantling the Klan’s influence at Terre Haute.”

In 1970, prisoners in Folsom State Prison in California went on strike, with demands such as “constitutional rights of legal protection,” “adequate visiting conditions and facilities,” and “an end to political persecution, racial persecution, and the denial of prisoners to subscribe to political papers.”<sup>48</sup> The next year, prisoners temporarily seized control of Attica Correctional Facility and demanded improved conditions and freedoms.<sup>49</sup> Some of these demands were more radical than the demands of previous prisoner riots.<sup>50</sup> Officials responded to these riots with force, such as shooting 29 prisoners at Attica and, at Folsom, transferring prisoners elsewhere and preparing to indict them. None of the Folsom demands were initially conceded, but California commissioned a study of prison labor and the state’s Correctional Industries offered some additional incentives for prison laborers in 1973-4.<sup>51</sup> Between 1968 and 1975, over 200 prisoner uprisings occurred, involving tens of thousands of prisoners; these seem to have peaked around 1971, following violent repression.<sup>52</sup> State departments of corrections may have set up internal prison grievance systems in response to these riots.<sup>53</sup> Around this time, prisoners also began to make demands relating to prison labor, such as the

---

<sup>48</sup> “The Folsom prisoners’ manifesto of demands and anti-depression platform,” the Folsom prisoners, November 3, 1970, [https://www.freedomarchives.org/Documents/Finder/DOC510\\_scans/Folsom\\_Manifesto/510.folsom.manifesto.11.3.1970.pdf](https://www.freedomarchives.org/Documents/Finder/DOC510_scans/Folsom_Manifesto/510.folsom.manifesto.11.3.1970.pdf).

<sup>49</sup> Liz Samuels, “Improvising on Reality: The Roots of Prison Abolition,” in Dan Berger (ed.), *The Hidden 1970s: Histories of Radicalism* (New Brunswick, NJ: Rutgers University Press, 2010), 21. Samuels summarizes that they “wanted improved conditions and rehabilitation programs, political and religious freedom, freedom from physical harm, and, in their initial demands, ‘speedy and safe transportation out of confinement, to a non-imperialist country.’”

<sup>50</sup> Ronald Berkman, *Opening the Gates: The Rise of the Prisoners’ Movement* (Lexington, MA: Lexington Books, 1979), 62 notes that the riots at Folsom and Attica included “a set of political demands, totally absent in the 1950s.” Berkman lists 5 example demands from Folsom, including “an end to political persecution, racial persecution, and the denial of prisoners to subscribe to political papers, books or other educational and current media periodicals.” Several demands focused on racial issues, such as the demand for “an immediate end to the agitation of race relations by the prisoner administrators of this state.”

On pages 65-7, Berkman argues that the Folsom prisoners’ “economic demands” were also unprecedented. These demands included “that inmates be allowed to form or join Labor Unions” and “that all institutions who use inmate labor be made to conform with the state and federal minimum wage laws.”

<sup>51</sup> Ronald Berkman, *Opening the Gates: The Rise of the Prisoners’ Movement* (Lexington, MA: Lexington Books, 1979), 79-85 and Liz Samuels, “Improvising on Reality: The Roots of Prison Abolition,” in Dan Berger (ed.), *The Hidden 1970s: Histories of Radicalism* (New Brunswick, NJ: Rutgers University Press, 2010), 21-2.

<sup>52</sup> Daniel S. Chard, “Rallying for Repression: Police Terror, ‘Law-and-Order’ Politics, and the Decline of Maine’s Prisoners’ Rights Movement,” *The Sixties* 5, no. 1 (2012), 51. Chard notes that, “[t]he height of this movement came in the fall of 1971 and throughout 1972, a year marked by a record-breaking number of at least 50 prison rebellions. Waves of inmate revolts rocked prisons throughout the USA following the shooting death of movement leader George Jackson by San Quentin Prison guards on 21 August 1971 and the New York State Police massacre at Attica State Penitentiary on 13 September of the same year.”

See also Dan Berger, *Captive nation: Black Prison Organizing in the Civil Rights Era* (Chapel Hill: The University of North Carolina Press Books, 2014).

<sup>53</sup> Kitty Calavita and Valerie Jenness, *Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic* (Oakland, CA: University of California Press, 2015), 208 note that, “California Inspector General Robert A. Barton (2011, 1) was explicit in linking the threat of riots to the establishment of a grievance system in California: ‘In the wake of several high-profile inmate riots and takeovers of prisons nationwide during the 1960s and 1970s, reviews of those incidents determined that one of the primary reasons for inmate unrest was inmates’ belief that no process existed for them to have their legitimate concerns and grievances addressed by correctional management. As a result, the state determined that it was in the best interests of the inmates, the correctional employees, and the public to create an inmate appeal

ability to join labor unions and receive vocational training) through mechanisms beyond rioting.<sup>54</sup> These efforts may also have been met with some repression.<sup>55</sup>

In the 1970s, activism from within the prison system was intended to support external legal challenges.<sup>56</sup> In 1970, the American Bar Association (ABA) set up the Commission on Correctional Facilities and Services to advance reform for prisoners. The Commission was granted funding by the Ford Foundation and set up offices in Washington. It created the Resource Center for Correctional Law and Legal Services to coordinate the efforts and resources of litigators and prisoners' rights groups. At least 7 sections of the ABA formed prisoners' rights committees by 1974 and 24 state bar associations had prison reform committees.<sup>57</sup> In California, advocates inside and outside prison seem to have encouraged and supported each other, such as by protesting simultaneously.<sup>58</sup> The New England Prisoners Association included prisoners, ex-prisoners, and

---

process. That process, now commonly referred to as the 602 appeal process, commenced in the mid-1970s and has continually evolved since that time.”

<sup>54</sup> Ronald Berkman, *Opening the Gates: The Rise of the Prisoners' Movement* (Lexington, MA: Lexington Books, 1979), 3. Berkman adds that, “[p]risoners had never addressed the issues of prison labor before the insurrections of the early seventies. On pages 86-7, Berkman describes how, in one prison in California, the “Men’s Advisory Council” proposed that its representative be elected and that it participate in the meeting of the Trade Advisory Council. Berkman summarizes that “MAC continued to make proposals linked to the interests of prisoners working in [Correctional Industries].”

<sup>55</sup> Ronald Berkman, *Opening the Gates: The Rise of the Prisoners' Movement* (Lexington, MA: Lexington Books, 1979), 88 summarizes that “the administration” responded to the “crisis” in the labor system in the mid-1970s by “selective stratification” which “creates a division in the prison body,” such as through “classification, job assignments, and honor units.” Additionally, “the administration has fallen back on a policy of active repression. Although the policy is not publicly articulated, evidence shows that it is operative. For example, in the quarter ending June 1975, the administration’s statistics reveal that 59 prisoners were given work-related disciplinary charges, which include a variety of offenses associated with work performance... This figure indicates that 5 to 7 percent of the full-time work force received a disciplinary charge.”

<sup>56</sup> Robert T. Chase, “We Are Not Slaves: Rethinking the Rise of Carceral States through the Lens of the Prisoners’ Rights Movement,” *The Journal of American History* 102, no. 1 (2015), 73-86 notes that prisoner and Black Panther John Eduardo Swift “was one of many prisoners who mobilized a grassroots movement to actively assist the legal campaigns against abusive Texas state prisons through self-defense, work strikes, and a system-wide letter-writing campaign to judges, state legislators, the governor, the media, and civil rights attorneys to bring visibility to the cause. Swift wrote the tract to call Texas prisoners to the movement, but he was not alone in his efforts. Other groups, including the Prisoners Solidarity Committee of Texas, Prisoners United, the First Inmate Reform Strike (FIRST), the JailHouse Lawyers Association, and Allied Prisoners Platform for Legal Equity, joined the movement.”

<sup>57</sup> James B. Jacobs, “The Prisoners’ Rights Movement and its Impacts, 1960-80,” *Crime and Justice* 2 (1980), 438-9.

<sup>58</sup> Eric Cummins, *The Rise and Fall of California’s Radical Prison Movement* (Stanford: Stanford University Press, 1994), 187 writes that, “[c]ommitment to prison reform among the mainstream California public welled in 1970-71. Banner-waving contingents urging prison reform joined in the last of the antiwar parades, suggesting that the Left had made the transition into a new decade by using prison reform as its rallying cry. Universities sponsored prison ‘teach-ins.’ Bay Area newspapers ran exposés of conditions in California prisons and provided extensive coverage of the growing convict unrest. Attorney groups such as Fay Stender’s Prison Law Project, its later splinter group the Prison Law Collective, and the National Lawyers Guild were receiving thousands of letters from prisoners complaining of conditions and alleging unfair treatment. Movement attorneys took on the grueling task of representing in court as many inmates as they could. When a full-scale prisoner unionization movement emerged in the prisons in 1970, using the rhetoric of class analysis originated by the prison system’s radicals, scores of community groups turned out in support and lobbied the state government for change.”

others; they demanded minimum wages for prison labor, prisoners' unions, and, from 1973, abolition of prisons.<sup>59</sup>

Prisoners' rights groups received financial support from foundations at this time.<sup>60</sup> The federal government also provided financial and legal support.<sup>61</sup>

---

On pages 201-2, Cummins describes a picket of 80 protestors outside Folsom prison in November 1970, which was supported by a strike of "approximately 2100" prisoners from their work and vocational assignments. This was reported in the press and attorneys and ex-convicts began to work on a constitution for the United Prisoners Union.

<sup>59</sup> Liz Samuels, "Improvising on Reality: The Roots of Prison Abolition," in Dan Berger (ed.), *The Hidden 1970s: Histories of Radicalism* (New Brunswick, NJ: Rutgers University Press, 2010), 32. Samuels summarizes that the NEPA "helped released prisoners find employment, edited and distributed a newspaper, *NEPA News*, and coordinated family visits at prisons throughout the Northeast." Similarly, the Prisoners' Solidarity Committee, which had "chapters in a dozen states in the Northeast, Mid-Atlantic, and Midwest," "organized for the abolition of prisons while providing concrete services in the form of legal assistance, transportation for family visits, and help with correspondence. The PSC also published a newspaper by the same name and publicized news in prisons through pamphlets, press releases, and demonstrations."

<sup>60</sup> Bert Useem and Peter Kimball, *States of Siege: U.S. Prison Riots, 1971-1986* (New York: Oxford University Press, 1989), 18 note that, "[c]ounting funds only from [private foundations], prisoners' rights groups received \$200 million in 1969, the first year any such grants were made. By 1975, that figure had risen to almost a billion dollars (\$900 million). This was followed by five somewhat leaner years, though still averaging in each year over \$600 million in contributors.

If the figures cited by Bert Useem and Peter Kimball on funding from foundations are accurate, then the prisoners' rights movement received astoundingly high amounts of funding. Indeed, these amounts are so high that the prisoners' rights movement's achievements with these levels of funding seem unimpressive. By comparison, Lewis Bollard, of Open Philanthropy Project recently estimated that \$150-180 million is spent on farmed animal advocacy internationally each year, of which \$35 million is from the Open Philanthropy Project itself ("Lewis Bollard on Ending Factory Farming," *The Most Interesting People I Know* (August 10, 2019), <https://mostinterestingpeople.podbean.com/e/11-lewis-bollard-on-ending-factory-farming/>).

In an endnote, Useem and Kimball note that, "[d]ata on contributions in the 1980s are not available. The data reported here are from work by Craig Jenkins on the funding of social movement organizations by foundations. We thank professor Jenkins for making them available to us. The broader project is described in Craig Jenkins, "Foundation Funding of Progressive Movements," in *The Grant-Seekers Guide*, 2nd edition, ed. Jill Shellow (New York: Kampmann and Co., 1985)." This book and article could not be identified by Google or Google Scholar searches. Nevertheless, the provided figures seem implausible. Craig Jenkins, "Channeling Social Protest: Foundation Patronage of Contemporary Social Movements," in Walter W. Powell and Elisabeth S. Clemens, *Private Action and the Public Good* (New Haven, CT: Yale University Press, 1998), 207 notes that Jenkins "examined the giving programs of all foundations that I could identify as having awarded a grant to a social movement organization between 1953 and 1980." The footnote adds that Jenkins found contributions of \$22.9 million in 1980 and (in another study), \$88 million in 1990. It therefore seems highly implausible that Jenkins had also provided figures of \$900 million for prisoners' rights alone, only a few years previously, unless Jenkins used some very broad definition of prisoners' rights and a narrow definition of a "social movement," in which case the high figures are of little interest to this case study.

<sup>61</sup> Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006), 178 notes that, "[t]hrough the Office of Economic Opportunity (OEO) Legal Services and other programs, the federal government provided critical support for the establishment and development of hundreds of state and local legal aid groups that pursued prisoners' rights issues. State and local governments also provided important support. The federal government supplied crucial help to the movement in other ways. The Civil Rights Act of 1964 gave the Department of Justice authority to sue for integration of public institutions. The Justice Department filed its first correctional desegregation lawsuit in 1969. For more than a decade after that it was seriously involved in prison and jail desegregation. It initiated its own desegregation investigations and intervened in many desegregation lawsuits initiated by private parties. The Civil Rights Division often used the desegregation lawsuits as an opening to challenge more general conditions in prisons and jails, even though its authority to do so rested on shakier legal ground. By 1980, the

During the 1970s, prisoners' rights cases increased in frequency. Jacobs notes, "11,195 prisoners' rights petitions were filed in federal district courts in the year ending 30 June 1979, a 451.5 percent increase since 1970 and a 15 percent increase over 1978."<sup>62</sup> The estimated number of filings per 1000 inmates rose from 6.3 in 1970 to a peak of 29.3 in 1981; the number remained above 20 until 1997.<sup>63</sup>

From the early 1970s onwards, various crime victims' rights organizations and support networks were founded, including the National Organization for Victim Assistance (1976), Parents of Murdered Children (1978), and Mothers Against Drunk Driving (1980).<sup>64</sup> Medium-term factors encouraging the development of the victims' rights movement included concern over the criminals' rights procedural changes in the courts in the 1960s,<sup>65</sup> the adoption by President Johnson and the Democrats in the 1960s of an anti-crime stance,<sup>66</sup> and the development of rape crisis centers by feminists.<sup>67</sup>

---

Department of Justice had been a key player in more than ten of the largest and most comprehensive prison cases and in many jail cases."

<sup>62</sup> James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 439. Jacobs adds that, "[t]he vast majority of these cases are filed pro se, without legal representation. Most of the cases are dismissed at the pleading stage or on summary judgment (Turner 1979), but if only a small percentage survive, the number of litigated cases will continue to be substantial."

<sup>63</sup> Margo Schlanger, "Inmate Litigation," *Harvard Law Review* (2003), 1583.

<sup>64</sup> Frank J. Weed, "The Framing of Political Advocacy and Service Responses in the Crime Victim Rights Movement," *Journal of Sociology and Social Welfare* 24 (1997), 45 summarizes that, "[t]he crime victim rights movement emerges out of a variety of separate social movements that started in the 1970s (Weed 1995). A part of the victim rights movement emerged out of the feminist movement's concern for battered women and rape victims which led to the first shelters and rape crisis centers in the early 1970s (Tierney 1982; Rose 1977; Matthews 1989; Matthews 1994). There are also groups that deal with criminal fatalities and bereavement like Parents of Murdered Children founded in 1978 (Villamoare and Benvenuti 1988), or anti-drunk driving groups like RID (Remove Intoxicated Drivers - USA) started in 1978, and MADD (Mothers Against Drunk Driving) founded in 1980 (Weed 1987). There are also a few groups that deal with the abuse, molestation, or abduction of children (Johnson 1989; Best 1989). There are more general victim advocacy groups at the local level such as VOCAL (Victims of Crime and Leniency). Finally, there are the Federal-State-County funded victim-witness programs started in 1974 to increase the cooperation of crime victims in prosecuting a legal case (Karman 1990). Some of these organizations with local affiliates have national offices that exist alongside national level umbrella organizations such as National Organization for Victim Assistance, Inc. (NOVA) founded in 1976 and the National Victim Center founded in 1985 (Carrington and Nicholson 1989; Weed 1995)."

<sup>65</sup> Katherine Beckett and Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (Thousand Oaks, CA: Sage Publications, 2004), 141. Much has been written on the "criminal procedure revolution" in the 1960s led by the Supreme Court under Chief Justice Warren. See, for example, Eric J. Miller, "The Warren Court's Regulatory Revolution in Criminal Procedure," *Connecticut Law Review* 43, no. 1 (2010).

<sup>66</sup> Katherine Beckett and Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (Thousand Oaks, CA: Sage Publications, 2004), 141. For details of these changes, see footnote 43.

<sup>67</sup> Katherine Beckett and Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (Thousand Oaks, CA: Sage Publications, 2004), 142.

Several rulings in the 1970s increased the access of prisoners to adequate legal assistance.<sup>68</sup> For example, the 1977 *Bounds v. Smith* Supreme Court ruling held that the constitution required corrections departments to provide prisoners with legal assistance, due to the prisoners' right of access to the courts.<sup>69</sup> Supreme Court rulings led to a number of other rights for prisoners at this time, such as the 1977 *Jones v. North Carolina Prisoners' Labor Union* Supreme Court ruling which protected prisoners' rights to join prisoners' unions and other service organizations,<sup>70</sup> the *Estelle v. Gamble* (1976) ruling that deliberate indifference to serious medical needs is unconstitutional, and the *Hutto v. Finney* (1978) ruling that approved an injunction against the conditions in Arkansas prisons.<sup>71</sup> The extent to which these regulations were followed in practice in individual prisons is likely to have varied.<sup>72</sup> The wave of legal victories, which likely had both practical and symbolic importance for the prisoners' rights movement,<sup>73</sup> was challenged by the 1979 *Bell v. Wolfish* decision which

---

<sup>68</sup> James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 436 notes that "The Supreme Court's decision in *Johnson v. Avery*, 393 U.S. 483 (1969), ushered in a new age in jailhouse lawyering. The court held that when prison officials are not providing prisoners with adequate legal services, prisoners can not be punished for providing legal assistance to one another. The decision marked another triumph for a class of prisoners whom the officials disliked and feared. More victories followed. In 1972, the Court held, in *Haines v. Kerner*, 404 U.S. 519 (1972), that prisoners' *in forma pauperis* petitions had to be treated in a manner most advantageous to prisoners; where there was a glimmer of a federal cause of action in the complaint the case could not be dismissed. *Wolff v. McDonnell*, 418 U.S. 539 (1974), extended the jailhouse lawyer's authority of representation to civil rights suits attacking institutional conditions and policies. The Court went even further in *Bounds v. Smith*, 430 U.S. 817 (1977), holding that the constitution imposed upon the states an affirmative obligation to provide prisoners with either adequate law libraries or adequate assistance from persons trained in the law."

For an alternative summary of these rulings, see Susan N. Herman, "Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue," *Oregon Law Review* 77 (1998), 1238-45.

<sup>69</sup> "Bounds v. Smith," Oyez, accessed October 8, 2019. <https://www.oyez.org/cases/1976/75-915>.

<sup>70</sup> "Jones v. North Carolina prisoners' Labor Union, Inc., 433 U.S. 119 (1977)," US Supreme Court, accessed October 10, 2019 <https://supreme.justia.com/cases/federal/us/433/119/>.

<sup>71</sup> James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 441.

<sup>72</sup> James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 452 notes that, "[j]udicial decrees are not self-executing. Sometimes the persistent efforts of lawyers are needed to prevent the case from being only a hollow victory. Sometimes even those efforts are not enough. Although judges have the power to hold noncomplying administrators in contempt, they are reluctant to take such drastic remedial action. In complicated 'totality of conditions' cases, federal judges have sometimes turned to special masters to help monitor compliance, gather information, and resolve ongoing disputes between the parties. But the special master is not an institutional panacea either. If the master lacks a full-time appointment and a staff, which is usually the case, he may simply not possess the capacity to see that a structural injunction is fully implemented. Even under the best of circumstances, the special master or other court appointed monitor (i.e. citizens' committee) must depend upon the institution's staff for information as to whether a decree is being followed."

On page 454, Jacobs notes his impression that, "for every instance of protracted institutional litigation like that involving the Arkansas prisons, there exist a dozen run-of-the-mill cases and consent decrees in which constitutional violations are remedied without such high drama." Much of the rest of the article focuses on the difficulties in assessing the extent to which prisoners' rights courts rulings have been successfully implemented.

<sup>73</sup> James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 441-4 argues that the importance of these rulings is more symbolic than practical, especially through its ability to "power a movement or to demoralize its opposition."

Ronald Berkman, *Opening the Gates: The Rise of the Prisoners' Movement* (Lexington, MA: Lexington Books, 1979), 45-6 describes several court rulings that gave prisoners more political power, such as *Procunier v. Martinez* (1974), which held that "censorship of prisoners' mail works a consequential restriction on the First and Fourteenth Amendment rights of

rejected protections on the privacy of pretrial detainees in New York that were being upheld by the Court of Appeals.<sup>74</sup> In that case, Justice Rehnquist emphasized the discretion and expertise of prison officials.<sup>75</sup> This decision may have been influenced by the fact that the case involved a federal facility and the lack of a clear theory from prisoners' rights advocates about how prisons should be run.<sup>76</sup> Nevertheless, the justices expressed renewed reluctance to intervene in prison conditions in several cases in the late 1970s and early 1980s.<sup>77</sup> As for Congress, its stance on changes in prisoners' rights during the 1970s seems to have remained

---

those who are not prisoners.” On page 50, Berkman concludes that, “the decisions of the court during this middle period of activity [the dates that this refers to are unclear] had ambiguous results. Court decisions undeniably opened up important political space for the development and growth of prison organizations. At the same time, the decisions failed to affirm the right of prisoners to carry out overt political activity or uphold other democratic rights.”

<sup>74</sup> James B. Jacobs, “The Prisoners’ Rights Movement and its Impacts, 1960-80,” *Crime and Justice* 2 (1980), 430 notes that the Supreme Court “rejected the Court of Appeals’ standard for review of jail conditions, under which pretrial detainees could ‘be subjected to only those ‘restrictions and privations’ which inhere in their confinement itself or which are justified by compelling necessities of jail administration.’ Instead, the majority required only a showing that jail practices are reasonably related to a legitimate governmental objective. Applying this less restrictive standard, the Court upheld a prohibition on receiving books and magazines from any source other than the publisher as well as a restriction on receipt of packages, double-bunking, unannounced cell searches, and mandatory visual inspection of body cavities.”

<sup>75</sup> James B. Jacobs, “The Prisoners’ Rights Movement and its Impacts, 1960-80,” *Crime and Justice* 2 (1980), 433. For example, Rehnquist noted that, “the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution, or in the case of a federal prison, a statute. The wide range of ‘judgment calls’ that meet constitutional and statutory requirements are confided to officials outside the Judiciary Branch of Government.”

<sup>76</sup> Edward Rubin (private email exchange, received June 16, 2020) summarizes the arguments in Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998): “*Bell v. Wolfish* involved a federal facility. The point we make in the book is that the prisoner rights cases did not really have a strong independent theory about the proper way to run a prison. Rather, the judges obtained the standards they imposed from two sources: the American Correctional Association and the Bureau of Prisons. In other words, they were not creating new norms, but imposing norms from these two national institutions on state prisons that diverged from them, particularly those in the South where the plantation model prevailed. For this reason, courts tended to reject suits against federal facilities, as we describe in the account of Marion Penitentiary (pp. 128-43).”

<sup>77</sup> Alvin J. Bronstein, “Prisoners and their endangered rights,” *The Prison Journal* 65, no. 1 (1985), 4 argued that, “beginning in the last half of the 1970’s, the Burger-Rehnquist Court has moved us, though not full circle back to the slave-of-the-state era, two-thirds of the way back. In what is best characterized by Justice Rehnquist’s callous comment that ‘nobody promised them a rose garden’ (*Atiyeh v. Capps*, 449 U.S. 1312, 1315 [1981]), a majority of the Supreme Court has seen as its principal role the halting of the doctrinal expansion of prisoners’ rights law. In a series of cases beginning in 1976, we began to see a return to the ‘hands-off’ doctrine with language about ‘a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than Federal courts’ (*Meachum v. Fano*, 427 U.S. 215, 225 [1976]), and to the effect that ‘the day-to-day functioning of state prisons’ involves ‘issues and discretionary decisions that are not the business of Federal judges’ (*Meachum v. Fano*, 427 U.S. 228-229 [1976]). In *Rhodes v. Chapman*, the first case in which the Supreme Court considered the limitations that the Eighth Amendment imposes upon the conditions in which a state may confine prisoners, the Court discusses the deference that should be given to prison administrators. It added that ‘to the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminals pay for their offenses against society’ (*Rhodes v. Chapman*, 452 U.S., 337, 347 [1981]). And one Federal court of appeals judge has recently said that ‘the *Rhodes* opinion, in my view, is a clear signal that the federal judiciary should, absent inaction by state courts, legislatures and executive officials where dire circumstances exist in a state penal system, practice a hands-off policy’ (*Ramos v. Lamm*, 713 F.2d 546 [10th Cir. 1983] [J. Barrett, dissenting]).”

neutral relative to its proactive, positive support for African American civil rights and hostile reaction to the Supreme Court's expansion of the rights of criminal defendants during the 1960s.<sup>78</sup>

In the early 1970s, Maine saw activism and vigilante attacks against prisoners' rights activists, who were often ex-convicts, including by state correctional officers.<sup>79</sup> This may have contributed to the decline of the prisoners' rights organization Statewide Correctional Alliance for Reform (SCAR).<sup>80</sup> SCAR was a group of predominantly convicts and ex-convicts whose activities ranged from letter-writing to litigation to

---

<sup>78</sup> Susan N. Herman, "Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue," *Oregon Law Review* 77 (1998), 1270 summarizes that, "[t]he Congress of the 1960s and 70s adopted neither expansive legislation like the Civil Rights Act or Voting Rights Act, nor hostile legislation designed to curtail the effects of the Court's rulings. Congress instead left the issue to the courts."

<sup>79</sup> Daniel S. Chard, "Rallying for Repression: Police Terror, 'Law-and-Order' Politics, and the Decline of Maine's Prisoners' Rights Movement," *The Sixties* 5, no. 1 (2012), 47-73. For example, Portland Police Officer Edward Foster attempted to organize "a police 'death squad' to assassinate local ex-convicts during the summer of 1974," but was arrested before his plans came to fruition. Chard adds that, "[a]lthough most Maine law enforcement agents would never have publicly condoned politically motivated arrests or vigilantism, the above were united in their embrace of a conservative ideology associated with Nixon-era law-and-order politics."

An example of less extreme activism was that, as Chard notes on page 56, "[i]n September 1973, an anonymous group headed by Waldoboro Police Chief Terrence Parker (a former MSP [Maine State Prison] guard) collected over 500 signatures of Maine citizens in the region surrounding MSP on a petition demanding an end to the institution's furlough program." On page 58, Chard adds that "[i]n September 1974, SCAR [Statewide Correctional Alliance for Reform, a radical prisoners' rights organization] members reported experiencing an unusual amount of police harassment, and accused local police of intimidating several of its donor organizations into withdrawing funding. Maine State Police also raided the unoccupied 'SCAR Farm' in Bowdoinham that month, confiscating marijuana plants from the premises in a move SCAR deemed 'politically motivated' and 'designed to discredit' them the day after the organization had received a \$35,000 grant from the National Catholic Foundation. Another attack occurred in the lobby of the Portland Police Headquarters in November, when a group of cops viciously punched, kicked, and arrested SCAR member Casey Hubbs after she got into an argument with an officer while inquiring about the status of her detained brother."

Many other examples are provided. Consequences included that, as Chard notes on page 59, "about half of SCAR's core external members left the organization to either join the underground resistance or escape escalating violence and in-fighting" in 1975.

<sup>80</sup> Daniel S. Chard, "Rallying for Repression: Police Terror, 'Law-and-Order' Politics, and the Decline of Maine's Prisoners' Rights Movement," *The Sixties* 5, no. 1 (2012), 47-73.

self-defense classes.<sup>81</sup> By 1980, several victories of Maine's 1970s prisoners' rights movement had been reversed.<sup>82</sup>

A 1973 report by the Council on Legal Education for Professional Responsibility listed 63 law schools that provided legal assistance to prisoners. Some lawyers supporting prisoners had previously worked on civil rights cases, including lawyers from the ACLU and the NAACP LDF.<sup>83</sup> Prisoner Legal Services was started in Illinois by a "nonlawyer activist" in the early 1970s and had 9 full-time attorneys and a staff of 40 by the mid-1970s.<sup>84</sup> The ACLU's National Prison Project had 7 full-time attorneys in 1980.<sup>85</sup> Its tactics included

---

<sup>81</sup> Daniel S. Chard, "Rallying for Repression: Police Terror, 'Law-and-Order' Politics, and the Decline of Maine's Prisoners' Rights Movement," *The Sixties* 5, no. 1 (2012), 51 notes that, "[i]n January 1973, Maine ex-convicts, prisoners, and their supporters united to form SCAR, a radical prisoners' rights organization" with chapters inside Maine prisons: "The majority of the organization's 15 or so core outside members were working-class ex-convicts from Maine or Massachusetts who had done time in MSP, MCC [two Maine prisons], or prisons in other states. The core group also included a number of others, most of them women, who had not done time, but knew loved ones who had, and saw the struggle for prisoners' rights as a crucial component of a larger movement for social justice. Additionally, SCAR enjoyed the support of most of the approximately 360 prisoners in MSP... Reflecting their state's broader demographics, members of SCAR were almost entirely white, and the majority came from working-class backgrounds. One of the organization's most outspoken supporters in the state capitol, however, was State Representative Gerald Talbot (D – Portland), the founder of the Maine National Association for the Advancement of Colored People (NAACP) and the state's first African American representative."

On page 51, Chard notes that, "[w]hile SCAR members in MSP pushed for prison reforms by writing articles, filing lawsuits, and appealing to the prison administration through the IAC [Inmates' Advisory Council], SCAR members in Portland and other cities established Black Panther Party-inspired 'survival programs,' including a community bail fund, free self-defense classes for children in the Kennedy Park housing projects, reading classes for inmates in county jails, free transportation services to MSP for prisoners' family members, and informal job, housing, and women's health referral services."

On pages 52- , Chard explains the origins of the group. Factors encouraging its development included developments in the civil rights movement, increased state repression of prisoners, and the apparently "failed liberal correctional reform efforts."

<sup>82</sup> Daniel S. Chard, "Rallying for Repression: Police Terror, 'Law-and-Order' Politics, and the Decline of Maine's Prisoners' Rights Movement," *The Sixties* 5, no. 1 (2012), 63 notes that, "[t]he most dramatic transformation of Maine's corrections system from one with limited rehabilitation opportunities to one based squarely on punishment came with the 1980 prison-wide lockdown at MSP [a Maine prison]. Called by Governor Joseph Brennan, ostensibly to crack down on a racket run by "powerful inmate bosses," the lockdown confined MSP prisoners to their cells 24 hours a day for over two months, required the assistance of approximately 150 state troopers, and cost the state over \$500,000. The lockdown led to a thorough overhaul of conditions in MSP, as acting Warden Donald Allen eliminated the furlough program, Sunday family picnics, the Inmates Advisory Council, and most other reforms won by prisoners in the early 1970s. Changes at MSP mirrored national prison trends. The scrapping of rehabilitative programs corresponded with astronomical prison expansion during the following three decades as Maine's prison population grew from roughly 840 in 1980 to over 2100 by 2007, and the national prison population expanded from approximately 500,000 to over 2.3 million during the same period."

<sup>83</sup> James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 437. Jacobs lists, as examples, "Herman Schwartz, a professor at the State University of New York at Buffalo, Alvin Bronstein of the American Civil Liberties Union's National Prison Project, William Bennett Turner and Stanley Bass of the NAACP Legal Defense Fund."

<sup>84</sup> James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 437.

<sup>85</sup> James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 440.

litigation, expert testimony from ex-correctional officials, lobbying, speaking engagements, and attending national conferences.<sup>86</sup>

In the mid-1970s, federal government grants to prisoner legal services became more restricted, such as by reducing funding for civil rights suits and class actions. The Resource Center for Correctional Law and Legal Services and Illinois Prisoner Legal Services both ran out of funds around 1978.<sup>87</sup> Indeed, comparing two surveys from 1975 and 1983-4 suggests that the budget of the average public interest law group (including, but not specific to groups focused on prisoners' rights) decreased slightly from around \$815,000 to around \$776,000.<sup>88</sup>

Also from the mid-1970s, several law schools, such as New York University Law School, increased their work to support women prisoners.<sup>89</sup> Around the same time, organizations such as Aid to Incarcerated Mothers (AIM) and Prison Mothers and their Children (Prison MATCH) were created or staffed by incarcerated or formerly incarcerated women.<sup>90</sup> Prisoners' rights groups focusing on women later became more active in the 1980s and 1990s with the development of the National Network for Women in Prison and the National Roundtables for Women in Prison.<sup>91</sup>

---

<sup>86</sup> James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 440.

<sup>87</sup> James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 439.

Additionally, Susan P. Sturm, "Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142 (1993), 644 summarizes a report from the Pennsylvania Bar Association as "stating that since 1979, state and federal funding for legal services to the poor has been severely reduced." Sturm adds that "[r]ecent declining interest rates have reduced the availability of funding from IOLTA (Interest on Lawyers' Trust Accounts) Programs." Sturm summarizes another report as "stating that as a result of declining interest rates, 60% of IOLTA programs participating in the survey face income declines, resulting in cuts of up to 42% in funding for legal services."

<sup>88</sup> Nan Aron, *Liberty and Justice for All: Public Interest Law in the 1980s and Beyond* (New York, Westview Press, 1989), paragraph 13.2. The total budget of the responding groups rounds to \$70,000,000 in 1975 and \$106,000,000 in 1983, but the funding was split between a larger number of groups in 1983. In paragraph 12.6, Aron notes that the [Alliance for Justice, who ran the surveys] "mailed surveys to all known public interest legal organizations, requesting information on clients served, size of groups, types of activities, issues addressed, lawyers salaries, and funding levels and sources. After a telephone follow-up effort, the Alliance received 158, or 71 percent, usable responses. An additional thirty-eight organizations were identified as having disbanded or discontinued their legal programs since the 1975 survey. A stable core of 57 groups has existed throughout." Given that different groups participated in the two surveys, the differences in the average funding and total funding could be attributable to these changes.

Aron notes in figure 2.1 that 4% of the 158 centers surveyed in 1983-4 had prisoners as their main clients, though another 10% of surveyed groups were categorized as focusing on civil liberties and another 13% were categorized as "multi-issue." Table 2.1 shows that the prisoner-focused groups had 20 full-time attorneys, with a median of 5 per organization. By comparison, fewer than 110 organizations were surveyed in 1975, since, as shown by figure 2.2, the number public interest law groups grew each year from 1969 to 1983 (i.e. each year in period measured).

<sup>89</sup> Ellen M. Barry, "Women Prisoners on the Cutting Edge: Development of the Activist Women's Prisoners' Rights Movement," *Social Justice* 27, no. 3 (81 (2000), 169.

<sup>90</sup> Ellen M. Barry, "Women Prisoners on the Cutting Edge: Development of the Activist Women's Prisoners' Rights Movement," *Social Justice* 27, no. 3 (81 (2000), 169.

<sup>91</sup> Ellen M. Barry, "Women Prisoners on the Cutting Edge: Development of the Activist Women's Prisoners' Rights Movement," *Social Justice* 27, no. 3 (81 (2000), 172-5.

In 1974, US Attorney General William Saxbe voiced opposition to lenient judges, the prison reform movement, and the concept of rehabilitation.<sup>92</sup> Rising crime rates in the 1960s and 1970s were encouraging reexamination of criminal justice procedures among local, state, and federal policy-makers, and there were increasing concerns among judges and scholars about the arbitrariness of indeterminate sentencing.<sup>93</sup> Research from the sociologist Robert Martinson on prison rehabilitation programs was cited by groups including the International Association of Chiefs of Police and was used to support the slogan against rehabilitative prison reform that “Nothing Works.” This research and line of argument was further expanded and debated by individuals like James Q. Wilson of Harvard University and David Fogel of the Illinois Law Enforcement Commission.<sup>94</sup> Maine adopted some of Fogel’s suggestions in June 1975, moving towards sentencing with fixed prison terms.<sup>95</sup> California moved towards a similar system in 1976<sup>96</sup> and this change met with little resistance.<sup>97</sup> Several victims’ rights and pro-law enforcement groups publicly advocated for tougher sentencing and took steps to protect law enforcement officers against legal actions.<sup>98</sup> Perhaps encouraged by

---

<sup>92</sup> Judith Greene, “Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act,” in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 4.

<sup>93</sup> Jennifer Edwards Walsh, *Three Strikes Laws* (Westport, CT: Greenwood Publishing Group, 2007), 6-9.

<sup>94</sup> Judith Greene, “Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act,” in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 4-5

<sup>95</sup> Judith Greene, “Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act,” in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 5 notes that, in June 1975, Maine “became the first state to abolish indeterminate sentences and parole release in favor of relatively short flat terms.”

<sup>96</sup> Judith Greene, “Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act,” in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 6-7 notes that “the California legislature enacted a far-reaching determinate sentencing law. Repudiating the state’s famed rehabilitationist penal philosophy by declaring that the purpose of prison was to punish offenders, legislators abolished parole release and replaced indeterminate ranges (which had been extremely broad — e.g., six months to fourteen years; one year to life) with a schedule of presumptive prison terms arrayed in four offense categories... Sentence enhancements were included for cases involving weapons or serious injuries, or where the offender had a prior record of violent crime.”

<sup>97</sup> Judith Greene, “Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act,” in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 7 notes that, “[t]he determinate sentence bill had won very broad support, from the California Peace Officers Association to the San Francisco-based Prisoners Union. Virtually no one defended the old indeterminate system. But at both ends of the political spectrum there were some who were opposed to the bill because they were not satisfied with the length of the scheduled prison terms: Los Angeles Police Chief Ed Davis declared them too short, while NCCD and the AFSC complained they were too long.”

<sup>98</sup> Judith Greene, “Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act,” in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 10 notes that, “[t]he relentless push for mandatory sentences which began in the late 1970s was evidence that the victims’ movement was coming into its own. In 1975 a Victims Committee was created within the American Bar Association’s Criminal Justice Section. That same year Frank Carrington, then the executive director of Americans for Effective Law Enforcement, published *The Victims*, a book which decried the treatment of crime victims in American jurisprudence. AELE had been founded in 1966 by Northwestern University law professors Fred E. Inbau and James R. Thompson (later the Governor of Illinois, and sponsor of the ‘Class X’ legislation), along with former Illinois Governor Richard B. Ogilvie, and O. W. Wilson — then Superintendent of Police in Chicago. According to Carrington, the AELE was formed to support law enforcement, and to provide an effective counter-voice to the American Civil Liberties Union on behalf of the law-abiding citizen. It carried this effort forward by filing amicus briefs to defend the legal authority of the police in cases before the U.S.

this advocacy, several states abolished parole in the late 1970s,<sup>99</sup> and between 1975 and 1985, all US states passed at least one mandatory sentencing law.<sup>100</sup> Determinate sentencing systems were introduced in 15 states in 1975-81.<sup>101</sup> Plea-bargaining restrictions were also introduced.<sup>102</sup>

From 1976, groups associated with the political left, including the ACLU and the National Council on Crime and Delinquency, demanded a moratorium on new prison construction, favoring community corrections programs instead.<sup>103</sup>

In the mid-1970s, states including Illinois, California, and Minnesota introduced prisoners' rights legislation, which codified some of the changes won through litigation, such as the availability of legal materials, or introduced regulations on correctional practices that asserted more clearly that prisoners had rights.<sup>104</sup>

From the late 1970s, prisons began to use long-term and indefinite solitary confinement for some prisoners; previously, solitary confinement had tended to be temporary.<sup>105</sup> By 2014, 44 states had super-maximum security (i.e. supermax) prisons, in which all prisoners were held in solitary confinement.<sup>106</sup> Litigation in the 1970s and 1980s did lead to restrictions on the conditions that were permitted in prisons, though these

---

Supreme Court, as well as by serving as a clearinghouse for lawyers and police departments involved in defending police officers in civil suits filed against them. Under Carrington's leadership the AELE was taking up legal representation for victims of crime (Carrington 1975)."

Greene adds that, "[t]he leadership ranks in the many grass-roots victims' rights advocacy groups which sprang up during this period were filled by crime victim/survivors, and by the bereaved relatives of deceased crime victims such as Robert and Charlotte Hullinger of Parents of Murdered Children, and Candy Lightner of Mothers Against Drunk Driving, who found a measure of relief from their personal grief through activism. In 1976 the National Organization for Victim Assistance (NOVA) was formed to provide support and coordination of victims' rights advocacy efforts at the national level. In 1977 the California District Attorneys Association spurred declaration of that state's first Victims' Rights Week."

<sup>99</sup> Judith Greene, "Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act," in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 8-9 notes that, "[a]bolition of parole in a few states, along with the debates about it in others, spurred parole board members and staff to begin creating administrative rules for the discharge of their release function... New federal parole guidelines legislated in 1976 folded a risk-prediction score into a release matrix which also weighed the seriousness of the conviction charge, with institutional behavior playing a lesser role. With the incentive of LEAA funding, this model was taken up in many states."

<sup>100</sup> Judith Greene, "Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act," in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 7.

<sup>101</sup> Jennifer Edwards Walsh, *Three Strikes Laws* (Westport, CT: Greenwood Publishing Group, 2007), 12. On pages 9-10, Walsh adds that, "[i]n the end, all 50 states and the federal government moved away from a purely indeterminate sentencing system toward one that featured more determinate sentences."

<sup>102</sup> Jennifer Edwards Walsh, *Three Strikes Laws* (Westport, CT: Greenwood Publishing Group, 2007), 10.

<sup>103</sup> Judith Greene, "Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act," in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 5.

<sup>104</sup> James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 447.

<sup>105</sup> Keramet Ann Reiter, "The Most Restrictive Alternative: A Litigation History of Solitary Confinement in US Prisons, 1960-2006," *Studies in Law, Politics, and Society* 57 (2012), 71-124.

<sup>106</sup> Alexa T. Steinbuch, "The movement away from solitary confinement in the United States," *New England Journal on Criminal and Civil Confinement* 40 (2014), 499-533.

restrictions left scope for solitary confinement.<sup>107</sup> Subsequently, the constitutionality of supermax prisons has been challenged in every state where they have been built. Challenges that supermaxes constitute “cruel and unusual punishment” (and therefore violate the Eighth Amendment) have not led any federal court to agree that supermaxes are unconstitutional, though courts have sometimes required the implementation of more specific minimum requirements for the use of solitary confinement in response to Fourteenth Amendment challenges.<sup>108</sup>

The salience of prisoners’ rights litigation may have increased in the late 1970s. One report from 1980 noted that, “[i]n 1976, the *New York Times* reported on prisoners’ rights litigation on seventy-eight different occasions, accounting for 16 percent of its total prison coverage. Prisoners’ rights cases made the CBS national news on eight separate occasions.”<sup>109</sup>

In 1980, People Organized to Stop the Rape of Imprisoned Persons (later renamed Stop Prisoner Rape, then Just Detention International) was formed. Many of the organizers were survivors of rape in prison.<sup>110</sup> However, by this point, some of the momentum of activism by prisoners themselves may have declined.<sup>111</sup>

---

<sup>107</sup> Keramet Ann Reiter, “The Most Restrictive Alternative: A Litigation History of Solitary Confinement in US Prisons, 1960–2006,” *Studies in Law, Politics, and Society* 57 (2012), 94-106 details and discusses several case studies of litigation which led to legal rulings that changed the conditions in prisons in different states. On page 106, Reiter notes that, “[i]n a sense, supermax prisons represent the opposite of the many abuses courts documented in the 1970s and 1980s prison reform cases. The supermax prison keeps people in absolute isolation; no overcrowding. The supermax prison is brand new — made of clean steel and smooth concrete, with technologically advanced central control rooms, from which officers can open and close cell doors at the push of a button without even the necessity of human sound, let alone contact; no dilapidation, no filth. Heavy doors with perfect seals muffle the sounds; no intolerable din. Supermax prisons keep individual prisoners contained, each in his own concrete box, for 23-24 h every day; no violence... every state prison system reviewed in this section as the subject of litigation challenging punitive isolation practices later opened a long-term solitary confinement, or supermax unit... the combined evidence from court cases, supermax designers, and details about what kinds of institutions states actually built in the 1980s and 1990s, demonstrated that federal courts played a role in encouraging and inspiring the physical shape of the modern supermax, down to the smallest detail of design, like whether or not prisoners control their own light switches.”

<sup>108</sup> Keramet Ann Reiter, “The Most Restrictive Alternative: A Litigation History of Solitary Confinement in US Prisons, 1960–2006,” *Studies in Law, Politics, and Society* 57 (2012), 110-7.

<sup>109</sup> James B. Jacobs, “The Prisoners’ Rights Movement and its Impacts, 1960-80,” *Crime and Justice* 2 (1980), 459.

<sup>110</sup> “Stop Prisoner Rape: A Brief History,” Stop Prisoner Rape, accessed 27/06/19, [https://web.archive.org/web/20080611155106/http://www.spr.org/en/spr\\_history.asp](https://web.archive.org/web/20080611155106/http://www.spr.org/en/spr_history.asp).

<sup>111</sup> Liz Samuels, “Improvising on Reality: The Roots of Prison Abolition,” in Dan Berger (ed.), *The Hidden 1970s: Histories of Radicalism* (New Brunswick, NJ: Rutgers University Press, 2010), 33 summarizes that, “[a]bolition efforts started to crystallize as the prison movement started to decline. In the mid-1970s, there were numerous calls and efforts to develop national organizations and a coordinated fight for prisoners’ rights, prison reform, and prison abolition. By the decade’s end, these calls faced limited support [though Samuels does not cite this claim or provide any evidence]. This waning support owed, in part, to a combination of limitations within the prison movement and expanded policing and retributive legislation. Recognizing the decline in the movement’s appeal, some prison activists acknowledged that they had romanticized prisoners, failed to build popular support for their politics in a ‘law and order’ climate, and responded to urgent crises rather than developing strategic priorities.” Samuels also suggests that some “sympathetic key-holders” like Jerome Miller ceased supporting the movement and that, “[w]ith the increasing salience of law-and-order politics... there were fewer sympathetic officials like Miller to whom organizers could turn to for support.”

This seems to roughly match up with the chronology implied by Eric Cummins, *The Rise and Fall of California’s Radical Prison Movement* (Stanford: Stanford University Press, 1994). Notwithstanding the book’s title, however, Cummins does not clearly state the timing of the “fall” of the movement, or the reasons for it.

In 1980, Congress enacted the Civil Rights of Institutionalized Persons Act, which enabled the Attorney General to litigate on behalf of prisoners. The act included reference to “systematic deprivations of the constitutional and Federal statutory rights” of prisoners and implied acceptance that prison conditions sometimes required federal involvement. Through the act, Congress also attempted to divert some prisoner litigation to the states by requiring that prisoners use state procedures first.<sup>112</sup> However, legal scholars Malcolm M. Feeley and Edward L. Rubin claim that the act was hardly enforced.<sup>113</sup>

## 1980-2003: Decreased Supreme Court support, tough-on-crime politics, harsher sentencing, and mass incarceration

Though the prison population had already been increasing in the 1970s,<sup>114</sup> during the 1980s, the number of people incarcerated doubled.<sup>115</sup> This increase was probably mostly driven by a crackdown on drug-related offences.<sup>116</sup>

---

However, Daniel S. Chard, “Rallying for Repression: Police Terror, ‘Law-and-Order’ Politics, and the Decline of Maine’s Prisoners’ Rights Movement,” *The Sixties* 5, no. 1 (2012), 49 argues that Cummins “overlooks the massive prisoners’ rights movement outside of California, much of which peaked in the years after prison organizing in the Golden State receded. Indeed, very little scholarship has examined the movement outside of California and New York.”

<sup>112</sup> Susan N. Herman, “Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue,” *Oregon Law Review* 77 (1998), 1270-2.

<sup>113</sup> Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons* (New York: Cambridge University Press, 1998), 45 summarize that, “[o]nce passed, the act promptly became a dead letter because the Reagan administration refused to enforce it, and occasionally went so far as to use the intervention rights granted by the act to appear on the side of the institutional defendant.” Otherwise, they summarize that “Congress did not play an active role in the prison reform movement.”

<sup>114</sup> Judith Greene, “Getting tough on crime: The history and political context of sentencing reform developments leading to the passage of the 1994 Crime Act,” in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 6, after discussing several developments in the mid-1970s, notes that, “prison population levels jumped skyward, leading to severe levels of overcrowding in many prisons across the country. A quarter of a million prisoners were held in state and federal institutions at the beginning of 1976, with every state but California reporting increases in 1975. (California’s prison population decrease was due to introduction of new parole guidelines that year.) High unemployment, soaring crime rates, and improved law enforcement methods spawned by increased federal funding through the LEAA were probably all contributing to the problem, but the cresting of the ‘baby boom’ into the high-crime age cohort (17-29) was held to be the primary cause by most experts — who anticipated that the prison population crisis would extend to 1985, when it would receive the predictable demographic relief. But tougher attitudes toward the treatment of criminals were also being cited by some experts as exacerbating the problem... Many state parole boards were tightening their discretion, especially in Southern states which were also experiencing the most severe overcrowding.”

<sup>115</sup> Susan P. Sturm, “Legacy and Future of Corrections Litigation,” *University of Pennsylvania Law Review* 142 (1993), 668, citing “Prisoners in 1990,” Bureau of Justice Statistics, US Department of Justice (1991), 1.

<sup>116</sup> Chase Riveland, “Prison Management Trends, 1975-2025,” *Crime and Justice* 26 (1999), 163-203 explains that, “[t]he major driver of greatly increased prison populations across the country during this period was an increase in law enforcement attention to illegal drugs and related increases in sentence severity, particularly for crack cocaine offenses, although increased penalties for trafficking in other drugs and longer sentences for violent and sex offenders also occurred in most jurisdictions. The approach taken by most jurisdictions, including the federal government, was to imprison increasingly large numbers of persons arrested for possession, possession with intent to sell, or sale of drugs.

Summarizing the changes in the Supreme Court's approach to prisoners' rights in the 1980s and early 1990s, legal scholar Christopher E. Smith writes:

Lower courts continued to issue decisions reforming practices and conditions in prisons throughout the country. However, the Supreme Court signaled a halt to the expansion of recognized rights and the identification of new rights. This development intensified as the Court's composition became more conservative through President Ronald Reagan's appointment of new justices. For example, in *Rhodes v. Chapman* (1981), the Court limited the contexts in which lower court judges could order changes in prison conditions. The Supreme Court also established new standards that limited prisoners' potential for success in raising certain rights issues. For example, in *Whitley v. Albers* (1986), the Court established a difficult-to-prove standard for proving rights violations for excessive use of force by corrections officials, and *Turner v. Safley* (1987) created a standard that was very deferential to corrections officials for certain First Amendment and other rights claims. The Supreme Court made it significantly more difficult for prisoners to raise conditions-for-confinement issues through a new difficult-to-prove standard for the violation of Eighth Amendment rights in *Wilson v. Seiter* (1991).<sup>117</sup>

Other legal scholars seem to share Smith's perception of a shift towards a less protective and sympathetic attitude of the Court towards prisoners' rights cases around the start of the 1980s.<sup>118</sup>

---

Many sentences for drug crimes were made mandatory and frequently for much longer terms than had previously been the case.”

<sup>117</sup> Christopher E. Smith, *The Supreme Court and the Development of Law: Through the Prism of Prisoners' Rights* (Basingstoke, UK: Palgrave Macmillan, 2016), 12.

<sup>118</sup> For example, Susan N. Herman, “Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue,” *Oregon Law Review* 77 (1998), 1246-50 argues that, “[t]he First Amendment, it turned out, only applied to prisoners in a highly modified form,” citing several cases from the 1980s, as well as from other decades. On pages 1250-2, Herman argues that, “[d]uring the 1980s and 1990s, the Eighth Amendment right to be free from cruel and unusual punishment was also whittled down to exclude some weighty claims about overcrowding and brutality” and “[i]n other areas of the law change was more radical.”

J. E. Call, “Supreme Court and Prisoners' Rights,” *Federal Probation* 59, no. 1 (March 1995), 36-46 summarizes that, “the U.S. Supreme Court case law on prisoners' rights can be divided into three periods: the Hands-Off Period (before 1964), the Rights Period (1964-78), and the Deference Period (1979-present). Before the 1960's, courts did not involve themselves in the issue of prisoners' rights. In the early 1960's, lower Federal courts began moving away from the hands-off approach. They showed an increasing willingness to identify rights of inmates found in the U.S. Constitution and to protect those rights. The Deference Period began in 1979 with the *Bell v. Wolfish* decision. The Supreme Court resolved five issues in that case and ruled against the inmates on all of them. In ruling against the inmates, the Court set the tone for the Deference Period. During this period, inmates would lose on most prisoners' rights issues before the U.S. Supreme Court, which would emphasize the need to give deference to the expertise of corrections officials.”

Susan Easton, *Prisoners' Rights: Principles and Practice* (Abingdon, UK: Routledge, 2011), 42-3 summarizes that in *Bell v. Wolfish*, “Justice Rehnquist concluded that the conditions of confinement did not infringe upon the detainees' rights and that issues of prison management were matters outside the jurisdiction of the judiciary,” given certain constraints. In *Hudson and Palmer* (1984), “the Supreme Court acknowledged that prisons had a duty to provide secure and sanitary conditions for both prisons and employees, but decided that the loss of many rights may be necessary to accommodate the institutional objectives of the prison. Similarly in *Turner v. Safley* 482 US 78 (1987) the Court again deferred to the needs of good order in prison and also moved away from a strict scrutiny test, where the limit on rights must be strictly

In the early 1980s, one prominent advocate of the victims' rights movement became an influential advisor to Republican President Ronald Reagan<sup>119</sup> and, alongside conservative think tank The Heritage Foundation, advocated for a variety of tough-on-crime reforms, such as increased sentences and lowered age limits for charging juveniles as adults.<sup>120</sup> Ronald Reagan emphasized a "war on drugs," arguably continuing the tactics that scholars and pundits ascribe to some earlier Republican leaders of implicitly linking criminality to race in order to win the votes of white racists and talking tough-on-crime in order to capitalize on fears of criminality.<sup>121</sup> In 1982, California passed Proposition 8, which created new rights for crime victims and introduced tougher sentencing procedures, with 54% support.<sup>122</sup>

During the 1988 presidential election campaign, Democratic nominee Michael Dukakis was criticized by the Republican campaign of George H. W. Bush for his liberal views on the treatment of convicts, including his support for a prison furlough system he had supported as governor of Massachusetts.<sup>123</sup> At this time, 44 states and the federal system had furlough policies in place,<sup>124</sup> and usage seems to have subsequently expanded, despite Bush's criticism.<sup>125</sup> Political use of capital punishment also increased in the 1990 mid-term

---

tailored to a compelling government interest, towards a rational relationship test, so limits on rights are acceptable if they are reasonably related to the pursuit of legitimate political aims."

<sup>119</sup> Judith Greene, "Getting tough on crime: The history and political context of sentencing reform developments leading to the passage of the 1994 Crime Act," in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 15 notes that Frank Carrington, earlier described as the executive director of Americans for Effective Law Enforcement and the author of the book *The Victims*, "had become a prominent advisor to the Reagan campaign on criminal justice issues. After Ronald Reagan was elected he was appointed to serve on both the Attorney General's Task Force on Violent Crime, and the President's Task Force on Victims of Crime."

<sup>120</sup> Judith Greene, "Getting tough on crime: The history and political context of sentencing reform developments leading to the passage of the 1994 Crime Act," in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 17.

<sup>121</sup> See, for example, Katherine Beckett and Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (Thousand Oaks, CA: Sage Publications, 2004), 60-4.

<sup>122</sup> Judith Greene, "Getting tough on crime: The history and political context of sentencing reform developments leading to the passage of the 1994 Crime Act," in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 15. The measure "provided curbs on plea bargaining, it set tougher bail procedures; and it increased sentencing enhancements for prior felony convictions."

<sup>123</sup> David Oshinsky, "What Became of The Democrats?" *New York Times* (October 20, 1991), <https://www.nytimes.com/1991/10/20/books/what-became-of-the-democrats.html>.

See the references in "Further reading" in "Southern strategy," Wikipedia, last edited August 1, 2019, [https://en.wikipedia.org/wiki/Southern\\_strategy#Further\\_reading](https://en.wikipedia.org/wiki/Southern_strategy#Further_reading)."

<sup>124</sup> T. R. Reid, "Most states allow furloughs from prison" (June 24, 1988),

<https://www.washingtonpost.com/archive/politics/1988/06/24/most-states-allow-furloughs-from-prison/ad22836e-11b-4f09-aa6d-6651d2e9a04e/>.

<sup>125</sup> S. P. Davis, "Number of Furloughs Increasing - Success Rates High," *Corrections Compendium* (December 1991), 10-21 describes the results of a poll of 47 states plus the Federal Bureau of Prisons, and the District of Columbia: "Forty-six systems now have a temporary release system. More than 230,960 furloughs were granted in the 40 U.S. systems that provided figures, a 15-percent increase over the 1987 figures and a 35-percent increase over 1988 for all systems. Success rates of 100 percent were reported in 7 of the systems including Delaware, Illinois, Nevada, Michigan, Virginia, Washington, and Wyoming, whereas the others had 95 to 99.9 successful completion of furloughs." However, the abstract does not compare the total number of furloughs granted in the period of study to earlier in the 20th century. The full article could not be accessed.

elections.<sup>126</sup> Tough-on-crime rhetoric was continued by subsequent Republicans and seems also to have influenced the Democrats in the 1990s.<sup>127</sup>

In 1990, the National Victims Center's directory listed 6,742 organizations and contact persons associated with the victims' rights movement in addition to 848 victim witness programs.<sup>128</sup>

By 1990, 25% of US jails were under court order to reduce overcrowding and 30% were under court order to improve conditions. By January 1993, 40 states were under court order to reduce overcrowding in prisons and jails or to end conditions deemed unconstitutional.<sup>129</sup>

During the 1992 presidential campaign, Attorney General William Barr advocated a variety of tough-on-crime policies, such as incarcerating repeat offenders. He published a report titled "The Case For More Incarceration." Shortly after Bill Clinton's appointment as president in 1993, the National Rifle Association (NRA) announced a national campaign to toughen policies towards criminals; it worked to support "Three Strikes and You're Out" laws in 7 states (which require mandatory life imprisonment for a third felony conviction), legislation requiring that violent juvenile offenders serve the same time as adults in 8 states, and "Victims' Bill of Rights" proposals in 13 states. The NRA also supported other measures, such as mandatory prison sentences and the abolition of prison furloughs.<sup>130</sup> Other conservative groups, such as the American

---

<sup>126</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 100 notes that, "[p]olitical manipulation of capital punishment increased in the 1990 mid-term elections. Candidates across the nation, and particularly in Florida, Texas, California, and Michigan gubernatorial races, used television commercials that bragged of their concrete efforts while governor or state attorney general to have convicted murderers executed. One such spot showed Texas candidate Mark White walking past portraits of inmates he had helped to execute while serving a previous term as governor."

<sup>127</sup> Katherine Beckett and Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (Thousand Oaks, CA: Sage Publications, 2004), 64-5 notes, for example, that, "[l]ike many 'new' Democrats, 1992 presidential hopeful Bill Clinton was determined not to suffer the fate of the previous Democratic presidential candidate, Michal Dukakis, who was portrayed by the Bush administration as hopelessly 'soft on crime.' As both governor and presidential candidate, Clinton expressed strong support for expanded police efforts, more aggressive border interdiction programs, and tougher penalties for drug offenders. The 1992 Democratic platform also embraced the idea that levels of crime and drug use are a direct function of crime control efforts: "The simplest and most direct way to restore order in our cities is to put more police on the streets."

<sup>128</sup> Frank J. Weed, "The framing of political advocacy and service responses in the crime victim rights movement," *Journal of Sociology and Social Welfare* 24 (1997), 49.

<sup>129</sup> Susan P. Sturm, "Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142 (1993), 641.

This was not a new phenomenon. Margo Schlanger, "Beyond the hero judge: Institutional reform litigation as litigation," *Michigan Law Review* 97, no. 6 (1999), 2004 notes that, "[b]y 1984 (the first year for which data are accessible), 24% of the nation's 903 state prisons (including at least one in each of forty-three states and the District of Columbia) reported to the federal Bureau of Justice Statistics that they were operating under a court order. In 1983 (the first year these data exist for jails), 15% of the nation's 3338 jails (including at least one in all but two of the forty-five states that had jails, and the District of Columbia) reported court orders. Litigants had been particularly active — or particularly successful — in large facilities: the prisons under court order housed 42% of the nation's state prisoners, and the jails under court order housed 44% of the nation's jail inmates, and for both jails and state prisons, about half of the nation's largest facilities were under court order."

<sup>130</sup> Judith Greene, "Getting tough on crime: The history and political context of sentencing reform developments leading to the passage of the 1994 Crime Act," in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 21.

Legislative Exchange Council, also advocated for a variety of criminal sentencing reforms, including “Three Strikes and You’re Out” and imposing “truth in sentencing” rules, which required that 85% of the sentence given by the judge was served in practice.<sup>131</sup> Some of these groups’ proposals were eventually included in Democrats’ 1994 Crime Act, which included a federal “Three Strikes and You’re Out” rule, funding for 100,000 new police officers, \$9.7 billion additional funding for prisons, and an expansion of death penalty-eligible offences.<sup>132</sup> Indeed, the Democrats seem to have become more supportive of punitive policies towards convicts at this time.<sup>133</sup>

In 1993, Washington passed a “Three Strikes and You’re Out” law. The next year, by a margin of 72%,<sup>134</sup> California voters passed Proposition 184, a measure that broadened the scope and increased the number of crimes considered “strikes.”<sup>135</sup> Legislators and the public may have been encouraged to support these laws by publicity around crimes committed by released convicts,<sup>136</sup> politicians’ emphasis on high-profile crimes,<sup>137</sup> and possibly by the NRA’s campaigning.<sup>138</sup> The NRA (\$40,000 plus undisclosed amounts of in-kind support), the prison guards’ union (\$101,000), and Congressman Michael Huffington (\$300,000) each contributed

---

<sup>131</sup> Judith Greene, “Getting tough on crime: The history and political context of sentencing reform developments leading to the passage of the 1994 Crime Act,” in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 23-4.

<sup>132</sup> Jessica Lussenhop, “Clinton crime bill: Why is it so controversial?” (April 18, 2016), <https://www.bbc.co.uk/news/world-us-canada-36020717>. See also Judith Greene, “Getting tough on crime: The history and political context of sentencing reform developments leading to the passage of the 1994 Crime Act,” in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 24-8.

<sup>133</sup> Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* (Oxford, UK: Oxford University Press, 2014), 113-47 discusses this process. For example, on 125, Murakawa summarizes that, “[t]hrough three consecutive Republican presidencies, conservatives successfully enconced crime, drug use, affirmative action, welfare, and immigration in a common language of personal responsibility and just deserts. In this context, Clinton’s turn to ‘punishment, police, and protection’ was undoubtedly an electoral strategy. In renouncing the extremes of ‘tough or compassionate’ criminal policy, Clinton played the New Democrats’ leitmotif of the centrist ‘third way,’ its tone of flexibility crafted by the Democratic Leadership Council with hopes of wooing white swing voters and Reagan Democrats. For Clinton Democrats, the strategy was to outbid on a range of issues, some clearly punitive (like long mandatory minimums), some ambiguously punitive (like community policing), and some not punitive (like drug treatment and midnight basketball).”

<sup>134</sup> “California Proposition 184, Three Strikes Sentencing Initiative (1994),” Ballotpedia, accessed October 11, 2019, [https://ballotpedia.org/California\\_Proposition\\_184,\\_Three\\_Strikes\\_Sentencing\\_Initiative\\_\(1994\)](https://ballotpedia.org/California_Proposition_184,_Three_Strikes_Sentencing_Initiative_(1994)).

<sup>135</sup> Judith Greene, “Getting tough on crime: The history and political context of sentencing reform developments leading to the passage of the 1994 Crime Act,” in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 21-2.

<sup>136</sup> James Austin, John Clark, Patricia Hardyman, and Alan Henry, “Three Strikes and You’re Out: The Implementation and Impact of Strike Laws” (March 6, 2000), <https://www.ncjrs.gov/pdffiles1/nij/grants/181297.pdf>, 1.

<sup>137</sup> Michael G. Turner, Jody L. Stundt, Brandon K. Applegate, and Francis T. Cullen, “Three Strikes and You’re Out Legislation: A National Assessment,” *Federal Probation* 59 (1995), 16, after describing a lack of change in crime rates in the 1990s, argues that “the recent get-tough movement appears to have grown out of a few highly-publicized, heinous crimes, combined with the public’s fear of being victimized... Legislators have focused on these incidents to draw support for their campaign by promising to enact ‘lock ‘em up’ legislation.”

<sup>138</sup> Judith Greene, “Getting tough on crime: The history and political context of sentencing reform developments leading to the passage of the 1994 Crime Act,” in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 21.

substantially to the Proposition 184 campaign.<sup>139</sup> Groups opposing the proposition seem to have been mostly groups representing legal professionals.<sup>140</sup>

By 1996, 24 states and Congress had adopted some form of three-strikes legislation.<sup>141</sup> A 2000 Department of Justice report found that “with the noted exception of California, there has been virtually no impact” from three strikes laws “on the courts, local jails or state prisons. Nor does there appear to be an impact on crime rates.”<sup>142</sup> Nevertheless, other countries have subsequently introduced similar laws, perhaps inspired by the US example.<sup>143</sup>

In 1993, Congress’ Religious Freedom Restoration Act required that laws and policies that impeded the right to free exercise of religion have “compelling justification.”<sup>144</sup> Though implemented in response to a non-prisoner case, this law protected prisoners’ freedom of religion.<sup>145</sup> Without invalidating its use in federal decisions, the Supreme Court ruled in *City of Boerne v. Flores* (1997) that this act did not apply to the states, though 21 states have subsequently enacted similar acts.<sup>146</sup> In *Flores*, the Supreme Court ruled that Congress may not “enforce a constitutional right by changing what the right is”; Legal scholar Susan Herman argues that this means that, “[w]hile it is relatively easy for Congress to curtail the Court’s expansion of rights by

<sup>139</sup> Jewelle Taylor Gibbs and Teiahsha Bankhead, *Preserving Privilege: California Politics, Propositions, and People of Color* (Westport, CT: Greenwood Publishing Group, 2001), 53-6.

<sup>140</sup> Jewelle Taylor Gibbs and Teiahsha Bankhead, *Preserving Privilege: California Politics, Propositions, and People of Color* (Westport, CT: Greenwood Publishing Group, 2001), 57 notes that, “[a]mong the organizations that went on record to oppose Proposition 184 during the campaign were a number of lawyers’ and judges’ groups such as the California Attorneys for Criminal Justice, the California Public Defenders Association, the California Judges Association, and the Los Angeles District Attorney. Additionally, organizations such as the American Civil Liberties Union, the California Drug Policy Reform Coalition, and the League of Women Voters of Orange County also opposed it and were united in their warnings about the long-term costs of the ‘Three Strikes’ provisions, as well as the damage that would be inflicted on education and social programs in the state of California.”

<sup>141</sup> James Austin, John Clark, Patricia Hardyman, and Alan Henry, “Three Strikes and You’re Out: The Implementation and Impact of Strike Laws” (March 6, 2000), <https://www.ncjrs.gov/pdffiles1/nij/grants/181297.pdf>, 1 and 5.

For details on the variations in these laws, at least as they were in 1995, see Michael G. Turner, Jody L. Stundt, Brandon K. Applegate, and Francis T. Cullen, “Three strikes and you’re out legislation: A national assessment,” *Federal Probation* 59 (1995), 20-31.

<sup>142</sup> James Austin, John Clark, Patricia Hardyman, and Alan Henry, “Three Strikes and You’re Out: The Implementation and Impact of Strike Laws” (March 6, 2000), <https://www.ncjrs.gov/pdffiles1/nij/grants/181297.pdf>.

<sup>143</sup> Julian V. Roberts, “Public opinion and mandatory sentencing: A review of international findings,” *Criminal Justice and Behavior* 30, no. 4 (2003), 483-508 notes that, “[t]he United States has led the world in the creation of mandatory sentencing laws, and there is evidence that other countries have learned from the U.S. example. Many jurisdictions, including Australia, England, and Wales have adopted variations on Three Strikes laws. In countries that have yet to pass such legislation (such as Canada), politicians have nevertheless called for Three Strikes laws, particularly during the period preceding an election (see Roberts et al., 2003). Other Western nations have also followed the U.S. example with respect to other forms of mandatory sentencing laws.”

<sup>144</sup> Christopher E. Smith, *The Supreme Court and the Development of Law: Through the Prism of Prisoners’ Rights* (Basingstoke, UK: Palgrave Macmillan, 2016), 12.

<sup>145</sup> Christopher E. Smith, *The Supreme Court and the Development of Law: Through the Prism of Prisoners’ Rights* (Basingstoke, UK: Palgrave Macmillan, 2016), 12. On page 13, Smith adds that, “Congress reiterated its desire for the free exercise of religion to receive a high level of protection in prisons through an additional statute aimed at religion-inhibiting policies of state and local officials (Religious Land Use and Institutionalized Persons Act of 2000).”

<sup>146</sup> “State Religious Freedom Restoration Acts,” National Conference of State Legislatures (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

enacting restrictive remedial and other measures clearly within its power, it may be practically and politically impossible for Congress to move in the other direction.”<sup>147</sup>

The early 1990s saw policy changes such as the loss of education grants for prisoners in 1994 and the reintroduction of chain gangs — where prisoners are chained together to perform physical or menial labor — in Alabama in 1995.<sup>148</sup> By 1995, most states had passed some form of “victims bill of rights.”<sup>149</sup> The victims’ rights movement won a variety of other legislative and legal changes in the 1990s, including 33 state constitutional amendments with an average of 79% support.<sup>150</sup>

In 1995, prisoners brought 40,000 lawsuits to federal courts; these lawsuits comprised about 15% of federal civil trials. Less than 15% of those lawsuits were successful.<sup>151</sup> Nevertheless, this litigation was sometimes successful in driving welfare improvements for prisoners and seems likely to have encouraged greater compliance with existing regulations regarding the rights of prisoners.<sup>152</sup> In some cases, sheriffs and law enforcement officials seem to have welcomed lawsuits to enhance their “tough on crime” persona, but this may have been rare.<sup>153</sup>

---

<sup>147</sup> Susan N. Herman, “Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue,” *Oregon Law Review* 77 (1998), 1274.

<sup>148</sup> Susan Easton, *Prisoners’ Rights: Principles and Practice* (Abingdon, UK: Routledge, 2011), 43. Easton sees this as evidence of a “retreat from prisoners’ rights and from a construction of prisoners as citizens.”

<sup>149</sup> Frank J. Weed, “The framing of political advocacy and service responses in the crime victim rights movement,” *Journal of Sociology and Social Welfare* 24 (1997), 46 explains that “[t]he conceptual frame of crime victim’s rights generally calls for crime victims to be treated with dignity and respect, that they have the right to be present and heard at various stages in the criminal justice process including bail hearings, sentencing and parole hearings, and that they have a right to compensation and restitution for the harm done to them. Starting in 1980 almost every state had passed some form of a ‘victims bill of rights’ which contains some or all of these elements.”

<sup>150</sup> Steven Darene, Steve Walker, and John Stein, “History of the Crime Victims’ Rights Movement in the United States” (2011), <https://ce4less.com/Tests/Materials/E048RMaterials.pdf>, 2-20. On 2-17, they note that, “[a]s of 1995, all 50 states, the District of Columbia, and three territories had enacted crime victim compensation programs. As of 1998, 33 states had passed constitutional amendments. The U.S. Congress passed major legislation that addressed hate crimes, campus security, child protection, violence against women, sexual assault, kidnapping, and gun control. The U.S. Supreme Court upheld the use of victim impact statements in capital cases. Currently, all states have passed victims’ rights legislation in the form of a victims’ bill of rights or a series of statutory protections.”

<sup>151</sup> Margo Schlanger, “Inmate Litigation,” *Harvard Law Review* (2003), 1557. On page 1563, Schlanger summarizes a finding from the research in the article: “Inmates fare worse than all other federal court plaintiffs in all measures of success. But they nonetheless settle a large portion of the cases that survive motions practice. In addition, inmates win punitive damages in an extraordinarily large portion of their trial victories.”

<sup>152</sup> Margo Schlanger, “Inmate litigation,” *Harvard Law Review* (2003), 1666 argues that, “individual inmate litigation prior to the PLRA had a real, though undeniably partial, tendency to pressure jail and prison authorities to comply with the (quite minimal) constitutional law of corrections.” Schlanger develops this argument on pages 1672-7. Drawing on interviews, Schlanger also argues that the litigation can drive improvements in conditions, noting for example, that, “[b]y comparison with prison administrators, I have found jail administrators far less reluctant to admit that they frequently have changed policies and practices nearly entirely because of individual lawsuits.”

<sup>153</sup> Margo Schlanger, “Inmate litigation,” *Harvard Law Review* (2003), 1679-80 summarizes that, “[o]ne salient current example of a jail official who seems to go looking for litigation is Joe Arpaio, who bills himself as the ‘toughest sheriff in America.’ The frequent lawsuits his department provokes substantiate this claim. Many states have their own Joe Arpaio (in Massachusetts, we have Bristol County Sheriff Thomas Hodgson, who has single-handedly brought the chain gang to the state). But my firm impression is that such sheriffs are exceptional. So the perverse consequences of individual inmate civil rights litigation seem to me very limited overall.”

In 1995 and 1996, through the *Sandin v. Conner* and *Lewis v. Casey* rulings, the Supreme Court added new requirements on pleadings that were applicable only to prisoners, thereby restricting prisoner litigation.<sup>154</sup>

In 1996, Congress enacted the Prison Litigation Reform Act (PLRA), which imposed filing fees on inmates and required them to use up all possible administrative remedies before filing lawsuits.<sup>155</sup> Legal scholar Margo Schlanger summarizes that this legislation was driven by “state officials who were the most frequent targets of the growing inmate docket” who “were finally able to capitalize on the rightward move in American politics and mobilize a major campaign against the lawsuits. Building on years of (non-inmate) tort reform drives as well as law-and-order rhetoric, state officials got their proposed legislative solution into the Republican Congress’s 1994 Contract with America.”<sup>156</sup> Congress’ debate about whether to enact the PLRA involved anecdotal claims about the frivolity, or importance, of inmate litigation.<sup>157</sup> Anecdotal evidence that inmate litigation focused on frivolous issues was highlighted by the attorneys general and the media; the actual cases were widely misrepresented, and the more substantial issues raised by litigation were ignored.<sup>158</sup> Nevertheless, the PLRA’s restrictions extended beyond frivolous cases.<sup>159</sup> Prior to the PLRA’s passage, prisoners’ litigation had indeed been increasing, though this had been caused by an increase in the number of prisoners; the filing rate per prisoner decreased by 17% between 1980 and 1996.<sup>160</sup> The PLRA likely contributed to a decrease in inmate filings, which fell by 43% between 1995 and 2001, despite a 23% increase in the number of people incarcerated.<sup>161</sup> Prisoners’ rights litigation seems to have survived the PLRA’s restrictions better in New York and California. In New York, the rate of prisoner filings per 1,000 prisoners rose by 8% between 1995 and 2011 and in California, the rate only fell by 5%; the rate fell by between 15% and 88% in all other states

---

<sup>154</sup> Susan N. Herman, “Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue,” *Oregon Law Review* 77 (1998), 1230 and 1252-66.

<sup>155</sup> Margo Schlanger, “Inmate litigation,” *Harvard Law Review* (2003), 1559.

<sup>156</sup> Margo Schlanger, “Inmate litigation,” *Harvard Law Review* (2003), 1558-9. Schlanger adds that, “[t]he PLRA’s passage was aided by its connection to several longstanding political trends. In particular, it marked the overlap of conservatives’ discontent with so-called ‘imperial’ judging, tort reformers’ concern with the problem of frivolous lawsuits, and new congressional willingness to legislate federal court procedure.”

<sup>157</sup> Margo Schlanger, “Inmate litigation,” *Harvard Law Review* (2003), 1568-9 summarizes that, “[t]he official critics of inmate litigation did not, of course, present anything like a balanced view of the inmate docket. As is typical in litigation-reform efforts (and, perhaps, in most of lawmaking), they instead used stylized anecdotes and gerrymandered statistics. The critics’ arguments about inmate cases were summed up by Letterman-like ‘Top Ten Frivolous Filings Lists,’ compiled by NAAG members. Two such lists made it into the Congressional Record; many others were released by state attorneys general back home. The lists were full of silly lawsuits about topics like melted ice cream and mind control devices... And the counterpunches offered by the PLRA’s opponents were no more systematic. Prisoners’ rights advocates publicized their own ‘Top Ten Non-Frivolous Lawsuits,’ which were filled with horror stories that had led to both individual and court-order law- suits. The debate, then, was a war of extremes, and generally failed to mention any less-anecdotal evidence.”

<sup>158</sup> Susan N. Herman, “Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue,” *Oregon Law Review* 77 (1998), 1297-9. Pages 1299-1300 also argue that Chief Justice Rehnquist commanded a majority on the Supreme Court and was able to represent a broad array of claims as frivolous without much opposition.

<sup>159</sup> Susan N. Herman, “Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue,” *Oregon Law Review* 77 (1998), 1275-90.

<sup>160</sup> Susan N. Herman, “Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue,” *Oregon Law Review* 77 (1998), 1293-7.

<sup>161</sup> Margo Schlanger, “Inmate litigation,” *Harvard Law Review* (2003), 1559-60. Data on page 1583 shows that the estimated number of filings per 1000 inmates rose from 6.3 in 1970 to a peak of 29.3 in 1981. The number remained above 20 until 1996; the drop was from 24.6 in 1995 and 23.2 in 1996 to 15.0 in 1997 and down further to 11.4 by 2001.

between those years, though California had previously had one of the lowest filing rates in the country.<sup>162</sup> In California, this may have been because of continued support from experienced lawyers.<sup>163</sup> The PLRA does not seem to have slowed grievance procedures within prisons.<sup>164</sup>

A survey of the US public from 1995 showed that a majority of respondents wanted harsher punishments for criminals.<sup>165</sup> The same survey found 55% support for mandatory sentencing.<sup>166</sup> By comparison, a survey from 1989 found 50% support for mandatory sentencing for possession of cocaine and a survey from 1999 found nearly 80% support for treatment rather than imprisonment for drug use, though the wording of the question may have influenced this result.<sup>167</sup> A survey from 1996 found that 54% of respondents saw “retribution” as

---

<sup>162</sup> Margo Schlanger, “Trends in Prisoner Litigation, as the PLRA Enters Adulthood,” *UC Irvine Law Review* 5 (2015), 160. In 1995, California had the 47<sup>th</sup> highest (i.e. sixth lowest) filing rate in the country. In 2011, it had the 15<sup>th</sup> highest. The rate actually increased

<sup>163</sup> Margo Schlanger, “The just barely sustainable California prisoners’ rights ecosystem,” *The Annals of the American Academy of Political and Social Science* 664, no. 1 (2016), 62-81 summarizes that, “[n]ationwide, litigation currently plays a far smaller role as a corrections oversight mechanism than in decades past, a change largely caused by the 1996 Prison Litigation Reform Act (PLRA). Yet no such decline is evident in the nation’s most populous state, California, where prisoners’ rights litigation remains enormously influential and was the trigger to the criminal justice “Realignment” that is the subject of this volume. Indeed, every prison in California is subject to numerous ongoing court orders governing conditions of confinement... California’s very large bar includes a critical mass of highly expert prisoners’ rights lawyers. Working for both nonprofits and for-profit firms, they benefited from a pipeline of large-scale, pre-PLRA, fees-paying cases that sustained them while they learned to cope with the statutory obstacles. And the Ninth Circuit’s hospitable bench awarded them some favorable fee-related rulings in support of their coping strategies. In short, they learned how to—just barely—maintain a prisoners’ rights docket, notwithstanding very substantial financial hurdles. They continue to litigate old and new cases, but ongoing challenges pose a real threat to the fragile litigation ecosystem they have created.”

<sup>164</sup> Kitty Calavita and Valerie Jenness, *Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic* (Oakland, CA: University of California Press, 2015), 19, also focusing on evidence from California, note that, “the predicted decline in prisoner litigation subsequent to the PLRA was paralleled by a dramatic increase in prisoner grievance filing.” On page 33, they add that, “[i]n the year following the system’s establishment [i.e. 1974], only about 500 prisoner appeals made their way through the system, as compared to more than 16,000 thirty years later. Even considering that the prison population in California by 2006 reached approximately 160,000—as compared to only 20,000 incarcerated in the early 1970s—the rate for these final appeals had risen by 400 percent.” They do not provide any evidence that the PLRA itself caused an increase in grievance procedures, however.

<sup>165</sup> Julian V. Roberts, “Public Opinion and Mandatory Sentencing: A Review of International Findings,” *Criminal Justice and Behavior* 30, no. 4 (2003), 486 summarizes that, “61% of the respondents to the National Crime and Justice Survey in the United States [noted on page 491 to have been conducted in 1995] expressed the view that sentence severity was a problem, and, of these people, 94% felt that offenders were not punished harshly enough (Myers, 1996). Americans also believe that sentences for nonviolent crimes are insufficiently harsh: This was the view reflected by more than half the responses to a recent survey (Belden Russonello & Stewart, 2001).”

<sup>166</sup> Julian V. Roberts, “Public opinion and mandatory sentencing: A review of international findings,” *Criminal Justice and Behavior* 30, no. 4 (2003), 491 explain that, “[r]espondents were specifically asked whether mandatory sentences were a good idea or whether judges should be able to decide the sentence. A slim majority (55%) favored mandatory sentencing, but almost 4 respondents out of 10 (38%) chose judicial discretion (an additional 6% gave an ambiguous response).”

<sup>167</sup> Julian V. Roberts, “Public opinion and mandatory sentencing: A review of international findings,” *Criminal Justice and Behavior* 30, no. 4 (2003), 492-3. The wording of the question for the second poll was: “Some people think anyone caught in possession of illegal drugs should be sent to jail or prison. Others think it makes little sense to imprison people for simple drug possession and they should receive treatment instead. Which comes closer to your own opinion—jail or prison, or treatment?”

the main purpose of sentencing, compared to 13% for deterrence; the other options presented were incapacitation or rehabilitation.<sup>168</sup>

Smith summarizes that the Supreme Court's refusal "to expand the range of both new and already-recognized rights for prisoners" continued into the 2000s.<sup>169</sup>

## 2003-present: Increased support for prisoners' rights from conservatives

In July 2003, both the House of Representatives and Senate voted unanimously for the Prison Rape Elimination Act, which was then signed into law by President George W. Bush in September.<sup>170</sup> The measure was supported by a diverse coalition of prisoners' rights, human rights, conservative, and religious organizations,<sup>171</sup> perhaps because its measures avoided expanding prisoners' rights to litigate<sup>172</sup> and seems to have been motivated at least partly by concern about the wellbeing of prisoners.<sup>173</sup> The measure was

---

<sup>168</sup> Julian V. Roberts, "Public opinion and mandatory sentencing: A review of international findings," *Criminal Justice and Behavior* 30, no. 4 (2003), 503.

<sup>169</sup> Christopher E. Smith, *The Supreme Court and the Development of Law: Through the Prism of Prisoners' Rights* (Basingstoke, UK: Palgrave Macmillan, 2016), 13. Smith adds examples; "the Court accepted strict limitations on access to newspapers, magazines, and family photos for certain prisoners in *Beard v. Banks* (2006) and overruled a lower court's support for an asserted right of prisoners to receive family visitors (*Overton v. Bazzyetta* 2003).

<sup>170</sup> Tom Strode, "Law targeting prison rape signed; diverse coalition backed measure" (September 8, 2003), <https://web.archive.org/web/20080327163535/http://www.sbcbaptistpress.org/bpnews.asp?ID=16630>.

<sup>171</sup> Tom Strode, "Law targeting prison rape signed; diverse coalition backed measure" (September 8, 2003), <https://web.archive.org/web/20080327163535/http://www.sbcbaptistpress.org/bpnews.asp?ID=16630> notes that, "[t]he [Southern Baptist Ethics & Religious Liberty Commission] and Prison Fellowship were part of a diverse coalition that worked for the measure's enactment. Other groups backing the legislation included Amnesty International USA, Concerned Women for America, Focus on the Family, Human Rights Watch, the NAACP, the National Association of Evangelicals, Penal Reform International, Physicians for Human Rights, the Presbyterian Church USA, the Salvation Army and the Union of American Hebrew Congregations."

Alex Friedmann, "Prison Rape Elimination Act Standards Finally in Effect, but Will They be Effective?" (September 15, 2013),

<https://www.prisonlegalnews.org/news/2013/sep/15/prison-rape-elimination-act-standards-finally-in-effect-but-will-they-be-effective/> adds that, "Michael J. Horowitz, a senior fellow at the Hudson Institute, garnered support for the legislation from a number of conservative and evangelical organizations — particularly Prison Fellowship, founded by former special counsel to President Nixon (and ex-federal prisoner) Charles 'Chuck' Colson. Groups from opposite ends of the political spectrum joined together to back the bill, including Just Detention International (formerly Stop Prisoner Rape), the NAACP, Amnesty International, National Council of La Raza, Concerned Women for America, the Salvation Army, Penal Reform International and Focus on the Family."

<sup>172</sup> Alex Friedmann, "Prison Rape Elimination Act Standards Finally in Effect, but Will They be Effective?" (September 15, 2013), <https://www.prisonlegalnews.org/news/2013/sep/15/prison-rape-elimination-act-standards-finally-in-effect-but-will-they-be-effective/> notes that, "[f]or some, legislation to protect prisoners from sexual abuse was preferable to enlarging their legal rights. According to a 2002 article in the *National Review*, 'While some on the left — most prominently the group Human Rights Watch — have proposed anti-prison-rape solutions such as expanding prisoners' rights to sue corrections officials, the new proposal represents a sensible middle-ground solution.'"

<sup>173</sup> Tom Strode, "Law targeting prison rape signed; diverse coalition backed measure" (September 8, 2003), <https://web.archive.org/web/20080327163535/http://www.sbcbaptistpress.org/bpnews.asp?ID=16630> quotes Barret Duke of the Southern Baptist Ethics & Religious Liberty Commission: "At worst, prison is a place where men and women pay for their crimes by being isolated from the world. At best, it is a place where they can rehabilitate

encouraged by a 2001 report by the group Human Rights Watch called “No Escape: Male Rape in U.S. Prisons.”<sup>174</sup> The Prison Rape Elimination Act’s measures were not implemented for ten years, however, due at least in part to concerns about costs and concerns from correctional staff’s unions.<sup>175</sup>

In 2004-5, state-level restrictions on past and current convicts’ right to vote may have affected the outcome of elections.<sup>176</sup> In four out of seven cases concerning UK prisoners’ right to vote 2005-2017, the European Court of Human Rights held that there had been a violation of the ECHR. In six out of seven cases concerning prisoners’ right to vote in other European countries, 2010-16, the court also held that there had been a violation of the ECHR.<sup>177</sup> In 2008, the ACLU and the Brennan Center for Justice at New York University published a report, *De Facto Disenfranchisement*, which noted restrictions in practice on voting rights for those with criminal records and offered guidelines for reforms. The Brennan Center also ran (and still

---

themselves. Rape should not be part of the punishment, and it certainly doesn’t assist in rehabilitation. The sexual brutalization of inmates exposes men and women to punishment that is not only cruel but that also severely impedes their opportunity to rehabilitate themselves to assume lives worthy of the dignity of their humanity.”

<sup>174</sup> Alex Friedmann, “Prison Rape Elimination Act Standards Finally in Effect, but Will They be Effective?” (September 15, 2013),

<https://www.prisonlegalnews.org/news/2013/sep/15/prison-rape-elimination-act-standards-finally-in-effect-but-will-they-be-effective/> claims that this “served as a catalyst which, in conjunction with increased public awareness about the issue of prison rape, led numerous organizations to lobby for federal legislation to address the dilemma of sexual abuse behind bars.”

Brenda V. Smith, “The Prison Rape Elimination Act: Implementation and Unresolved Issues Torture,” *American University Criminal Law Brief* 3, no. 2 (2008), 10 claims that, “the event that contributed most to the passage of the Prison Rape Elimination Act was the 2001 publication of No Escape: Male Prisoner Rape by Human Rights Watch (HRW)” but suggests that the legislation was also encouraged by “(1) the increase in persons under custodial supervision, in particular, white men; (2) a focus on male-on-male prison rape as opposed to sexual abuse of women in custody; (3) and the concern among conservatives about the ramifications of sexual violence in custody.”

Alex Coolman, “No Escape: Male Rape in U.S. Prisons: A Human Rights Watch Report by Joanne Mariner” (May 15, 2003),

<https://www.prisonlegalnews.org/news/2003/may/15/no-escape-male-rape-in-us-prisons-a-human-rights-watch-report-by-joanne-mariner/> notes that the report was “cited during Congressional hearings on the bill” and was reported on the front page of *The New York Times*.

<sup>175</sup> Alex Friedmann, “Prison Rape Elimination Act Standards Finally in Effect, but Will They be Effective?” (September 15, 2013),

<https://www.prisonlegalnews.org/news/2013/sep/15/prison-rape-elimination-act-standards-finally-in-effect-but-will-they-be-effective/>.

<sup>176</sup> Marie Gottschalk, “Dollars, Sense, and Penal Reform: Social Movements and the Future of the Carceral State,” *Social Research* 74, no. 2 (2007), 681-2 notes that, “[t]he voting irregularities of the 2000 and 2004 presidential elections drew enormous public attention to the plight of the estimated 5 million Americans who are barred from voting by a maze of state laws that deny past or current felons the right to vote, sometimes temporarily, sometimes permanently. More than one in seven black men is disenfranchised because of his criminal record... Jeff Manza and Christopher Uggen calculate that if Florida had not banned an estimated 800,000 people with criminal records from voting in the 2000 election, Al Gore would have carried the state by at least 50,000 votes (and maybe as many as 80,000) and would have handily won the White House. They identify several Senate and gubernatorial races that likely would have been won by Democrats instead of Republicans over the years, and contend that ‘Democrats might have controlled the Senate during much of the 1990s’ had many former felons been permitted to vote... In every state except Maine and Vermont, imprisoned felons are barred from voting.”

<sup>177</sup> “Prisoners’ right to vote,” European Court of Human Rights (April 2019), [https://www.echr.coe.int/Documents/FS\\_Prisoners\\_vote\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Prisoners_vote_ENG.pdf).

runs) a campaign to restore voting rights to convicts called the Right to Vote Project. The Brennan Center has campaigned for legislation to support voting rights (with at least one example of success in Washington) and filed amicus curiae briefs in relevant legal cases.<sup>178</sup>

In 2007, Julian Bond, the chairman of the NAACP spoke in favor of mandatory HIV tests for criminals entering and leaving prison; AIDS prevalence was three times higher among prisoners than among the general population.<sup>179</sup> Bond later admitted that the NAACP was “pushed” by “people outside the organization” and by “a succession of [the NAACP’s] health directors” to take a stance on HIV in the 1980s and 1990s and that he regretted not taking a stronger stance earlier.<sup>180</sup>

In 2009, the trend towards an increasing number of incarcerated people, which had been uninterrupted since the early 1970s, was reversed. The total fell by 3.5% (80,000 people) between 2008 and 2013; 45% of this decline was in California.<sup>181</sup>

---

<sup>178</sup> Susan Easton, *Prisoners’ Rights: Principles and Practice* (Abingdon, UK: Routledge, 2011), 235-6. Eaton notes that the Brennan Center supported the Democracy Restoration Act. However, this bill does not seem to have succeeded, despite being introduced to congress over many years (“Democracy Restoration Act,” The Brennan Center (August 8, 2019), <https://www.brennancenter.org/our-work/policy-solutions/democracy-restoration-act>). Easton also notes that “[i]n Washington State in 2009 a Voting Rights Restoration Act was passed which removed requirements that all fees, fines and restitution as well as surcharges and interest be passed before becoming eligible to vote.

<sup>179</sup> Marie Gottschalk, “Dollars, Sense, and Penal Reform: Social Movements and the Future of the Carceral State,” *Social Research* 74, no. 2 (2007), 685.

<sup>180</sup> Jason M. Breslow, “Julian Bond: HIV/AIDS Is ‘A Civil Rights Issue’” (July 10, 2012), <https://www.pbs.org/wgbh/frontline/article/julian-bond-hiv-aids-is-a-civil-rights-issue/>.

<sup>181</sup> Marie Gottschalk, “Razing the Carceral State,” *Social Justice* 42, no. 2 (2015), footnote 1 on page 45, citing Lauren E. Glaze and Danielle Kaebler, “Correctional Populations in the United States, 2013,” Bureau of Justice Statistics, US Department of Justice (December 2013), [www.bjs.gov/conlenl/pub/pdf/cpus13.pdf](http://www.bjs.gov/conlenl/pub/pdf/cpus13.pdf).

Litigation relating to the *Brown v. Plata* (2011) case linked mass incarceration to poor prison conditions; the court judgement, defended by the Supreme Court, ordered reductions in overcrowding in California.<sup>182</sup> The decision followed from litigation efforts that had begun in the 1990s.<sup>183</sup>

In 2011, conservatives including Newt Gingrich, Grover Norquist, Edwin Meese III, and the Texas Public Policy Foundation endorsed strategies to reduce the incarcerated population.<sup>184</sup> This growth in support from

---

<sup>182</sup> Jonathan Simon, *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America* (New York, NY: The New Press, 2014), 7 summarizes that, “[t]he quantitative explosion of prison populations and the qualitative implosion in the security and humanity of our prisons are related, but their stories have remained largely apart, with scholars of punishment tracing the quantitative trends, while prisoners’ legal advocates have focused on the abysmal and dangerous conditions in prisons. In 2009 a special three-judge federal court in a case then titled *Coleman v. Schwarzenegger* (after the older of the two underlying cases and governor Arnold Schwarzenegger) held a fourteen-day hearing that finally brought the two stories together and placed mass incarceration on trial. In August 2009, the three-judge federal court issued an opinion finding that California’s chronic levels of hyper-overcrowding prevent any possibility of correcting the unconstitutional lack of mental and physical health care that had persisted despite two decades of court orders to remedy it. The court held that the nearly 200 percent overcrowding in the system during that period (300 percent more common in the reception centers, where most short-term prisoners languish) had made any adequate remedy to unconstitutional health conditions impossible. The judges ordered the state to reduce overcrowding to 137 percent in two years, a reduction of approximately forty thousand prisoners from the population at the time of the hearing. *Coleman v. Schwarzenegger* in 2009 and the Supreme Court’s review [of the same case] in *Brown v. Plata* in 2011 reveal in a more integrated way the size and nature of mass incarceration.”

On page 2, Simon summarizes that, “[t]he majority opinion in *Brown v. Plata* drew a direct line between the sentencing practices of mass incarceration and the inhumane conditions in prisons—the quantitative and qualitative stories. The majority, while only one vote strong, powerfully proclaimed the human dignity of prisoners and the requirement to provide humane conditions as core animating values of constitutional punishment.”

On page 15, Simon adds that, “[a]lthough the court was divided, Justice Anthony Kennedy’s majority opinion was anything but narrow and offered a green light to begin what Justice Antonin Scalia in dissent called ‘the most radical injunction in our nation’s history.’ *Brown* is the first major court-ordered reform of a state prison system since the Prison Litigation Reform Act of 1996 sought to close the doors of federal courts to prisoners. Justice Kennedy’s opinion also offered some of the strongest language in decades about prisoners as more than legal subjects, possessors of ‘human dignity’ whose recognition and protection ‘animates’ the Eighth Amendment. The majority affirmed that it understood the inhumanity of California’s prisons and appended three remarkable photographs of the inhuman prison conditions to underscore its point.”

<sup>183</sup> Jonathan Simon, *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America* (New York, NY: The New Press, 2014), 2 notes that *Brown v. Plata* “was a consolidation of two independent but related ongoing federal court cases covering California prisons: *Coleman v. Wilson*, a 1995 case ordering comprehensive improvements to mental health care delivery in prisons, and *Plata v. Davis*, a 2002 negotiated agreement in which California admitted systemwide violations of its constitutional requirement to provide adequate medical care in its prison systems.”

On page 11, Simon notes that the *Madrid v. Gomez* case was “filed by the same lawyers and decided at virtually the same times as *Coleman v. Wilson*, the first part of the *Brown v. Plata* litigation. *Madrid* was a landmark challenge to supermax-style incarceration and California’s extreme version of total isolation. On page 12, Simon summarizes that, “Judge Thelton Henderson’s opinion in *Madrid* offered stinging criticism of the supermax strategy, but it was only a partial victory for prisoners. Following Supreme Court precedent to defer broadly to California’s total incapacitation logic, Judge Henderson stopped just short of finding the supermax to be inherently ‘cruel and unusual’ and thus a violation of the Eighth Amendment, instead ordering major changes in the internal security procedures of the prison. Most significantly for our subject, Judge Henderson did hold that housing prisoners with a serious mental illness in a Security Housing Unit [supermax] does violate the Eighth Amendment.”

<sup>184</sup> Marie Gottschalk, “Razing the Carceral State,” *Social Justice* 42, no. 2 (2015), 34.

conservatives may have been caused by an increasing focus on the fiscal costs of mass incarceration and the increased prominence of the discussion of the “3 R’s” of reentry, justice reinvestment, and recidivism.<sup>185</sup>

In 2013, the UN Special Rapporteur on Torture, Juan E. Mendez, publicly urged the US government to end the use of prolonged solitary confinement following a complaint filed by 20 California prisoners and 15 supporting organizations and a federal lawsuit on behalf of California prisoners.<sup>186</sup> The UN Special Rapporteur on Torture has been involved in several other investigations of practice in the US and issued several other public statements of concern.<sup>187</sup>

Prisoners’ rights advocacy continued in the 2010s.<sup>188</sup> Open Philanthropy granted \$125.6 million to organizations working on criminal justice reform in the US in that decade,<sup>189</sup> though the organization’s focus seems to be on reducing the use of incarceration rather than protecting the rights of incarcerated people.<sup>190</sup>

---

<sup>185</sup> Marie Gottschalk, “Razing the Carceral State,” *Social Justice* 42, no. 2 (2015), 31-51.

<sup>186</sup> Bill Quigley and Sara Godchaux, “Prisoner Human Rights Advocacy,” *Loyola Journal of Public Interest Law* 16 (2014), 389-91.

<sup>187</sup> Bill Quigley and Sara Godchaux, “Prisoner human rights advocacy,” *Loyola Journal of Public Interest Law* 16 (2014), 391-5.

<sup>188</sup> For example, Jacqueline Henke, “Prisoners’ Rights Activism in the New Information Age” (May 2019), [https://hammer.figshare.com/articles/Prisoners\\_Rights\\_Activism\\_in\\_the\\_New\\_Information\\_Age/8038931/1](https://hammer.figshare.com/articles/Prisoners_Rights_Activism_in_the_New_Information_Age/8038931/1), describes how the “the New Prisoners’ Rights Coalition (NPRC), [organized] against low and no-wage prison labor, unhealthy and unsafe prison conditions, and inhumane prisoner treatment” in the period from December 2013 to September 2016.” On page 281, Henke notes that, “the NPRC does not succeed in convincing prison administrators to meet their demands. Moreover, the NPRC is not able to get their primary demand, proper compensation for prisoners, met. When NPRC activists share their grievances online, they are met with limited support, hostility, and disinterest.”

Additionally, “Prisoners’ Rights,” American Civil Liberties Union, accessed June 4, 2020, <https://www.aclu.org/issues/prisoners-rights> notes that the ACLU’s National Prison Project continues to be “dedicated to ensuring that our nation’s prisons, jails, and detention centers comply with the Constitution, domestic law, and human rights principles.” “Prisoners’ Rights,” Florida Justice Institute, accessed June 4, 2020, <https://www.floridajusticeinstitute.org/advocacy/prisoners-rights/> notes that, “[t]he small staff of the Florida Justice Institute accounts for many of the lawyers in Florida whose primary purpose involves advocacy for incarcerated people and their families. We represent such persons in civil lawsuits challenging the conditions of their confinement and aiming to reform inhumane prison practices.”

Malcolm M. Feeley has the impression (private email exchange, received June 8, 2020) that, “prison conditions litigation is now not so big and dramatic, but it still exists at lower levels, using ad regulations and laws, rather than big constitutional principles.” Feeley also commented: “You are quite right about the flagging interest in prisoners’ rights (though the Covid-29 pandemic has increased interests, at least temporarily), and the longer term movement towards decarceration is responding in part to the terrible conditions in prisons.”

<sup>189</sup> “Grants Database,” Open Philanthropy, accessed June 4, 2019 <https://www.openphilanthropy.org/giving/grants>.

<sup>190</sup> “Criminal Justice Reform,” Open Philanthropy, accessed June 4, 2019, <https://www.openphilanthropy.org/focus/us-policy/criminal-justice-reform>.

# The Extent of the Success of the US Prisoners' Rights Movement

## Institutional changes

Notable legislative and legal successes of the US prisoners' rights movement include:

- *Cooper v. Pate* (1964), which acknowledged Muslim prisoners' constitutional rights to worship;<sup>191</sup>
- *Talley v. Stevens* (1965), which declared that some conditions at an Arkansas prison were "cruel and unusual punishment," and subsequent court orders to reform prison conditions;<sup>192</sup>
- *Bounds v. Smith* (1977) and other 1970s rulings that increased the access of prisoners to adequate legal assistance;<sup>193</sup> and
- The federal Prison Rape Elimination Act (2003).<sup>194</sup>

The strategies of the prisoners' rights movement have contributed to a number of other changes to prisons and corrections institutions, which seem, on balance, to have been beneficial for the rights and wellbeing of

---

<sup>191</sup> See the paragraph beginning "The 1964 *Cooper v. Pate*..." in "A Condensed Chronological History of the US Prisoners' Rights Movement."

<sup>192</sup> See the paragraph beginning "In 1965, the US District Court..." in "A Condensed Chronological History of the US Prisoners' Rights Movement."

<sup>193</sup> See the paragraph beginning "Several rulings in the 1970s..." in "A Condensed Chronological History of the US Prisoners' Rights Movement."

<sup>194</sup> See the paragraph beginning "In July 2003, both the House..." in "A Condensed Chronological History of the US Prisoners' Rights Movement."

prisoners.<sup>195</sup> The prisoners' rights movement may have received low amounts of funding; if this is the case, then the institutional changes secured by the movement could be seen as fairly substantial successes.<sup>196</sup>

Notable legislative and legal defeats include:

---

<sup>195</sup> Susan P. Sturm, "Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142 (1993), 662-9 summarizes that, as well as providing evidence that litigation has had an impact on conditions and practices in prisons, the case studies examined in the article provide evidence for the following claims:

1. "Litigation Has Contributed to a Greater Understanding and Acceptance of Constitutional Standards Governing Correctional Institutions,"
2. "Litigation Has Contributed to the Professionalization of Corrections Leadership and Programmatic Staff,"
3. "Litigation Has Contributed to the Bureaucratization of Correctional Institutions,"
4. "Litigation Is Associated with Short-Term Demoralization of Staff and Disruption of Institutional Order,"
5. "Litigation Has Increased the Visibility and Accountability of Corrections,"

Sturm does not claim that these changes have occurred solely because of the actions of litigators, but argues that litigation was crucial for these developments. Sturm notes on pages 663-4, for example, that, "[i]ndependent efforts within the corrections field, such as the emergence of a network of professional organizations that promulgate standards and the incorporation of these standards in state statutes and administrative regulations, have also contributed to this development. However, litigation and professionalization have not occurred in isolation. Litigators and courts rely on professional standards and experts to evaluate the adequacy of conditions and practices and to apply those standards in a particular institutional context. The corrections field has, in turn, developed standards, rules, and regulations with an eye toward avoiding further judicial intervention. Litigation has thus played a major role in the development and further refinement of professional standards and oversight."

James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 457-63 described the following "Hypotheses on the Impacts of the prisoners' Rights Movement":

1. "The prisoners' rights movement has contributed to the bureaucratization of the prison,"
2. "The prisoners' rights movement has produced a new generation of administrators,"
3. "The prisoners' rights movement expanded the procedural protections available to prisoners,"
4. "The prisoners' rights movement has heightened public awareness of prison conditions,"
5. "The prisoners' rights movement has politicized prisoners and heightened their expectations,"
6. "The prisoners' right movement has demoralized prison staff,"
7. "The prisoners' rights movement has made it more difficult to maintain control over prisoners," and
8. "The prisoners' rights movement has contributed to a professional movement within corrections to establish national standards."

Relatedly, Malcolm M. Feeley has the impression (private email exchange, received June 8, 2020) that, "litigation has reduced violence within prisons dramatically—guard-inmate; inmate-guard; inmate-inmate, etc. It may have only been indirect; the new prisons built to comply with court regarding overcrowding were 'direct services' prisons, and reduced the amount of movement of inmates, even though they give them greater freedom of movement within a confined space. They allow for efficient classification and surveillance. All in all, I think this was very good. Litigation's single greatest impact was to improve medical services to inmates. This is not built into the system."

See also the paragraph beginning "In 1970, prisoners in Folsom..." in "A Condensed Chronological History of the US Prisoners' Rights Movement."

<sup>196</sup> For some relevant evidence of the movement's financial resources, see footnotes 60 and 88. The US anti-death penalty movement, which partly overlaps with the US prisoners' rights movement, also seems to have fairly low funding; see the section on "Organizational resources" in Jamie Harris, *Social Movement Lessons from the US Anti-Death Penalty Movement* (May 22, 2020), <https://www.sentienceinstitute.org/death-penalty#organizational-resources>.

Malcolm M. Feeley has the impression (private email exchange, received June 8, 2020) that, "prison litigation has, proportionately, probably been more successful than school desegregation."

- *Bell v. Wolfish* (1979) and subsequent rulings where judges expressed reluctance to intervene in prison conditions;<sup>197</sup>
- The introduction of indefinite solitary confinement from the late 1970s and the development of supermax prisons, which have survived constitutional challenges;<sup>198</sup>
- *Rhodes v. Chapman* (1981) and other rulings in the 1980s and 1990s that made it more difficult to win further improvements to prisoners' rights and conditions;<sup>199</sup> and
- The judicial and legislative restrictions on prisoner litigation introduced in 1995 and 1996, which added further administrative requirements and imposed filing fees on inmate litigation.<sup>200</sup>

A broad chronological assessment of the US Prisoners' rights movement is that it managed to win substantial institutional victories in the 1960s and 1970s, but that from around 1980 onwards, various new legislative restrictions made further progress more difficult. Political scientists Lee Epstein and Andrew D. Martin use survey data to measure the "public mood," representing this as a score on a single liberal-conservative dimension. They also construct measures of the liberalism of Congress, the US presidents, and the Supreme Court. None of these measures show notable changes around 1980 that persist throughout the period of apparent retrenchment against prisoners' rights over the next two decades.<sup>201</sup> This observation provides evidence against the otherwise plausible hypothesis that the US prisoners' rights movement's stagnation was primarily caused by a general rightward political shift in the 1980s and 1990s.

The causes of the stagnation in the prisoners' rights movement's progress around 1980 are therefore open to interpretation. Decreasing levels of advocacy from prisoners' rights activists seem likely to have contributed,<sup>202</sup> as did the adoption of tough-on-crime rhetoric and policies by the Democrats in the 1990s, which was seemingly a strategy to win elections.<sup>203</sup> The harsher attitudes towards criminals and criminal procedure from some institutional actors from the mid-1970s<sup>204</sup> and the attitudes of President Reagan and his advisors may

---

<sup>197</sup> See the paragraph beginning "Several rulings in the 1970s..." in "A Condensed Chronological History of the US Prisoners' Rights Movement."

<sup>198</sup> See the paragraph beginning "From the late 1970s, prisons began to use..." in "A Condensed Chronological History of the US Prisoners' Rights Movement."

<sup>199</sup> See the paragraph beginning "Summarizing the changes..." in "A Condensed Chronological History of the US Prisoners' Rights Movement."

<sup>200</sup> See the paragraph beginning "In 1995 and 1996..." and the subsequent paragraph in "A Condensed Chronological History of the US Prisoners' Rights Movement."

<sup>201</sup> Lee Epstein and Andrew D. Martin, "Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)," *University of Pennsylvania Journal of Constitutional Law* 13 (2010), 263-81. According to the measures that they report, the public mood shifted from its most liberal peak in around 1961 to its most conservative in around 1980; for much of the period of apparent conservative retrenchment against prisoners' rights, the public mood was more liberal than it had been for most of the 1970s. Notwithstanding year-by-year variation, there was little change in the overall levels of judicial conservatism from 1970 onwards, after a sudden shift from the Court's high-point of liberalism in the 1960s. Congress does seem to have become slightly more conservative in around 1980, and again in around 1992.

<sup>202</sup> See the strategic implication beginning "Social movements based heavily on litigation (or perhaps any single strategy) seem to be fragile..."

<sup>203</sup> See the paragraphs beginning "During the 1988 presidential election campaign..." and "In 1996, Congress enacted..." in "A Condensed Chronological History of the US Prisoners' Rights Movement."

<sup>204</sup> See the paragraph beginning "In 1974, US Attorney General William Saxbe..." in "A Condensed Chronological History of the US Prisoners' Rights Movement."

have also contributed.<sup>205</sup> But perhaps the preferences of the Supreme Court simply changed around 1980, or the Justices concluded that reform had gone far enough.

## Changes to public opinion

The General Social Survey found that the percentage of the US public who believed that local courts were “Not harsh enough” rose from 65% in 1972 to 86% in 1983. This number fluctuated until about 1994 (85%), after which point it dropped sharply to 54% by 2018.<sup>206</sup> Similarly, Gallup polls found a substantial fall in the proportion of the US public who believed that the criminal justice system in the US was “Not tough enough”. This figure fell from 83% in 1992 (when polling on this question began) to 45% in 2016.<sup>207</sup> However, there appears to be little polling on issues of more direct relevance to the rights and wellbeing of convicts during their periods of punishment or incarceration.<sup>208</sup>

## Features of the US Prisoners’ Rights Movement

### Intended beneficiaries of the movement

- Criminals are excluded from humanity’s moral circle in the sense that they are denied rights afforded to other humans such as the right to liberty and, in some countries, the right to life. Criminals are usually individuals who have previously been included within the moral circle but have been excluded from it as a result of their actions.
- Much of the advocacy for prisoners’ rights has originated from prisoners themselves. Prisoners’ agitation within prisons and external advocacy efforts seem to have encouraged and supported each other.<sup>209</sup>

### Institution

- Reform of court procedures that affect criminals is a technical issue, balanced between legal participants and stakeholders with a variety of competing interests.<sup>210</sup>

---

<sup>205</sup> See the paragraph beginning “In the early 1980s, one prominent...” in “A Condensed Chronological History of the US Prisoners’ Rights Movement.”

<sup>206</sup> “Civil Liberties,” National Opinion Research Center’s General Social Survey, accessed June 28, 2019, <https://gssdataexplorer.norc.umd.edu/trends/Civil%20Liberties>.

<sup>207</sup> “Crime,” Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1603/Crime.aspx>.

<sup>208</sup> See footnote 8.

<sup>209</sup> See footnote 5.

<sup>210</sup> Malcolm M. Feeley, *Court Reform on Trial: Why Simple Solutions Fail* (New Orleans, LA: Quid Pro Books, 2013), 12 notes that, “[j]udges, prosecutors, defense attorneys, defendants, clerks, police officers, bailiffs, sheriffs, bondsmen witnesses, and all the others whose activities take them into the courthouse pursue distinctly different interests and purposes and may understand their participation in the process in entirely different ways. Each of these players is participating in a different game, or in several different games.” This book is mostly focused on criminal prosecuting and sentencing procedures, rather than on convicts.

- The courts have substantial influence over the regulation of sentencing, punishment, and treatment of convicts because these issues do not tend to involve non-judicial institutions.<sup>211</sup>
- There are large racial disparities in imprisonment. For example, the admission rate to state and federal prisons grew from fewer than 100 per 100,000 black people in the US in 1975 to around 500 per 100,000 during the late 1980s and 1,400 per 100,000 by 2014. The rates for white people also grew, but did not exceed 100 per 100,000 until at least 1998; the rate was 275 per 100,000 by 2014.<sup>212</sup> By comparison, the proportion of the US population that was black or African American only increased from 11.1% in 1970 to 12.7% in 2014.<sup>213</sup> The historical legacy of slavery seems likely to have affected the tractability of change in various ways.<sup>214</sup>
- Prison reform court orders have affected prisons in the South more than prisons in other parts of the US.<sup>215</sup>
- Support for harsh punishments is an easy way for politicians to signal the strength of their opposition to crime, which almost everybody is opposed to.<sup>216</sup>

---

<sup>211</sup> Carol S. Steiker and Jordan M. Steiker, “Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment,” *Harvard Law Review* 109, no. 2 (December 1995), 403-4 makes this point.

<sup>212</sup> Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* (Oxford, UK: Oxford University Press, 2014), 6 and Ashley Nellis, “The Color of Justice: Racial and Ethnic Disparity in State Prisons” (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>, both citing the Bureau of Justice Statistics. Murakawa’s data only extends to 1997. Data by state is provided on pages 62-3 of Murakawa and in Nellis’ publication.

<sup>213</sup> The data for 1970 is from Campbell Gibson and Kay Jung, “Historical Census Statistics On Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For Large Cities And Other Urban Places In The United States” (February 2005), <https://www.census.gov/population/www/documentation/twps0076/twps0076.pdf> and the data for 2014 is from “American Community Survey Demographic and Housing Estimates,” US Census Bureau, accessed June 4, 2020, <https://data.census.gov/cedsci/table?q=United%20States&table=DP05&tid=ACSDP1Y2014.DP05&g=0100000US&astDisplayedRow=24>.

<sup>214</sup> The cultural and social connections between slavery, race, and incarceration have been explored in various books and resources. See, for example, Dennis Childs, *Slaves of the State: Black Incarceration from the Chain Gang to the Penitentiary* (Minneapolis, MN: University of Minnesota Press, 2015). Edward Rubin comments (private email exchange, received June 16, 2020) that, “prisoners’ rights drew on a discourse that was central to the American political tradition, both explicitly (treatment of human beings) and implicitly (rejection of the slave plantation).”

<sup>215</sup> Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998), 41 note that, “[o]f the first six cases, five, and arguably six [depending on whether one counts Oklahoma or not], involved systems in the South. Ultimately, comprehensive orders involving the totality of conditions in the entire prison system were issued against six of the eleven southern states: Alabama, Arkansas, Mississippi, South Carolina, Tennessee, and Texas; comprehensive orders were issued regarding the principal maximum security facility, as well as numerous smaller facilities, in Georgia and Louisiana. In addition, court orders were entered against the entire Florida system and virtually all the North Carolina prisons regarding overcrowding and certain specified conditions. In contrast, only four of the thirty-nine states outside the South have been subject to comprehensive orders against their entire system — Alaska, Delaware, New Mexico, and Rhode Island — and... one of these, Rhode Island, has only one prison.”

See also footnote 42.

<sup>216</sup> Stephen B. Bright and Patrick J. Keenan, “Judges and the Politics of Death: Deciding between the Bill of Rights and the Next Election in Capital Cases,” *Boston University Law Review* 75 (1995), 769-71 make this argument.

## Advocacy

- At least some members of the prisoners' rights movement have advocated for full abolition of prisons in addition to or in place of incremental improvements in conditions and rights.<sup>217</sup> However, some prisoners seem to mostly accept the logic of incarceration.<sup>218</sup>
- There was some overlap between the prisoners' rights movement and the civil rights movement, via groups including the Black Muslims<sup>219</sup> and NAACP LDF.<sup>220</sup> The prisoners' rights movement was also associated with wider left-wing radicalism.<sup>221</sup>
- The prisoners' rights movement may have received low amounts of funding.<sup>222</sup>

## Society

- While we normally think of entities excluded from the moral circle as either receiving very little or zero consideration, prisoners are seen as meriting active disconsideration, i.e. they are often seen as

---

<sup>217</sup> Liz Samuels, "Improvising on Reality: The Roots of Prison Abolition," in Dan Berger (ed.), *The Hidden 1970s: Histories of Radicalism* (New Brunswick, NJ: Rutgers University Press, 2010), 27-8, for example, summarizes that, "[t]he combination of the disappointing reality of reform and the rapid radicalization of people inside, facilitated by the steady influx of radical entering prison on politically motivated charges, led reformers and revolutionaries to start coupling demands for institutional changes with calls to overhaul or eliminate the entire system... The United Prisoners Union wrote, 'It is a gross political mistake to struggle for minimal reforms, because even when these reforms are granted, the Koncentration Kamps are still there for those who threaten the ruling class.' Jerome Miller agreed, characterizing reform as 'innovation without threatening the institution's stability' and 'new language to cover old realities'... A variety of organizations, individuals, and means were employed to further the cause of abolition. This included prisoner unions, prisoner support organizations, revolutionary organizations, pacifists, and even a few judges and prison administrators. The broad politics of abolition provided one of very few places where black nationalists, proponents of armed self-defense, and primarily white, radical pacifists came together in shared politics and practice." See also footnote 59.

<sup>218</sup> Kitty Calavita and Valerie Jenness, *Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic* (Oakland, CA: University of California Press, 2015), 20 summarize that, "despite their cynicism about many aspects of the criminal justice system, nearly half of the [prisoners] we interviewed expressed a belief in the fairness of the system in general and a surprising faith in law and evidence as the key ingredients in winning an appeal." However, on page 22, they add that, "[t]he written grievances in our random sample... present a sharp contrast to the flashes of ideological convergence we encountered in our interviews. Tracing frames deployed by prisoners and staff across four levels of review, we reveal that these written documents present in their hardened form the respective logics of rights and confinement."

<sup>219</sup> See the paragraph beginning "By the 1960s..." in "A Condensed Chronological History of the US Prisoners' Rights Movement."

<sup>220</sup> See footnote 42.

<sup>221</sup> Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006), 178 summarizes that, "[i]n the U.S. case, the prisoners' rights movement was deeply rooted in broader political currents involving first race... and then race and revolution. By the late 1960s, prison activism was enmeshed in revolutionary causes in a way not seen elsewhere. The U.S. prisoners' rights movement came to be seen at home and abroad as a vanguard of a worldwide liberation movement for oppressed people, especially people of color. The radical prisoners' movement that emerged in the late 1960s provided a bridge between the New Left, which was largely white, and the revolutionary black power movement, which was associated with groups like the Black Panthers." Details and examples are provided on pages 178-82.

<sup>222</sup> See footnote 196.

deserving harm rather than simply not deserving benefit.<sup>223</sup> A 2016 study that asked US participants to rate 30 different entities by the “moral standing” that they deserved found that “villains” (murderers, terrorists, and child molesters) were deemed by participants to deserve less moral standing than “low-sentience animals” (chickens, fish, and bees), with mean scores of 1.77 and 2.64 respectively on a scale from 0 to 9. Indeed, they were deemed to deserve less moral standing than non-sentient “environmental targets” (3.53) or plants (2.52).<sup>224</sup>

- One method of social movement mobilization is to create organizations or framings that tap into “latent constituencies”: groups with pre-existing beliefs and attitudes well-matched to those of the social movement.<sup>225</sup> Given the racial disparities in incarceration<sup>226</sup> and execution,<sup>227</sup> ethnic minority groups may form latent constituencies for the US prisoners’ rights movement; 28% of the respondents to the 2010 US census reported their race as being something other than white (including 13% black or African American).<sup>228</sup>
- Punitive attitudes towards criminals are influenced, but not entirely determined, by crime rates.<sup>229</sup>

---

<sup>223</sup> See, for example, the paragraph beginning “A survey of the US public...” in “A Condensed Chronological History of the US Prisoners’ Rights Movement.”

<sup>224</sup> Daniel Crimston, Paul G. Bain, Matthew J. Hornsey, and Brock Bastian, “Moral Expansiveness: Examining Variability in the Extension of the Moral World,” *Journal of Personality and Social Psychology* 111, no. 4 (2016), 636-53. In this “moral expansiveness scale” (MES), a score of 9 meant that all three example entities were deemed to be part of the “inner circle,” whereas a score of 0 meant that all 3 example entities were deemed to be “outside the moral boundary.” The authors explain that, “[i]n the MES, participants indicate the relative moral standing of a wide range of entities by placing them within four defined boundaries... The four boundaries of morality are graded (inner circle = 3, outer circle = 2, fringes = 1, outside = 0), and an aggregate score is calculated to reflect the expansiveness of an individual’s moral world... 30 entities were included spanning 10 categories... Three entities were included in each of these categories.”

<sup>225</sup> John H. Evans, “Polarization in Abortion Attitudes in U.S. Religious Traditions, 1972–1998,” *Sociological Forum* 17, no. 3 (September 2002), 398-9 characterizes this as the assumption of social movement scholars, and cites David A. Snow, E. Burke Rochford, Steven K. Worden, and Robert D. Benford, “Frame alignment processes, micromobilization, and movement participation,” *American Sociological Review* 51 (1986), 464–481.

<sup>226</sup> See the feature above beginning “There are large racial...”

<sup>227</sup> “Facts about the Death Penalty,” Death Penalty Information Center, last updated May 31, 2019, <https://files.deathpenaltyinfo.org/legacy/documents/FactSheet.pdf> summarizes studies that found, for example, that “Jurors in Washington state are three times more likely to recommend a death sentence for a black defendant than for a white defendant in a similar case... In Louisiana, the odds of a death sentence were 97% higher for those whose victim was white than for those whose victim was black.”

<sup>228</sup> Karen R. Humes, Nicholas A. Jones, and Roberto R. Ramirez, “Overview of Race and Hispanic Origin: 2010,” *2010 Census Briefs* (March 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

<sup>229</sup> Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* (Oxford, UK: Oxford University Press, 2014), 213 notes that, “[r]isk of criminal victimization is largely independent from levels of fear and punitiveness and therefore it is difficult to believe that the crime [rate] alone simply prompted more punitive attitudes and more punitive measures. Levels of fear remained strikingly constant from 1965 through the 1990s, despite the fact that crime rose markedly in the 1960s and declined significantly in the early 1990s. Similarly, a preponderance of evidence disconfirms the hypothesis that criminal victimization increases support for harsh crime policies. Individual-level data show that people with high risks of criminal victimization are the least punitive. Consider, for example, that African American experience more criminal victimization than other racial groups, but historically African Americans as a group are not the loudest advocates for punishment expansion; on the contrary, African Americans have opposed drug-related mandatory minimums and capital punishment in higher percentages than their comparatively safe white counterparts. In sum, ‘the politics of law and order has a life of its own which is quite independent of crime and criminal victimization.’” A large number of references are provided, though the author has not followed any of these up.

## Differing outcomes in the United States and Europe

- Though differences could have been caused by a number of factors other than the influence of social movements, the treatment of convicts seems to be harsher in the US than in Europe:
  - The percentage of sentenced prisoners serving life sentences is 9.5% in the US, compared to 0.8% in France, 3.6% in Germany, and 11% in the UK.<sup>230</sup>
  - Although not solely indicative of the harshness of penalties, the US has the highest prison population rate in the world, with 655 prisoners per 100,000 members of the national population. The European country with the highest prison population rate is Russia with 381 per 100,000.<sup>231</sup>
  - US prisoners also seem to have worse conditions than many European prisoners<sup>232</sup> and high rates of solitary confinement. In 2013, The UN estimated that 80,000 prisoners are in solitary confinement in the US.<sup>233</sup> This represents 5% of the US prison population.<sup>234</sup>
  - US prisoners seem to have fewer rights than in some parts of Europe.<sup>235</sup>

## Strategic Implications

### Institutional Reform

- **Litigation can improve welfare for the intended beneficiaries of a movement.**

---

<sup>230</sup> “Life imprisonment: A policy briefing,” Penal Reform International and University of Nottingham (April 2018), <https://s16889.pcdn.co/wp-content/uploads/2018/04/PRI-Life-Imprisonment-Briefing.pdf>, 3.

Even though the percentage is higher in the UK, this still only means that 13.4 people per 100,000 in the national population are serving life sentences, compared to 50.3 in the US.

<sup>231</sup> “Highest to Lowest - Prison Population Rate,” World Prison Brief [http://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate](http://www.prisonstudies.org/highest-to-lowest/prison_population_rate).

By comparison, England and Wales have 139 and Liechtenstein has 31.

<sup>232</sup> Susan Easton, *Prisoners’ Rights: Principles and Practice* (Abingdon, UK: Routledge, 2011), 97 summarizes that, “[i]n contrast to the Netherlands, the prison system in the United States has a reputation for penal austerity. However, while prison sentences may be longer than in the Netherlands and conditions harsher, the quality of conditions may vary. The harshest conditions are in so-called ‘supermax,’ maximum security prisons.” Comparisons are briefly made to the UK and Netherlands at various points in the book.

<sup>233</sup> “California jails: “Solitary confinement can amount to cruel punishment, even torture” – UN rights expert,” United Nations Human Rights Office of the High Commissioner, accessed June 27, 2019, <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13655&LangID=E>.

<sup>234</sup> Danielle Kaeble and Mary Cowhig, “Correctional Populations in the United States, 2016” *Bureau of Justice Statistics* (April 2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf> estimate that the US prison population in 2013 was 1,577,000. An additional 731,200 were held in local jails.

<sup>235</sup> For example, Susan Easton, *Prisoners’ Rights: Principles and Practice* (Abingdon, UK: Routledge, 2011), 231 notes that, in the US, “the majority of states (48) ban sentenced prisoners from voting, and some states disenfranchise ex-offenders as well... Yet in other parts of the world, there is a move towards enfranchisement and in some countries prisoners are allowed to vote while inside prison and the argument is over *which groups* of prisoners should be denied the right to vote, rather than disenfranchisement per se.”

Legal scholar Susan P. Sturm reviewed many case studies on the impact of litigation in particular states and prison systems and summarizes that most of the case studies' authors "conclude that courts have had a significant and positive, though limited, impact."<sup>236</sup> For example, "[v]irtually every case study of judicial intervention in correctional institutions recounts the internal development of correctional standards to govern future practices and conduct within the institution, following major litigation invalidating the conditions and practices in those institutions"<sup>237</sup> and "[t]he case studies document that governance by personal dominance and officially sanctioned brutality is a thing of the past. Many scholars argue that the move toward bureaucracy has led to safer, less arbitrary, and more humane institutions."<sup>238</sup>

As a result, "[i]n some cases, the improvements linked to court-ordered change have been quite dramatic and have concerned virtually every aspect of inmate life. Yet, in many systems improvements have been limited to raising living conditions to minimal standards, and have failed to provide a systemic response to the overcrowding problem plaguing most correctional institutions."<sup>239</sup> In other cases, litigation has had little impact.<sup>240</sup> Sturm does not thoroughly outline the causal chain of events that is claimed to have led from litigation to welfare improvements in each case, so the strength of the evidence is unclear without conducting a thorough review of each case study. Nevertheless, the overall claim seems plausible, especially in the absence of other factors that might explain changes in the conditions and practices of prisons. Additionally, Sturm does outline generalized mechanisms for how the process unfolds.<sup>241</sup>

Sturm suggests several factors that may help to explain the varying impact that litigation has had on prisons in different areas:

---

<sup>236</sup> Susan P. Sturm, "Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142 (1993), 652.

<sup>237</sup> Susan P. Sturm, "Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142 (1993), 662.

<sup>238</sup> Susan P. Sturm, "Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142 (1993), 667-8.

<sup>239</sup> Susan P. Sturm, "Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142 (1993), 670-1.

<sup>240</sup> Susan P. Sturm, "Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142 (1993), 677 notes that, "[i]n some cases, court intervention simply failed to have any significant effect on the overcrowding problem. In a significant number of cases, administrators responded in the short run to population caps by transferring inmates to other facilities. Population limits in state correctional institutions have in some cases caused delays in the transfer of sentenced prisoners to state custody, thereby dramatically increasing overcrowding in local jails."

<sup>241</sup> Susan P. Sturm, "Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142 (1993), 681-3 explains that, "[a]nalysis of the case studies suggests several factors that prompt government officials to change in response to court intervention. First, discovery mechanisms and monitoring devices serve to uncover the existence of gross inadequacies in prison conditions that are otherwise insulated from sustained public scrutiny. Extensive and sustained media attention paid to corrections litigation creates pressure to address these inadequacies. Second, the case studies suggest that corrections officials are motivated to achieve compliance with court orders by an overwhelming desire to get rid of judicial involvement and oversight... This response appears to be particularly pronounced where judicial oversight has been active and where courts have used judicial sanctions to respond to noncompliance. Third, major corrections litigation is frequently accompanied by an influx of expertise and resources that expands the capacity of government officials to manage the process of reform and to maintain constitutional facilities. Finally, prisoners' rights litigators have developed a considerable presence in the corrections world and have been able to pursue litigation on a wide scale. In systems that have a centralized administration, administrators are likely to be aware of litigation against a major institution, even if the entire system is not under scrutiny. Unlike many areas of public interest advocacy, there is no shortage of individuals willing to file corrections litigation challenging conditions of confinement in prisons. Prisoners have both the time and inclination to file litigation. Although most of these cases never make it past a motion to dismiss, some do lead to the appointment of extremely competent counsel. Thus, many correctional administrators view litigation as a fact of life that must be addressed."

- Given that “litigation has been identified as having the most dramatic and far-reaching structural effects in the South, where prisons previously were modeled on the plantation system... litigation may be most effective in transforming institutions that deviate from a widely shared professional and social norm.”
- “[E]nlisting the support of crucial insiders within the targeted system” may be important for achieving “lasting reform.”
- The strategy used in litigation and judicial intervention may affect outcomes.<sup>242</sup>

To the extent that some litigators focusing on prison conditions were interested in the abolition of prisons, their successes provide evidence that incremental progress can be made towards radical goals.<sup>243</sup> As with other

---

<sup>242</sup> Susan P. Sturm, “Legacy and Future of Corrections Litigation,” *University of Pennsylvania Law Review* 142 (1993), 683-6. On the last point, Sturm notes that, “[j]udges and litigators have developed more cooperative forms of factfinding, remedial formulation, and monitoring that minimize the adverse effects of the adversary process and enhance the possibility of cooperative approaches to solving the problems identified through litigation or the threat of litigation. These approaches include: (1) the use of expert panels selected by the parties to perform factfinding, assist in developing remedies and monitor compliance; (2) the use of court-supervised mediation to achieve a consensual remedy that addresses the problems underlying constitutional violations; (3) the use of existing oversight mechanisms in the enforcement stage, such as state regulatory agencies and the accreditation process; (4) the use of monitoring mechanisms that employ defendants’ employees as compliance officers; and (5) consolidation of cases involving related institutions to avoid the tendency to displace problems to institutions not under the purview of a particular court.”

Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998), 367 also summarize that one “direct effect of the prison reform cases was the abolition of the South’s plantation model. In 1965, southern prisons were distinctly different from those in other parts of the United States; by the 1980s this was no longer the case. Precisely how much value one attaches to this change depends upon one’s views. Some observers might share John DiIulio’s preference for well-run plantation-style prisons, while others might view all American prisons as so repressive that the variation in form is insignificant. But whatever one’s evaluation of the change, it seems clear that a distinct, extensive change had been effectuated by the federal courts... That is not to say that courts acted entirely on their own. As discussed in Chapter 5, reform movements were initiated in several southern states. In Florida, the effort was carried to completion without comprehensive court orders and indeed before courts began an active role in conditions cases. In other states, such as Louisiana, it fizzled, but nonetheless indicated that there were forces in these states that would support the judicial effort. Once the courts issued their orders, moreover, they found allies from both inside and outside the prison system.” On pages 368-73, they also argue that prison reform litigation promoted professionalization, bureaucratization, and homogenization of national standards in the correctional system.

<sup>243</sup> Edward Rubin believes (private email exchange, received June 16, 2020) that, “[m]any of the lawyers involved were not primarily concerned with prison conditions. They were prison abolitionists, who thought that states compelled to provide humane conditions (good food, health care, greater living space, education) would reduce their prison populations rather than shoulder the increased expense. Thus, the conditions litigation can be viewed as the development of a legal strategy that was not directly related to the primary goal.” By comparison, Rubin suggests that, “[p]erhaps conditions for farmed animals could be approached through the issue of sustainability.”

social movements,<sup>244</sup> whether litigation and judicial rulings successfully achieve the goals of litigators is contested among scholars.<sup>245</sup>

- **Litigation and legal change may cause surprisingly little financial damage to targeted institutions.**

After controlling for “previous expenditures, total state spending, and prison population,” one analysis estimated that, of the ten states analyzed, court-ordered prison reform had caused significant increases in “total expenditures for corrections” in five (with increases averaging 47%), and a significant decrease of 27% in Ohio.<sup>246</sup>

- **Litigation can draw public attention to an issue.**

Sturm summarizes that, “[v]irtually every case study reports extensive media coverage of the litigation and the conditions and practices in the targeted institutions. This media coverage exposed serious abuses and inhumane conditions in correctional institutions, and is widely credited with increasing public awareness of the inadequacies in correctional institutions and acceptance of the need for reform.”<sup>247</sup>

---

<sup>244</sup> See, for example, Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 2008).

Criticisms of Rosenberg include:

Roy B. Flemming, John Bohte, and B. Dan Wood, “One Voice among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947-92,” *American Journal of Political Science* 41, no. 4 (1997), 1224-50.

David Schultz and Stephen E. Gottlieb, “Legal Functionalism and Social Change: A Reassessment of Rosenberg’s *The Hollow Hope: Can Courts Bring about Social Change?*” *The Journal of Law and Politics* 12, no. 63 (1998), 63-91.

Lani Guinier, “Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence—courting the People Demosprudence and the Law/Politics Divide,” *Boston University Law Review* 89 (2009), 539-61.

Scott L. Cummings, “Rethinking the foundational critiques of lawyers in social movements,” *Fordham Law Review* 85 (2016), 1987-2015.

Scott L. Cummings and Douglas NeJaime, “Lawyering for Marriage Equality,” *University of California, Los Angeles Law Review* 57 (2009), 1235-331.

<sup>245</sup> For example, Malcolm M. Feeley and Edward L. Rubin. *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons* (New York: Cambridge University Press, 1998) argue that judicial rulings were effective only within limited domains. Their approach and arguments are criticized extensively by Margo Schlanger, “Beyond the hero judge: Institutional reform litigation as litigation,” *Michigan Law Review* 97, no. 6 (1999), 1994-2036.

<sup>246</sup> William A. Taggart, “Redefining the Power of the Federal Judiciary: The Impact of Court-Ordered Prison Reform on State Expenditures for Corrections,” *Law and Society Review* 23 (1989), 241-71. Alabama had a significant increase of 42%, Arkansas had a significant increase of 43%, Louisiana had a significant increase of 79%, Mississippi had a significant increase of 31%, and Oklahoma had a significant increase of 39%. The model suggested that the total spending on correction decreased in the other 5 states (Ohio, Delaware, Florida, New Hampshire, and Rhode Island), though only Ohio’s decrease was significant. Across all ten states, the model suggested an average change of 17% (the averages were not calculated in the original paper).

<sup>247</sup> Susan P. Sturm, “Legacy and Future of Corrections Litigation,” *University of Pennsylvania Law Review* 142 (1993), 670.

- **Litigation may have unintended negative consequences, such as entrenching and legitimizing institutions that advocates are opposed to.**

Litigation to improve conditions for prisoners may have encouraged an increase in the number of prisons constructed.<sup>248</sup> For example, this seems to have happened in Florida in response to *Costello v. Wainwright* (1975), a case brought by inmates in Florida and supported by an experienced civil rights attorney with the goal of reducing overcrowding in prisons.<sup>249</sup> The ruling seems to have encouraged prison construction, rather than improvement in the conditions of existing prisons.<sup>250</sup> It is possible that this increase in capacity then increased or reinforced the state’s “willingness to incarcerate,” though Schoenfeld does not provide much

---

<sup>248</sup> Susan P. Sturm, “Legacy and Future of Corrections Litigation,” *University of Pennsylvania Law Review* 142 (1993), 678 summarizes that “[a] third type of response [to court intervention on overcrowding issues] observed in most of the case studies is the expansion of the capacity of the targeted system through prison construction and increased use of temporary housing. In some of these cases, plans were already in the works for construction of new facilities, but litigation was credited by some for pushing through previously unsuccessful bond issues or expediting construction.”

<sup>249</sup> Heather Schoenfeld, “Mass Incarceration and the Paradox of Prison Conditions Litigation,” *Law and Society Review* 44, no. 3-4 (2010), 737-8 notes that, “[t]he plaintiffs in *Costello* were represented by Tobias Simon, a local veteran civil rights attorney who had defended Dr. Martin Luther King Jr. and supporters in St. Augustine, Florida, during one of the more violent clashes of the civil rights movement. In the late 1960s, Simon, motivated by the racial disparities in death sentences, turned his attention to death penalty cases in Florida. Simon’s trips to death row exposed him to the brutal conditions at Florida State Prison, where cells designed for two housed 10, and inmate ‘medics’ provided medical ‘treatment’ to other inmates. Looking for an opportunity to address overcrowding, in 1972 Simon agreed to represent two inmates who had filed a complaint in the United States District Court for the Middle District of Florida about inadequate medical care at Florida State Prison. District Judge Charles R. Scott, one of the active pro-civil rights judges in the South, knew Simon well and had previously signaled his respect for the ‘advantages of the class device’ in Simon’s work on the death penalty. Within a few months, Simon had added overcrowding to the complaint, and Judge Scott certified it as a class action on February 22, 1973. Extending the successful framework from death penalty lawsuits, the amended complaint sued Louie Wainwright, the director of the Florida Division of Corrections (later renamed the Florida Department of Corrections), for relief from overcrowding and inadequate medical care that caused ‘substantial harm to inmates in violation of the Eighth Amendment prohibition against cruel and unusual punishment.’”

<sup>250</sup> Heather Schoenfeld, “Mass Incarceration and the Paradox of Prison Conditions Litigation,” *Law and Society Review* 44, no. 3-4 (2010), 731-68. On page 741, Schoenfeld summarizes that, “Judge Scott selectively relied on a report by the American Justice Institute (the ‘AJI report’) submitted in Simon’s application for injunction. He chose to use its concept of ‘prison capacity’—ordering the defendants to ‘reduce the overall inmate population’ in five stages over one year to ‘emergency capacity,’ defined as ‘the population beyond which the institution must be considered critically, and quite probably, dangerously overcrowded,’ and in 18 months to ‘normal capacity,’ defined as ‘that population which an institution can properly accommodate on an average daily basis.’” However, “by focusing the relief on ‘capacity’ rather than a reduction of the prison population as originally asked for by the plaintiffs, Judge Scott’s order left open the possibility of compliance by prison growth.” Pages 741-51 describe various legal and political developments that meant that various attempted solutions to the overcrowding problem were insufficient. As a result, Schoenfeld notes on page 751 that, from the late 1980s, Florida legislators approved what they later referred to as “an aggressive prison construction program.”

evidence that this effect was substantial.<sup>251</sup> Insofar as we accept that this effect occurred at all, this can be seen as evidence that litigation can backfire, strengthening the institution that it is intended to challenge.<sup>252</sup>

Additionally, Sturm summarizes contributions from other scholars that highlight the increase in federal regulation of prisons in response to litigation and even, in one case in California, the creation of a new county department of corrections.<sup>253</sup>

Relatedly, the anti-death penalty movement's litigation may have unintentionally legitimated the institution of capital punishment by encouraging detailed regulation that assuaged the anxiety of judges and juries tasked

<sup>251</sup> Heather Schoenfeld, "Mass Incarceration and the Paradox of Prison Conditions Litigation," *Law and Society Review* 44, no. 3-4 (2010), 733 argues that, "[i]n the long run, compliance with the court order increased the state's capacity and willingness to incarcerate, leading to the further expansion of incarceration throughout the 1990s in ways that continued to disproportionately impact black Americans."

Schoenfeld notes on page 732 that, "[s]ince 1973, the incarceration rate in the United States has grown by 700 percent," and on page 752 that, "[b]y 1993, when Costello was finally settled, 50,000 people were incarcerated in Florida's state prisons—up from just below 20,000 in 1980. In the next 15 years, the state prison population grew by another 50,000." Though Schoenfeld provides evidence that Florida incarcerated more people and became tougher on crime, no evidence is provided that the increased availability of prisons actually encouraged this development. Indeed, the article provides evidence that increases in prison capacity were a response to overcrowding and the insufficient supply of prison beds. There does not appear to have ever been a substantial oversupply of prison beds which were somehow free to be filled by whoever state officials might have decided to incarcerate.

<sup>252</sup> Heather Schoenfeld, "Mass Incarceration and the Paradox of Prison Conditions Litigation," *Law and Society Review* 44, no. 3-4 (2010), 731, citing Margo Schlanger, "Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders," *New York University Law Review* 81 (2006), 560, claims that "[t]he civil rights lawyers who represented [prison inmates] not only sought to extend hard-fought 'rights' to prisoners, but they also 'had extraordinary high hopes that . . . [prison conditions] litigation, and in particular overcrowding litigation' would reduce states' reliance on incarceration."

In Florida, Tobias Simon, an attorney who had been involved in civil rights and anti-death penalty cases, represented the plaintiffs in Costello. Schoenfeld notes on page 738 that, "Simon asked the court to compel state officials to 're-distribute' or 'reduce' the prison population in one of three ways: 'either stem the influx of inmates . . . ; accelerate the discharge of qualified inmates . . . ; or allocate adequate funds and facilities to care for the ever-expanding inmate population.'"

<sup>253</sup> Susan P. Sturm, "Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142 (1993), 667, footnote 123.

James B. Jacobs, "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 457-63 likewise listed "The prisoners' rights movement has contributed to the bureaucratization of the prison" and "The prisoners' rights movement has produced a new generation of administrators" as "Hypotheses on the Impacts of the prisoners' Rights Movement."

Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998), 15 summarize that, "[t]he decisions of the federal judiciary have established a comprehensive code of detailed rules and regulations that governs every prison in America, a code that is reflected in state statutes, administrative regulations, and internal prison rules, that is understood by virtually every lawyer and corrections commissioner, and that is monitored by compliance officers in every state department of corrections." On page 373, they add that, "[t]o the extent that judicial prison reform protected prisoners by enhancing rational-legal organization, it also strengthened the prison's capacity for control. This double-edged feature of prisoners' rights litigation helps explain why, after their initial hostility to the judicial intervention and the short-term disruptions it sometimes involved, so any prison administrators came to welcome it."

with sentencing people to death.<sup>254</sup> However, a variety of tactics other than litigation may also risk unintentionally strengthening institutions that advocates would otherwise criticize and oppose.<sup>255</sup>

Sturm also summarizes that, “[a] number of commentators have observed that litigation contributes, at least in the short run, to inmate violence and staff demoralization by raising inmates’ expectations, undermining prison officials’ authority, widening the gap between administration and staff, and by limiting the discretion of prison officials vis-à-vis inmates. The most frequently cited studies, however, fail to establish a causal chain between violence and litigation... Case studies analyzing the impact of litigation suggest with virtual unanimity that even when violence and turmoil occur, they may well be short-lived and may give way to effective and legal methods of control over inmate behavior.”<sup>256</sup>

- **Laws and rulings that are intended to promote rights and welfare through particular mechanisms may permit the continued worsening of welfare through other mechanisms.**

---

<sup>254</sup> See the Strategic Implication section beginning “There is some evidence that procedural reforms...” in Jamie Harris, “Social Movement Lessons from the US Anti-Death Penalty Movement,” (May 22, 2020), <https://www.sentienceinstitute.org/death-penalty>.

<sup>255</sup> Though the book is framed provocatively and “inverts the conventional wisdom” (page 3), Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* (Oxford, UK: Oxford University Press, 2014) argues that, in several unintended ways, liberals contributed to the development of racialized mass imprisonment in the US. For example, on pages 2-4, Murakawa summarizes that, “two decades before Nixon’s anti-black law-and-order campaign, liberal law-and-order campaigns pursued ‘the right to safety’ as the first step toward racial equality. At the close of World War II, President Harry S. Truman’s Committee on Civil Rights designated the ‘right to safety and security of the person’ the first condition of all rights... As the black freedom struggle gained momentum, as lynchings of black veterans caused international embarrassment, and as all feared impending ‘race wars,’ liberals established a law-and-order mandate: build a better carceral state, one strong enough to control racial violence in the streets and regimented enough to control racial bias in criminal justice administration.” Nevertheless, one effect was that “the race ‘problem’ of the civil rights movement from the 1940s onward was answered with pledges of carceral state development—from racially liberal and conservative lawmakers alike. My overarching claim is therefore that lawmakers constructed the civil rights carceral state, in which liberal notions of racial violence and agendas for race-neutral machinery actually propelled development of a punitive carceral state.”

As another example, on page 23, Murakawa summarizes that the book’s third chapter “traces the development of two banner policies of police professionalization and sentencing reform with shared liberal logics [but conservative implications]: the Law Enforcement Assistance Act of 1968... and the Sentencing Reform Act of 1984... I argue that these policies share liberal origins. In the tradition of Truman-era identification of prejudice in criminal justice, Johnson Democrats supported police funding to recruit and train the racism out of local police departments, through varied policy actions such as the Law Enforcement Assistance Act of 1968, a string of antecedent recommendations from the U.S. Civil Rights Commission, the Juvenile Justice Act of 1961, and the Law Enforcement Assistance Act of 1965.”

<sup>256</sup> Susan P. Sturm, “Legacy and Future of Corrections Litigation,” *University of Pennsylvania Law Review* 142 (1993), 668-9. For example, Ben M. Crouch and James W. Marquart, “Resolving the paradox of reform: Litigation, prisoner violence, and perceptions of risk,” *Justice Quarterly* 7, no. 1 (1990), 103-23 is one of the cited case studies, focusing on Texas. Crouch and Marquart, drawing on “extensive interviews of prisoners and staff,” “participant observation,” and “[d]ata on actual prisoner violence” conclude that “prisoners did not feel at all safe in the “old days” and that the paradox [“in which the very process intended to make the prison better can make it a more dangerous place”] exists only in the short term.” Their results in table 2 on page 111 show that, in 1987, 67%, 63%, and 64% of white, black, and hispanic inmates felt safe, compared to 38%, 27%, and 45% in 1970-8.

As a result of litigation, there were some improvements to the rights and welfare of prisoners in the 1960s and 1970s. Nevertheless, the use of solitary confinement increased in the 1970s and the development of supermax prisons was permitted by the courts.<sup>257</sup>

- **Incremental successes of improving welfare may distract advocates' attention from more important political and systemic issues.**

During the 1970s, the prisoners' rights movement was able to win meaningful improvements on welfare and conditions for prisoners.<sup>258</sup> During this same period, however, politicians were increasingly focusing on retribution and deterrence rather than on rehabilitation. As a result, reforms to mandatory sentences, determinate sentencing, plea bargaining, and parole were introduced.<sup>259</sup> From the 1970s onwards, the problem of mass incarceration grew,<sup>260</sup> and alongside it, the victims' rights movement increased in strength.<sup>261</sup> While sentencing and imprisonment are distinct from the conditions inside a prison, there is clear overlap between these issues, as demonstrated by the Supreme Court's *Brown v. Plata* decision (2011).<sup>262</sup> These changes in sentencing and incarceration rates were encouraged by long-term, indirect factors such as rising crime rates and increasing concerns about the inefficacy of rehabilitative reforms.<sup>263</sup> It is also unclear whether the resources of the prisoners' rights movement could have been redirected towards addressing these arguably more systemic changes. Nevertheless, the movement's focus on palliative welfare reforms while doing little to halt the increasing number of prisoners and more punitive treatment of criminals may have been an oversight.<sup>264</sup>

- **The tractability of different litigation strategies is dependent on political and judicial opportunities.**

Based on interviews and an examination of legal rulings, Sturm argues that litigation for prisoners' rights has shifted from a "test case model" focused on "bringing cases that would establish new constitutional protections for inmates" and securing favorable precedent towards a model of "implementing the legal

<sup>257</sup> See the paragraph above beginning "From the late 1970s, prisons..."

<sup>258</sup> See the paragraphs beginning "In 1970, prisoners in Folsom..." and "Several rulings in the 1970s..." in "A Condensed Chronological History of the US Prisoners' Rights Movement."

<sup>259</sup> See the paragraph beginning "In 1974, US Attorney General William Saxbe..." in "A Condensed Chronological History of the US Prisoners' Rights Movement."

<sup>260</sup> See the paragraphs beginning "Though the prison population...", "By 1990, 25% of US jails...", and "In 2009, the trend..." in "A Condensed Chronological History of the US Prisoners' Rights Movement."

<sup>261</sup> See the paragraphs beginning "From the early 1970s onwards...", "In the early 1980s, one prominent...", and "In 1990, the National Victims Center's..."

<sup>262</sup> See footnote 182.

<sup>263</sup> See the paragraph beginning "In 1974, US Attorney General William Saxbe..." in "A Condensed Chronological History of the US Prisoners' Rights Movement."

<sup>264</sup> Edward Rubin agrees (private email exchange, received June 16, 2020) that, "the advent of mass incarceration changed the character of American corrections. I don't think it eliminated the advances of the prisoners' rights movement. Even under the pressure of the huge increase in the number of inmates, American prisons haven't re-instituted the plantation model. Prisoners are not beaten or physically tortured as a form of discipline any more, they are not denied health care and they get decent food. What happened, I think, is that those concerned about prisoners' rights were unable or unwilling to address the next problem that arose. Judges who were willing to hold prison systems unconstitutional because of their inhumane conditions were not willing to strike down inhumane sentences."

regime [litigators] helped create.”<sup>265</sup> This shift was partially due to the successful establishment of norms and rules to govern institutions, but may also have been encouraged by the “increasing conservatism of the federal courts.”<sup>266</sup> Of course, legal precedent on specific issues affects the tractability of litigation.<sup>267</sup>

The total number of legal claims filed by prisoners increased substantially during the 1960s, primarily through habeas corpus claims rather than civil rights claims.<sup>268</sup> This may indicate that the increase was encouraged by changes in regulations and interest from the courts.<sup>269</sup> From 5 case studies of prison reform, legal scholars Malcolm M. Feeley and Edward L. Rubin summarize that, “it was often the judge who selected the attorney, rather than the attorney who selected the judge, the issue, or the case.”<sup>270</sup> This suggests that judicial decision-making may have set the possibilities and trajectory of prison reform, reducing the tractability of influencing judicial policy from outside the judiciary.

Despite the constraints, a shift in litigation strategies may result in substantially different outcomes. Edward Rubin has commented that, “*Talley v. Stephens* (1965) was not a habeas case, but a suit in equity. Instead of the writ demanding release of the prisoner (an inappropriate remedy), the suit demanded reform of prison

---

<sup>265</sup> Susan P. Sturm, “Legacy and Future of Corrections Litigation,” *University of Pennsylvania Law Review* 142 (1993), 707-11. Additionally, citing three interviews with prison reform advocates, Sturm claims that, “[v]irtually every specialist reported a shift away from First Amendment, due process, and programmatic issues towards an emphasis on overcrowding, environmental health and safety, violence, and medical and mental health care.” Sturm adds that advocates focus on the most inhumane conditions.

<sup>266</sup> Susan P. Sturm, “Legacy and Future of Corrections Litigation,” *University of Pennsylvania Law Review* 142 (1993), 711.

<sup>267</sup> See, for example, the sections on “Corrections litigation and the Reagan/Bush judiciary: There is a future” and “Corrections Cases Will Be More Complex and Costly to Litigate, Requiring Sophisticated Litigation Tools and the Extensive Use of Experts” in Susan P. Sturm, “Legacy and Future of Corrections Litigation,” *University of Pennsylvania Law Review* 142 (1993), 699-706 and 719-23.

<sup>268</sup> Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998), 45 note that, “[i]n 1960, prisoners filed a total of 872 habeas corpus and civil rights claims, less than 2 percent of all federal court filings. By 1965, the number had increased to 5,329, or 12 percent, and by 1971 it reached 12,145, or 18 percent of all filings... the bulk of the claims filings were pro se and did not state a justiciable claim; they were reviewed and rejected after just a few minutes of scrutiny by the judges’ clerks, student clerks, or secretaries.”

<sup>269</sup> Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998), 45 notes that, “[c]omparing 1966 to 1961, the number of habeas filings by state prisoners increased by over five thousand, perhaps because the federal courts had begun to abandon the hands-off doctrine and to award limited relief for specific constitutional violations. The number of civil rights complaints, however, increased by less than two hundred. Between 1966 and 1971, when the federal court in the Arkansas case was issuing the first comprehensive orders on civil rights grounds, the increase in absolute numbers for habeas and civil rights cases was similar — about three thousand — but the rate of increase was 53 percent for habeas petitions and 1,237 percent for civil rights petitions. Between 1971 and 1981, as federal courts throughout the nation issued comprehensive civil rights orders, habeas filings by state prisoners declined 14 percent, from 9,230 to 7,968, but civil rights filings rose another 536 percent, from 2,915 to 15,639. In 1986, as the period of retrenchment set in, both categories of claims had increased at a moderate and roughly equal rate over the 1981 level.”

<sup>270</sup> Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998), 46. The case studies are discussed on pages 51-144. Arkansas and Texas are considered “classic prison reform cases,” whereas “Colorado State Penitentiary,” “The Santa Clara County Jails,” and “Marion Penitentiary” are considered “variations on the theme.”

conditions. This represented a conceptual shift in legal doctrine and gave the prisoners' rights movement a more effective basis to pursue and obtain judicial remedies."<sup>271</sup>

- **Sudden changes in conditions for the intended beneficiaries of a movement may cause practical difficulties and encourage political backlash or judicial restrictions.**

Occasionally, officials have used emergency releases of inmates in response to overcrowding issues highlighted by courts.<sup>272</sup> Legal scholar Larry Yackle notes that after the release of inmates in Alabama, the state's Attorney General attempted to "capitalize on public anxiety over the release of convicts and thus increase his political popularity—both affirmatively, by resisting the release order in court, and negatively, by suggesting that [the governor] favored the release of felons and contrasting the governor's stance with his own."<sup>273</sup> In Florida in 1987, the threat of prisoner releases was used by legislators to secure funding for prison construction<sup>274</sup> and, the next year, one media outlet expressed their "screaming rage" while reporting on the criminal activity of a convicted felon who had been released early.<sup>275</sup> At least two federal court rulings have subsequently restricted the usage of prisoner releases.<sup>276</sup>

- **Introducing harsher sentences may have no effect on perceptions of the severity of the crime.**

While there is little evidence on this from the US, in a 1987 survey of Canadian adults, half of the participants were informed about Canada's new, significantly harsher sentence for impaired driving, and the remainder

---

<sup>271</sup> Edward Rubin, private email exchange, received June 16, 2020, referring to the arguments discussed in the paragraph above beginning "In 1965, the US District Court..." and in footnote 16.

<sup>272</sup> Susan P. Sturm, "Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142 (1993), 678.

<sup>273</sup> Larry W. Yackle, *Reform and regret: The story of federal judicial involvement in the Alabama prison system* (New York: Oxford University Press, 1989), 202-3, cited in Susan P. Sturm, "Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142 (1993), 678.

<sup>274</sup> Heather Schoenfeld, "Mass Incarceration and the Paradox of Prison Conditions Litigation," *Law and Society Review* 44, no. 3-4 (2010), 749 notes that, "[i]n order to overcome the public's and legislators' resistance to prison construction, the Martinez administration used the threat of 'early releases.' For example, the governor's office sent state legislators (and local officials) lists of offenders from their districts who would be released if the state did not build more prisons: 'I mean we actually did this, 'Here's a list of the people that are... going to be appearing in the neighborhood near you.'"

<sup>275</sup> Heather Schoenfeld, "Mass Incarceration and the Paradox of Prison Conditions Litigation," *Law and Society Review* 44, no. 3-4 (2010), 750 notes that, "[d]espite new restrictions on potential releasees, in winter 1988 a repeat offender named Charlie Street, who had served only half of his prison sentence, killed two Miami police officers. Calling the incident 'Florida's Willie Horton,' the Miami Herald reported the crime in a tone meant to capitalize on racial fears: 'NUMBNESS is the first reaction to the murders of Metro Police Officers Richard Boles and David Strzalkowski. Then, as the story unfolds, the shock gives way to rage. Screaming rage. Rage that cracks the veneer of civilization from one end of urban South Florida to the other. How could these two fine, dedicated police officers be dead, allegedly at the hands of a career criminal, an attempted murderer just 10 days out of state prison.'"

<sup>276</sup> Susan P. Sturm, "Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142 (1993), 678 notes that, "[t]he Fifth Circuit has limited the availability of prisoner releases as a mechanism for enforcing population caps, directing district courts first to apply contempt sanctions for noncompliance. See *Newman v. Alabama*, 683 F.2d 1312, 1321 (11th Cir. 1982) (holding that the district court abused its discretion by ordering the release of prisoners to alleviate prison overcrowding), cert. denied, 113 S. Ct. 1050 (1993). Similarly, the Ninth Circuit reversed a district court order that gave the sheriff the power to supersede sentencing orders and release inmates when they complete 50% of their sentence. However, it left undisturbed a ruling allowing the sheriff to release inmates when they complete 70% of their sentence because this ruling did not require the sheriff to override state law. See *Stone v. San Francisco*, 968 F.2d 850 (9th Cir. 1992)."

were told nothing about the legislative reform. When asked to rate the seriousness of impaired driving on a 100-point scale, there was no significant difference between the groups.<sup>277</sup> After being informed about mandatory sentences for burglary, 46% of respondents to a study in England and Wales answered that learning about this penalty had not changed or had reduced their level of confidence in the UK criminal justice system, while 18% of respondents answered that it had increased their confidence.<sup>278</sup>

- **The recommendations of credible institutions affect policy.**

Feeley and Rubin describe the interest and involvement of the National Prison Association (later, the American Correctional Association), the American Bar Association, and the Law Enforcement Assistance Administration in promoting national standards for corrections.<sup>279</sup> These organizations seem to have had some influence on policy and standards in prisons,<sup>280</sup> though this does not necessarily mean that these efforts were cost-effective methods for improving prisoners' wellbeing.

- **Newspaper coverage may affect policy.**

Comparing crime coverage in *The Los Angeles Times* to "Twelve Types of Penal Code Revisions" in California in 1954 to 1971, Richard Berk, Harold Brackman, and Selma Lesser (1977) found evidence of a positive

---

<sup>277</sup> The study is summarized by Julian V. Roberts, "Public opinion and mandatory sentencing: A review of international findings," *Criminal Justice and Behavior* 30, no. 4 (2003), 497.

<sup>278</sup> The study is summarized by Julian V. Roberts, "Public opinion and mandatory sentencing: A review of international findings," *Criminal Justice and Behavior* 30, no. 4 (2003), 497-8.

<sup>279</sup> Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998), 370-1.

<sup>280</sup> Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998), 371 note that, "[t]he ABA produced twelve volumes before abandoning its effort in 1977 when its general assembly was unable to reach agreement on the results. The draft reports, however, have influenced both legislation and court decisions and are frequently cited. The Department of Justice's Standards and Goals project lost its support during the cutbacks under the Reagan administration, but not before some of its results were incorporated into department policy, influencing its stance toward intervention in prison conditions suits and helping shape provisions in the Civil Rights for Institutionalized Persons Act (CRIPA)... The ACA receives ongoing support from the National Institute of Corrections, and virtually every correctional administrator agrees that its standards have become increasingly accepted as the prevailing norm. One measure of this effort's success is that the ACA's 'Division of Standards and Accreditation' had approved and published nineteen separate sets of standards as of 1994, for 'Small Jails,' 'Juvenile Facilities,' 'Boot Camps,' 'Correctional Administration,' and the like, and was active in reviewing correctional facilities in all fifty states and in performing accreditation reviews in many of them."

association.<sup>281</sup> In contrast, the researchers found that a measure of public concern about crime failed to predict law and order legislation, seeming instead to rise following the legislation.<sup>282</sup>

---

<sup>281</sup> Richard A. Berk, Harold Brackman, and Selma Lesser, *A Measure of Justice: An Empirical Study of Changes in the California Penal Code, 1955-1971* (New York: Academic Press, 1977), 215-7 explain that, samples of *The Los Angeles Times* from 1954-71 were coded: “One edition was randomly selected for every 2-week period, and the following items were tabulated for the first four pages of the editorial section: (1) the number of columns of crime-related news articles, (2) the number of columns of letters to the editor about crime, (3) the number of columns of crime-related editorials, (4) the number of columns of crime-related political cartoons... We did not code the value positions taken in the material because this would have created a reliability problem and required many coders. Even editorials that were supposed to address a specific issue and present clear opinions often were very difficult to assess.” These values were calculated for each year and the correlations with twelve variables for penal code revisions (affecting issues such as “convicted defenders,” “police,” and “severity of penalty”) were checked.

They note that, “[l]ooking initially at the lower half of Table 6.6, correlations with various types of criminalization and with severity of penalties, one sees that positive signs outnumber negative signs by well over 3 to 1. The main exceptions are for articles and letters with a 1-year lag. What this means is that, in general, increased newspaper coverage of crime is associated with greater increments in criminalization. Turning to the upper half of the table the pattern of correlations with the legal rights and resources of criminal justice actors is more complicated. Increased newspaper coverage appears to be associated with greater increases in resources for police, prosecutors, and convicted offenders, while inversely related to the interests of defendants and corrections officials. Patterns for the judiciary are mixed. A tentative conclusion is that Penal Code revisions are associated with the amount of crime coverage in *The Los Angeles Times*.”

After further statistical analysis, they conclude on page 221 that, “[f]or every type of legislation, our best-fitting models include a direct causal link between editorials and the legislation. For defendants and the judiciary, the sign of the path coefficient is negative, indicating that the greater the number of columns of crime-related editorials (lagged by 1 year), the less likely that legislation will favor defendants and judges. In all other diagrams the signs are positive. The path coefficients for defendants, police, prosecutors, severity of penalties, and overall criminalization suggest a rather traditional law-and-order stance. Interpretations for the judiciary, convicted offenders, and correction officials are less obvious.” Pages 222-31 describe the content of the paper as including a mixture of law-and-order and liberal messages.

On pages 239-56, in multiple regression with the same dependent variables that includes the percentage of the legislature that was Democratic, the number of *Los Angeles Times* editorials at a one year lag, and a measure of the civil liberties lobby, the editorials measure was found to be significantly associated with 7 of the 12 dependent variables.

<sup>282</sup> Richard A. Berk, Harold Brackman, and Selma Lesser, *A Measure of Justice: An Empirical Study of Changes in the California Penal Code, 1955-1971* (New York: Academic Press, 1977) note that, “[w]e searched the Roper files (which contain records of most of the large public polls ever taken in the United States) for questions about crime that had been asked consistently in California in the period 1950-1971. Only one question of use was found: ‘What are the major problems facing the country today?’ This open-ended item was used by Gallup for literally decades, and fortunately there were special tabulations for California. For every 6-month period we summed the proportion of mentions received by crime-related responses and used yearly means as the independent variable predicting the passage of Penal Code legislation... Our measure of public opinion shows no interesting patterns of association with the legislation, whether for simultaneous occurrence of with a 1-year lag. Part of the reason for the low correlations may be the small size of the California sample [under 100]... However, examination of Figure 6.4, showing public concern with crime-related issues over time, suggest consistent trends, not a random pattern. Public concern increases dramatically after 1967, but the increases appear to *follow* trends in legislation.” They argue that this shows that public opinion does not predict the legislation, but seems to follow it. They add that their “quantitative analysis and graphs... suggested shifts in legislative mood during the mid-1960s. Yet, Figure 6.4 indicates that it too until 1968 for the public to abstract law and order as a special and overriding problem. Ironically, 1968 is the year of Sieroty’s Prisoner Rights Bill and a year when liberal forces were already beginning an effective counterattack.”

If public attitudes affect policy, then the media may influence policy via its effect on public opinion. For example, Katherine Beckett and Theodore Sasson (2004) summarize that, “recent experimental research confirms that news reports of violent crime do tend to increase punitive attitudes among viewers, and that this effect is especially pronounced among white viewers of news items describing crimes committed by African Americans.”<sup>283</sup>

- **Disruptive tactics can lead to both concessions and repression from institutional targets.**

Prison riots and strikes seem to have encouraged the creation of new procedures and rules for prisoners but have also led to repression and even deaths.<sup>284</sup>

## Movement Composition

- **Social movements based heavily on a strategy of litigation (or perhaps any single strategy) seem to be fragile.**

Though Jacobs’ article from 1980 describes an active social movement comprised of both prisoners and sympathetic legal experts,<sup>285</sup> in 2004, Jacobs wrote that, “[t]he heyday of the prisoners’ rights movement roughly spanned the time period from 1960 to 1980” and referred to “the ruins of prisoners’ rights.”<sup>286</sup> Schlanger likewise refers to “the nearly complete disappearance of what used to be an active and influential prisoners’ rights movement.”<sup>287</sup> Accounts that emphasize the activism of the prisoners themselves suggest a similar timeline of decline, though this is disputed.<sup>288</sup> The extent of resource usage among different groups at

---

<sup>283</sup> Katherine Beckett and Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (Thousand Oaks, CA: Sage Publications, 2004), 100. On page 101, they summarize that observational studies provide more ambiguous evidence; the studies are “unable to disentangle cause and effect” because “crime-related programs may, in fact, attract the already fearful (for reassurance) and the vindictive (for vicarious vindication). See also pages 117-9, which describe the effects of reading media coverage of court cases on encouraging punitiveness.

<sup>284</sup> See the paragraph beginning “In 1970, prisoners in Folsom...” in the section on “A Condensed Chronological History of the US Prisoners’ Rights Movement.”

<sup>285</sup> See the paragraphs beginning “Legal scholar James B. Jacobs...,” “The 1964 *Cooper v. Pate* Supreme Court ruling...,” and “In the 1970s, activism from within...” in “A Condensed Chronological History of the US Prisoners’ Rights Movement.”

<sup>286</sup> James B. Jacobs, “Prison reform amid the ruins of prisoners’ rights,” in Michael Tonry (ed.) *The future of imprisonment* (Oxford, UK: Oxford University Press, 2004), 179-196.

<sup>287</sup> Margo Schlanger, “Inmate litigation,” *Harvard Law Review* (2003), 1558.

<sup>288</sup> Daniel S. Chard, “Rallying for Repression: Police Terror, ‘Law-and-Order’ Politics, and the Decline of Maine’s Prisoners’ Rights Movement,” *The Sixties* 5, no. 1 (2012), 48-50 summarizes that Eric Cummins, *The Rise and Fall of California’s Radical Prison Movement* (Stanford: Stanford University Press, 1994) emphasizes that (in Chard’s words), “California’s prison movement [took] a decisive hit following Jonathan Jackson’s August 1970 raid on the Marin County Courthouse, [as did] New York’s after September 1971.”

In contrast, Chard argues on pages 48-50 that, “[d]ecentralized and lacking a unifying national organization,” the US prisoners’ rights movement “surged in some regions of the country after suffering devastating setbacks in others. California’s prison movement may have taken a decisive hit following Jonathan Jackson’s August 1970 raid on the Marin County Courthouse, and New York’s after September 1971, but in Maine and elsewhere Attica mobilized rather than discouraged prisoners’ rights organizing. It was not until several years later, in response to local prison activism, that

different times is unclear from these accounts, as are the causes of the perceived decline. However, research reviewed in this report implies that the US prisoners' rights movement was primarily focused on litigation, supported by some grassroots efforts from prisoners and ex-prisoners. Funding for legal services seems to have declined in the 1970s and 1980s,<sup>289</sup> and the federal government, including the Supreme Court, seems to have become more hostile to various forms of public interest law during the 1980s, including prisoners' rights litigation.<sup>290</sup> Though litigation increased in total volume, the average number of filings per inmate decreased.<sup>291</sup>

Arguably, however, the prisoners' rights movement has had limited opportunities for institutional change through mechanisms other than litigation.<sup>292</sup>

- **Social movements can collaborate to challenge institutions, but a movement's opposition may also come from groups with diverse motivations.**

Civil rights groups as diverse as the Black Panthers, Black Muslims, NAACP LDF, and ACLU have contributed at times to the prisoners' rights movement, while other groups in the movement have been less motivated by racial concerns.<sup>293</sup> Conservative judges, conservative politicians, law-enforcement officials, the

---

proponents of law-and-order gained prominence in the Pine Tree State.” However, Chard’s account focuses on activism by prisoners and ex-prisoners themselves in the 1970s, so still fits within Jacobs’ periodization.

<sup>289</sup> See the paragraph beginning “In the mid-1970s, federal government grants...” in “A Condensed Chronological History of the US Prisoners’ Rights Movement.”

<sup>290</sup> See the paragraph beginning “Summarizing the changes in the Supreme Court’s approach...” in “A Condensed Chronological History of the US Prisoners’ Rights Movement.”

On public interest law more widely, see “The Pendulum Swings to the Right” and “Attacks on Public Interest Law Organizations” in Nan Aron, *Liberty and Justice for All: Public Interest Law in the 1980s and Beyond* (New York, Westview Press, 1989). For example, in paragraph 11.34, Aron summarizes that President Ronald Reagan “initiated a three-pronged strategy: slashing the budgets of federal agencies; appointing agency officials sympathetic with the Administration’s overall mission; and lobbying Congress to overturn environmental, consumer, and civil rights statutes. Under the banner of ‘defunding the left,’ President Reagan also sought to cut off sources of public funding for public interest and legal services organizations and to vitiate the working relationship that had developed over the years between these groups and various branches of government.”

<sup>291</sup> Susan N. Herman, “Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue,” *Oregon Law Review* 77 (1998), 1293-7.

<sup>292</sup> Both presidents and Congress have been hostile to the aims of the prisoners’ rights movement at various points, as shown, for example, through the PLRA and various tough-on-crime policies. However, there may still have been opportunities to work with (or put pressure on) state legislators, individual prisons, state corrections departments, and so on through grassroots pressure or professional lobbying efforts.

Malcolm M. Feeley has the impression (private email exchange, received June 8, 2020) that, “prisoners’ rights litigation did not die of its own accord due to lack of social movement. It has been reduced significantly because of strong actions by Congress (PLRA) and Presidential Administration priorities. After all, even with powerful courts and aggressive litigation, courts are the ‘least dangerous branch,’ lacking either sword or purse. So, in the face of concerted opposition by the two other branches (Congress and President), they are not likely to fare well.”

<sup>293</sup> These groups are discussed at various points in the section on “A Condensed Chronological History of the US Prisoners’ Rights Movement.” See also footnote 249. As an example of a group less motivated by racial concerns, see footnote 81.

victims' rights movement, and even anti-death penalty activists have all advocated at times for harsher treatment of convicts.<sup>294</sup>

## Messaging

- **People are less willing to sanction harm against individuals than against abstract groups of beings.**

A 1996 study of Ohio residents found 88% support among respondents for the implementation of a Three Strikes law in Ohio when asked a straightforward question with little additional context, but the study also found that only 17% of respondents who were given specific cases to consider actually favored the imposition of a life sentence on the offenders described.<sup>295</sup> A 2001 survey of the US public found that opposition to mandatory sentencing for nonviolent crime remained fairly consistently at around two-thirds of respondents, even after additional information was added. However, the respondents were also provided with an example of how mandatory sentencing applied to a case where a woman was caught transporting cocaine: 72% of the sample opposed mandatory sentencing as it applied to this individual.<sup>296</sup> Several other studies from the US and Canada suggest that people express less punitive preferences when asked about individual criminals than asked about their preferences in the abstract.<sup>297</sup>

---

<sup>294</sup> The actions of these groups are described at various points in the section on “A Condensed Chronological History of the US Prisoners’ Rights Movement” above. On the anti-death penalty movement’s encouragement of life sentences, see the section on “Capital punishment and life sentences” in Marie Gottschalk, “Sentenced to life: Penal reform and the most severe sanctions,” *Annual Review of Law and Social Science* 9 (2013), 373-5.

<sup>295</sup> Julian V. Roberts, “Public opinion and mandatory sentencing: A review of international findings,” *Criminal Justice and Behavior* 30, no. 4 (2003), 493.

<sup>296</sup> Julian V. Roberts, “Public opinion and mandatory sentencing: A review of international findings,” *Criminal Justice and Behavior* 30, no. 4 (2003), 494-5.

<sup>297</sup> Julian V. Roberts, “Public opinion and mandatory sentencing: A review of international findings,” *Criminal Justice and Behavior* 30, no. 4 (2003), 501-2 summarizes that, “[w]hen asked a general question, almost all Canadians support a mandatory sentence of life imprisonment for offenders convicted of murder (Roberts, 1988). However, when given a description of an actual case of a man sentenced to life imprisonment for the murder of his severely disabled daughter, three quarters of the polled public voted against the imposition of the mandatory sentence of life imprisonment (Angus Reid, 1999). This finding—support for the law accompanied by a reluctance to impose the law in specific cases—echoes the results from the American research on mandatory Three Strikes sentences. Specifically, the mandatory sentence appeals to the public in principle, but once confronted with actual cases, people quickly resile from their position and express a preference for a less punitive punishment.

“The difference between respondents’ views in response to general and case-specific questions also applies to opinions about capital punishment in the United States and parole eligibility for life prisoners in Canada. With respect to the death penalty in the United States, although a high percentage of Americans has always supported the use of capital punishment, when asked to consider the imposition of this sentence in specific cases, support for the death penalty drops significantly (see Cullen et al., 2000; Roberts & Stalans, 1997). When provided with actual case descriptions, survey respondents tend to favor less punitive sentencing options (e.g., Cumberland & Zamble, 1992; Zamble & Kalm, 1990).

“Although surveys show that the majority of the Canadian public are opposed to the possibility of parole for lifers at any point, juries composed of members of the public routinely reduce parole eligibility periods after being provided with information about offenders (see Roberts, 2002). Records show that 80% of prisoners who have applied for jury reviews have obtained reductions in the number of years that they must serve before being eligible to make applications for parole.”

- **Messaging that includes supplementary arguments may attract broader support.**

In 2011, conservatives endorsed strategies to reduce the incarcerated population, following an increased focus on the societal impacts of prisoners' rights issues.<sup>298</sup> The support of conservatives for the 2003 Prison Rape Elimination Act may also have been partly motivated by concern about the societal impacts of prison rape.<sup>299</sup>

## Potential Items for Further Study

Some of the most interesting strategic implications from this case study are based on the summaries of state-level case studies by Susan P. Sturm, "Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142 (1993), 639-738. Further research could refer back to those case studies to assess the strength of the evidence for Sturm's claims and evaluate whether more recent case studies confirm or disconfirm the claims.

What caused the US' "tough-on-crime" political trend, and was this the dominant factor in movement outcomes in the 1980s and 1990s?

How did the prisoners' rights movement develop in other nations? Why are conditions and rights worse for US prisoners than many European prisoners, and to what extent is this attributable to differences between the prisoners' rights movements in different countries? What effects did the strategic factors considered in this report have in other countries?

Many of the potential items for further study of the anti-abortion movement suggested in Sentience Institute's earlier report<sup>300</sup> could be adapted as items for further study of the US prisoners' rights movement. For example:

- A more detailed analysis of the legal history of the US prisoners' rights movement could provide more actionable insights for the judicial strategy of advocates seeking to secure rights for animals, such as through legal personhood.
- Interviews with prisoners' rights advocates and their opponents or surveys of the current US population could lead to further insights and provide evidence on questions more specifically tailored to the interests of the farmed animal movement.
- A systematic check through the annual reports of all identifiable prisoners' rights organizations could be informative, assuming such reports are accessible.
- Are there important contributions in the historical and social scientific literature on the US prisoners' rights movement that I have not included here?

---

<sup>298</sup> See the paragraph beginning "In 2011, conservatives..." in the section on "A Condensed Chronological History of the US Prisoners' Rights Movement" above.

<sup>299</sup> See the paragraph beginning "In July 2003, both the House ..." in the section on "A Condensed Chronological History of the US Prisoners' Rights Movement" above, especially footnote 173.

<sup>300</sup> Jamie Harris, "Social Movement Lessons From the US Anti-Abortion Movement" (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion>.

## Selected Bibliography

- Beckett, Katherine, and Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (Thousand Oaks, CA: Sage Publications, 2004).
- Berkman, Ronald, *Opening the Gates: The Rise of the Prisoners' Movement* (Lexington, MA: Lexington Books, 1979).
- Chard, Daniel S., "Rallying for Repression: Police Terror, 'Law-and-Order' Politics, and the Decline of Maine's Prisoners' Rights Movement," *The Sixties* 5, no. 1 (2012), 47-73.
- Cummins, Eric, *The Rise and Fall of California's Radical Prison Movement* (Stanford: Stanford University Press, 1994).
- Easton, Susan, *Prisoners' Rights: Principles and Practice* (Abingdon, UK: Routledge, 2011).
- Feeley, Malcolm M., and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998).
- Gottschalk, Marie, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006).
- Harris, Jamie, "Social Movement Lessons from the US Anti-Death Penalty Movement," (May 22, 2020), <https://www.sentienceinstitute.org/death-penalty>.
- Herman, Susan N., "Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue," *Oregon Law Review* 77 (1998), 1229-304.
- Jacobs, James B., "The Prisoners' Rights Movement and its Impacts, 1960-80," *Crime and Justice* 2 (1980), 429-70.
- Murakawa, Naomi, *The First Civil Right: How Liberals Built Prison America* (Oxford, UK: Oxford University Press, 2014).
- Roberts, Julian V., "Public Opinion and Mandatory Sentencing: A Review of International Findings," *Criminal Justice and Behavior* 30, no. 4 (2003), 483-508.
- Samuels, Liz, "Improvising on Reality: The Roots of Prison Abolition," in Dan Berger (ed.), *The Hidden 1970s: Histories of Radicalism* (New Brunswick, NJ: Rutgers University Press, 2010), 21-38.
- Schlanger, Margo, "Inmate Litigation," *Harvard Law Review* (2003), 1555-706.
- Schoenfeld, Heather, "Mass Incarceration and the Paradox of Prison Conditions Litigation," *Law and Society Review* 44, no. 3-4 (2010), 731-68.

Smith, Christopher E., *The Supreme Court and the Development of Law: Through the Prism of Prisoners' Rights* (Basingstoke, UK: Palgrave Macmillan, 2016).

Sturm, Susan P., "Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142 (1993), 639-738.

Tata, Cyrus, and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002).

Walsh, Jennifer Edwards, *Three Strikes Laws* (Westport, CT: Greenwood Publishing Group, 2007).