Law & Society REVIEW



# Mass Incarceration and the Paradox of Prison Conditions Litigation

Heather Schoenfeld

In this article I examine how prison conditions litigation in the 1970s, as an outgrowth of the civil rights movement, inadvertently contributed to the rise of mass incarceration in the United States. Using Florida as a case study, I detail how prison conditions litigation that aimed to *reduce* incarceration was translated in the political arena as a court order to *build prisons*. Drawing on insights from historical institutionalist scholarship, I argue that this paradox can be explained by considering the different historical and political contexts of the initial legal framing and the final compliance with the court order. In addition, I demonstrate how the choices made by policy makers around court compliance created policy feedback effects that further expanded the coercive capacity of the state and transformed political calculations around crime control. The findings suggest how "successful" court challenges for institutional change can have long-term outcomes that are contrary to social justice goals. The paradox of prison litigation is especially compelling because inmates' lawyers were specifically concerned about racial injustice, yet mass incarceration is arguably the greatest obstacle to racial equality in the twenty-first century.

In the late 1960s, prison inmates in the United States drew inspiration and resources from the movement for black civil rights in order to challenge prison conditions and practices through the federal courts (Cummins 1994; Jacobs 1980; Strum 1993). The civil rights lawyers who represented them 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 (Schlanger 2006:560). Prisoners and their lawyers throughout the 1970s and 1980s were largely successful: By 1993, 40 states were under court order to reduce overcrowding and/or eliminate

This research was funded by grants from the National Science Foundation and the Alice Berline Kaplan Institute for the Humanities at Northwestern University. I would like to thank Elisabeth Anderson, Corey Fields, Gabrielle Ferrales, John Hagan, Ron Levi, and the anonymous reviewers for their helpful comments on earlier versions of this article. Special thanks to Carroll Seron and the organizers of the "Paradoxes of Race, Law and Inequality" conference held at the University of California at Irvine in 2008. Please address correspondence to Heather Schoenfeld, Northwestern University School of Law, 375 East Chicago Avenue, Chicago, IL 60611-3069; e-mail: hschoenfeld@u.northwestern.edu.

*Law & Society Review,* Volume 44, Number 3/4 (2010)
© 2010 Law and Society Association. All rights reserved.

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

unconstitutional conditions of confinement (Sturm 1993). Yet despite the noted "success" of prison litigation, the decarceration goals of lawyers were never realized.[1] In fact, just the opposite occurred: Since 1973, the incarceration rate in the United States has grown by 700 percent (Western 2006:13).

In this article I ask how prison conditions litigation intended to reduce the state's reliance on incarceration eventually contributed to unprecedented prison growth. This question is important because despite recent restrictions on litigation by inmates, "the civil rights injunction is more alive in the prison and jail setting than the conventional wisdom recognizes" (Schlanger 2006:555). In addition, this question complicates explanations of the new "culture of control" or "law-and-order" politics that foreground the *backlash to* the civil rights movement (Beckett 1997; Garland 2001; Weaver 2007) by suggesting that mass incarceration is also a result of policies that *complied with* civil rights litigation. Finally, the paradox of prison litigation in the United States is especially compelling because inmates' lawyers were motivated by concerns for racial justice: Particularly in the South, prison reform litigation targeted historical racial inequities in the prison system (Feeley & Rubin 1998; Yackle 1989). Yet the growth of incarceration over the last 30 years has been disproportionately concentrated on poor black communities and has arguably reinscribed second-class citizenship on black Americans since the civil rights movement (Wacquant 2002; Western 2006).[2]

Although some existing scholarship characterizes prison litigation as a "double-edged sword," it has not systematically examined how specific prison litigation contributed to the rise of mass incarceration at the state level (Feeley & Swearingen 2004:466; Schlanger 1999). Using Florida as a case study, I demonstrate how the legal challenge to the grossly inadequate condition of state prisons, *Costello v. Wainwright* (1975) (hereinafter "*Costello*"), was a product of developments in civil rights law and legal activists' concerns for racial justice. Given the liberalization of racial politics in Florida, the national consensus on rehabilitation (and less secure confinement for offenders), and the state's widespread efforts at reform, inmates' lawyers hoped that the litigation would force Florida state policy makers to rethink their conservative penal policy. Yet between the negotiation of the court order in the late 1970s and its enforcement in the late 1980s, the political context had changed

[1] On the success of prison litigation see Feeley and Rubin (1998) and Feeley and Swearingen (2004). See Crouch and Marquart (1989), Filter (1996), and Taggart (1989) for a more circumspect take on the impact of prison litigation.

[2] In the United States, 1 in 15 adult black men versus 1 in 106 white men are in prison (Pew Center on the States 2008:34).

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

from reform to retrenchment (Pierson 1994). Increasingly, the dominant political discourse depicted black citizens as drains on the state rather than rightful claimants of equal opportunity (MacLean 2006), and criminal offenders as objects of "risk" rather than rehabilitation (Feeley & Simon 1992). In this new context, policy makers began to understand the problem as not too many people in prison but the risk of too many people being released from prison. Thus, state policy makers *translated* the court order on overcrowding as an order to *build prisons*. In 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 (see Figure 1).

To explain how policy makers translated compliance with prison litigation as an order to build prisons, I present a chronological "strategic narrative" of *Costello* (Pedriana & Stryker 2004; Stryker 1996). The narrative details the translation of *Costello* across a changing political and social context between its origins in 1973 and final compliance with the court order in 1993.[3] To do this I draw on a variety of primary data, including state records, court documents, newspaper articles, and 54 formal interviews with key actors (see Methods Appendix for details). Throughout the narrative I highlight the key decisions that directed the course of the litigation and its implementation in social policy in ways that put the state on the path toward mass incarceration.

Note that my findings highlight a previously unconsidered explanatory factor in the rise of mass incarceration: the role of prison conditions litigation. Specifically, I find that prison conditions litigation was a mediating factor in the politicization of punishment. Politicians' interpretation of the litigation created a platform by which they could draw on cultural distrust of the state (Zimring et al. 2001; see also Lynch 2010) and racialized fears of criminals (Russell-Brown 2008) for their political advantage. Consequently, the translation of prison litigation in the political arena can help explain some of the contemporary features of "governing through crime," such as its bipartisan support, the zero-sum game between criminals and victims (Garland 2001), and the value of prison "capacity" regardless of prisons' ability to lower the crime rate (Simon 2007).

More broadly, my findings point to new reasons that positive legal outcomes for the disadvantaged may not be sufficient for reducing inequality in the long term. Beyond those detailed in other scholarship, such as the "myth of rights," the need for

[3] *Costello* covered medical care, overcrowding, and food service in the Florida prisons. My narrative does not cover the medical care or food services portion of the litigation.

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

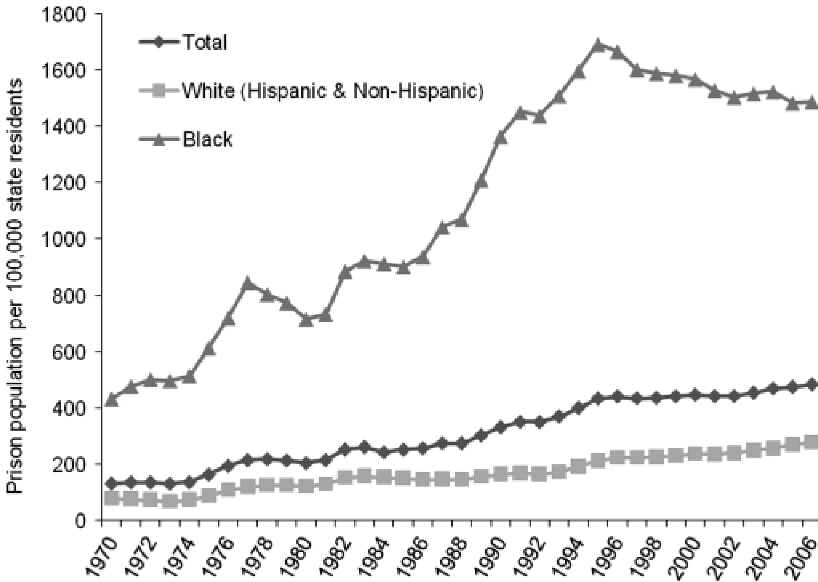


**Figure 1. Incarceration Rates by Race, Florida, 1970–2006.**
*Source:* Compiled by author from Florida Department of Corrections Annual Reports and Bureau of the Census.

congruent political mobilization, the presence of symbolic victories, and the limits of court enforcement, I argue that research should examine how "progressive" court orders are "translated" into social policy by lawmakers. Specifically, I find that the contingencies of timing and the broader political and social context over which litigation unfolds can cause unintentional and unfavorable terms of compliance. In addition, I argue that researchers need to consider how the translation process can produce "feedback effects" that ultimately bring about consequences that are quite opposed to the spirit of the initial legal mobilization.

## Timing and the Translation of Compliance

This article builds on understandings of "legal translation" (White 1990, 1996), or how narrative and rhetoric underpin legal claims. I conceive legal translation as happening on both the front end and back end of litigation. On the front end, legal translation is "how reformers translate their moral values and political goals into . . . plausible legal claims and arguments" (i.e., legal framing) (Paris 2001:640). On the back end, it is how the language and content of court decisions is understood for the purposes of implementation. Research on legal translation is important because on the front end, legal framing shapes court opinions that, on the

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

back end, can "powerfully shape the language of politics" and the current and future "agenda of contention" (Paris 2006:1028; citing ideas in Brigham 1987). In particular, this article considers the ways in which *timing* influences how legal framing impacts the translation of compliance. This insight about timing, gleaned from historical institutionalist scholarship on social policy and institutional change, helps explain how legal "successes" in court can have detrimental impacts over the long run.

Contemporary scholarship in sociolegal studies examines not only the success or failure of court decisions, but also the contingencies and conditions that affect courts' ability to bring about social change (McCann 2006; Stryker 2007). Important for the case of institutional reform litigation, this scholarship finds that court procedure, which requires lawyers to choose one particular legal argument, can lead to a narrow reframing of disputes and narrow definitions of social problems (Bumiller 1988; Coglianese 2001; McCann 1992). In the case of civil rights litigation, the focus on liberal notions of freedom, i.e., "negative rights" or freedom from coercion, gives way to a remedy that "merely neutralizes the inappropriate conduct of the perpetrator," rather than positively affirming the self-determination of the victim (Freeman 1995:29; Frymer 2005; Roberts 1995). The construction of prisoners' rights fell squarely into this negative rights tradition, as the courts ruled that Florida inmates had a right to be free from immediate physical violence brought about by overcrowding and inadequate medical attention. This framing precluded consideration of whether those in prison should have been there in the first place—even though this was part of the larger critique waged by the prisoners' movement (see Jackson 1972).

In a recent article, Paris (2006) imagines new realms of research analyzing change agents' conscious or unconscious choices about how to frame their claims in the legal arena. While this research agenda is important, it neglects an essential part of the processes by which law brings about social change. Instead, this article focuses on legal translation on the back end—the conscious or unconscious choices by those responsible for implementing court decisions. The contention that "law is a language into which other languages must be continuously translated" holds true in reverse: implementation requires the translation of the language of law into other languages, including the language of compliance, social policy, and politics (White 1996:55, cited by Paris 2006:1026). This is not to say that prison reformers' early choices for framing legal claims did not matter—they certainly did. But researchers need to better understand how the language of the court is ultimately understood in the political arena by those responsible for compliance.

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

Scholarship on legal framing has also recognized that the convergence of social movement strategy and legal discourse can help account for the "success" of some reform litigation (McCann 2006; Paris 2001). Numerous empirical case studies have demonstrated that court decisions are more likely to lead to change in policy (on the books and on the ground) when complemented by active political pressure from below (McCann 1994; Melnick 1994; Paris 2006; Pedriana 2006; Pedriana & Stryker 2004; Ziv 2001). However, the effect of timing on the convergence between legal framing and political strategy has often been overlooked. In addition, legal scholarship has not sufficiently considered the impact of timing on the convergence between political context, policy implementation, and court enforcement—generally thought to be the weakness of courts (McCann 2006:32). Yet historical institutionalist scholars have created multiple theoretical models that elucidate how the timing of policy initiatives influences future practices and institutional development (Pierson 2004; Thelen 1999). This work can be applied to legal initiatives in ways that demonstrate how the lasting impact of court decisions depends on the timing of legal translation.

For example, advocates of "path-dependent" explanations hypothesize that timing and the substance of decisions have independent causal effects on social outcomes:

> Specific patterns of timing and sequence matter; starting from similar conditions, a wide range of social outcomes may be possible; large consequences may result from relatively "small" or contingent events; particular courses of action, once introduced, can be virtually impossible to reverse (Pierson 2000:251).

In law, path dependency occurs when the "ideational constraints of liberal legal doctrine" (Paris 2001:637) restrict the content of judicial decisions, which in turn "block one path of development while encouraging another" (Stone Sweet 2002:119); or when the system of legal precedent creates a branching quality to the law as "each step in one direction increases the likelihood of additional steps in the same direction" (Hathaway 2001:628; see also Cunningham 2006; Gillette 1998; Posner 2000).

In explaining policy outcomes historical institutionalist scholarship points out that the *when* of policy innovation can be as important as the *what* of policy ideas (Weir 1992). Or in the case of legal outcomes, the timing of litigation with historical and political context can be more important than the legal arguments themselves. Similar to scholarship that recognizes courts' inability to control the temporal order of cases that come before them (Stone Sweet 2002), the case of prison litigation in Florida demonstrates that plaintiffs do not control the speed of the court process. As a

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

result, while the initial framing by legal activists may be congruent with their goals in one political context, the actual period of compliance can take place in a different historical and political context that undermines litigators' original goals.

The contingencies of legal translation can have long-term "policy feedback" effects. Policy feedback is the idea that past policy shapes politics or the language and capacity of interest groups to frame and enact subsequent policy (Orloff 1993). Policy decisions will have significant feedback effects when they create large institutions, organize beneficiary groups, or are embedded into economic and social structures (Hacker 2002). The same can be said for legal decisions that become embedded in social policy. In the case of prison litigation in Florida, the framework of the consent order became institutionalized in state law in ways that structured political contention and limited the options for court compliance. In turn, the translation of compliance created new resources, incentives, and opportunities that changed political and policy calculations around crime control.

## Legal Translation on the Front End

### The Foundations of Prison Litigation in Florida

Similar to other prison litigation across the country in the 1970s, the prison conditions litigation in Florida was a product of the personal biographies of civil rights lawyers, specific developments in civil rights law itself, and newly available resources for legal challenges to civil rights violations (Smith 1974; see generally Greenberg 2004; Thomas 1988). The case study of Florida supports Schlanger's (1999) contention that the source of prison litigation is best described not just by the actions of activist judges (Feeley & Rubin 1998), but by "looking, instead, at the interaction between sympathetic judges and a set of advocates who saw a potential for urging change by lawsuit and had both resources to bring case after case and expertise to work effectively within the legal frameworks governing both contested and settled orders" (Schlanger 1999:2030).

The 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 (Associated Press 1964). In the late 1960s, Simon, motivated by the racial disparities in death sentences, turned his attention to death penalty cases in Florida (Greenberg [1985]2004:479). Simon's trips to death row exposed him to the brutal conditions at Florida State

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

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.[4] 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 (*Adderly v. Wainwright* 1972:400). 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 [hereafter "FDOC"]), 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." Specifically, 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" (Amended complaint, 2 Jan. 1973).[5]

While the lawsuit did not specifically challenge racial injustice—as deplorable prison conditions equally impacted black and white inmates—it addressed racial inequality in at least three regards. First, as mentioned above, the key actors initiating the case—Simon and Judge Scott—were themselves motivated by concerns about racial inequality. And in directing the course of *Costello*, they drew on their civil rights litigation experience and doctrinal and procedural precedents established in desegregation and other civil rights cases.[6] Second, at the time racial inequality pervaded all state

[4] Earlier, as a staff attorney for the ACLU, Simon had volunteered to represent Clarence Earl Gideon, whose petition to the Supreme Court became the basis of the right to counsel (*Gideon v. Wainwright* 1963). Although Gideon eventually refused the ACLU's help, Simon later wrote of that experience in terms that pointed to the logic of his commitment to protecting the rights of prisoners: "It has become almost axiomatic that the great rights which are secured for all of us by the Bill of Rights are constantly tested and retested in the courts by the people who live in the bottom of society's barrel. . . . Upon the shoulders of such persons are our great rights carried" (quoted in Lewis 1964:239).

[5] Legal documents referred to in the text are on file with the author.

[6] For example, citing *Carter v. West Feliciana School Board* (1970), Judge Scott ordered the defendants to cooperate with a comprehensive survey of FDOC medical care by a Special Master (*Costello v. Wainwright* 1973). In addition, he assigned the United States as amicus curiae in order to tap the resources of the Civil Rights Division of the Department of Justice (see also Yackle 1989). Judge Scott also gave the U.S. Department of Justice rights of a party, which allowed it to participate actively in discovery, cross-examination, and oral

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

institutions in Florida, including the penal system (V. Miller n.d.). In their court filings, the plaintiffs repeatedly blamed the overcrowding on "governmental neglect," which was due to the legacy of racialized penal servitude in Florida (DuBois 1901; Mancini 1996) and the dominance of Northern rural segregationist legislators, who opposed spending money on black prisoners (Schoenfeld 2009). In a nod to the legacy of slavery, in his first order Judge Scott reproached the defendants that "a free democratic society cannot . . . stack [inmates] like chattels in a warehouse" (*Costello v. Wainwright* 1975:38). Finally, this same legacy contributed to Florida's "highly conservative criminal justice policy," which relied on "excessive use of imprisonment by the courts" (Ohmart & Bradley 1972:A-1). As Simon's statements later indicated, he hoped that the lawsuit would force state legislators to amend Florida's penal culture, beginning by releasing nonviolent offenders and reforming sentencing in order to divert offenders from prison (Interview, Elisabeth DuFresne, inmate lawyer, 21 Sept. 2009). And similar to the eradication of the death penalty and the provision of social services for the poor (Davis 1995; Greenberg 2004), these measures stood to disproportionately benefit black offenders, who at the time made up more than 55 percent of the prison population in Florida (compared to the less than 15 percent black population of the state; Florida Division of Corrections 1973:54; U.S. Bureau of the Census 1970: Table 24).

At the time, Simon's hope that the state would reduce the prison population was understandable. First, there was a national move *away* from secure confinement. The National Advisory Commission on Criminal Justice Standards and Goals (1973) recommended halting prison construction and using community sanctions instead of prison sentences for all but the worst offenders. Second, Floridians had recently elected a "reform" governor, Reubin Askew, and court-ordered legislative reapportionment had brought a new cohort of more progressive policy makers to the state capitol, many of whom realized that recent federal court decisions on prison conditions meant they "would have to do something different" (Interview, Jim Tillman, former Florida State House Representative, 10 May 2007).[7] In addition, the Attica prison riot in 1971 and subsequent riots across the country's

arguments on behalf of the plaintiffs (*Costello v. Wainwright* 1972). Simon drew on his relationship with and the resources of the Legal Defense Fund and the ACLU's National Prison Project.

[7] In 1971, the Eighth Circuit Court of Appeals affirmed the decision in *Holt v. Sarver* (1970) that the whole prison system in Arkansas constituted cruel and unusual punishment. Other early prison litigation cases include *Taylor v. Perini* (1972) (entering a consent decree for the Ohio prison system) and *Battle v. Anderson* (1974) (finding that several conditions in the Oklahoma prison system violated the Constitution).

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

prisons, including in Florida, sparked legislators' concern about prison violence:

> We had three and four people staying in a cell made for one person at the main prison. So overcrowded conditions and the fact that correctional officers were terribly underpaid and qualifications were if you had a broad back and a weak mind and could hit somebody over the head with a baton, you qualified to be a prison guard . . . our correctional system was just a boiling pot ready to explode (Interview, Jim Tillman, former Florida State House Representative, 10 May 2007).

Finally, administrators at the FDOC *embraced* the lawsuit. As overcrowding threatened to jeopardize the progress Wainwright had made "modernizing" the prison system, he welcomed the chance to use the court as leverage with state legislators (Interview, Louie Wainwright, 17 April 2007; Florida Division of Corrections 1973:45). In fact, in spring 1973, when Simon asked the court to restrict the FDOC from accepting more inmates into the system, Wainwright took it upon himself to do so. In addition, he signed a pretrial stipulation agreeing to "gross systemic deficiencies in the delivery of adequate medical care to inmates" and "severe overcrowding" in the prison system (Pretrial stipulation, 6 Dec. 1974).

## The *Costello* Injunction

By 1975, the legislature had still not appropriated adequate resources for the prison system, and Governor Askew, facing a tough re-election campaign, had strictly forbade more system closures, so Simon refiled the application for preliminary injunction. Granted by Judge Scott, the injunction became both the legal and political cornerstone of the events that unfolded around *Costello*. As it met with the political reality on the ground, it guided both sides' interpretation of the case and the resulting consent decree. In particular, three aspects of the injunctive order were important, including the definition of the problem, the substantive framework of the order, and the assumption of responsibility for relief.

First, the language of the injunction defined the problem as the immediate possibility of violence in overcrowded prisons. In his published decision, Judge Scott cited several medical experts and Wainwright, who all testified that the overcrowding created unsanitary, unhealthy, and dangerous living conditions for the inmates. In addition, a fair amount of attention during the testimony, and in the reasoning for the court, involved the mental health of inmates, including the suggestion that crowded conditions put black and white inmates too close to each other and that this could lead to physical violence (*Costello v. Wainwright* 1975:12–14). By

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

interpreting the problem as such, Judge Scott's decision precluded a discussion of the underlying purpose and use of the prison system.

Second, in establishing the framework for relief, 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" (*Costello v. Wainwright* 1975:34).[8] Judge Scott specifically stated that the order was based on the nebulous concept of "capacity" rather than a fixed number, in order to motivate the "Division of Corrections to maintain its pertinacious program of developing further innovations to increase the capacity of the Florida penal system" (*Costello v. Wainwright* 1975:35).

It is important to note that Judge Scott chose *not* to point to some very specific remedies suggested by the AJI report that would have *reduced admissions* to the prison system, including increasing the age of youth that could be sent to prison, developing short-term incarceration options for minor offenders, or establishing a pre-commitment diagnostic service to the courts that had been shown to "divert a significant number away from the prison system" (Ohmart & Bradley 1972:B12–14). Thus 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.

Third, the decision placed the primary responsibility for reducing the population to "normal capacity" on the FDOC.

[8] As fully defined by the American Justice Institute:

> "Normal capacity" [is] that population which an institution can properly accommodate on an average daily basis. It represents that population which best utilizes the resources currently available. It should include some vacant beds, to accommodate population surges, and to allow for different classifications of inmates within institutional totals.
>
> "Maximal capacity" [is] the fullest possible use of the plant, given virtually unlimited program and staff resources.
>
> "Emergency capacity" [is] the population beyond which the institution must be considered *critically, and quite probably, dangerously overcrowded*. It includes every bed in the institution which it is judged can safely be occupied at times of peak populations either due to intermittent and unpredictable population surges or to emergency and temporary circumstances (Ohmart & Bradley 1972:C-6; emphasis added).

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

However, in elucidating the ways to reduce overcrowding, Judge Scott touched on a number of means that required the cooperation of other institutional actors. For example, he suggested that the Florida Parole and Probation Commission could accelerate granting of parole, that courts could increase their use of pretrial intervention programs, or that the State of Florida could "simply construct or lease additional facilities" (*Costello v. Wainwright* 1975:39). However, by himself, Wainwright only had the authority to find ways to house inmates temporarily, or to award inmates between five and 15 days per month of "gain-time" (reductions to original prison sentences for good behavior, participation in programming, or other positive activity).[9] Consequently, by placing responsibility for compliance on Wainwright, rather than the governor or legislature, Judge Scott's order empowered the FDOC to direct the translation of compliance in ways that did not divert people from prison.

### The Initial Reaction by Lawmakers: Delay and Limited Reform

The injunction hit state lawmakers like a "bombshell" (Interview, William Sherrill, former attorney for the Florida Department of Legal Affairs, 4 Feb. 2008). However, because of the legacy of *Brown v. Board of Education* (1954), instead of prompting legislators to "do something," it prompted invectives against federal court interference. As one House Representative wrote to the Florida Sheriffs Association:

> I want you to know that I am in complete agreement with your position. . . . The Federal Courts have stepped in to legislate conditions in our jails and once again the rights of criminals are vastly superior to those of honest, hardworking, taxpaying, law obeying citizens . . . we might as well sign a contract with the Hilton Hotel to come in and build and operate our penal system (if you can call it one) (Letter to Rayman Hamlin, President, Florida Sheriffs Association, 5 Feb. 1975).

Yet the state could not appeal the case on factual grounds because the FDOC had repeatedly conceded to the basic facts. Therefore, state attorneys appealed on the procedural grounds that because the injunction required Wainwright to violate the state law (by

[9] At the time, it was common practice by state corrections agencies to award "gain-time," or "good time." Florida had a history of controlling the prison population via gain-time. The first gain-time laws came about as part of the large overhaul of the Division of Corrections in 1957 (Fla. Laws 1957, ch. 57–121, sec. 25). At the time, gain-time credits were given to inmates at the discretion of the individual warden or prison supervisor. In 1963, the legislature spelled out a more generous, but uniform, schedule of gain-time credits, awarding each inmate a certain number of days' credit for each month served depending on the length of the original sentence (Fla. Laws 1963, ch. 63–243).

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

closing the prison system to new entrants), the case needed to be heard by a three-judge panel (Interview, William Sherrill, former attorney for the Florida Department of Legal Affairs, 4 Feb. 2008). The delay tactic worked, and over the next two years the case went all the way to the Supreme Court.[10]

When the injunction was reinstated in May 1977, legislators responded ambiguously with lofty mandates, small reforms, and relatively little in the way of funding. As a result, FDOC administrators spent most of their time trying to figure out where to put newly arriving inmates:

> In those days . . . much of our time and energy went to finding bed space for the people who were being sent in. They [the legislature] hadn't yet figured out that when you send someone to prison you have to have a bed and a place for them to stay. In the early days, it was our problem. I mean I heard legislators say in open meetings, "What are you going to do with your prisoners?" Those are actually the words [they used]. I told them, "These are the state of Florida's prisoners" (Interview, Dave Bachman, former deputy director, FDOC, 28 March 2007).

Given the historical underfunding of the Florida penal system by the state legislature and the realization that the FDOC had no ability to stem the flow of inmates but would be held responsible anyway, FDOC administrators advocated changes to the gain-time laws for more leeway in releasing inmates (Fla. Laws 1978, ch. 78–304). Despite this new discretion, the FDOC still estimated that it would need 7,000 new prison beds because commitments to prison continued to increase (see Figure 2). In response, the state conducted a survey that relied on the same concepts of "capacity" as the injunctive order but labeled them "design capacity" and "maximum capacity" in order to arrive at different numbers—reducing the FDOC's estimated need to 3,400 beds (Florida Department of Offender Rehabilitation, Bureau of Planning Research and Staff Development, 8 July 1976). The concepts of design and maximum capacity then became the framework for a settlement agreement reached almost two years later.

[10] *Costello v. Wainwright*, 525 F 2d. 1239 (Crt. of App. 5th Cir. 1976, affirmed), 539 F 2d. 547 (en banc), reversed and remanded, 430 U.S. 325 (1977). Relying almost completely on the lack of challenge to the constitutionality of the law in question, the Court clarified that the "temporary suspension of an otherwise valid state statute" in order to comply with court-ordered relief is *not* "equivalent to finding that statute unconstitutional" (*Costello v. Wainwright* 1977:328).

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

**Figure 2. Increase in Annual Commitments to Florida Prisons, 1960–1980.** *Source:* Florida Department of Corrections Annual Reports; additional information available from the author.

## Legal Translation on the Back End

Sensing that the federal courts were turning against broad intervention in prison conditions cases, Simon worked with state lawyers on a compromise between his demand for a prison system based on "design capacity" and the state's desire to maintain prisons at "maximum capacity" (Interview, Elisabeth DuFresne, inmate lawyer, 21 Sept. 2009).[11] The result, the Overcrowding Settlement Agreement (OSA), approved in February 1980, stipulated that no individual prison could exceed maximum capacity (and could only be at maximum capacity for five days) and, most important, that the inmate population of the entire system could not exceed "design capacity" plus one-third. It defined "design capacity" as 40 to 90 square feet for inmates in individual cells and no less than 55 square feet per inmate in dorms; and "maximum capacity" as approximately 33 percent less space per inmate (40 to 60 square feet for cells and 37.5 square feet for dormitories), with double bunking allowed along outer walls (*Costello v. Wainwright* 1980). In addition, the FDOC agreed to no longer use three deteriorating buildings

[11] In May 1979, the Supreme Court held that lower courts should defer to the expertise of correction officials and that double-celling was not a violation of the Eighth Amendment (*Bell v. Wollfish* 1979). The Court's subsequent rulings trended away from a broad interpretation of prisoners' rights and comprehensive federal court intervention (Schlanger 2006).

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

for housing inmates. In exchange, the plaintiffs agreed to drop any liability claims and gave the FDOC five and a half years to comply with the consent decree.

Unlike the injunctive order, the Court emphasized the responsibility of not only Wainwright, but the governor and the legislature as well. In fact, although the U.S. Department of Justice and some national reformers felt that a settlement agreement was "premature," Simon may have been more optimistic about state compliance because of the election of Bob Graham as governor (Personal communication, former law partner of Toby Simon, 20 March 2007). Having pledged to "exercise" his "authority and leadership" to implement the terms of the OSA, Governor Bob Graham appointed Simon and the state's legal representative to a Governor's Advisory Committee on Corrections charged with developing legislative mechanisms for compliance (Press release, governor's office, 12 Nov. 1980).

## The Institutionalization of the *Costello* Consent Decree in State Law

Notwithstanding the work of the Governor's Advisory Committee, the OSA was only incorporated into state law after the state experienced a "prison overcrowding crisis" in spring 1982. In 1980, Wainwright had lobbied the governor for more prison beds, insisting that the FDOC had "no control over the growth of the system and the cost of providing care and supervision for the increasing number of inmates" (Letter to Governor Graham, 13 Jan. 1981). However, Governor Graham and the legislature, wanting to direct state funds elsewhere, were not forthcoming with additional resources (Florida House of Representatives 1996). Responding to ongoing revelations of brutality in the prisons, Judge Scott ordered an immediate status report, which revealed that 19 of the FDOC's 25 institutions were operating above maximum capacity and that the FDOC had built temporary wooden housing in order to count 1,640 additional bed spaces (Report to the Court Pursuant to the Order of May 12, 1982).[12] William Sheppard, who took over as lead counsel for the plaintiffs after Simon died of cancer, argued that the "plywood tents" were potential fire hazards and as such were an immediate threat to the inmates (Hearing on violation of settlement agreement, 6 July 1982). Although Judge Scott allowed them, he warned that "further recalcitrance in building adequate permanent facilities to house state prisoners will breed further woes for the defendants" (Order, 14 July 1982, pp. 8–9).

[12] According to Richard Dugger, the warden of Florida State Prison at the time, the temporary structures were not used to house inmates but were constructed in order to count the space when determining "maximum capacity" (Interview, Richard Dugger, former secretary of the FDOC, 22 March 2007).

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

The legislature responded by appropriating money for 2,000 more prison beds and convening a bipartisan task force to recommend solutions to the overcrowding crisis. Although the task force recognized public concern over crime, it also noted the fiscal consequences of a crime policy that relied too heavily on confinement (Corrections Overcrowding Task Force 1983). A similar sentiment was expressed by some members of the public:

> Florida simply cannot afford to build more and more prisons. . . . . But Florida, as many other states, is under a federal court order to reduce its prison population or provide more space. This pressure is valid because the courts have recognized the rights of inmates not to be treated as animals (*The Evening Independent*, 17 March 1983, Editorial, n.p.).

And indeed, the task force's recommendations, codified in the Corrections Reform Act of 1983, included the implementation of sentencing guidelines and policies to stem the flow of offenders into prison through alternative court dispositions (including drug treatment and a stricter form of probation). The task force hoped that guidelines would "regulate the type of offenders who require incarceration . . . reduce their average length of stay . . . [and] foster greater public and professional confidence due to the honesty of the new system" (Corrections Overcrowding Task Force 1983:iii). The law even included an official goal to lower the state's incarceration rate (Fla. Laws 1983, ch. 83–131).

Yet lawmakers also understood that guidelines and goals, in and of themselves, would not necessarily keep the prison population under maximum capacity—making additional statutory release mechanisms necessary. Thus, the 1983 reforms included new retroactive gain-time rules that shortened sentences by up to 50 percent and an emergency release gain-time mechanism to deal with "crisis overcrowding." The latter, developed by the *Costello* lawyers in their earlier capacity as members of the Governor's Advisory Commission on Corrections, required the FDOC to reward additional gain-time of up to 30 days, in five-day increments, to *all* inmates eligible to receive gain-time when the prison population reached within two percentage points of "system maximum capacity" (Fla. Laws 1983, ch. 83–131).

The decision to institutionalize the *Costello* consent decree through gain-time laws had significant feedback effects on the translation of compliance. While FDOC administrators could not compel prosecutors and judges to use the sentencing alternatives in the 1983 reforms, they could use the gain-time laws to compel legislators to fund more prisons. An FDOC administrator explained,

> [The Overcrowding Agreement] helped us tremendously, because we finally had some standards. We wanted that. . . . So

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

> we developed through that, housing standards—"maximum capacity" beyond which we wouldn't be able to go without violating the *Costello* Agreement. That then gave us the hammer we needed to go to the legislature and say "look, we are within two percentage points of being in contempt of court, we have got to build more beds, or we are going to have to trigger this release mechanism"—and nobody wanted to do that, so they said, "We'll give you money for more beds" (Interview, Dave Bachman, former deputy director, FDOC, 28 March 2007).

## The Timing of Final Compliance

Despite a temporary reduction in the prison population in 1984 (Dykstra 1986), by 1985 the prison system was still overcrowded and the FDOC was scheduled to lose an additional 1,367 beds when it closed two units under the terms of the consent decree. In anticipation of noncompliance, and concerned about the safety of the FDOC's temporary wooden housing, lead counsel Sheppard began filing notices of violation (e.g., Notice of Violation of Overcrowding Settlement Agreement and Motion for Order to Show Cause, 27 March 1985). Judge Scott's successor, Judge Susan H. Black, reacting to the state's slow response, appointed a Special Master and Monitor in order to significantly increase the court's day-to-day monitoring of the prison system (Opinion and Order Preamble, 22 Aug. 1985). When coupled with the advent of the crack cocaine epidemic and a conservative shift in state politics, the timing of this pressure from the court marked a critical juncture that led to state officials' decision to comply by building more prison beds.

Although President Ronald Reagan had declared a "war on drugs" in 1982, arrests for drug offenses in Florida grew only slightly before 1985. But in summer 1986, the media discovered crack cocaine, and Florida law enforcement and politicians committed new resources to the "fight" against drugs (Drummond 1988; Petchel 1987; Ritchie & Gallagher 1988). In the second half of 1986, arrests for sale and possession of cocaine in Florida jumped by 30 percent. The increased prosecution of cocaine offenses led to a spike in prison admissions: Between fiscal year 1986 and 1987, prison admissions increased by 7,400 offenders (or 33 percent). Forty-six percent of this increase was due to the increase in admissions for drug crimes (see Figure 3; FDOC 1987:38; 1988:28, 41). As others have noted, the increase in drug offender admissions had a disproportionate impact on black offenders (Mauer 1999; Tonry 1995): Between 1986 and 1990, the number of black offenders admitted to prison for drug crimes increased by 850 percent, while admissions for white drug offenders increased by 210 percent (statistical information from FDOC annual reports 1986–1990; available upon request).

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

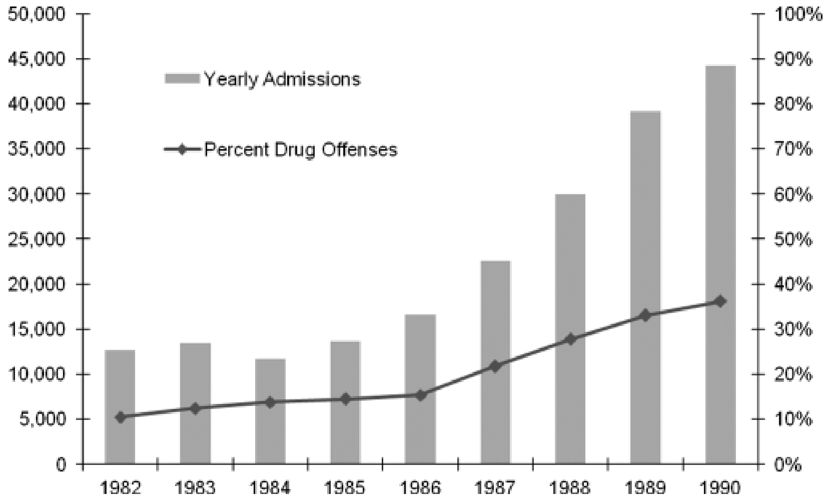


**Figure 3. Prison Admissions for Drugs as a Percentage of Total, 1980–1990.**
*Source:* Florida Department of Corrections Annual Reports; additional information available from the author.

The unprecedented number of prison admissions led to another overcrowding crisis that perfectly coincided with the arrival of a new Republican governor and a more conservative legislature. In January 1987, the new Secretary of Corrections, Richard Dugger, warned Governor Bob Martinez that the prison population was about to exceed 99 percent of design capacity. Realizing that Judge Black was "rapidly losing patience," Governor Martinez quickly called a special legislative session to enact measures that could immediately reduce the emergency overcrowding, including new gain-time rules that gave additional discretion to the FDOC (State of Florida, Journal of the House: First Special Session "A", 1987). However, the crack cocaine scare also prompted legislators to restrict gain-time for drug and habitual offenders.[13] The legislature funded contracted jail beds, tent beds, and beds in converted industry buildings (Fla. Laws 1987, ch. 87–1). However, the court's increased monitoring had made clear that "temporary" housing was an "unacceptable" long-term solution (Dahl 1987a), forcing the Martinez administration to develop a permanent solution to overcrowding and the *Costello* lawsuit.

[13] When the prison population reached 98 percent of capacity, instead of *requiring* the FDOC to credit *all* inmates with five-day increments of gain-time, the new administrative gain-time mechanism *allowed* the FDOC to grant up to 60 days of administrative gain-time to all inmates with positive work evaluations, program participation, and/or behavior adjustment, except those serving mandatory minimum terms for drug crimes, firearm possession, and capital offenses. Sex offenders who had not received "treatment" and those sentenced as "habitual offenders" were also ineligible (Fla. Laws 1987, ch. 87–2).

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

As Governor Martinez had campaigned in the mold of President Reagan, he was predisposed to support aggressive policing and the use of prison (Nordheimer 1986). Former Governors Askew's and Graham's previous decisions to accelerate the release of inmates further guided Governor Martinez's understanding of the state's options under *Costello*. Consequently, the Martinez administration believed that "under the terms of the federal court order, inmates must be released early when a population cap is reached" (*St. Petersburg Times*, 19 Dec. 1986, Editorial, n.p.). Eager to reverse the "mistakes" of his predecessors, and under pressure from district attorneys and county sheriffs strongly opposed to "releasing inmates through the back door" (Interview, Ed Austin, former president, Florida Prosecuting Attorney's Association, 21 Sept. 2008), Governor Martinez and Dugger began to advocate a new large-scale prison construction program. As Lieutenant Governor Bobby Brantley, who headed the initiative for Governor Martinez, explained,

> It is a hard thing [funding prisons] because ... you've got educational needs and [the public] don't want to ... spend all this money on prisoners, because the public, they'll tell you real quick [*sic*], "Oh yeah do what Governor Graham did, put 'em in tents." I mean they'd bury 'em all if it was up to the public. But *yeah we had to do it* ... there's just not a whole lot more that anybody's been able to come up with ... other than lock 'em up (Interview, former Lieutenant Governor Bobby Brantley, 12 April 2007; emphasis added).[14]

In 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'" (Interview, former Lieutenant Governor Bobby Brantley, 12 April 2007). While some Democrats argued that Florida relied too heavily on incarceration and that the state budget lacked resources for drug treatment programs, they were also concerned that the new release mechanism would overwhelm their urban districts with prison releasees (Dahl & Nickens 1987). Thus, according to Jon Mills, the former

[14] Brantley's recollection of his perception that the public opposed spending money on prisons was probably accurate for the time period. A poll commissioned by one of Governor Martinez's political opponents found that only 15 percent of respondents favored the construction of new prisons (*St. Petersburg Times*, 20 May 1988, 6B). This perception changed by the mid-1990s when legislators repeatedly stated that the public wanted to lock up offenders "whatever it cost."

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

Democratic Speaker of the House from relatively liberal Gainesville, Democrats also felt the urgency of the moment:

> I think there was some looking ahead, but it was more viewed as this is what we have to do and *there really are no other options* and trying to work with the Department and work with the Governor and others to meet what was a situation that had backed up (Interview, Jon Mills, former Florida State House Representative, 26 April 2007; emphasis added).

Of course, the legislature did have other options, but none were as guaranteed to end the overcrowding. Lawyers from the Florida Justice Institute, for example, argued that the state should redouble its 1983 reform efforts and expand alternatives such as probation, restitution, community control, community service, and work release (Berg 1987). This argument, however, did not "hold water" with many legislators because "if somebody gets killed because you don't have a [prison] bed . . . [or] the Federal Court tells you to release [a criminal offender] and they kill someone the next night, that's not very good" (Interview, Robert Trammell, former Florida State House Representative, 1 May 2007).

This interpretation of the lack of options was compounded by the media's coverage of the release program: Newspaper articles quoted judges, prosecutors, and defense attorneys worried about offenders returning to the community faster than expected (Dahl 1987b). Rightly or wrongly, the media blamed the early release mechanisms on the legislature, which then blamed the federal courts: "I don't like letting them out on administrative gain time at all, but we've got to go by the federal guidelines until we build enough prisons to hold them" (former State Senator Wayne Hollingsworth (D) Lake City, quoted in Dahl 1987b). Despite 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 . . . ("Florida's 'Willie Horton,'" *Miami Herald*, 30 Nov. 1988, p. 24A).

Although it is not uncommon for released inmates to re-offend, because of the media attention and the national politicization of

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

prisoner releases, legislators felt the need to express their outrage by vowing to "build more prisons to make room for more criminals" (Dahl 1989:D1).

As a consequence of this series of decisions, legislators approved what would later be called "an aggressive prison construction program" (Florida House of Representatives 1996:13). Between 1987 and 1991, the legislature appropriated 27,087 "prison bedspaces" (or 20 major correctional institutions)—six times what had been appropriated in the previous five years (Florida House of Representatives 1996:13). Yet despite these new measures, because of increasing prison admissions and gain-time restrictions on drug offenders, the FDOC had to continue granting early release to inmates. In fact, by the end of the decade Florida prisons had gained national attention, with the *New York Times* reporting that for every prisoner the FDOC accepted, it had to release one (Malcolm 1989).

### The Final Settlement

The prison building program and the accelerated releases finally brought the state into compliance 21 years after Michael Costello's original complaint. In May 1991, the parties to *Costello* entered into an agreement with the governor and the state legislature that stipulated four points. The first three concerned the stability, independence, and power of a newly created medical oversight agency (the Correctional Medical Authority [CMA]), and the fourth required that the legislature enact a law to maintain the prison system population at or below design capacity plus one-third.[15] Although Sheppard "didn't have faith in the system," he had successfully forced the FDOC to stop using tents and wooden facilities and was "satisfied that we had done everything that we could."

> When they said, we will put it in the statute, I said, fine, put it in the statute and when you get it done come back and talk to me, and they did that. I guess I was more hopeful that it would last (Interview, William Sheppard, 21 Feb. 2008).[16]

[15] In 1986, at the urging of the Special Master, the legislature created the Correctional Medical Authority (CMA) to replace the monitoring functions of the court (Fla. Laws 1986, ch. 86–183). Funded by the state but politically independent, the CMA was staffed by professionals who had the authority to compel the FDOC to fix deficiencies. The CMA also indirectly monitored overcrowding through its oversight of FDOC's Office of Health Services, which was tasked with certifying housing occupancy.

[16] The prison capacity requirement was codified in state law in 1992 (Fla. Stat. §944.023, 1993).

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

The Special Master's final report agreed that Dugger's actions as secretary of the FDOC supported a "conclusion of a good faith effort to comply":

> These actions include not only removal from bed inventory of questionable actual housing units and of certain jail and other beds which did not exist but also the promulgation . . . of criteria by which the Department will determine bed capacity (Special Master's Report and Recommendation on Case Closure, 9 Oct. 1992, p. 7).

The report further cited that compliance had been "maintained long enough" that future noncompliance was unlikely (p. 49).

On March 30, 1993, after hearing direct assurances of the state's commitment from Lieutenant Governor Kenneth "Buddy" MacKay and the new Secretary of Corrections, Harry Singletary, Judge Black issued her opinion and order granting final judgment (*Costello v. Wainwright* 1993). Expressing confidence that the CMA would faithfully monitor health care delivery and act as a "check on unconstitutional levels of overcrowding" (1993:15), Judge Black found it an adequate mechanism to "assure continued compliance with the orders entered" (1993:18). As the future would confirm, however, Sheppard's reluctance was justified: In 1995, the state legislature modified the prison capacity law to allow for design capacity plus one-half (Fla. Laws 1995, ch. 95–251). Yet his reservation that the state would not maintain safe and adequate housing and medical care for inmates did not foresee the long-term effects of the prison litigation—which were only just becoming clear.

## The Path of *Costello*: Policy Feedback and Future Prison Growth

By 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 (see Figure 4; FDOC 1981, 1994, 2008). Although unintended and unanticipated, the ways in which *Costello* was understood in the political arena and translated into social policy had feedback effects that increased the state's capacity and willingness to build prisons. In turn, this new capacity and willingness paved the way for the "tough justice" laws of the 1990s, which guaranteed increasing incarceration rates for years to come and the persistence of racial inequality.

First, the decisions that brought the FDOC into compliance in the crucial period from 1987 to 1991 increased the state's capacity to build going forward. In order to comply with the court order, Dugger took responsibility for "building prisons in the quickest,

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

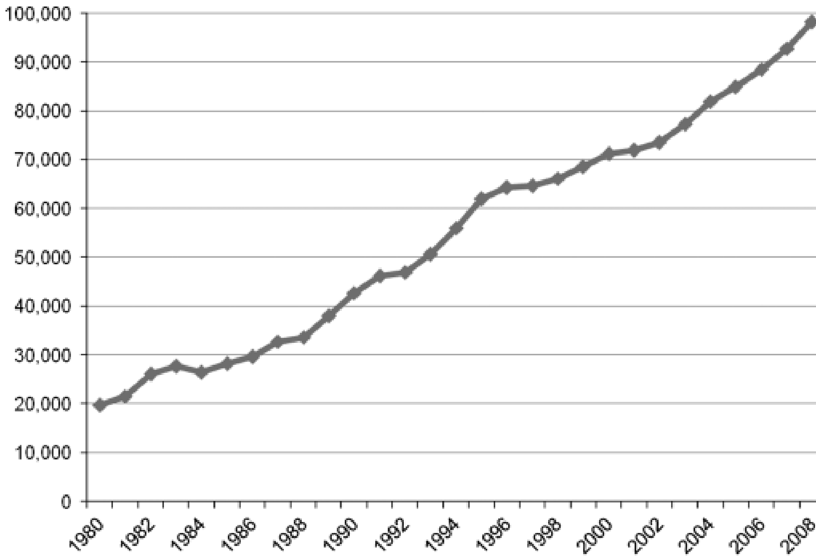


**Figure 4. Prison Population Growth in Florida, 1980–2008.**
*Source:* Florida Department of Corrections Annual Reports; additional information available from the author.

least expensive way possible" (Interview, Richard Dugger, former secretary of the FDOC, 22 March 2007). To find the cheapest land on which to build prisons, the FDOC abandoned efforts to put prisons in the southern half of the state, close to the homes of most inmates (FDOC 1990). Instead it ran advertisements in North Florida local newspapers and developed glossy brochures on the economic benefit of prisons for rural communities (Florida Department of Corrections brochure: "Siting of New Correctional Facilities," 1990). The FDOC then built prisons in the counties that provided free land and ready-made infrastructure. This policy created new incentives for state lawmakers to support prisons. As one North Florida state legislator stated,

> Well, [the state] needed a prison and I figured if it was going to be somewhere we ought to get some advantage out of it. . . . [It] was always recognized [as] a good clean industry, no smokestacks, employed a lot of people. [Later] the Chamber [of Commerce] saw it as economic development (Interview, Samuel Bell, former Florida State House Representative, 30 May 2007).

Of the 20 new prisons built between 1987 and 1993, 13 were located in North Florida, five in Central Florida, and only two in South Florida.

In order to build cheaply, the FDOC also abandoned ongoing efforts to expand smaller "community-based" institutions and

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

instead used in-house architects and engineers to develop a "quick construction," dormitory-style institution that could be built almost entirely with inmate and staff labor (FDOC 1988). In the early 1990s, the FDOC improved its inmate-built prison prototype, making it even faster to build, and more secure (Rhine 1998). The litigation and dynamic release policies also forced the FDOC and the state to create internal mechanisms that strengthened policy makers' capacity to enhance criminal sentences in the future, including a nonpartisan statutory system to predict prison populations and an in-house corrections data processing system to calculate inmate release dates.

Second, the decision to comply with *Costello* through early releases and prison growth had feedback effects that reduced the perceived costs and increased the political benefits of incarceration as a crime control strategy—resulting in a new willingness to build prisons. In the 1970s and early 1980s, legislators were loath to build prisons for a variety of reasons: some ideological (the state should treat, rather than warehouse), some fiscal (state budget dollars should be spent elsewhere), some political (voters would punish politicians who spent state money on prisoners). But in the late 1980s, these concerns were tempered by the conservative shift in state politics, the perceived financial benefit of prisons for rural communities, and the absence of a negative public response to the building program into the early 1990s. These developments reinforced state legislators' calculation that they could spend money on prisons (as a trade-off with transportation, education, or health care) without any political cost (Klas 1991). Furthermore, organized interests that could have highlighted the costs of prison growth did not appear. Traditional civil rights organizations, black legislators, and urban Democrats who were concerned about over-incarceration and racial disparities did not enter into the debate because they served constituents who were the most impacted by crime (Burgos 1988; Marques 1988). Thus even in more liberal districts, as long as prisons stayed out of the news (i.e., no more egregious brutality or conditions scandals), legislators did not lose voters' support by funding prison expansion (Interview, Jon Mills, former Florida State House Representative, 26 April 2007).

The events of the late 1980s also marked the ascent of the political use of crime in Florida. When new sensational crimes occurred, as in the case of Charlie Street, legislators felt compelled to enhance criminal penalties and place further restrictions on who was eligible for gain-time (Fla. Laws 1988, ch. 88–131).[17] However, because they did this while the state was still under court order, they had to continue the early-release program. With fewer people

[17] Similar to the Willie Horton episode and the defeat of Michael Dukakis, Florida state lawmakers still remember the name "Charlie Street" and the lesson that releasing offenders can have negative political consequences.

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

eligible for early release, the time served by eligible offenders decreased even further, such that by the early 1990s, average time served was less than 35 percent of court-imposed sentences (Task Force for the Review of the Criminal Justice and Corrections Systems 1994:14).[18] The liberal gain-time policies galvanized the law enforcement community, who used the opposition to early release policies to lobby legislators, organize victims' groups, and provide the media with juicy sound bites (Schoenfeld 2009). In the early 1990s, the perceived public backlash to the release policies created new incentives for lawmakers to expand prison capacity.[19] Thus in 1994, legislators funded another 14,000 prison beds in order to end the early release program (including beds in three private prison facilities). And in 1995, they passed one of the first "truth-in-sentencing" laws in the country, which required all future inmates to serve 85 percent of their court-imposed sentence (Fla. Laws 1995, ch. 95–294).

Since then, having realized both the physical capacity and the political willingness to build prisons, state lawmakers have continually used crime and prison resources to enhance their political capital (Garland 2001; Simon 2007; Wacquant 2009). For example, in 1995, Florida emblematically "reintroduced" chain gangs due to the initiative of State Senator Charlie Crist, who came to be known as "Chain Gang Charlie" and is now the current governor of Florida (Fla. Laws 1995, ch. 95–283). In 1999, Governor Jeb Bush campaigned on the slogan "10-20-LIFE," promising mandatory sentences for those who carried guns during the commission of a crime (Fla. Laws 1999, ch. 99–12). His initiative passed despite the fact that the violent crime rate in Florida had been decreasing an average of 4 percent per year since 1990 (Florida Department of Law Enforcement 2008: n.p.). Most recently, in response to "the horrendous murders of children like Adam Walsh, Carlie Brucia, Jessica Lunsford, [and] Sarah Lunde," Governor Crist passed the Anti-Murder Act, which stipulates zero tolerance for probation violators (Florida Governor's Office 2007: n.p.). Passed

[18] In 1988, the legislature replaced administrative gain-time with "provisional credits," which allowed for up to 90 days to be subtracted from the sentence of eligible inmates when the prison population reached 97.5 percent of capacity. It became so common it was referred to as "computer release" (Interview, Assistant Bureau Chief of Sentence Structure, FDOC, 30 March 2007).

[19] The backlash to early releases even impacted national politicians in Florida (Nurse 1993). Congressmen Charles Canady (12th District) and Bill McCollum (8th District), with the support of their respective county sheriffs, introduced the Prison Litigation Relief Act in summer 1993. The Act aimed to "limit judicial interference in the management of the nation's prisons and jails" (H. R. 2354, introduced in the 103rd Cong.). Their proposed bill was eventually incorporated into the Prison Litigation Reform Act of 1995, which has drastically reduced the number of federal claims filed by prisoners and has conceivably prevented legitimate claims from being heard (Schlanger & Shay 2007).

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

unanimously by the legislature, the large potential fiscal impact of the law (estimated at more than $20 million per year) was hardly considered by legislators during the committee hearings before its passage.

To accommodate the growth in the prison population that accompanied tough justice laws, the FDOC built an additional 32 institutions between 1995 and 2007 at an average cost per bed of $12,000 to $30,000 (FDOC 1996:13, 2007b). In 2007, Florida spent one in every 11 budget dollars on corrections, a total of $2.7 billion (Pew Center on the States 2008:30). Similar to many other states with oversized prison populations, in 2009 Florida faced a deficit of $2.4 billion and began cutting back on state services (Cave 2009). In addition, if the prison population continues to grow at this pace, the FDOC will need to add another 16,500 beds over the next five years (Pew Center on the States 2008:10).

It is important to note that this growth in incarceration continues to disproportionately impact black Americans and contribute to racial inequality. New crime initiatives, like those passed in the late 1980s, have disparate consequences: For example, of the almost 4,000 inmates currently imprisoned under "10-20-LIFE," more than 63 percent are black (non-Hispanic) (FDOC 2007a:6). As when the *Costello* litigation began, the percentage of black inmates in the FDOC is still more than 50 percent, and the ratio of black to white incarceration is approximately 5.5 to 1 (FDOC 2007b:38).

## Conclusion and Discussion

The story of prison litigation in the United States presents a paradox: How could legal mobilization aimed at decreasing incarceration and improving prison conditions have been successful, yet contribute to unprecedented levels of incarceration in the long run? This paradox is exemplified in a statement by Simon, the original lawyer for the inmates in *Costello*, during the hearings for the OSA in 1979:

> My own hope is that once the Federal Court enters a non-appealable order we will see the last of the new prisons built in this state. The system will begin to look at other remedies . . . because we know that if the prisons get overcrowded again . . . they will have to begin spending considerable sums of dollars for the construction of prisons. *And the legislature for the first time will be forced to make that choice*. For that reason, your honor . . . we have signed it (Transcript, hearing on OSA, 23 Oct. 1979; emphasis added).

Yet less than 10 years later, the legislature chose to comply with the order through a massive prison building initiative. As Mills, the

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

Speaker of the Florida House of Representatives in 1987, later recalled, legislators did not feel like they had a choice:

> The corrections situation was unchangeable and immutable and you had to deal with it. *It really . . . wasn't a discretionary issue;* not dealing with it had . . . public safety consequences. So it wasn't a matter of joyfully pushing for more funding for corrections. It was a fact of life and a fact of the circumstances of that period of time (Interview, Jon Mills, former Florida State House Representative, 26 April 2007; emphasis added).

The case study of Florida prison litigation suggests that the discrepancy between Simon's and Mills's understanding of the state's options can be explained by considering the congruence and timing of legal translation on both the front and back end *and* how decisions around legal translation constrained or enabled future possibilities for compliance.

Prisoners' rights lawyers and activists in the early 1970s were concerned about the overreliance on confinement, the overrepresentation of black Americans in the criminal justice system, and negligible treatment of inmates. Given the historical context, litigating these issues meant translating them into a problem of constitutional "rights" (Scheingold 2004). While reformers' decarceration goals seem profoundly misplaced in today's political climate, at that time they were in sync with national criminal justice experts who were promoting the ideal of rehabilitation and a future with fewer prisons (American Friends Service Committee 1971; Blumstein & Cohen 1973). However, the "rights" framing of prison litigation limited the ideation of the problem to the "immediate dangerous conditions" instead of, for example, the overuse of incarceration for low-level offenses.

Had the framework of the initial preliminary injunction required the state to *reduce* the prison population using specific measures designed to permanently decrease commitments to prison, the idea of regulating "prison capacity" may not have taken on such central importance. As it was, the capacity framework guided negotiations over a consent decree. Similarly, the injunction left space for FDOC administrators, as the "target population," to interpret the court's decision based on their own needs and understandings (Horowitz 1977). In their view, the court order was an opportunity to finally extract sufficient resources from the state. Yet during the first part of the 1980s legislators opposed spending more money on corrections, so instead they attempted to reduce the prison population through sentencing reform. In addition, legislators opted to regulate immediate overcrowding crises, as defined by *Costello*, by releasing inmates before the end of their sentences.

Together, the 1983 reforms offered the best chance for compliance along the terms envisioned by Simon and other prisoners'

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

rights attorneys. However, the reforms were stymied because legislators did not create new infrastructure or incentives to force district attorneys and judges to utilize alternatives to state prison. In addition, because of the timing of court intervention, the reforms were given less than two years to work. As a consequence, the prison system remained overcrowded and the FDOC was forced to create temporary housing. The attorney for the inmates used the potential danger of temporary housing to uncover the state's unwillingness to enact permanent remedies, prompting the court to increase its monitoring of the prison system.

Having already "experimented" with reform, state officials were left with two options that could *guarantee* a long-term solution to overcrowding: release offenders, or build more prisons. Timed with the beginning of the first Republican administration in 20 years and the crack cocaine scare, releasing offenders became politically untenable—thus legislators' belief that building prisons was their *only* option. Yet increased drug offense enforcement forced the FDOC to continue to grant accelerated gain-time to inmates in order to stabilize the prison population. The governor, law enforcement, and the media all used the "early releases" for strategic advantage, conflating the legislative release mechanism with the court order to end overcrowding and reinforcing the notion that *Costello* required the state to build new prisons.

As historical institutionalist scholarship suggests, the case study of Florida prison litigation highlights how the contingencies of timing can affect the court's ability to bring about social change. The temporal separation between the translation of a problem into a lawsuit on the front end and the translation of the court order into public policy on the back end creates the possibility that legal outcomes will diverge from legal activists' original intentions. Even when a court order favors the aggrieved party and aims to reduce inequality or remedy injustice, the process by which it is translated over time, with all its contingencies, can produce "compliance" that is unintended or unfavorable.[20] Thus scholars of law and social change should consider the ongoing political and historical contexts "in which courts do their work" (Paris 2001), from the initial interpretation of the legal issues at stake, to the legal remedy, to compliance efforts by responsible parties.

The case of Florida prison litigation also points to limits of traditional grassroots mobilization in expanding the progressive possibilities of court decisions. Although a grassroots prison reform

[20] Others have made the argument that civil rights litigation, and in particular *Brown v. Board of Education* (1954), did not ultimately bring about the racial equality that plaintiffs envisioned (Bell 2004). One can argue that in *Brown*, the meaning of "compliance" was formally rewritten by the Court as the political context changed, rendering "compliance" insufficient to achieve educational equality.

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

movement did not exist in Florida during the *Costello* litigation, it seems unlikely that it could have focused the translation of compliance toward reducing incarceration in the long run. Traditional civil rights organizations did not see it in their interest to advocate on behalf of criminal offenders. And even if they had, in the 1970s civil rights organizations were marginalized in Florida state politics. Most important, inmates' lawyers could not have predicted the mobilization of law enforcement, and victims' groups in support of incarceration. With the advantage of hindsight and unlimited resources, inmates' lawyers could have countered this mobilization by organizing educators and public welfare activists to maintain political support for the 1983 reforms.

In addition, the case of prison litigation in Florida highlights the role of policy feedback in the long-term evaluation of social change efforts through the courts. In Florida, the choices made by policy makers around court compliance, including where and how to build prisons, created policy feedback effects that further expanded the coercive capacity of the state and transformed political calculations around crime control. Thus scholarship on law and social change needs to look beyond one-dimensional "measures" of court success (Stryker 2007:74) (such as the implementation of law "on the books" and "on the ground") and instead follow how legal translation generates new constituencies, molds new languages of contention, and constrains and enables the definition of new "problems."

The framework of policy feedback can also help researchers better understand some features of the "law-and-order" politics of the 1990s. By translating the court order into a statutory release mechanism, legislators effectively increased the discrepancy between nominal and actual prison sentence lengths. In turn, this discrepancy created a potent symbol for politicians and interest groups looking to capitalize on the public's distrust of the state (Zimring et al. 2001). While there may have been valid reasons to shorten prison sentences, politicians in the early 1990s could claim that the "forced release" of offenders before the end of their "true" sentences was a substantial harm to public safety and a "risk" not worth taking. This claim then reinforced the racialized "fear that government authorities [would] serve the interests of criminals" over law-abiding citizens (Zimring et al. 2001:231). In this sense, while unintentional, the prison conditions litigation created a means by which state legislators and district attorneys could attack judicial discretion, expand mandatory minimums, and abolish sentencing guidelines. The political backlash to "early releases" thus allowed politicians to strengthen their own political authority by building new prisons and enacting new policy meant to keep more criminals behind bars for longer periods of time (Simon 2007).

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

The finding that prison litigation contributed to mass incarceration in Florida supports the "double-edged" sword scholarship about prison conditions litigation (Feeley & Swearingen 2004:466) and substantiates the concern that "by promoting the comforting idea of the 'lawful prison,' the litigation movement may have smoothed the way for ever-harsher sentences and criminal policies" (Schlanger 1999:2036, commenting on Feeley & Rubin 1998: note 19). Yet the findings run counter to the idea that prisoner rights litigation engendered a backlash *within* prisons that drew corrections administrators toward a "custody orientation" (Gottschalk 2006; Irwin 1980; Lynch 2010). To the contrary, Florida prison officials embraced prison conditions litigation, using it as a chance to pry needed resources from the state legislature (see also Carroll 1998). The story of prison litigation in Florida also extends new scholarship that finds counterintuitive explanations for mass incarceration. As Gottschalk (2006) has carefully detailed, we should consider how "not the usual suspects," but rather women's rights groups and other "liberal" organizations, contributed to policies of mass incarceration. In this case, concerns about racial justice ultimately helped create incentives to expand the penal state, which now ensnares 1 in 11 black adults (in prison or jail or under probation or parole supervision) (Pew Center on the States 2009:1).

Finally, the story of Florida demonstrates how detailed, in-depth accounts of prison growth in one particular state can offer new theoretical insights to explanations of mass incarceration. As most scholarship on the growth in incarceration has focused on the national level (Beckett 1997; Garland 2001; Murakawa 2005; Simon 2007), scholars of punishment have only begun to examine the unique paths to mass incarceration at the state level (Campbell 2009; Lynch 2010; L. Miller 2008; Page n.d.). I believe that more scholarship in this vein will demonstrate that prison litigation had similarly non-intuitive effects in other states. Future scholarship, therefore, should examine other states' growth in prison capacity, the state-level politics of punishment, and the specific ways in which race has shaped the penal States of America.

## Methods Appendix

The data for this article are drawn from a larger case study of prison growth in Florida between 1950 and 2000 (Schoenfeld 2009). The case study incorporated the analysis of a variety of primary data, including archival records, court records, and formal interviews. These sources are supplemented by secondary accounts of Florida's political history, newspaper articles, and crime and law enforcement data. In addition, my understanding of Florida's

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

politics and its prison system was also informed by numerous informal conversations and field visits to a representative sample of Florida's correctional institutions.

I created a historical record of key decisions concerning Florida's system of punishment between 1950 and 2000 with archival data from the Florida State Archives and Library, the Florida Legislative Library, the Florida Supreme Court Library, and the FDOC. I reconstructed the *Costello* case using publicly available court decisions and filings and hearing transcripts, pleadings, correspondence, and monitoring and other reports from the private files of William Sheppard, Esq., in Jacksonville, Florida. Documents referred to in the text are on file with the author.

From the documentary evidence I identified key actors involved in promoting or opposing key legislation and/or administrative changes from a variety of perspectives, including elected state officials, bureaucrats, legal and other activists, and representatives of special interest groups. I reached out to 75 potential interviewees, being careful to include people from each time period, both Republicans and Democrats and people who were less formally involved in the policy process. I was able to conduct 54 formal interviews between March 2007 and September 2009. Where I could not speak directly to key people, I relied on the archival data and newspaper accounts of their positions, statements, and actions. For the most part I was able to conduct interviews in person and digitally record and transcribe them (I asked permission to record interviews and only three people declined). Interviews lasted anywhere from 45 minutes to 2 1/2 hours. Since interviewees are elected or appointed public officials, or lawyers asked about their professional decisions and duties, I was granted an exemption by the IRB to receive oral consent. Where relevant I use interviewees' real names. The following table lists the number of interviewees by perspective and time period:

| **Perspective** | 1970–1986 | 1987–2000 | Total Number of People Interviewed |
|---|---|---|---|
| FDOC Personnel | 12 | 8 | 12 |
| State Legislators (Democrats) | 6 | 3 | 7 |
| State Legislators (Republicans) | 4 | 4 | 7 |
| Gubernatorial/Legislative Staff | 4 | 7 | 7 |
| Lawyers (Prisoners) | 6 | 4 | 6 |
| Lawyers (State) | 1 | 1 | 2 |
| Other Legal | 1 | 0 | 1 |
| Special Interests/Other | 6 | 12 | 12 |

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

I generated separate interview schedules for each of the 54 interviewees depending on the time period, the decisions made during the time period, and his or her involvement. In general, I asked interviewees about their role in the decisionmaking process, their goals, their choices, what information they used to guide their decisions, who supported their decisions and opposed their decisions, and their understandings of the consequences of their decisions. I asked interviewees who did not directly make policy decisions about the process by which decisions were made, the information available to decision makers, or other administrative processes. As interviewees were often speaking of events that happened years in the past, my detailed questions helped jog their memories. When their answers conflicted or were circumspect, I triangulated the information with available documentary evidence or newspaper articles from the time.

## References

American Friends Service Committee (1971) *Struggle for Justice: A Report on Crime and Punishment in America*. New York: Hill & Wang.

Associated Press (1964) "King Seized in Florida Cafe Protest: Aide, 12 Others Also Jailed After Integration Try," *Los Angeles Times*, 12 June, p. 3.

Beckett, Katherine (1997) *Making Crime Pay: Law and Order in Contemporary American Politics*. New York: Oxford Univ. Press.

Bell, Derrick (2004) *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform*. New York: Oxford Univ. Press.

Berg, Randall C. (1987) *Florida Does Not Need More Prisons*. Florida Forum, Tallahassee.

Blumstein, Alfred, & Jacqueline Cohen (1973) "A Theory of the Stability of Punishment," 63 *J. of Criminal Law, Criminology and Political Science* 198–207.

Brigham, John (1987) *The Cult of the Court*. Philadelphia: Temple Univ. Press.

Bumiller, Kristin (1988) *The Civil Rights Society: The Social Construction of Victims*. Baltimore: John Hopkins Univ. Press.

Burgos, Frank (1988) "Lawmakers Ready to Battle Crime, Drugs," *The Miami Herald*, 3 April, p. 10.

Campbell, Michael (2009) "Agents of Change: Law Enforcement, Prisons, and Politics in Texas and California." Ph.D. diss., Department of Criminology, Law and Society, University of California, Irvine.

Carroll, Leo (1998) *Lawful Order: A Case Study of Correctional Crisis and Reform*. New York: Garland Publishing.

Cave, Damien (2009) "Budget Woes Expose Rifts over Tobacco Money," *The New York Times*, 14 Jan., p. A16.

Coglianese, Cary (2001) "Social Movements, Law and Society: The Institutionalization of the Environmental Law Movement," 150 *University of Pennsylvania Law Rev.* 85.

Corrections Overcrowding Task Force (1983) *Final Report and Recommendations*. State of Florida, Tallahassee.

Crouch, Ben, & James W. Marquart (1989) *An Appeal to Justice: Litigated Reform of Texas Prisons*. Austin: Univ. of Texas Press.

Cummins, Eric (1994) *The Rise and Fall of California's Radical Prison Movement*. Stanford, CA: Stanford Univ. Press.

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

Cunningham, Lawrence A. (2006) "The Common Law as an Iterative Process," 81 *Notre Dame Law Rev.* 747–82.
Dahl, David (1987a) "Martinez Will Seek Special Legislative Session on Prisons," *St. Petersburg Times*, 30 Jan., p. B1.
——— (1987b) "Prison Time Dips to 20% of Sentence," *St. Petersburg Times*, 4 Nov., p. B1.
——— (1989) "The Prison Crisis Series: For a Better Florida," *St. Petersburg Times*, 5 March, p. D1.
Dahl, David, & Tim Nickens (1987) "Plan Approved to Release Inmates to Ease Crowding," *St. Petersburg Times*, 5 Feb., p. B2.
Davis, Martha F. (1995) *Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973*. New Haven, CT: Yale Univ. Press.
Drummond, Tammerlin (1988) "Police Deaths on Rise in Florida, Officials Blame Transients, Drugs, Gun Law for Increase," *St. Petersburg Times*, 11 Jan., p. B1.
DuBois, W. E. B. (1901) "The Spawn of Slavery: The Convict Lease System in the South," 24 *Missionary Rev. of the World* 737–45.
Dykstra, Mark (1986) "Apart from the Crowd: Florida's New Prison Release Program," 14 *Florida State Univ. Law Rev.* 799–810.
Feeley, Malcolm, & Edward L. Rubin (1998) *Judicial Policy Making and the Modern State*. Cambridge, UK: Cambridge Univ. Press.
Feeley, Malcolm, & Jonathan Simon (1992) "The New Penology: Note on the Emerging Strategy of Corrections and Its Implications," 30 *Criminology* 449–74.
Feeley, Malcolm, & Van Swearingen (2004) "The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications," 24 *Pace Law Rev.* 433–75.
Filter, John (1996) "Another Look at the Judicial Power of the Purse: Courts, Corrections, and State Budgets in the 1980's," 30 *Law & Society Rev.* 399–414.
Florida Department of Corrections (1981) *1980–1981 Annual Report*. Florida Department of Corrections, Tallahassee.
Florida Department of Corrections (1987) *1986–1987 Annual Report*. Florida Department of Corrections, Tallahassee.
Florida Department of Corrections (1988) *1987–1988 Annual Report*. Florida Department of Corrections, Tallahassee.
Florida Department of Corrections (1990) *1989–1990 Annual Report*. Florida Department of Corrections, Tallahassee.
Florida Department of Corrections (1994) *1993–1994 Annual Report*. Florida Department of Corrections, Tallahassee.
Florida Department of Corrections (1996) *1995–1996 Annual Report*. Florida Department of Corrections, Tallahassee.
Florida Department of Corrections (2007a) "10-20-Life Criminals Sentenced to Florida's Prisons," http://www.dc.state.fl.us/pub/10-20-life/index.html (accessed 29 Jan. 2009).
Florida Department of Corrections (2007b) *2006–2007 Annual Report*. Florida Department of Corrections, Tallahassee.
Florida Department of Corrections (2008) *2007–2008 Annual Report*. Florida Department of Corrections, Tallahassee.
Florida Department of Law Enforcement (2008) "Total Violent Crime for Florida, 1989–2007," Florida Statistical Analysis Center, http://www.fdle.state.fl.us/Content/getdoc/d0209ed2-68c4-4878-b8ca-c3129409bf3a/1989_fwd_violent.aspx (accessed 29 Jan. 2009).
Florida Division of Corrections (1973) *Ninth Biennial Report: July 1, 1971 to June 30, 1973*. Florida Division of Corrections, Tallahassee.
Florida House of Representatives (1996) *Corrections Issues Orientation Package*. Report, Committee on Corrections, Tallahassee.
Florida Governor's Office (2007) "Governor Crist Signs Anti-Murder Act," Press release, State of Florida, http://www.flgov.com/release/8709 (accessed Jan. 2009).

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

Freeman, Alan David (1995) "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine," in K. Crenshaw et al., eds., *Critical Race Theory: The Key Writings That Formed the Movement*. New York: The New Press.

Frymer, Paul (2005) "Racism Revised: Courts, Labor Law, and the Institutional Construction of Racial Animus," 99 *American Political Science Rev.* 373–87.

Garland, David (2001) *Culture of Control: Crime and Social Order in Contemporary Society.* Chicago: Univ. of Chicago Press.

Gillette, Clayton P. (1998) "Lock-in Effects in Law and Norms," 78 *Boston Univ. Law Rev.* 813.

Gottschalk, Marie (2006) *The Prison and the Gallows: The Politics of Mass Incarceration in America*. New York: Cambridge Univ. Press.

Greenberg, Jack (2004) *Crusaders in the Courts: Legal Battles of the Civil Rights Movement*. New York: Twelve Tables Press.

Hacker, Jacob S. (2002) *The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States*. Cambridge, UK: Cambridge Univ. Press.

Hathaway, Oona A. (2001) "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System," 86 *Iowa Law Rev.* 601.

Horowitz, Donald (1977) *The Courts and Social Policy.* Washington, DC: Brookings Institution.

Irwin, John (1980) *Prisons in Turmoil*. Boston: Little, Brown.

Jackson, George (1972) *Blood in My Eye*. New York: Random House.

Jacobs, James B. (1980) "The Prisoners Rights Movement & Its Impacts," in N. Morris & M. Tonry, eds., *Crime and Justice: An Annual Review of Research*. Chicago: Univ. of Chicago Press.

Klas, Mary Ellen (1991) "Staff Readies $270 Million Budget Cuts," *The Palm Beach Post*, 9 Jan., p. 6A.

Lewis, Anthony (1964) *Gideon's Trumpet*. New York: Vintage Books.

Lynch, Mona (2010) *Sunbelt Justice: Arizona and the Transformation of American Punishment*. Palo Alto, CA: Stanford Law Books.

MacLean, Nancy (2006) *Freedom Is Not Enough: The Opening of the American Workplace*. New York: Russell Sage Foundation.

Malcolm, Andrew H. (1989) "Florida's Jammed Prisons, More in Means More Out," *The New York Times*, 3 July, p. 1.

Mancini, Matthew (1996) *One Dies Get Another: Convict Leasing in the American South*. Columbia, SC: Univ. of South Carolina Press.

Marques, Aminda (1988) "Neighbors," *The Miami Herald*, 16 June, p. 6.

Mauer, Marc (1999) *Race to Incarcerate*. New York: The Sentencing Project.

McCann, Michael W. (1992) "Reform Litigation on Trial," 17 *Law & Social Inquiry* 15–43.

——— (1994) *Rights at Work: Pay Equity and the Politics of Legal Mobilization*. Chicago: Univ. of Chicago Press.

——— (2006) "Law and Social Movements: Contemporary Perspectives," 2 *Annual Rev. of Law and Social Science* 17–38.

Melnick, R. Shep (1994) *Between the Lines: Interpreting Welfare Rights*. Washington, DC: Brookings Institution.

Miller, Lisa L. (2008) *The Perils of Federalism: Race, Poverty, and the Politics of Crime Control*. Oxford: Oxford Univ. Press.

Miller, Vivien (n.d.) *Life and Labor in Florida's Sunshine Prison*. Gainesville, FL: Univ. Press of Florida, forthcoming.

Murakawa, Naomi (2005) "Electing to Punish: Congress, Race and the American Criminal Justice State." Ph.D. diss., Department of Political Science, Yale University, New Haven, Connecticut.

National Advisory Commission on Criminal Justice Standards and Goals (1973) *Corrections*. Washington, DC: U.S. Department of Justice.


https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

Nordheimer, Jon (1986) "Florida Race Underscores Changes," *The New York Times*, 2 Sept., p. D16.

Nurse, Doug (1993) "Canday Urges Limiting Judges' Power over Prisons," *The Tampa Tribune*, 3 June, p. 10A.

Ohmart, Howard, & Harold Bradley (1972) *Overcrowding in the Florida Prison System: A Technical Assistance Report*. Washington, DC: American Justice Institute.

Orloff, Ann Shola (1993) *The Politics of Pensions: A Comparative Analysis of Britain, Canada and the United States*. Madison: Univ. of Wisconsin Press.

Page, Joshua (n.d.) *The "Toughest Beat": Politics, Punishment, and the Prison Officers' Union in California*. Oxford: Oxford Univ. Press, forthcoming.

Paris, Michael (2001) "Legal Mobilization and the Politics of Reform: Lessons From School Finance Litigation in Kentucky, 1984–1995," 26 *Law & Social Inquiry* 631–84.

——— (2006) "The Politics of Rights: Then and Now," 31 *Law & Social Inquiry* 999–1034.

Pedriana, Nicholas (2006) "From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960's," 111 *American J. of Sociology* 1718–61.

Pedriana, Nicholas, & Robin Stryker (2004) "The Strength of a Weak Agency: Enforcement of Title Vii of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965–1971," 110 *American J. of Sociology* 709–60.

Petchel, Jacquee (1987) "Mother's Nightmare: Innocent Daughter Killed in Drug Fight," *The Miami Herald*, 30 Aug., p. 1BR.

Pew Center on the States (2008) *One in 100: Behind Bars in America 2008*. Washington, DC: The Pew Charitable Trusts.

Pew Center on the States (2009) *One in 31: The Long Reach of American Corrections*. Washington, DC: The Pew Charitable Trusts.

Pierson, Paul (1994) *Dismantling the Welfare State? Reagan, Thatcher and the Politics of Retrenchment*. Cambridge, UK: Cambridge Univ. Press.

——— (2000) "Increasing Returns, Path Dependence and the Study of Politics," 94 *American Political Science Rev.* 251–67.

——— (2004) *Politics in Time: History, Institutions, and Social Analysis*. Princeton, NJ: Princeton Univ. Press.

Posner, Richard (2000) "Path-Dependency, Pragmatism, and a Critique of History in Adjudication and Legal Scholarship," 67 *Univ. of Chicago Law Rev.* 573.

Rhine, Edward (1998) "Prison Design for the Future: Precast Concrete," in E. Rhine, ed., *Excellence in Corrections—Best Practices*. Alexandria, VA: American Correctional Association.

Ritchie, Lauren, & Kristen Gallagher (1988) "Drug Buy Becomes Deadly Deal: Woman Was Victim of Rising Cocaine Violence in Orlando," *The Orlando Sentinel*, 26 June, p. B1.

Roberts, Dorothy (1995) "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy," in K. Crenshaw et al., eds., *Critical Race Theory: The Key Writings That Formed the Movement*. New York: The New Press.

Russell-Brown, Katheryn (2008) *The Color of Crime (Second Edition): Racial Hoaxes, White Fear, Black Protectionism, Police Harassment, and Other Macroaggressions*. New York: New York Univ. Press.

Scheingold, Stuart A. (2004) *The Politics of Rights: Lawyers, Public Policy and Political Change*, 2d ed. Ann Arbor: Univ. of Michigan Press.

Schlanger, Margo (1999) "The Courts: Beyond the Hero Judge: Institutional Reform Litigation as Litigation," 97 *Michigan Law Rev.* 1994–2036.

——— (2006) "Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders," 81 *New York Univ. Law Rev.* 550–628.

Schlanger, Margo, & Giovanna Shay (2007) *Preserving the Rule of Law in America's Prisons: The Case for Amending the Prison Litigation Reform Act*. American Constitution Society for Law and Policy, Washington, DC.

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

Schoenfeld, Heather (2009) "The Politics of Prison Growth: From Chain Gangs to Work Release Centers and Supermax Prisons, Florida, 1955–2000." PhD. diss., Department of Sociology, Northwestern University, Evanston, Illinois.

Simon, Jonathan (2007) *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. New York: Oxford Univ. Press.

Smith, Chesterfield (1974) "Development of Florida Legal Services, Inc.," 48 *Florida Bar J.* 733.

Stone Sweet, Alec (2002) "Path Dependence, Precedent, and Judicial Power," in A. Stone Sweet & M. Shapiro, eds., *On Law, Politics and Judicialization*. Oxford: Oxford Univ. Press.

Stryker, Robin (1996) "Beyond History vs. Theory: Strategic Narrative and Sociological Explanation," 24 *Sociological Methods and Research* 304–52.

——— (2007) "Half Empty, Half Full, or Neither: Law, Inequality, and Social Change in Capitalist Democracies," 3 *Annual Rev. of Law and Social Science* 69–97.

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

Taggart, William A. (1989) "Predefining the Power of the Federal Judiciary: The Impact of Court-Ordered Prison Reform on State Expenditures for Corrections," 23 *Law & Society Rev.* 241–71.

Task Force for the Review of the Criminal Justice and Corrections Systems (1994) *Interim Report*. State of Florida, Tallahassee.

Thelen, Kathleen (1999) "Historical Institutionalism in Comparative Politics," 2 *Annual Rev. of Political Science* 369–404.

Thomas, Jim (1988) *Prisoner Litigation: The Paradox of the Jailhouse Lawyer*. Lanham, MD: Rowman & Littlefield Publishers.

Tonry, Michael (1995) *Malign Neglect: Race, Crime and Punishment in America*. New York: Oxford Univ. Press.

U.S. Bureau of the Census (1970) "Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States," Table 24, http://www.census.gov/population/www/documentation/twps0056/twps0056.html.

Wacquant, Loic (2002) "From Slavery to Mass Incarceration," 13 *New Left Rev.* 41–60.

——— (2009) *Punishing the Poor: The New Government of Social Insecurity*. Chapel Hill, NC: Duke Univ. Press.

Weaver, Vesla M. (2007) "Frontlash: Race and the Development of Punitive Crime Policy," 21 *Studies in American Political Development* 230–65.

Weir, Margaret (1992) "Ideas and the Politics of Bounded Innovation," in S. Steinmo et al., eds., *Structuring Politics: Historical Institutionalism in Comparative Analysis*. New York: Cambridge Univ. Press.

Western, Bruce (2006) *Punishment and Inequality in America*. New York: Russell Sage Foundation.

White, James Boyd (1990) *Justice as Translation: An Essay in Cultural and Legal Criticism*. Chicago: Univ. of Chicago Press.

——— (1996) "Imagining the Law," in A. Sarat & T. Kearns, eds., *The Rhetoric of Law*. Ann Arbor: Univ. of Michigan Press.

Yackle, Larry W. (1989) *Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System*. New York: Oxford Univ. Press.

Zimring, Franklin E., et al. (2001) *Punishment and Democracy: Three Strikes You're Out in California*. Oxford: Oxford Univ. Press.

Ziv, Neta (2001) "Cause Lawyers, Clients, and the State," in A. Sarat & S. Scheingold, eds., *Cause Lawyering and the State in a Global Era*. Oxford: Oxford Univ. Press.

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

## Cases Cited

*Adderly v. Wainwright*, 58 F.R.D. 389 (M.D. Fla. 1972).
*Battle v. Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974).
*Bell v. Wollfish*, 441 U.S. 520 (1979).
*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
*Carter v. West Feliciana School Board*, 396 U.S. 290 (1970).
*Costello v. Wainwright*, 353 F. Supp. 1324 (M.D. Fla. 1972).
*Costello v. Wainwright*, 387 F. Supp. 324 (M.D. Fla. 1973).
*Costello v. Wainwright*, 397 F. Supp. 20 (M.D. Fla. 1975).
*Costello v. Wainwright*, 525 F. 2d. 1239 (5th Cir. 1976).
*Costello v. Wainwright*, 539 F. 2d. 547 (5th Cir. 1976).
*Costello v. Wainwright*, 430 U.S. 325 (1977).
*Costello v. Wainwright*, 489 F. Supp. 1100 (M.D. Fla. 1980).
*Costello v. Wainwright*, 147 F.R.D. 258 (M.D. Fla. 1993).
*Gideon v. Wainwright*, 372 U.S. 335 (1963).
*Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).
*Taylor v. Perini*, 365 F. Supp. 557 (N.D. Ohio 1972).

## Statutes Cited

Fla. Laws 1957, ch. 57–121, sec. 25.
Fla. Laws 1963, ch. 63–243.
Fla. Laws 1978, ch. 78–304.
Corrections Reform Act of 1983, Fla. Laws 1983, ch. 83–131.
Fla. Laws 1986, ch. 86–183.
Fla. Laws 1987, chs. 87–1, 87–2.
Fla. Laws 1988, ch. 88–131.
Fla. Stat. §944.023, 1993.
Fla. Laws 1995, chs. 95–251, 95–283, 95–294.
Fla. Laws 1999, ch. 99–12.
Prison Litigation Reform Act of 1995, Pub. L. No. 104-134 (codified as amended in scattered titles and sections of the U.S.C.); *see also* H.R. 3019, 104th Cong. (1996).

***Heather Schoenfeld*** *is a postdoctoral fellow at Northwestern University School of Law. Her research focuses on the historical, political, and racial antecedents of mass incarceration in the United States. She has previously published articles on prosecutorial misconduct, social movements around criminal justice, and the development of international criminal law. She is currently working on a book that investigates the politics of prison growth in Florida over the second half of the twentieth century.*

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press

https://doi.org/10.1111/j.1540-5893.2010.00421.x Published online by Cambridge University Press