

THE POLITICS OF PRISON EXPANSION

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I

INTRODUCTION

We know very little about how decisions to build prison are made, or, to be more accurate, how such decisions develop and evolve in the political process. Filling prisons with convicted felons requires a vast number of small decisions by police, prosecutors, judges, and probation and parole personnel. In contrast, building prisons requires a small number of large decisions by key political agencies and actors, including the Department of Corrections, the Division of the Budget, the Governor's Office, legislative committees, and occasionally the electorate. Local community groups play a role in the politics of prison construction, frequently acting as a lobby or litigant opposing a particular proposed site. The federal courts play a role when, on constitutional grounds, they foreclose the option of crowding more prisoners into existing facilities. Citizens' commissions may also play a role, although not always the same one: they may be appointed to increase the political legitimacy of the Governor's decision, or to politically defuse or bury the issue.

This Article describes the political and legal processes of prison expansion, and identifies the kind of empirical questions that a comprehensive study of expansion politics must address. In addition, this Article raises a number of questions about how key decisions on prison expansion should be made. A better understanding of the process of political decision-making may lead pro-builders and anti-builders alike to redesign the processes or, at the very least, to re-examine their assumptions and role conceptions.

This Article maps the political terrain, identifies key features of the political landscape, and suggests hypotheses about the way different interests combine or collide. In developing a framework for understanding "the politics of prison construction," I will draw upon examples from New York State, which has greatly expanded its prison capacity in the past decade in order to meet the enormous increase in the number of prisoners.¹ Although

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1. New York's prison population has increased from approximately 12,500 in 1971 to almost 26,000 in 1981, and to more than 31,000 as this Article goes to press. CORRECTIONAL

no typical state or political scenario exists, certain political ingredients and scenarios common to the resolution of prison expansion issues can be identified.

Each section of the Article focuses on a different political organ's role in resolving the question of prison expansion. Section II analyzes the role of the Department of Corrections, the executive branch agency with front line responsibility for administering prisons. Section III focuses on the role of the electorate and considers certain constitutional and philosophical questions about how plebiscites on prison expansion should be conducted. Section IV turns to the legislature, and identifies real and perceived political costs in taking positions which favor or oppose prison expansion and in voting for any particular expansion plan. Section V identifies the interests of local governments in the state's expansion policy. Section VI briefly examines the role of citizens' commissions in producing or avoiding resolution of prison crowding.

II

THE DEPARTMENT OF CORRECTIONAL SERVICES AS AN IMPERIAL POWER

In New York State and, it is my impression, elsewhere as well, the Department of Correctional Services ("the Department") is the most important advocate of prison expansion. Without the Department's enthusiastic support, prison expansion is unlikely, and probably not possible. The Department justifies expansion through prison population projections and capacity limitations. It must take the lead in drawing up plans, searching for sites, hiring technical consultants and so forth. But it need hardly be added that by itself the Department cannot insure that prisons will be built.

A. Whether to Expand

Why and when does the Department leadership decide that prison capacity must be increased? Is it forced to this conclusion by the action of other political organs or interest groups, or by its own internal bureaucratic logic? Conceivably, a legislature might place orders for new prisons upon deciding that more space will be needed to accommodate an increase in the number of felony commitments flowing from new sentencing laws. Alternatively, a court might order the Department to build more prisons or reduce the prisoner population so that eighth amendment rights are not violated.

ASSOCIATION OF NEW YORK, *THE PRISON POPULATION IN NEW YORK STATE: A STUDY OF ITS CAUSES AND CONSEQUENCES WITH RECOMMENDATIONS FOR CHANGE* 4, 9 (March 1982). The Department of Correctional Services has opened eighteen new institutions during this period. Its operating budget has more than quadrupled.

Perhaps in some states legislators have had the foresight to attach penal impact statements to sentencing proposals, and to provide funds to meet expected space requirements.² But this has not occurred in New York nor, I suspect, in the vast majority of jurisdictions. In New York, the passage of mandatory criminal sentences in Rockefeller's strict drug laws, the Second Felony Offender law, and the Violent Felony Offender Law has not been accompanied by legislative commitment to expansion. Nor was the Department pressured to prepare for more prisoners.³ Legislatures typically lack the staff, the sustained attention, or the political will to face the budgetary consequences of their sentencing policies. At minimum, this suggests that prison expansion will result from, rather than create, serious prison crowding.⁴

It is possible that the courts might force a corrections department to expand capacity. The federal courts, in particular, have become increasingly willing to impose constitutionally mandated population ceilings on prisons.⁵ A federal judge will not actually order a department to build more prisons, but the effect of a population cap may inevitably produce this result, unless key political actors choose to divert prisoners from the prison system rather than to create more space to accommodate them.⁶ Even in the absence of

2. Requiring the attachment of penal impact statements to new sentencing proposals has been suggested as a way of forcing the legislature to confront the fiscal implications of crime and justice legislation. Blumstein, *Sentencing Policy Must Weigh Impact on Prison Population*, Pittsburgh Post-Gazette, May 7, 1982. Professor Blumstein has also suggested that sentencing judges be allotted a fixed number of bed days to be allocated among those whom they sentence. Blumstein and Kadane, *An Approach to the Allocation of Scarce Imprisonment Resources*, 29 CRIME & DELINQ. 546 (1983).

3. Controlled Substances Act, 1972 N.Y. Laws 878-881, 1973 N.Y. Laws 163, 276-278, 676, 1051; Second Felony Offender Law, N.Y. PENAL LAW § 70.06 (McKinney 1982-1983); Violent Felony Offender Law, N.Y. PENAL LAW § 70.02 (McKinney 1982-1983).

4. I am aware, of course, that certain statistical studies seem to show that capacity drives population rather than vice versa. See J. MULLEN, K. CARLSON & B. SMITH, 1 AMERICAN PRISONS AND JAILS 38 (1980) [hereinafter cited as J. MULLEN]. But see the devastating criticism of that research in Blumstein, Cohen & Gooding, *The Influence of Capacity on Prison Population: A Critical Review of Some Recent Evidence*, 29 CRIME AND DELINQ. 1 (1983).

5. There are a vast number of cases. For a compendium up till mid-1980, see J. MULLEN, *supra* note 4, at 35-36. A useful source of up to date information on current case law is *Prison Decisions*, a digest of prison case law edited by Professor Frank Merritt of the University of Toledo College of Law.

In *Rhodes v. Chapman*, 452 U.S. 337 (1981), the Supreme Court reversed a lower court's decision that a modern Ohio penitentiary was unconstitutionally crowded because, on average, prisoners were confined in less than 63 square feet of space. The Court held that failure to provide this much space was not, by itself, a *per se* violation of the eighth amendment. *Id.* at 348. Although heralded apocalyptically by prison reform groups, the *Rhodes* decision does not seem to have stayed the tide of litigation on crowding. See Balz, *24 States Face Orders to Relieve Overcrowding*, The Wash. Post, June 16, 1981, at A7, col. 1.

6. In November, 1983, federal district Judge Morris Lasker refused to modify his order imposing a population cap on the New York City jail system. See *Rehm v. Malcolm*, No. 70-3962 (S.D.N.Y. 1983). The New York City Department of Corrections began releasing

major lawsuits, the spectre of judicial intervention may lead prison officials to assess capacity requirements closely. Although there has not been a successful "crowding" lawsuit in New York State, corrections officials and pro-builders stress the constitutional rights of prisoners and the desirability of forestalling federal court intervention. Two alternative strategies for dealing with excess prisoners—non-incarcerative sanctions and shorter prison terms—have attracted very little support from the executive or legislative branches.

Cynics may suggest that it is unnecessary to prod prison officials to adopt an expansion program because, like all bureaucrats, prison officials have an insatiable appetite for organizational growth.⁷ This argument, however, proves too much. The very antiquity of most American prisons suggests either that no such urge for growth exists, or, if it does, it has been spectacularly unsuccessful over the years. Historically, prison officials appear to have been much more concerned with issues of "control" than with capacity; prestige in the profession goes to those who run a "tight ship," not to those who preside over large numbers of prisoners.⁸

A less cynical variation of the preceding theory claims that the typical commissioner wants institutions to be well run and well funded.⁹ Prison crowding, or any other credible problem, can be used to justify budget increases. In short, commissioners will ask for more space if they think they can get it. A problem with this hypothesis is that funds for expansion will compete with other correctional priorities—larger staff, better services, higher pay. An increase in the size of the prison system will not necessarily mean an increase in per prisoner resources; in fact, it might mean a decrease.

Another, more likely, hypothesis is that top prison officials seek to minimize the risk that their operations will be disrupted. Careers can be

detainees who could post ten percent of their bail. Ultimately, 610 inmates were released in this manner. This chain of events touched off a political furor. Apparently, there are similar emergency releases of jail inmates taking place around the country. See Werner, *Overcrowding Spreads to Jails in U.S.*, New York Times, Nov. 23, 1983, at A24, col. 3.

7. See W. NAGEL, *AN AMERICAN ARCHIPELAGO: THE UNITED STATES BUREAU OF PRISONS* 4 (1974):

In 1972 the [Federal] Bureau [of Prisons] startled many of us when it produced a so-called Master Plan calling for 35 new institutions during the next decade. A bureaucracy which had existed with only 3 prisons during its first 30 years, and which had gradually increased to 24 facilities during its next 4 decades suddenly now planned to add 35 new correctional institutions costing over \$500 million.

8. See J. JACOBS, *STATEVILLE: THE PENITENTIARY IN MASS SOCIETY* (1977).

9. W. NAGEL, *supra* note 7, at 4:

Yet the Federal Bureau is a Bureau of Prisons. This strongly defines the Bureau's role which is to build and operate prisons. It almost has to follow that the success or failure of the Bureau's administration is directly tied up with its success or failure in perpetuating the so-called "institutional solution" to the nation's crime problem.

damaged or destroyed by riots, rampant violence, or scandal. Accordingly, it would be natural for prison officials to advocate expansion when they perceive good management jeopardized by intolerable crowding. It would be useful to know what triggers these officials' perceptions that their institutions are intolerably overcrowded. Even if one just considers bodies and beds, "prison crowding" is a very amorphous concept. How many people is any one prison meant to hold? Figures for "planned capacity" and "rated capacity" change frequently, even for the same institutions.¹⁰ Many prisons, which today are called *overcrowded*, held many more prisoners decades ago when there was less sensitivity to privacy and space needs. Conditions that some corrections officials would label "crowded" would be defined as comfortable by others.¹¹ Even different prisons within the same state have different rules of thumb concerning space capacity. Recently, the courts and the accrediting agencies have played an important role in defining what constitutes crowding, but even standards have ambiguities and, of course, the existence of varying and inconsistent standards leaves considerable room for debate over what really constitutes unacceptable crowding.¹² Furthermore, determining whether overcrowding exists is more complicated than computing the number of square feet of cell space required by each prisoner. Even when there are enough beds, some officials may feel conditions are crowded because of limited recreational facilities, jobs in prison industries, or disciplinary segregation cells.¹³

10. See M. SHERMAN & G. HAWKINS, *IMPRISONMENT IN AMERICA* 32 (1981).

The New York State 1980-1985 Correctional Services Master Plan makes a fine distinction between "overcrowding" and "population density":

The simplest definition of overcrowding refers to the cubic feet of living area available to each inmate. "Overcrowding" can mean requiring inmates to share cells or dormitory spaces designed for single individuals.

Population density refers to measures of personal and social interaction and the constraints upon one's personal space in a large, congregate living environment. It refers to ratios of staff to inmates and to availability of "real jobs," educational programs and recreational programs that provide the difference between meaningful involvement for inmates and forced idleness.

STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, *MASTER PLAN: 1980-1985 20* (1981) [hereinafter cited as *MASTER PLAN*].

11. For analysis of the wide variation in "crowding" from state to state, see M. SHERMAN & G. HAWKINS, *supra* note 10, at 38-41.

12. The best known of the recently promulgated standards for prison conditions are: COMMISSION ON ACCREDITATION FOR CORRECTIONS, *AMERICAN CORRECTIONAL ASSOCIATION, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS* (2d ed. 1981); *AMERICAN BAR ASSOCIATION, TENTATIVE DRAFT OF STANDARDS RELATING TO LEGAL STATUS OF PRISONERS* (1977); U.S. DEPARTMENT OF JUSTICE, *DRAFT FEDERAL STANDARDS FOR CORRECTIONS* (1978).

13. The New York State Coalition for Criminal Justice, a prison reform organization, comments in a recent newsletter: "The Department of Correctional Services should not be allowed to repeat the mistake committed at Ossining as they open these new prisons: namely, putting prisoners in the cells before the ancillary service space is also ready." *New York State Coalition for Criminal Justice, Update 2* (Feb. 1983), at 2.

The personality and values of the Commissioner and her staff are likely to figure importantly in determining if, when, and how a department moves to increase capacity.¹⁴ Some corrections administrators will be more committed to professional accreditation standards than others; some will be motivated by humanitarian concerns for prisoners; and others will fear court intervention or violence and riots. The crucial question is whether top corrections officials see themselves as advocates for more prison cells as, for example, military leaders see their jobs as requiring continuous lobbying for more and better weapons.

Once a determination is made that the prisons are unacceptably crowded, the commissioner may quickly conclude that more beds and buildings are necessary. But this conclusion is not inevitable. The commissioner may believe that crowding will be temporary. No population projection can accurately forecast how criminals, police, prosecutors, sentencing judges, and parole boards will behave over the long run.¹⁵ For this reason, if no other, prison administrators will always be forced to react to new population pressures. With so many unpredictable variables, it is impossible to make credible estimates of what space needs will look like three or more years in the future.

Planning in advance for population increases is highly unusual. For example, New York State's prison population has been steadily increasing since the early 1970s. The drive to expand the system did not develop real momentum, however, until 1978 when the state initiated negotiations to purchase the Rikers Island jail complex from New York City.¹⁶ Since the collapse of those negotiations in 1980, the Department has continuously sought to expand the prison system through acquisitions and new construction.

There is also some evidence which shows that even after conditions have become unmistakably crowded, top prison officials will not necessarily become expansionists. There are reasons why prison expansion might be considered a dubious solution to crowding: 1) it is difficult to get funds for

14. There is a serious need for scholarship on the recruitment, career paths, and self-conceptions of top corrections officials. For an autobiographical account of one prominent commissioner, see R. MCGEE, *PRISONS AND POLITICS*, (1981).

15. Departments constantly monitor criminal justice system and demographic data in order to project future capacity requirements. The failure of the projections has time and again frustrated planning, and produced underestimates of population increase and capacity requirements. See J. MULLEN, *supra* note 4, at 91:

In responding to the Congressional mandate, Volume II has demonstrated at length that accurate projections of correctional populations, even for the short term, are exceedingly hard to formulate. It is not too much to say that if a projection turned out to be very accurate, it would probably be by accident.

16. The negotiations and their collapse are chronicled in Zisser, *Close to Home: Another Look at Rikers Island*, 8 *NEW YORK AFFAIRS* 65 (1983).

prison expansion, especially if the governor or legislature is opposed; 2) even if funds can be obtained, it takes time to plan and build new prisons, but relief is needed immediately; 3) rapid expansion places enormous strain on administration and personnel management; 4) there is no assurance that the augmented capacity provided by new prisons will not be cancelled out by a concomitant increase in incarcerations. These factors might convince a commissioner to lobby within the executive branch and before the legislature for reduction of the number of prisoners through emergency release mechanisms, liberalized good time, accelerated parole, or sentencing reform. These mechanisms, especially emergency release powers, would assure that the prisons would not become intolerably overcrowded. In New York State, the prison leadership has not lobbied for alternatives to incarceration or various early release mechanisms, because it is believed such proposals would not receive legislative support.

Whether to advocate or oppose prison expansion is not a one time decision. During the last decade, prison officials have had to face building and expansion decisions over and over again. Key political actors and decision-makers have been able to test strategies, assess the results of both action and inaction, and accumulate expertise.

What have corrections administrators learned from the crowding crisis? Do commissioners and their staffs experience a "maturation process"? Do they come to expect unceasing increases, the correctional equivalent of an inflationary mentality? Do they typically inflate population projections? If so, will that lead to trouble with the Division of the Budget and key legislative committees? In some cases, do they deflate their projections to allow the budget officers and governor to say later that they provided "everything that corrections requested?" If, as seems frequently to be the case, the expansion program does not reduce crowding, yet consumes correctional resources, do prison officials start to doubt the capacity of further expansion to resolve administrative problems? At some point do the corrections administrators cease advocating expansion because they see other needs being neglected?¹⁷

17. The 1980-1985 Correctional Services Master Plan seems to evince interest in reducing overcrowding by means other than expanding capacity. The Plan states:

The Department's public policy will endorse efforts by the criminal justice system to divert appropriate offenders from imprisonment.

1. The Department will continually assess its population to determine for which groups of its population imprisonment is least appropriate.

2. The Department will closely monitor its "special need" populations, and, where appropriate, recommend which population groups can be better served by other agencies.

3. The Department will issue regular statements on its efforts to divert specific sub-populations.

When the Commissioner and top staff determine that expansion is necessary, they must then obtain the support of others—namely, the governor, Division of the Budget, legislative committees, the full legislature, and perhaps the electorate. The Department's lobbying efforts are important to the process, though they absorb substantial time and energy, diverting top staff from day-to-day administration of the prisons.

Each administrator's view of lobbying responsibilities depends, in part, on her conception of the role of an administrator. While some administrators may dispassionately present population projections and alternative strategies for reducing population to the executive budget office and the legislature, others lobby furiously, threaten to resign, and make repeated references to what "might happen" if monies for expansion are not appropriated.

Every corrections commissioner benefits, to some extent, from the leverage created by fear of prison riots. In the event of a riot, no governor wants to be charged with having turned a deaf ear to pleas for more funding and resources. Each administrator must decide whether and how to exploit this fear. In New York, the awful spectre of Attica,¹⁸ and its destructive impact on Nelson Rockefeller's political ambitions, has given correctional officials a special advantage for lobbying.¹⁹

Because prison riots or violence can cause political damage governors may protect themselves by positioning their corrections commissioner as the party responsible if and when the prisons blow up. Governors want to be in a position to say, "I provided everything that was requested; the Department of Corrections consistently underestimated its capacity requirements." This type of precautionary positioning may be one reason why population projections consistently underestimate actual population increases. Population projections in many states are so politicized as to be virtually meaningless.

B. How to Expand

The decision to expand prison facilities involves more than just whether to build or not to build. Decisionmakers must decide what kinds of institu-

4. The Department will publicly endorse and speak on behalf of diversion programs it has found to be successful.

5. The Department shall, when necessary, sponsor enabling legislation to foster diversion efforts.

MASTER PLAN, *supra* note 10, at 23. It appears that the Department has not given much emphasis to implementing these recommendations.

18. See THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA, ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA (1972).

19. In addition, because Governor Hugh Carey repeatedly vetoed death penalty legislation, it is likely that he felt a need to compensate by supporting tougher sentencing policies

tions to build and whether to expand by renovating old prisons, building new ones, or acquiring and adapting other types of facilities. If expansion means no more than "more beds," increased capacity can be produced *within* existing institutions. Cells with single beds may be refurbished with two beds, gymnasiums can be converted into dormitories, and tents can be erected on playing fields. This approach is particularly sensible if administrators expect the inmate population to decrease within a few years. In New York, a good deal of expansion has taken place within existing facilities,²⁰ although the Department has vigorously and successfully resisted double celling on grounds that it causes tension, frustration, conflict, and increased danger to inmates and staff.²¹

One might anticipate a preference for new maximum security institutions²² since this type of institution is familiar to correctional leaders and carries prestige within the profession. However, these institutions are extremely expensive; construction costs run as high as \$70,000 per cell in New York State, exclusive of finance charges.²³ Expanding capacity by addition and renovation is cheaper, but less satisfactory for prison administrators accustomed to operating highly secure institutions.²⁴ Nevertheless, renovation can put new beds into use quickly and for a fraction of the cost of constructing new maximum security institutions.

and more cells. Governor Mario Cuomo takes the same position on the death penalty, and he also seems firmly committed to prison expansion.

20. The largest renovation project is the creation of 940 new beds by remodeling a cell block at Ossining Correctional Facility.

21. It is interesting that groups opposed to prison expansion also oppose double celling, although this strategy is more likely to be reversible than acquisitions or new construction.

22. See "Expansion Plan For the New York State Prison System," submitted to Governor Hugh L. Carey by Thomas Coughlin, III., Commissioner, Department of Correctional Services and Howard F. Miller, Director, Division of the Budget (June 5, 1980): "In adopting the Rikers Island Plan, the State based its decision on the following assumptions . . . (B) Any new space should represent a level of security higher than that acquired in recent years through conversion of existing State properties."

23. See D. McDONALD, *THE PRICE OF PUNISHMENT: PUBLIC SPENDING ON CORRECTIONS IN NEW YORK* 51-55 (1980).

24. The 1980-1985 Correctional Services Master Plan indicates concern with expanding capacity in medium and minimum security institutions:

The excess space that does exist is found in minimum security, specialized facilities which have historically proven difficult to fill.

MASTER PLAN, *supra* note 10, at 23.

All space had to be filled and the space acquired was in the medium and minimum security categories requiring staff to make riskier decisions than they did ten years ago.

Id. at 30.

III

THE ROLE OF THE ELECTORATE IN PRISON EXPANSION

One of legal historian Willard Hurst's many important insights is that the electorate, like the legislature and judiciary, is a legal institution.²⁵ It can use its powers of initiative, recall and referendum to enact legislation, and in some states, to change the constitution.²⁶

Virtually no one has examined the role of the electorate in deciding to build prisons.²⁷ Voter approval is, of course, unnecessary for building projects *per se*. But most state constitutions²⁸ require voter approval to finance prison or jail constructions through long term indebtedness.²⁹ During the 1970's voters across the country considered dozens of prison bond issues. Unfortunately, no comprehensive study has compiled the results.³⁰ Identification and analysis of factors that affect passage or defeat of prison bond

25. J. W. HURST, *Force and Fruition*, in *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* 258, 306 (1972).

26. "Initiative may be defined as the process by which legislation proposed by a specified number of voters is submitted to the electorate for approval. Referendum is the process of submitting for voter approval matters proposed or already passed upon by a legislative body." Note, *Constitutional Constraints on Initiative and Referendum*, 32 *VAND. L. REV.* 1143, 1144 (1979). The use of the referendum may be increasing. In the November, 1978 general election over 200 measures of initiative and referendum appeared on the ballot in 38 states. *Id.* at 1143. See also Note, *Governmental Referendum Advocacy: An Emerging Free Speech Problem*, 29 *CASE W. RES. L. REV.* 886 (1979) ("The use of the referendum . . . may be one of the most significant political developments of the decade."); Gunn, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 *URB. L. ANN.* 135 (1981).

27. But see Comment, *Voters' Rights to Approve State Debt—How Much Choice is Allowed?*: New Jersey Association on Correction v. Lan, 33 *RUTGERS L. REV.* 198 (1980).

28. The classic work is A. HEINS, *CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT* (1963). See also Gelfand, *Seeking Local Government Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York City Fiscal Crisis; the Taxpayers' Revolt, and Beyond*, 63 *MINN. L. REV.* 545 (1979); Morris, *Evading Debt Limitations With Public Building Authorities: The Costly Subversion of State Constitutions*, 68 *YALE L.J.* 234 (1958).

29. Political theorists, at least since Bentham, have been concerned with the question of how to prevent transient legislative majorities from mortgaging the polity's future. Politicians will inevitably be tempted to increase expenditures while holding the line on taxes. Every system needs a way to check the possibility that a momentary decision to make massive expenditures will not burden the political community for decades. The state constitutional restrictions against long term indebtedness without voter approval are one approach to this problem. Enacted in the late nineteenth century in response to profligate (and often corrupt) spending on public works projects, these constitutional restraints are grounded in the belief that the electorate is less easily influenced than the legislature by special interests which stand to profit from the government's expenditures. See, e.g., N.Y. CONST. art. VII, § 11.

30. The National Prison Moratorium project has recently begun the arduous task of identifying state and local prison and jail bonds. By its preliminary count, from 1976 until mid-1981, eight bonds passed and twelve failed. During the summer of 1981, there were twenty bonds slated for the fall election. See National Moratorium on Prison Construction, News Release on proposed jail and prison construction bonds.

issues would greatly increase our understanding of public opinion regarding prison issues and of the politics of punishment.

The proposal to float a bond issue to finance prison construction surfaced in the New York legislature as early as 1978, but was not passed until 1981. That year, the legislature approved a \$500 million bond issue by overwhelming majorities in both the Senate (52-4) and Assembly (130-6).³¹ The proposal's political attractiveness is obvious: the cost of construction would be spread over many years, minimizing the need for fiscal trade-offs affecting other programs.

The prison bond referendum pitted the Department and its legislative allies against a coalition of citizens' groups. The Department launched a vigorous campaign on behalf of the bond issue, with top personnel making personal appearances across the state. The Department's spokesmen argued that an increase in capacity would make the streets safer.³²

The bond was ultimately defeated, albeit by less than fourteen thousand votes out of nearly 2.6 million cast. This indicates that prison construction is *not necessarily* a popular political position. The bond was successful in the more liberal New York City metropolitan area, receiving at least sixty percent of the votes cast in each of the five boroughs. In the more conservative upstate areas, however, the bond suffered defeat in all but three counties.

Those opposing prison construction hailed the vote as a repudiation of the expansion program.³³ The Department and the legislature, however, chose to interpret the defeat merely as voter rejection of the *financing terms for new construction*. The leadership of the legislature has remained committed to expansion. Capital budgets for prison construction for 1982-1983 and 1983-1984 were larger than ever.³⁴ In retrospect, it is clear that the

A more recent Moratorium newsletter reports that:

Voters in California, following an ominous trend which started with the passage in June of a \$495 million bond for prison construction, approved the \$285 million bond issue on the November ballot for jail construction and renovation.

. . . In New Jersey, the \$170 million bond issue for prison construction was also approved.

. . . Rhode Island voters defeated an \$8.5 million proposal for capital expenditures in the Department of Corrections.

Statewide bond issues were only the tip of the iceberg, however. At least 13 counties have voted on jail funding initiatives since September and the great majority of them have passed.

Election Results: Most Construction Bonds Win, 30 JERICHO 4, (1982-1983).

31. Security through the Development of Correctional Facilities Bond Act of 1981.

32. See Jacobs & Berkowitz, *Reflections on the Defeat of New York State's Prison Bond*, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 115 (J. Jacobs ed. 1983).

33. Even the prestigious Executive Advisory Commission on the Administration of Justice announced in its Spring, 1982 *Preliminary Report* that prison construction was politically foreclosed and, thus, no longer an option.

34. The capital construction budget in Governor Mario Cuomo's "austerity" FY 1983 budget is \$66 million for new construction and \$253 million in re-appropriations. For an

legislature had already set aside the necessary funds to carry out expansion, and intended to use the proceeds from the bond, at least in part, to replace funds siphoned from general revenue.

The dust had barely settled on the bond issue when it became all too clear that the 1980 expansion program was woefully inadequate to accommodate the escalating number of prisoners. In 1981, for example, 12,445 persons were admitted to the Department, the largest number in history. To make matters worse, the number of releases declined from the previous two years. The *net increase* of 3,983 bodies was more than triple that of the previous year.³⁵ The magnitude of this net increase was not, and probably could not have been, anticipated, which once again demonstrates that prison expansion is usually a process of reacting to, or catching up with, current space needs.

An obvious solution to population increases is to take over existing facilities that can, with minimal renovation, be adapted for prisoners. In 1982, two abandoned air force bases, a defunct college, and several mental health and retardation facilities were targeted for conversion, and a \$24 million supplemental budget was requested to meet expenses. With only minor exceptions, the legislature provided the requested funds.

A. What is the Electorate's Role.

The legislature need not have put the matter to the voters. Rather, it could have funded the prison expansion on a "pay as you go" basis, as it later decided to do. But once the decision to submit the issue to the voters was made, it is worth asking whether the legislature should have abided by the voters' decision. It can, of course, be argued that the referendum merely asked the voters to indicate their approval or disapproval of assuming long term debt in order to construct new prisons and jails. The flavor of the campaign, however, probably suggested to many voters that they were deciding simply whether or not to build new prisons and jails. In fact, at least one blue ribbon citizens' committee interpreted the vote in this way.³⁶ Proper respect for the electorate would suggest that, at the very least, a thorough review of nonexpansion alternatives should have been undertaken prior to the approval of building programs.

analysis of the budget, see NEW YORK STATE COALITION FOR CRIMINAL JUSTICE, 1983-84 CRIMINAL JUSTICE BUDGET: ANALYSIS AND QUESTIONS (1983) [hereinafter cited as COALITION FOR CRIMINAL JUSTICE].

35. The numbers are nicely compiled and clearly presented in CORRECTIONAL ASSOCIATIONS OF NEW YORK, THE PRISON POPULATION EXPLOSION IN NEW YORK STATE 107 (1982).

36. See EXECUTIVE ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE, PRELIMINARY REPORT (1982).

In fact, the latest proposal, to use the proceeds from Urban Development Corporation³⁷ bonds to fund prison expansion constitutes a near veto of the 1981 referendum.³⁸ This plan is also contrary to the state constitutional requirement that long term indebtedness be undertaken only with voter approval. On the other hand, it is true that New York State has a well established tradition of using public corporations to carry out public works projects.³⁹ Such corporations raise money by selling so-called moral obligation bonds that are not guaranteed by the state or its taxpayers. Arguably, the use of the UDC to raise money for prison construction is a violation of the State Constitution.⁴⁰

In light of the vast amount of money and the fundamental issues at stake, it is worth considering whether the voters should have the final say on prison expansion. Certainly, prison expansion seems to be the kind of broad policy question that the electorate could readily grasp, at least as easily as the legislature. The New York legislature has failed to demonstrate any particular expertise on the matter. And if all expansion programs were decided by the voters, punishment policy might achieve greater legitimacy.⁴¹ If the electorate is not to have authority to authorize or veto prison expansion, then what role, if any, should it play in determining fundamental criminal justice policy?

B. Partisan Advocacy by an Executive Agency

A second political and legal issue raised by prison bond referenda is the propriety of Department of Corrections activities on behalf of the bond. In New York, the Commissioner and his staff not only toured the state making pro-bond speeches and taking the "affirmative" in local debates but also appeared frequently on television. In addition, the Department's public

37. For a book-length study of the Urban Development Corporation see E. BRILLIANT, *THE URBAN DEVELOPMENT CORPORATION* (1975); see also Osborn, *New York's Urban Development Corporation: A Study on the Unchecked Power of a Public Authority*, 43 BROOKLYN L. REV. 237 (1977).

38. See *NYS Coalition for Criminal Justice v. Coughlin*, (Sup. Ct. Albany Cty 1983). 1983).

39. See *Wein v. City of New York*, 36 N.Y. 2d 610, 331 N.E. 2d 514, 370 N.Y.S. 2d 550 (1975) (upholding constitutionality of New York City Rent Stabilization Reserve Corporation Act).

40. State Comptroller Edward Regan reacted to the announcement of the plan by stating that the use of the UDC's bonding authority "not only circumvents the voting public but increases the interest costs to the taxpayers." COALITION FOR CRIMINAL JUSTICE, *supra* note 34, at 1.

41. There is much political science literature on the advantages and disadvantages of direct democracy. Compare J.J. Rousseau, *CONTRACT SOCIAL*, Ch. XV (1762) with THE FEDERALIST No. 10 (J. Madison). Since the early twentieth century, the initiative and referendum have become well ensconced features of the American system. I know of no general positive or normative theory concerning the type of issues most appropriate for the electorate's determination, but it seems sound to begin by suggesting that broad issues of general policy would be more appropriate than narrow, technical, and complex issues of limited

relations task force provided information packets to the public and the media, and distributed thousands of brochures which stated: "New York Must Remove Violent Criminals From Its Communities." Moreover, the task force allegedly distributed this brochure to all state employees.

1. *Political and Policy Concerns*

The Department's actions raise important questions of political theory and public policy. Is the government just another "speaker" in the market place of ideas or does its power and role give it special obligations? Does the government have a responsibility to campaign for "good programs?" If so, might not its campaign drown out the voices of citizens who take a different view?

As a policy matter, it is worth asking whether it is desirable for corrections departments to campaign or lobby in favor of more prisons. The best argument for their doing so is that it is their responsibility to alleviate crowding and to make certain that prisoners and staff have safe and healthy living and working conditions. But it is not the corrections departments' responsibility to advocate more incarceration. It is up to the legislature and the courts to decide who should be "locked up" and for how long. What, then, should the Department do when threatened with ever-increasing numbers of prisoners? Should it assume a passive role, merely informing the governor and the legislature of space requirements based on population projections? Should it develop alternative strategies for reducing the population? What if it concludes that alternatives to expansion are not politically feasible?

2. *Legal Issues*

On the eve of the election a public interest law group sought to enjoin the Department's campaign activities; it achieved limited success by obtaining a restraining order on distribution of the brochures.⁴²

Two major legal objections can be made to the Department's role as advocate.⁴³ First, the Department lacks statutory authority to expend funds

scope. See *Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976), especially Justice Steven's dissent ("I have no doubt about the validity of the initiative or the referendum as an appropriate method of deciding questions of community policy." *Id.* at 693.).

42. *New York Public Interest Research Group, Inc. v. Coughlin*, No. 11619-81 (Sup. Ct. 1981) (temporary injunction denied, November 4, 1981). In denying the preliminary injunction, New York Supreme Court Justice Daniel H. Prior, Jr. stated, "A review of the material circulated by the Department of Corrections, while generally favorable toward the bond issue, cannot be said to be false or misleading and, in fact, appears consistent with the legislative finding in Chapter 850 of the Laws of 1981. The material does not directly promote the passage of the bond and is informational and educational." *Id.*

43. My sensitivity to this subject has been raised by Professor Ziegler's impressive article *Government Speech and the Constitution: the Limits of Official Partisanship*, 21

on a political campaign. Second, and much more problematic, even if authorized, such expenditures violate the first amendment and perhaps even the guaranty clause of the Constitution, although the latter has never been used to void a state law.

It is true that some state agencies have statutory authority to provide public information regarding their activities and programs. But it is sometimes a subtle judgement call as to where information ends and advocacy begins. Under New York law, there is no explicit statutory authority for the Department to provide public information on correctional issues. The Department justifies its expenditures as public relations measures, a position that finds little support in the statutes, case law or common sense.⁴⁴

Even if the Department's action were permissible under state law, there may be a constitutional question with regard to the use of government resources to rebut the views of private groups and individuals. Professor Ziegler makes a telling point when he says that in a democracy the government should be responsive to the will of the people; it should not assume responsibility for directing electoral decisions "the right way." Indeed, a department's campaign activities could conceivably be so well organized and generously funded as to dominate the issue completely, thereby suppressing the speech of others. Moreover, if government propaganda drowns out all other voices in an election, one could also argue that the Constitution's guarantee of a republican form of government has been denied.⁴⁵

IV

THE ROLE OF THE LEGISLATURE IN PRISON EXPANSION

Our understanding of correctional politics is too shallow to wade in. One constantly hears that because corrections has no constituency, it is

B.C.L. REV. 578 (1980). See also Comment, *Governmental Referendum Advocacy: An Emerging Free Speech Problem*, 29 CASE W. RES. L. REV. 886 (1979).

44. The issue of partisan advocacy by a governmental agency had arisen before in New York. A lower court enjoined the state's Division of Human Rights from expending public funds directly, through promotional and advertising activities, or indirectly through the use of government employees or facilities, to secure voter approval of the Equal Rights Amendment. *Stern v. Kamarsky*, 84 Misc.2d 447, 375 N.Y.S. 2d 235 (Sup. Ct. 1975). The court said:

The spectacle of State agencies campaigning for or against propositions or proposed constitutional amendments . . . , albeit perhaps well-motivated, can only demean the democratic process. As a state agency supported by public funds they cannot advocate their favored position on any issue or for any candidates, as such. So long as they are an arm of the state government they must maintain a position of neutrality and impartiality.

84 Misc. at 452, 375 N.Y.S.2d at 239. See also *Mountain States Legal Foundation v. Denver School District 1*, 459 F. Supp. 357 (D. Colo. 1978); *Stanson v. Mott*, 17 Cal.3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976); *Anderson v. City of Boston*, 376 Mass. 178, 380 N.E.2d 628 (1978).

45. See Ziegler, *supra* note 43, at 606.

grossly "underfunded." This claim, however, is terribly simplistic. What does "underfunded" mean? That corrections could usefully deploy more resources? By that definition, every state agency is underfunded. Are schools, roads, mental health, and parks "better funded" than corrections?

Interestingly enough, it is also often said that legislators usually are willing to spend money on prisons because it is "good politics." This claim does seem to find some empirical support, at least in New York State over the past decade. Whatever fiscal obstacles corrections may meet in "normal times" are not apparent during the current crowding crises. Both operating and capital budgets have increased considerably during the past half dozen years, and the rate of growth shows no sign of decline.⁴⁶

Why is prison expansion "good politics"? Is it obvious that conservative Republicans should favor capital expenditures of hundreds of millions of dollars on prison expansion and even larger amounts to cover operating costs, when these legislators represent rural or suburban districts which experience little violent crime and contribute disproportionately few prisoners to the Department of Corrections?⁴⁷ Conservative Republicans are ideologically committed to law and order but are also committed to agricultural subsidies, highway maintenance, low taxes and scores of other policies. And although agricultural and highway programs directly benefit their constituents, new prisons do not. Crime is a local, not a statewide problem. Seventy percent of the prisoners in New York State come from New York City. What do upstaters get for the tax dollars they expend on housing New York City's criminals? Just this point may have been in voters' minds when they defeated the 1981 prison bond issue in almost every upstate county, including those designated as sites for new institutions. Yet Republican support for expansion has not diminished since the bond's defeat.⁴⁸

Equally confusing is the strong support for prison construction from Democratic liberals. They might be expected to oppose prison construction for several reasons. For the last several decades, liberals have rejected law and order jargon as a cover for repressive governmental policies.⁴⁹ They have stressed civil rights and civil liberties for the accused, and social justice

46. For example, New York Governor, Mario Cuomo's first budget provides for decreases for almost all state functions, except corrections. See COALITION FOR CRIMINAL JUSTICE, *supra* note 34.

47. Lewis Lehrman, the staunchly conservative 1982 Republican candidate for governor in New York did not support prison construction. He paid obeisance to the totem of law and order by proclaiming unwavering support for a death penalty. As for the prisons, he advocated double-celling as the best way to expand capacity without increasing costs. To me, this position seems at least as logical for a conservative as supporting more prison construction.

48. It has been suggested that some Republican support for prison expansion is explained by legislators' responsiveness to lobbying by the construction and business community. I have found no evidence that there is such lobbying.

49. Ronald Bayer, *Crime, Punishment and the Decline of Liberal Optimism*, 27 CRIME AND DELINQ. 169 (1981).

and welfare for the community. They have been skeptical about the general deterrent effect of imprisonment and averse to moral condemnation of law breakers. Although previously rehabilitation provided ideological justification for imprisonment, it is hard to see other typically "liberal" policies that can be furthered by more imprisonment.⁵⁰

Liberals who do not oppose prison expansion on ideological grounds might oppose it because they give higher priority to social welfare expenditures.⁵¹ The liberal chairman of the New York Assembly's Codes Committee has said that at some level of inmate population, perhaps 40,000, he would no longer support prison expansion because it would mean unacceptable sacrifices in other programs. Other liberal groups, for example, the Black and Puerto Rican Caucus in the New York legislature, oppose prison expansion on the ground that it is racist.⁵²

Perhaps both conservatives and liberals believe that voters are fed up with crime and will support politicians who promise to lock up the criminals and throw the keys away. This belief is partially confirmed by a decade of opinion polling that shows more consistent public support for crime control policies than for any other government program.⁵³ Yet, as response to the New York bond referendum indicates, voters hesitate when it comes to providing funds for law enforcement.

Furthermore, politicians should be wary of voter support for "tough" crime control enactments. Expenditures on crime control do not produce "results" in the way other kinds of expenditures do. More police, prosecu-

50. See F. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981).

51. The New York Department of Correctional Service's latest Annual Report reports 50% of the prisoners are black; 19% are Puerto Rican. *NEW YORK DEPT OF CORRECTIONAL SERV., REPORT OF OPERATIONS AND DIVISION 17* (1981-82).

52. *Voters Against the Prison Construction Bond, Position Paper* (Aug. 1981).

We question the wisdom of allocating billions of dollars to build and maintain prisons while the state is confronted with cutbacks to government services of such magnitude. We also wonder how many teachers, job developers, nurses, daycare workers, and librarians that \$500 million bond issue can pay for.

Cited in J. JACOBS, *NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT* 120-21 (1983).

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

Skogan, *On Attitudes and Behaviors*, in *REACTIONS TO CRIME* 22-23 (D. Lewis ed. 1981).

tors, and prisons will not necessarily reduce crime. Even if they did, frightened citizens would probably find it hard to perceive the reduction.

It is hard to imagine voters supporting a candidate solely or primarily because he or she campaigned for increased prison capacity. It seems more likely that voters might withdraw support from legislators who refused to pay homage to such an important law and order symbol as "more prisons." From a legislator's point of view there are few affirmative reasons to support expenditures on prisons, but powerful negative reasons to avoid the possible consequences of spending too little.

It is an obvious truism that very few legislators attend to any single issue with more than superficial and fleeting attention. Most legislators have neither knowledge nor strong convictions regarding prison capacity and expansion. Legislative decisionmaking on prison issues is typically dominated by a handful of powerful legislators on a few crucial committees.

In New York's lower house, the Assembly, the crucial decisions on prison expansion are made by the Codes Committee, which has jurisdiction over all civil and criminal justice issues, and by the Ways and Means Committee, which has broad jurisdiction over almost all appropriations. With a staff of two and one-half full-time personnel, the Codes Committee provides only minimum scrutiny of Department population projections and budgetary requests. For a major funding request to pass, the Committee, and more especially its chairman, must come to feel that expansion is "necessary" and "right." Legislators are willing to pay whatever it costs to provide the punishment, incapacitation and deterrence they believe is required, once they are convinced of the necessity.⁵⁴

In the New York State Senate, two committees have an interest in prison expansion: the Finance Committee, and the Crime and Corrections Committee. Like the Assembly committees, the Senate committees and their chairmen, who are staunch Republican conservatives, have never wavered in their support for expansion. If anything, the Senate has been more supportive of prison expansion than the Assembly.

Over the last decade, New York's legislators have given full support to the Department's expansion program. After the defeat of the bond, the legislature funded three maximum security institutions out of general reve-

54. I have gained this impression from interviewing various members of the legislature and their staffs. A strikingly similar observation appears in a recent issue of the Newsletter of the National Moratorium on Prison Construction.

The Pennsylvania legislature authorized expenditures of \$102 million for 2,380 new prison cells last December. In June, a tough mandatory sentencing law went into effect. Governor Dick Thornburgh, a former prosecutor, admits there is no evidence that such measures will reduce crime, but says that is no reason "to avoid what we think should be done."

Pennsylvania: More Cases, More Time, 30 JERICHO 4, 1982-83.

nue. When that expansion proved insufficient, the legislature funded a large scale acquisitions program. In 1983 the legislature gave its approval to a new expansion initiative to be funded through the sale of Urban Development Corporation Bonds.⁵⁵

What does make legislators balk is the issue of site selection. It is the Department's practice to play its site selection procedure "close to the vest." The Department does not ask the legislature for specific appropriations to make particular acquisitions and renovations; rather, it charts its own course, sometimes resorting to fiscal sleights of hand to acquire various institutions for which no funds have been specifically budgeted.

It would be useful to know how potential prison sites are identified and selected. How much initiative comes from local communities or interested parties? Although the record seems to show strong opposition to penal facilities in nearly all communities which have been designated as sites, it is also true that representatives of certain communities or community interests, through their legislators, continue to contact the Assembly Rules Committee chairman with requests for consideration as prison sites.⁵⁶

As a rule, new sites must be acquired and developed quickly, before community opposition coalesces. The Department would no doubt prefer the *carte blanche* to acquire new sites without having to obtain legislative approval; legislators might also prefer to avoid making controversial siting decisions which risk alienating community groups. Presently, under New York's Finance Law, the Department has considerable authority to move forward with its expansion program without prior legislative approval.⁵⁷ This law permits a department or agency, with the Director of the Budget's approval, to transfer funds from an account with appropriated but unexpended funds to an account whose funds have been exhausted.⁵⁸

In 1978, the legislature appropriated \$1.9 million for capital improvements to permit the Department to expand prison capacity by 3000 beds.⁵⁹

55. N.Y. CORRECT. LAW § 56 (McKinney 1983).

56. The Department faces certain professional, political, and legal constraints as well. The strong consensus of liberal penology is that prisons should be located in or near the communities from which prisoners are drawn. The Department is sure to take a certain amount of heat each time it acquires a new site far from New York City, which is home for approximately 70% of state prisoners.

57. N.Y. STATE FIN. LAW § 43 (McKinney 1983). At first glance, the Finance Law would seem to limit the Department's discretion to spend funds as it likes. Section 43 provides that money appropriated for a specific purpose shall not be used for any other purpose. Funds appropriated to renovate Prison A cannot be used to pay an architect to develop plans for new Prison B, or to purchase an abandoned air force facility. However, since it is impossible for a legislature to designate specifically every cent in the budget, some appropriations will necessarily be general, leaving the door open for an aggressive agency to claim some of the funds and undertake renovation and building initiatives that the legislature has not approved and might not be willing to approve.

58. N.Y. STATE FIN. LAW § 93 (McKinney 1983).

59. The title of this appropriation is "Acquisition of Property, Planning, Construction, or Alterations and Improvements to Provide Housing and Support Facilities For up to 3,000 Inmates."

The so-called "fund for 3000" came to be worth its weight in gold. It provided funds with which to purchase new sites that could be renovated into penal facilities. When this money was exhausted, the Department needed to find a well from which to replenish the "fund" and turned to unexpended capital appropriations for the three new prisons. The Department could not possibly, and did not expect to, expend all appropriated funds for these long-term building projects in a single fiscal year. Thus, it made repeated withdrawals from the construction fund to replenish the fund for 3000. When the legislature finally made an effort to restrict this practice, the Department found a substitute appropriation to fill the same purpose. Thus, the Department was able to pursue its acquisition program aggressively, but without specific legislative approval.⁶⁰ The legal capacity and political willingness to engage in such financial maneuvering may be an important factor in explaining the different patterns of prison expansion in different states.

V

THE LOCAL INTERESTS IN STATE PRISON EXPANSION

Prison expansion impinges upon local interests in two ways. Most obviously, new prisons, which can affect property values, community repose, or quality of life, have to be built in somebody's town. Local communities may be touched by the crowding crisis even if no new prisons are plunked down in their backyards. Intense crowding in the state prisons is bound to have a ripple effect in the local jails, because state prison officials will be looking for ways to shift some of their excess population to the jails.

A. Sources of Community Opposition

The most controversial aspect of New York's prison expansion program has been site selection. Community groups have opposed almost all of the Department's proposed acquisition or building projects and, although rarely successful, have sought to block the Department in the legislature and in the courts. Such opposition is probably a serious constraint on prison expansion projects all over the country.⁶¹

60. In 1982 a bill was introduced to prevent the Department from engaging in this sort of practice. The Governor ultimately vetoed it. S. 10375, 205th Sess. (1982) ("An Act to amend the corrections law, in relation to the prohibition of the designation of an operation of correctional facilities by the commissioner of the Department of Correctional Services unless specific legislative authorization has been provided therefor.") (vetoed by Governor Hugh Carey on July 13, 1982 (Memorandum No. 237.))

61. F.W. Benton & J. Silverstein, *Explanatory Models of State Prison Expansion*, (1981) (unpublished manuscript), cite community opposition as "a particularly potent inhibitory factor [for prison expansion]." *Id.* at 40. They observe, for example, that "[a] major

Although it might seem obvious to some that people would oppose construction of a prison in their communities, prisons, once built, usually coexist comfortably with their surrounding communities: perhaps more comfortably than housing projects, universities, and commercial and industrial enterprises.⁶² It is rare to read of community efforts to oust a prison, although efforts to close correctional halfway houses are legion. One reason for this is that prisons, like other state institutions, provide employment and stimulate local business. Many older megaprisons are located in towns that grew up around the prison, and whose inhabitants are now economically dependent on it. Perhaps most significant is that prisons exist, to a large extent, as closed communities with comparatively limited interaction with the surrounding environment.

In New York State, most prison expansion since 1980 has involved the conversion of existing state facilities, including institutions that formerly held drug addicts or the mentally ill. In some cases, communities that had accepted the previous institutional population protested the conversion into the penal institution. Queens residents vigorously fought the plan to transform Rikers Island from a City jail to a State prison.⁶³ Suffolk County

factor in the defeat of the prison construction program in Kansas was the location which was proposed." *Id.* at 49.

One state where community opposition has been a particular obstacle to prison expansion is New Jersey, where, for years, governors have been searching for acceptable sites. *See, e.g.,* Waldron, *After 200 Years, the Trenton Prison is Being Replaced*, N.Y. Times, Dec. 3, 1978 (N.J. Weekly), at 1, col. 5. "Locating the new medium security prison has been a headache for state officials for at least four years. Efforts to put it in the northeastern section of the state, where 55 percent of the inmates come from proved fruitless. Even Newark, which seeks most state offices, refused to take it." *Id.* at 1, col. 6.

The Federal Bureau of Prisons has also encountered a good deal of opposition to its expansion program over the past few years.

62. For a case study of town-prison relations, *see* J. Jacobs, *Town/Prison Relations As a Determinant of "Reform,"* in *NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT* 99.

63. Initially, acquisition of New York City's Rikers Island Jail Complex was touted (most vigorously, it is reported, by Governor Carey) as "the solution" to the crowding crisis. For an account of these negotiations, *see* Benjamin v. Malcolm, 495 F. Supp. 1357 (S.D.N.Y. 1980). The state legislature voted \$200 million to purchase Rikers from the City; it was anticipated that the City would use the funds to build new scatter site jails closer to the courts. The idea foundered for several reasons. First, it became clear to the City that replacement cells could not be constructed for \$200 million. Second, state officials were dubious about the operating costs of the Rikers complex. They worried that during the several-year transition period state corrections officers would object to being paid one-third less than city corrections officers; ultimately, parity would be hard to resist. And, it was feared, parity for correction officers working on Rikers Island would mean parity for all of the state's officers, which in turn might lead to demands for higher wages by all state employees. Third, the state Department of Corrections' personnel had doubts about how well Rikers could be run as a state prison complex.

This was the only significant expansion proposal of the last decade that did not originate with the State Corrections Department, and the Department's coolness to the idea no doubt contributed to the plan's failure to materialize. If these concerns were not enough to doom the negotiations, there was also intense opposition from Queens residents who, while accept-

residents, who apparently accepted the giant Pilgrim Psychiatric Center, bitterly opposed a plan to use part of the hospital for prisoners. In upstate Watertown, residents fought conversion of an abandoned air force base into a penal facility. Residents of Seneca Falls rejected the plan to turn the defunct Eisenhower College over to the Department. There are dozens of additional examples.⁶⁴

Some believe these protesters' first concern is protecting the real estate values of their homes. Although this may be the primary motivation of adjacent property owners, it does not explain wider community opposition—or opposition to the transfer of existing institutions from the Departments of Health and Retardation to the Department of Corrections. It is important to remember that many proposed prison sites are located in rather sheltered or remote locations. Many community residents are likely to be more frightened of prisoners than of a decline in property values. They may specifically worry about escapees or feel more diffuse anxiety about living in close proximity to institutions that symbolize violence, immorality and degradation.⁶⁵ Of course, another source of community opposition involves

ing pre-trial detainees, were adamantly opposed to the placement of convicted felons on Rikers Island. See Zisser, *supra* note 16.

The Rikers Island negotiations dominated thinking about expansion for two crucial years. When the deal was finally called off, the Department was left with a worse crowding problem than ever and no coherent expansion program. On June 5, 1980, with the total prisoner population just below 21,000, Governor Carey unveiled a prison expansion plan to increase capacity by 4,000 beds by 1984. (See Press Release, "Governor Carey unveils Prison System Expansion Plan, Calls Legislative Action Urgent" (June 5, 1980).) The plan provided for 2,360 additional beds to be created through the rehabilitation and renovation of existing facilities, and 1,536 additional beds to be provided through three 512-bed maximum security prisons, two of which were to be constructed adjacent to existing maximum security institutions. In order to fund this expansion, the Governor and legislative leadership agreed upon a \$500 million prison bond, which under the state constitution required approval by the voters.

64. See, e.g., Board of Visitors-Marcy Psychiatric Center v. Coughlin, 60 N.Y.2d 14, 453 N.E.2d 1085, ___ N.Y.S.2d ___ (1983).

65. See Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973), where a community group challenged the construction of a federal jail in lower Manhattan. The Second Circuit noted, "For the most part, [the community's] opposition is based upon a psychological distaste for having a jail located so close to residential apartments, which is understandable enough." *Id.* at 833. The court described the steps that had been taken by the jail's planners to shield the community from moral pollution:

The windows, which will be glazed with unbreakable polycarbonate plastic shatter-proof sheets will be recessed and will be of a dark grey color designed to insulate the community from visual contact with the detainees. Moreover, there will be no fortress walls or unsightly steel-barred windows. In short, the building will not look like a correctional center. . . .

In addition to the recessed, darkened windows, all prisoners will enter the building through an entrance on Cardinal Hayes Place, located on the side opposite from and out of view of neighborhood residential apartments. Although there will be a roof-top recreational area for detainees, a 20-foot wall will minimize their visibility from the apartments.

distaste for the inevitable presence of prisoners' families and friends.⁶⁶ In attempting to account for community opposition, we should not assume that proposed prisons produce a unique community response. It is well to remember that these days local groups emerge to oppose almost every announced development or change—new parking garages, dumps, nuclear power plants, residential centers for the handicapped, retarded or mentally ill, YMCA's and even parks.

B. *Tactics of Community Opposition*

In New York, community opposition groups have developed two strategies for combatting Department decisions: recruiting political support and bringing lawsuits to prevent, or at least to delay, an acquisition or construction project. In at least two cases political action was successful. Organized community groups from Lockport persuaded the Assembly Codes Committee to deny supplemental appropriations to the Department for the takeover of an air force base.⁶⁷ The Department also suffered a limited setback in its effort to convert part of the immense Pilgrim Psychiatric Center into a prison facility, when community groups obtained promises of support from all four of the major candidates in the 1982 gubernatorial primary, including the two Republicans, Lehrman and Curan, and the Democrats, Cuomo and Koch. Governor Cuomo now appears committed to following through on his pledge despite the Department's protests that the beds at Pilgrim are absolutely necessary. There are other cases in which the Department has postponed proposed acquisitions because of local protests. Even when unsuccessful, opposition may result in construction delays and "hassles."

Lawsuits filed in order to curtail or delay the expansion projects, however, have not been particularly effective. Plaintiffs typically charge the

Id. at 832. See also *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir.), *cert. denied sub. nom.* *Hanly v. Kleindienst*, 409 U.S. 990 (1972).

66. Here we may be dealing not so much with fear as with stereotyping. There is some hint of these impulses in the following affidavit by a Watertown supervisor who opposes the conversion of a U.S. Radar Station to a correctional facility.

The Environmental Assessment form is silent with respect to the potential impact of housing for the expected increase in people traveling to Watertown to visit inmates. It is to be expected that generally such transients will be unable to pay the cost of motel units and will require less expensive housing.

Affidavit of Ralph R. Dickinson at 12, *Town of Watertown v. New York State Department of Correctional Services*, No. 82-2047 (N.Y. Sup. Ct. Aug. 2, 1982).

67. The Department proposed a \$25.9 million supplemental appropriation to create 1,200 spaces for inmates by converting sites in Watertown, Lockport and Gabriels and adding beds at four existing facilities. See Rules Bill A.9042, July 2, 1981. Subsequently the legislature substituted A.9049 which deleted Watertown and Lockport from the appropriations package. This passed both houses as S.7112 and A.9049A respectively.

Department with failure to file proper environmental impact statements⁶⁸ and with violation of the state finance law for expansion without proper appropriations.⁶⁹ A few plaintiffs have obtained preliminary relief from sympathetic local judges, only to be reversed by higher courts.⁷⁰

New York's Environmental Quality Review Act (SEQRA) requires all state and local agencies, including the Department of Corrections, to prepare an environmental impact statement for any action they propose or approve which "may have significant effect on the environment."⁷¹ Under Agency guidelines, "indicators of significant effects on the environment" may include "the creation of a material conflict with a community's existing plans or goals as officially approved or adopted."⁷² Although the requirement of an environmental assessment could operate as a significant barrier, SEQRA's potential to block a Departmental initiative is substantially undermined by a provision that allows officials such as the Director of the Department to stay compliance with the Act by declaring a temporary emergency.⁷³ The Director has not hesitated to make such declarations.

Plaintiffs have also failed to convince the courts that the Department's fiscal maneuvers violate Article VII, section seven of the State Constitution and section forty-one of the Finance Law, which limit expenditure of state funds to specific appropriations. In the Watertown controversy, for example, the Committee Opposing the Prison at Dry Hill argued that conversion was *ultra vires* because the legislature had never authorized funds for conversion of the facility. The court disagreed, holding that the Director of the Budget had authority to permit transfer of funds from one account to another.⁷⁴

Where community groups have been successful in obtaining temporary restraining orders, the Department has gone ahead with its building and renovation plans under a law providing that judgments against the state are automatically stayed pending appeal.⁷⁵ While the suit is pending, the De-

68. See *Board of Visitors-Marcy Psychiatric Center v. Coughlin*, 60 N.Y.2d 14, 453 N.E.2d 1085, _____ N.Y.S.2d _____ (1983). For parallel litigation challenging jail construction under the National Environmental Protection Act, see *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied* 412 U.S. 908 (1973), *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir.) *cert. denied sub nom.* *Hanly v. Kleindienst*, 409 U.S. 990 (1972).

69. For the Watertown litigation (regarding the Dry Hill Air Force Radar Station), see *Town of Watertown v. NYS Department of Correctional Services*, No. 82-2047 (N.Y. Sup. Ct. Aug. 2, 1982) (dismissing a petition for an order to show cause and a motion for preliminary injunction).

70. For the Pilgrims State litigation see *Cohalan v. Carey*, 82-11713 (July 10, 1982), *rev'd*, 88 A.D.2d 77, 452 N.Y.S.2d 639 (1982), *app. dis.*, 57 N.Y.2d 672, 439 N.E.2d 878, 454 N.Y.S.2d 69.

71. See N.Y. ADMIN. CODE tit.6 §§ 617.8, 617.14 (1982).

72. *Id.* at § 617.1(c).

73. *Id.* at § 617.11(a)(4).

74. *Town of Watertown v. NYS Department of Correctional Services*, No. 82-2047 (N.Y. Sup. Ct. Aug. 20, 1982).

75. N.Y. CIV. PRAC. LAW § 5519(a) (McKinney 1982).

partment will rapidly proceed with building, renovations and prisoner transfers. Courts are then confronted with a *fait accompli* that is difficult to reverse, especially because the prison system is so overcrowded. Were a court to order the transfer of prisoners from a new facility, the Department might be forced to either release prisoners or engage in unconstitutional and unconscionable crowding in other prisons. Commissioner Coughlin told the court which considered the legality of the conversion of Pilgrim Psychiatric Center into a correctional institution that:

[T]he loss of 400 beds will undoubtedly mean that I will not be able to comply with Judge Lasker's order in *Benjamin v. Malcolm* [ordering prompt acceptance of state convicted felons awaiting transfer in the City jail]. The exigencies of the situation are now very simple and they are perilously emphatic. The administration of any delay would be the equivalent of the ingestion of a convulsing thalidomide. In my opinion, the system could not endure it.⁷⁶

In denying the plaintiff's request for an injunction, the court stated:

In balancing the equities, we cannot overlook the dangerously crowded conditions in the State's prisons, and the potentially explosive situation they create. This renders efforts to alleviate those conditions matters of the highest public priority. These conditions, and the pressures placed upon the Department of Correctional

76. Affidavit of Commissioner Thomas Coughlin at 16, *Cohalan v. Carey*, No. 82-11713 (N.Y. Sup. Ct. June 29, 1982). The Commissioner also testified that:

The further purpose of this affidavit is to bring to the attention of the court in the clearest terms possible the fact that an emergency situation exists within the facilities of the Department, occasioned by an unforeseen and unforeseeable increase in its inmate population, that the statewide need for additional housing capacity is grave and is immediate, that any delay in or deferral of measures to relieve the State's critically over-extended facilities is an unacceptably dangerous risk, and to demonstrate that the proposed undertaking by the Department to reutilize a portion of the existing Pilgrim Psychiatric Center is a sound determination.

Id. at 2.

The Department has taken every possible initiative to create cell space in existing facilities. Hallways, basements and galleries have been utilized just to meet the existing overload. There is no more room. We are no longer looking at capacity in terms of ideal situations. Rather we are concerned only with finding the next cell.

Id. at 7.

The Department has run its course with the population crisis and frankly, it has no more ready alternatives to which it can now turn. Without immediate access to the identified Pilgrim site and the relief it will provide, the Department's ability to meet its statutory obligations will be crippled.

Id. at 15.

Services by State and Federal Court decisions, makes [sic] time of the essence.⁷⁷

The conversion of Pilgrim Psychiatric Center from a mental health facility to a prison was accomplished in a matter of a few weeks.

The public sector unions, which are strong in New York, have also opposed the conversion of nonpenal institutions into prison facilities.⁷⁸ In the bitter Pilgrim controversy, the Mental Health Workers' union filed a lawsuit against the Department, alleging that the presence of prisoners at the Pilgrim complex would jeopardize the health and safety of the mental patients, and that the Director of Mental Health has no authority under state law to transfer his facility to the Department of Correctional Services.⁷⁹ The Court rejected these arguments.⁸⁰

To date, local communities have not used zoning ordinances to block prison expansion. Could a community prevent the placement of prisons, or other state buildings, within its boundaries by exclusionary zoning?⁸¹ Although the law varies from state to state, the overwhelming conviction of practitioners in the field of state and local government is that the state is not subject to local zoning ordinances, at least not when acting within its governmental, as distinct from proprietary, capacity.⁸² In New York, it is

77. *Cohalan v. Carey*, 88 A.D.2d 77, 81, 452 N.Y.S.2d 639, 642, *appeal dismissed*, 57 N.Y.2d 672, 439 N.E.2d 878, 454 N.Y.S.2d 69 (1982).

78. See J. JACOBS & N. CROTTY, *GUARD UNIONS AND THE FUTURE OF THE PRISONS* (1978).

79. *McGowan v. Carey*, No. 7781-82 (N.Y. Sup. Ct. June 18, 1982) (affidavit of M. Smith). For a newspaper report of a similar controversy in New Jersey see *Judge Rules State May Proceed to Move Prisoners to Ancora*, N.Y. Times, Oct. 18, 1974 at 88, col. 1.

Judge R. Cooper Brown of Camden County Superior Court ruled today that the state could proceed with its plan to transfer prisoners to Ancora Psychiatric Hospital and house them there for laundry and maintenance work.

Winslow Township and other municipalities in the vicinity of the state mental hospital had sued to block the plan. They charged that assigning inmates convicted of murder, robbery, and burglary to live at the hospital would encite and endanger the patients, imperil the citizenry in the area and depress property values.

80. *McGowan v. Carey*, No. 7781-82 (N.Y. Sup. Ct. July 6, 1982).

81. For a discussion of intergovernmental zoning conflicts, see Johnston, *Recent Cases in The Law on Intergovernmental Zoning Immunity: New Standards Designed to Maximize the Public Interests*, 8 THE URBAN LAWYER 327 (1976).

82. See S. SATO & A. VON ALSTYNE, *STATE AND LOCAL GOVERNMENT LAW* 891-1012 (2d ed. 1977).

This distinction has its roots in tort law, and is derived from the notion that the sovereign cannot be sued without his consent. A prime corollary of the sovereign immunity concept was that governmental activities should be exempt from tort liability. As the functions of government expanded, however, the traditional statement of this rule became a more "severe and irrational burden upon the citizenry." In an "attempt to relax" the rule, a distinction was made between the governmental and proprietary function of the government itself.

N. WILLIAMS, *AMERICAN LAND PLANNING LAW* § 81.15 (1974).

settled that neither the state nor its agencies need conform to municipal zoning regulations;⁸³ state agencies are immune from local land use regulation unless there is an explicit waiver of immunity.⁸⁴

The question remains: How should local community concerns be accommodated in selecting prison sites? What constitutes a legitimate community objection to placement of a new prison? How should a political jurisdiction equitably apportion undesirable institutions among its counties and localities? Should there be incentives for communities to accept penal or other undesirable institutions?

C. Allocation of Crowding Between State Prisons and Local Jails

A final dimension to the political conflict surrounding prison crowding and expansion is the allocation of responsibility for housing prisoners. Typically, those criminals sentenced to a term greater than one year are remanded to the custody and control of the state department of corrections. Some states send certain categories of more serious misdemeanants into the state prison system as well. Prisoners serving short misdemeanor sentences are almost always kept in the county jails. As crowding has become more acute, there has been increasing controversy over who belongs in local jails and who belongs in state prisons.

In New York, the Department has successfully removed all misdemeanants from the state prison system, decreasing state prison populations at the expense of local jails. In addition, the Department delayed taking custody of state felony offenders for weeks or months, in effect annexing jail cells for the state system. This tactic ignited a bitter dispute between New York City and the State. The conflict began in 1975.

In that year, pre-trial detainees in New York City's Rikers Island jail launched a massive conditions of confinement suit which charged, among other things, that Rikers was unconstitutionally overcrowded. After five years of litigation, a federal judge ruled that the city had to reduce the jail population to 1200.⁸⁵ Shortly thereafter, the city moved to join the state as a defendant, asserting that the state had failed to meet its statutory obligations to take custody of convicted felons. The city's motion was denied on the assurance of Commissioner Coughlin that the state would meet its obligation.⁸⁶ But, the unprecedented increase in the state prison system in

83. See B. ANDERSON, *ZONING LAW AND PRACTICE IN NEW YORK STATE*, § 9.03 (1963).

84. *Id.* The New York cases almost invariably hold that the state is not amenable to local zoning regulations, and that localities lack power to impose such regulations on the state and its agencies.

The construction of a jail or prison might also be attacked as a "psychological nuisance." Similar challenges to locating funeral homes in residential neighborhoods have sometimes been successful. See N. WILLIAMS, *supra* note 82, at § 12.03 (1974).

85. *Benjamin v. Malcolm*, 495 F. Supp. 1357 (S.D.N.Y. 1980).

86. *Benjamin v. Malcolm*, 88 F.R.D. 333 (S.D.N.Y. 1980).

1980 resulted in the state's failure to remove state-ready prisoners from Rikers. This time the court ordered Coughlin to accept all state-ready prisoners within forty-eight hours after their sentencing. The state then moved to modify the order to permit it to accept only those state-ready inmates for whom it had beds. The city responded that creating unconstitutional crowding on Rikers was not an acceptable solution to the state's crowding crisis. The court's summary of the arguments on both sides provides a revealing picture of the tension between state and local governments produced by the crowding crisis:

The State argues that the relief it seeks is justified because it has "taken every possible initiative to create cell space in existing facilities," has utilized recreation areas, basements and substandard galleries, and rejected the Department's long-standing policy of refusing to "double-encumber" all space—that is, has even utilized cells of inmates who are in the hospital or out to court. The State claims that as a result of the present overcrowding in its prisons it has discontinued rehabilitation and program efforts, and that the present population of 25,490 prisoners amounts to 112.1% of its system's capacity. It contends that further population growth will cause "unacceptable risk to the safety and security of the employees, the inmates and the institution," including the housing of inmates in the cell-block corridors of maximum security prisons and the use of current program space for inmate housing in such institutions.

The City vigorously opposed the State's request for relief. Its arguments are set forth in the affidavit of Benjamin Ward, Commissioner of the New York City Department of Corrections who, immediately before coming to his present position in August, 1979 was, for over three years, the Commissioner of the Department of Correctional Services of the State of New York and who, accordingly, had intimate knowledge of the operations of both systems. According to the City, the State is not entitled to relief because it has failed to provide a solution for the problem it faces today although the problem was entirely foreseeable. For example, the City points out that in 1978, Ward, then State Commissioner, drew up a construction plan which would have resulted in the provision of 3,000 beds, but that the State failed to implement it; and that the present State correctional administration, in its 1980 Master Plan, called for consideration of expanded use of "good time," increased use of alternatives to imprisonment, and earlier parole to reduce prison population, but that none of these proposals has been acted on.

The City points out that it has reduced its own overcrowding not only by adding 900 beds to its capacity in the last year, but also

by conducting monthly bail reviews, funding additional community services programs as alternatives to incarceration and decreasing inmates' lengths of stay by expediting the preparation of probation reports. It suggests that similarly creative approaches should be used by the State and that their absence renders it against the interests of justice to grant the State's application. It concludes that "[s]urely overcrowding City jails with convicted felons is the least desirable of the solutions to the State defendants' problem."

Moreover, the City claims that since the State releases approximately 173 inmates per week from its prisons and takes only an average of 160 from the City it is attempting, by this motion, merely to accommodate the other counties in the State from which it draws the remainder of its population.⁸⁷

Judge Lasker denied the state's motion, thus ending the backing-up of state prisoners in local jails as a strategy for reducing state prison crowding.⁸⁸ Nevertheless, this strategy may still be viable in other jurisdictions.

The ultimate issue is the allocation of offenders between a state and its counties. A political system in which counties were required to provide confinement for all those sentenced within its boundaries might create incentives for county prosecutors and judges to find alternatives to incarceration wherever possible.

Another political scenario, which exists in some states, makes the state financially and administratively responsible for local jails as well as prisons. Under this system, local police, prosecutors and judges have no incentive to seek out alternatives to incarceration. In fact, if alternatives are locally financed, there are powerful incentives to utilize state-paid incarceration. The current fiscal and crowding crisis will undoubtedly generate movement toward one of these polar alternatives.

VI

CITIZEN COMMISSIONS

No survey of the politics of prison expansion would be complete without mention of the role of task forces and commissions. The "commission" is, of course, a well known feature of American politics, as much in the criminal area as anywhere else.⁸⁹ It may be created by the governor, legisla-

87. *Benjamin v. Malcolm*, 75 Civ. 3073 (December 22, 1981).

88. The most recent development in the *Malcolm* case is Judge Lasker's refusal to allow the city to exclude the population cap embodied in his decree. This decision resulted in the release of 610 pre-trial detainees from the city's jails. See *supra* note 6.

89. The classic study on the political role of crime commissions is A. PLATT, *THE POLITICS OF RIOT COMMISSIONS, 1917-1970: A COLLECTION OF OFFICIAL REPORTS AND CRITICAL ESSAYS* (1971).

ture,⁹⁰ or interested private citizens.⁹¹ Its members may be asked to ratify decisions that have already been made, or to co-opt the opposition, or to delay a decision that is politically unpopular.

Over the past several years, New York State has spawned many commissions that have studied sentencing and corrections. To date, none appears to have influenced greatly the governor or the legislature. Their recommendations regarding prison crowding are sufficiently diverse to accommodate all major policy options: in short, they have recommended more building *and* various sentencing reforms which would reduce the number of prisoners.

The commissions document the existence of a problem or even a crisis, and they can provide justification for almost any course of action. But they may also add to the political costs of inaction. By acknowledging that there is a "crisis," crime commissions provide ammunition against opponents of prison expansion if the situation continues to deteriorate.

VII

CONCLUDING REFLECTIONS: THE POLITICS OF PRISON EXPANSION

The United States prisoner population more than doubled over the last decade.⁹² This unprecedented growth may well, in retrospect, be seen as a fundamental change in American punishment policy. But whether or not such change has taken place, this tidal wave of new prisoners has produced what is popularly referred to as a prison crowding crisis.⁹³

The crisis has two aspects. One involves the difficulty of ensuring safe, humane, and constitutional prisons; the second involves providing enough beds for all those sentenced to prison terms. The first is a crisis of too many prisoners; it particularly concerns prison administrators, federal courts and academic penologists. The second is a crisis of too little space; it is largely a

90. Among the most important are: THE EXECUTIVE ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE, *supra* note 36; EXECUTIVE ADVISORY COMMITTEE ON SENTENCING, CRIME AND PUNISHMENT IN NEW YORK: AN INQUIRY INTO SENTENCING AND THE CRIMINAL JUSTICE SYSTEM (1979); STATE OF NEW YORK, REPORT OF THE ADVISORY COMMISSION ON CRIMINAL SANCTIONS: PART I-III (1982).

91. See, e.g., CITIZENS' COMMITTEE ON PRISON OVERCROWDING, POLICY STATEMENT (1983).

92. The prison population has risen from about 200,000 at the end of 1972 to 412,303 as of December 31, 1982. Galvin, *Introduction: Prison Policy Reform Ten Years Later*, 29 CRIME AND DELINQ. 495, 496 (1983).

93. See EDNA MCCONNELL CLARK FOUNDATION, OVERCROWDED TIME: WHY PRISONS ARE SO CROWDED AND WHAT CAN BE DONE (1982); J. MULLEN, *supra* note 4; M. SHERMAN & G. HAWKINS, *supra* note 10; Nagel, *On Behalf of a Moratorium on Prison Construction*, 23 CRIME AND DELINQ. 154 (1977); F.W. Benton & J. Silberstein, *supra* note 61; National Moratorium on Prison Construction, Jail and Prison Construction and Planning (May 9, 1981) (unpublished survey).

concern of governors, legislators, police departments, sentencing judges and the public.

Technically, neither crisis is difficult to solve. The crisis of too many prisoners can be alleviated by sending fewer people to prison or by reducing the time served by those who are incarcerated. The crisis of too little space can be solved by expanding prison capacity. The political, moral and economic dimensions of both sets of solutions are very difficult to solve.

Those who define the prison crowding crisis in terms of too many prisoners do not want prison expansion. For them, the crowding crisis should provide an opportunity to reduce prison population and liberalize punishment policy. In addition to arguing in favor of decriminalization, shorter sentences, more time off for good behavior, earlier parole and emergency release mechanisms, they maintain that prison expansion is a hopeless policy because it will cost too much. A thesis of this article is that prison expansion is not politically and economically infeasible. Prison expansion has become the basic policy choice.

A. *The Anti-Expansionist Argument*

Some liberal criminologists and prison reformers argue that the crowding crisis will not be solved by building new prisons, because the "system" will continue to produce overcrowding by generating more imprisonable felons, thus filling however many new prison beds are created.⁹⁴ Those who accept this line of reasoning advocate reducing the prisoner population by sending fewer people to prison, shortening sentences, accelerating parole, increasing the amount of time off for good behavior, and providing for emergency release procedures when crowding occurs.⁹⁵

Such strategies would provide sufficient space for those who are incarcerated, as well as reduce stress for both prisoners and staff. But implementing these recommendations entails sending fewer people to prison or holding

94. See, e.g., J. MULLEN, *supra* note 4, at 120. ("While our analysis falls far short of a definitive proof that capacity changes cause population changes, it is suggestive. Corrections planners must at least consider that provision of new funds for increased capacity will not relieve crowding . . ."); W. NAGEL, *THE NEW RED BARN; A CRITICAL LOOK AT THE MODERN AMERICAN PRISON* (1973). Benjamin Ward, Commissioner of the New York City Department of Corrections, said "You cannot build out of this crisis. If you don't make management improvements, you will be right back where you were in three years. If space is there, the system adjusts itself to fill up that space." *Ending Unnecessary Imprisonment in New York State*, *EUI NEWS*, August 1981, at 5. See also EDNA MCCONNELL CLARK FOUNDATION, *supra* note 93, at 25. ("Prison overcrowding is not something we can build our way out of"). But see the devastating critique of this thesis by Blumstein, Cohen, & Gooding, *The Influence of Capacity on Prison Population: A Critical Review of Some Recent Evidence*, 29 *CRIME AND DELINQ.* 1 (1983).

95. For an example of such recommendations see CORRECTIONAL ASSOCIATION OF NEW YORK, *THE PRISON POPULATION EXPLOSION IN NEW YORK STATE: A STUDY OF CAUSES AND CONSEQUENCES WITH RECOMMENDATIONS FOR CHANGE*, 1-8 (1982).

those who are imprisoned for shorter periods. The anti-builders generally do not see any costs here. In fact, because they believe that too many offenders are already in prison, and that their sentences are too long, they see only advantages in reducing the numbers.

All other actors in the political system, with the possible exception of the electorate, have reached the opposite conclusion. In New York State there is a solid political consensus that prison sentences should not be more lenient. Given that assumption, there is only one conclusion: the prison crowding crisis can only be solved by creating more prison capacity.

The anti-builders argue that prison expansion will never reduce crowding because there is simply not enough money to provide the cells necessary to satisfy the punishment policy that political leaders want. This is a vague, self-serving political assessment for which there is no support. Certainly New York's experience shows that, even in the face of pervasive opposition, political leaders will provide the funds necessary to expand prison capacity. The same legislative behavior is evident elsewhere in the country. The National Moratorium on Prison Construction reported in 1982 that 700 prisons and jails were under construction or proposed for construction.⁹⁶

The argument that expansion cannot be implemented quickly enough ignores the fact that construction is only one means of expanding capacity. A great deal of expansion can take place, and has taken place, through the modification of existing prisons and the acquisition and renovation of other facilities. The political system can vastly expand prison capacity without encountering unacceptable political costs. Thus, it would behoove anti-builders, including most academic penologists, to study the politics of corrections more seriously.

B. Challenge of Political and Social Analysis

This article demonstrates the strong political consensus in New York State in favor of prison expansion. What is challenging, from the standpoint of social analysis, is to dissect and explain this consensus. A massive change in punishment policy and a concomitant commitment to spend hundreds of millions of dollars for more imprisonment should not simply be passed over as obvious and unproblematic, especially during a time of general disillusionment about rehabilitation, deterrence, and government initiative.

Prison expansion is not inevitable, although I do confess to not understanding fully its dynamics. I repeat what was said at the beginning: building prisons requires a small number of large decisions by key political actors and organs. This Article raises some questions, offers some speculations, and provides some empirical observations about the way these political

96. National Moratorium on Prison Construction, News Update on Jail and Prison Construction (June 4, 1982).

decisions are made. The intent is to call attention to the politics of prison expansion as a subject for sustained and systematic inquiry. Decades from now, I hope we will be able to explain to new generations why and how the American states embarked upon a monumental program of prison expansion in the 1970's and 1980's.

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