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Essay

The New Overcrowding

JONATHAN SIMON

American prisons are seriously overcrowded, perhaps more than ever in our history. Before the era of mass incarceration, prisoner advocates sought to build on progressive penological ideas about the proper standards for housing prisoners, which focused on one person to each prison cell to create a jurisprudence of overcrowding that might compel states to reduce their reliance on incarceration. The goal failed, and states adopted tough new sentencing laws that increased imprisonment. As the prison book got under way, the Supreme Court decisively rejected the one person to a cell rule in the 1981 case of Rhodes v. Chapman. *This Essay returns to this failed jurisprudence to argue that it has been outdated by a fundamental transformation in the nature of prison overcrowding. Before mass incarceration, overcrowding was primarily a product of antiquated prisons and the reluctance of states to pay for new modern facilities to better fit the then dominant rehabilitative objectives. While overcrowding was a problem, states had effective tools to deal with it, especially parole laws that allowed centralized administrative boards to control the pace of prison releases. Mass incarceration has created a new type of overcrowding, one that is far more severe and enduring than in the past. This new chronic hyper overcrowding plays out in a context where prisoners serve much longer sentences, have less access to rehabilitative programs, and greater unmet needs for medical and mental health treatment. The old overcrowding led to conflicts and riots. The new overcrowding leads to inhumane treatment and sometimes tortuous suffering on a routine basis. With states having eliminated parole mechanisms for the majority of prisoners, the time is ripe for the courts to recognize that the new overcrowding has rendered past precedents out of date and invalid. We need a new jurisprudence of overcrowding; one that recognizes the need for a hard constitutional limit, like one prisoner to one cell. The Supreme Court's recent decision in* Brown v. Plata *suggests that the Court is now aware of the magnitude of the problem and lower courts have begun to test the applicability of a strengthened overcrowding norm more appropriate to the age of mass incarceration.*

ESSAY CONTENTS

The New Overcrowding

JONATHAN SIMON*

I. INTRODUCTION: HYPER-CHRONIC OVERCROWDING AS A NEW PENOLOGICAL PROBLEM

As Jeff Bleich pointed out in an insightful comment written at the beginnings of mass incarceration in California, there is something funny about the concept of "overcrowding":

> The term "overcrowding" is redundant at best, since crowding already refers to a higher level of social density than is desired. At worst, the term begs one of the central questions posed by this Comment—namely, at what point does a prison's population become so great that the risks to prisoners' health and safety outweigh society's demand that the prisons simply become administratively unmanageable.[1]

Bleich goes on to an important critique of the way prisoner-advocates, prisons, and courts were using overcrowding at that time. Prisoners and their advocates were using overcrowding to attack a range of actual features of incarceration (including, one might add, imprisonment itself).[2] Prison managers were often eager to use court-mandated reforms to achieve their own agenda for investments in the prison.[3] Bleich worried that due to these institutional incentives, overcrowding jurisprudence might lead to a paradoxical situation—one where more success by prisoners in establishing constitutional violations on overcrowding grounds might lead to more imprisonment, and where the underlying problems facing prisoners remain unsolved.[4] Some scholars of punishment now believe that this is

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[1] *See* Jeff Bleich, Comment, *The Politics of Prison Crowding*, 77 CALIF. L. REV. 1125, 1125 n.2 (1989).

[2] *See id*. at 1127 ("[P]risoners embrace the perception of crowding as an opportunity to reduce their sentences. Prisoners' rights advocates depend upon crowding to get into courts to pursue other improvements in prison conditions.").

[3] *See id*. ("Prison administrators, prison employees, and legislators advocating the current prison building program benefit institutionally from the perception of crowding. Prison administrators benefit because this perception supports their demands for more personnel, larger budgets, and stricter controls over prisoners, and because it permits them to escape blame for prison disturbances.").

[4] *See id*. at 1128 ("[B]ecause the debate now focuses on crowding, the term may be used in place of or even to mask other serious defects in the prison system. Prison managers may be

part of the dynamic that led to mass incarceration in states under court orders, where prisoner lawsuits forced fiscally conservative state legislatures to increase investment in the prison just as other political forces aligned to make increasing imprisonment a popular political position.[5]

This Essay returns to the failures of overcrowding jurisprudence in the period leading up to mass incarceration, but from the perspective of a new overcrowding that has come to characterize many American prisons in the era of mass incarceration. The old overcrowding was rooted in the antiquity of most state prisons as these populations began to grow in the late 1970s and early 1980s.[6] Some states keen on advancing new hopes for a rehabilitative penology had built new prisons in the 1950s and 1960s that were typically targeted at the most promising prisoners; these smaller and more specialized prisons added little to the state's overall prison capacity.[7] To handle the great majority of their prisoners, almost all states in the 1970s relied on one or more prisons built during the last great prison boom in the late nineteenth and early twentieth centuries.[8] These prisons, dubbed "Big Houses" after the facades of some of the more influential nineteenth century ones (a term then immortalized by Hollywood in the twentieth century), were generally large and organized around tightly stacked tiers of cells.[9] These prisons typically suffered from significant problems in heating and cooling, inadequate plumbing, and contained little space for

misdiagnosing—or intentionally misstating—the sources of current prison problems because of the ease of attributing difficulties to crowding. Accordingly, many of the programs currently funded by legislatures to combat crowding may be unsuccessful because they are ill-suited to the true underlying problems.").

[5] *See* MONA LYNCH, SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 1–2 (Markus D. Dubber ed., 2010) ("[A] mere 25 years after what looked like the demise, or at least the diminution of incarceration, the national imprisonment rate had nearly quintupled to 410 prisoners per 100,000 population."); Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC'Y REV. 731, 731–32 (2010) (discussing increased incarceration rates during and after the 1970s).

[6] *See* Bleich, *supra* note 1, at 1129–30 ("In absolute numbers, the nation's incarcerated population is at an all-time high; there are almost 630,000 people in state and federal prisons—more than three times as many as in 1970. As of 1985, there were 150,000 more prisoners than America's prisons were designed to accommodate.").

[7] *See* Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC'Y REV. 33, 36 (2011) (discussing the prevalence of the rehabilitative ideal in the 1950s and its decline in the 1970s).

[8] *See* Bleich, *supra* note 1, at 1145 (describing the relationship between rising prison populations and prison construction rates).

[9] *See* Stefanie Evans, Comment, *Making More Effective Use of Our Prisons Through Regimented Labor*, 27 PEPP. L. REV. 521, 523 (2000) ("In the 1950s, the 'Big House' dominated the prison scene. The typical Big House prison consisted of many large cell blocks on multiple tiers, and on average it held 2,500 men.").

accommodating more prisoners after double celling.[10]

While overcrowding was a problem in some states before the beginnings of mass incarceration, most states had a significant tool to combat it: parole. State sentencing laws typically allowed for the early release of prisoners well before the end of their judicially imposed sentences.[11] In theory, parole boards were supposed to consider early release (as well as the parallel question of when parolees—released prisoners under supervision in the community—who have violated the conditions of parole should be returned to prison) only in terms of how much risk the person posed to public safety.[12] However, prison experts have long believed that these boards used their discretion to manage state prison populations and head off the internal tensions and riots that overcrowding could lead to.[13]

In the era of mass incarceration, a new kind of overcrowding has emerged that I call "hyper-chronic" overcrowding.[14] It is "hyper" in the sense that it is "extreme." Before mass incarceration, prison experts considered anything above 90% of the design capacity to be overcrowded.[15] During mass incarceration, the most overcrowded states operated at well above 120% of capacity.[16] California, the locus of the landmark case *Brown v. Plata*,[17] had long operated at nearly 200% of design capacity at the time the court order authorizing relief of

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[10] James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 HOUS. L. REV. 1003, 1013 (1997) ("The Big House was a walled prison with large cell blocks that contained stacks of three or more tiers of one-or-two-man cells. On the average, it held 2,500 men. Sometimes a single cell block housed over 1,000 prisoners in six tiers of cells. . . . Overall . . . cell blocks were harsh worlds of steel and concrete, of unbearable heat and stench in the summer and chilling cold in the winter, of cramped quarters, and of constant droning, shouting, and clanking noise."); Evans, *supra* note 9, at 523 (describing the poor living and sanitary conditions inside "Big House" prisons).

[11] *See* Bleich, *supra* note 1, at 1147 ("Prior to 1970, prison administrators were better able to adjust prison populations through flexible parole criteria. As prison populations increased, parole boards frequently advanced parole dates or took slightly greater risks with parole candidates in order to ease the burden on a prison.").

[12] Sheldon L. Messinger et al., *The Foundations of Parole in California*, 19 LAW & SOC'Y REV. 69, 81–84 (1985) (providing the original intentions of parole programs).

[13] *See, e.g.*, Phelps, *supra* note 7, at 36 ("[T]here was a growing consensus that the indeterminate mode of sentencing (whereby inmates were released by parole boards that ostensibly decided whether an inmate was 'rehabilitated') was an unacceptable model, with critics on the left focusing on the racial disparities produced by the system and commentators on the right complaining about 'liberal' judges and parole boards 'coddling' offenders.").

[14] JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 110 (2014).

[15] Bleich, *supra* note 1, at 1142 n.80.

[16] *See, e.g.*, Pamela M. Rosenblatt, *The Dilemma of Overcrowding in the Nation's Prisons: What Are Constitutional Conditions and What Can Be Done?*, 8 N.Y.L. SCH. J. HUM. RTS. 489, 489–90, 490 nn.6–7 (1990) (discussing the history of mass incarceration overcrowding).

[17] 131 S. Ct. 1910 (2011).

overcrowding was upheld and entered.[18] "Chronic" means something that is enduring or occurring again and again.[19] Before mass incarceration, overcrowding was episodic, partially because it was tied to crime waves or other sources of episodic increases in law enforcement or severity.[20] One expects that a number of important social and political forces (e.g., racial tensions and strikes) influenced imprisonment rates even within the largely steady pattern that persisted before mass incarceration. Overcrowding under mass incarceration is enduring and it arises from structural features of the sentencing and criminal justice systems that are relatively independent of crime and other social factors. In California, for example, despite building twenty-two new prisons, overcrowding was present throughout the growth and stabilization of mass incarceration, and stayed at or near 200% of capacity system-wide for well over a decade, until forced by the courts to reduce to 137% of design capacity, a level reached only this past spring.[21] However, even this accomplishment was achieved only by keeping some ten thousand prisoners either in county jails or private prisons out of state (both at great expense). Moreover, California Governor Jerry Brown has expressed concern that overcrowding could rise again without further changes in sentencing laws.[22]

Hyper-chronic overcrowding presents a very different problem for prisoners and prison workers than the old overcrowding, and it lends itself to a very different kind of organizational adaptation. The old overcrowding

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[18] *Id.* at 1923–24.

[19] *See, e.g.*, *Chronic*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, http://www.merriam-webster.com/dictionary/chronic [https://perma.cc/KH3R-G82M] (defining this term as meaning, among other things, "continuing or occurring again and again for a long time").

[20] *See* Bleich, *supra* note 1, at 1144–46 (describing the historical flux in prison crowding).

[21] After several extensions California reached the level in the spring of 2015, prior to the December final deadline, thanks to (1) legislative changes introduced in 2011 known as Correctional Realignment that diverted non-serious, non-sexual, and non-violent felons from state prison, Bob Egelko, *Crime Down, Costs Up Since Prison Realignment, Study Finds*, S.F. GATE (Sept. 29, 2015), http://www.sfgate.com/crime/article/Crime-down-costs-up-since-prison-realignment-6536236.php#photo-3198399 [https://perma.cc/SX8J-LF9B], and (2) Proposition 47, a 2014 ballot initiative that freed some existing prisoners by allowing their felony convictions for non-violent drug and property crimes to be reduced to misdemeanors, Melody Gutierrez, *California Prisons Have Released 2,700 Inmates Under Prop. 47*, S.F. GATE (Mar. 6, 2015), http://www.sfgate.com/crime/article/California-prisons-have-released-2-700-inmates-6117826.php [https://perma.cc/CD6Y-PLXD].

[22] Governor Jerry Brown expressed this concern in a conference call with reporters announcing his support for a ballot initiative that would allow parole release consideration for people in prison for non-violent felony convictions. *See* John Myers, *Gov. Brown to Seek November Ballot Initiative to Relax Mandatory Prison Sentences*, L.A. TIMES (Jan. 27, 2016), http://www.latimes.com/politics/la-pol-sac-jerry-brown-sentencing-reform-ballot-20160127-story.html [https://perma.cc/K88A-9EFQ] (discussing Governor Brown's proposals concerning a referendum aimed at rehabilitation and reducing California's prison population).

led to discomfort, conflicts, and the risk of riots.[23] The new overcrowding leads to a routine lack of medical care and mental health care, leading to higher levels of suicide, death, and instances of extreme pain amounting to torture—conditions which were the driving considerations in *Brown v. Plata*.[24] Prisons responded to the old overcrowding internally with a combination of discipline and restraint, and at the system level by using parole mechanisms to reduce the population over time.[25] Prisons in California have responded to the new overcrowding by relying on a race-based gang classification system to establish internal mechanisms for conflict and conflict resolution among prisoners, and also through lockdowns, cell extractions, and other forms of emergency style management.[26]

In retrospect, the Supreme Court's 1981 decision in *Rhodes v. Chapman*[27] was a fateful bridge on the road (or if you will, with poetic license, the *Rhodes*) to mass incarceration. Lower courts had been citing overcrowding as a ground for finding constitutional violations, but there was no clear Eighth Amendment standard for overcrowding. Given the coalescence of many prison experts and the American Correctional Association's accreditation standards around a one prisoner for one cell standard, many prison advocates hoped the Supreme Court would establish such a standard.[28] Already, in *Bell v. Wolfish*,[29] the Court had suggested that it saw no "one man, one cell principle lurking in the Due Process Clause of the Fifth Amendment."[30] In *Rhodes*, the Court faced the issue squarely in the context of a new prison built as part of the pre-mass incarceration effort to expand rehabilitative penology, but which had gradually become overcrowded as incarceration rates began to rise in the late 1970s.[31] The Court rejected an overcrowding doctrine based on the one person to a cell standard, pointedly noting that there was no constitutional right to "comfortable prisons."[32]

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[23] *See* Bleich, *supra* note 1, at 1132–37 (describing the dangers which obtained in overcrowded prisons in 1989, including inmate violence, inmate health, and the overtaxing effect on prison management).

[24] Brown v. Plata, 131 S. Ct. 1910, 1923 (2011).

[25] *See* Bleich, *supra* note 1, at 1147–49, 1159–60 (describing the strategies used to manage or reduce prison crowding).

[26] Second Amended Complaint, Mitchell v. Cate, No. 2:08-cv-01196-RAJ (E.D. Cal. Sept. 23, 2011).

[27] 452 U.S. 337 (1981).

[28] *See* Lareau v. Manson, 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980) (stating that the "[ACA] Manual provides that in a detention facility there should be one inmate per room or cell").

[29] 441 U.S. 520 (1979). The case dealt with pretrial detainees and thus relies on the Due Process Clause of the Fifth Amendment rather than the Eighth Amendment, but for prison conditions the analysis is essentially the same.

[30] *Id*. at 542.

[31] *Rhodes*, 452 U.S. at 339, 340–42.

[32] *Id*. at 349.

Had *Rhodes* come out the other way, mass incarceration would likely not have happened. With an Eighth Amendment requirement to achieve one prisoner to a cell, the escalation of people being sent to prison and the lengthiness of sentences would have been stopped in its tracks by a hard constitutional line that states could never have afforded to overtake through prison building, and the Supreme Court would have been reluctant to reverse. Instead, *Rhodes* gave the green light to sustain overcrowding by state prison systems, and helped assure that prison condition lawsuits, where successful, would drive a process of prison expansion that would lead to an ever-growing prison population, along with enduring overcrowding.

However, the Supreme Court's recognition of the new overcrowding in *Brown* may signal a new opportunity for judicial development of overcrowding as a distinct Eighth Amendment doctrine. The long-term goal should be to reduce *Rhodes* to its facts on the grounds that it no longer makes sense to apply it to a new kind of prison system and a new kind of overcrowding. In the meantime, lower courts can use this gap to craft meaningful limits on overcrowding, and even establish a "one person per cell" rule without waiting.

II. THE OLD OVERCROWDING

Prison overcrowding is almost repetitive as a term. In the history of prisons, they have rarely operated below their design capacity,[33] which may suggest that the size of the prison estate establishes, in effect, a minimum size of the prison population. Overcrowding as a social problem has largely been concerned with prisons, or with housing for the poor (i.e., prisons are another form of housing for the poor). For much of its history, prison overcrowding has been primarily a function of the extremely high capital costs of building new prisons, which makes the marginal cost of the last prisoners stuffed into the old prison dramatically lower than that for the first prisoner placed in the new prison. As pressure built on prison overcrowding at the end of the nineteenth century, most states adopted laws permitting early release (known as parole, from the shortening of the French phrase for "word of honor," a ritual by which military prisoners were traditionally allowed to leave confinement on the promise not to return to the field of battle).[34] In theory, parole was supposed to be based on an administrative judgment that the prisoner had been effectively rehabilitated and, with proper aftercare (parole supervision which was invented at the same time), could return to the community with little risk of

[33] Claudia Angelos & James B. Jacobs, *Prison Overcrowding and the Law*, 478 ANNALS AM. ACAD. POL. & SOC. SCI. 100, 101 (1985).

[34] Paul J. Larkin Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 306–08 (2013).

further criminal behavior.[35] While imperfect, there is little doubt that parole allowed prison managers to regulate the level of overcrowding. Perhaps because of this, overcrowding was never defined as a distinct Eighth Amendment issue during the most active period of prison condition lawsuits between 1960 and 1990.[36]

A. *The Old Penal Estate*

On the eve of mass incarceration—the decade of the 1970s—the prison "system" (a term only applicable to the largest prisons at the time) in most states consisted of one or two penitentiaries—older prisons built typically in the nineteenth century and expanded during the crime wave of the 1920s.[37] These "Big House" style prisons typically consisted of stacked tiers of cells.[38] In the most reform-oriented and richest states, like California, Illinois, and New York, the 1950s saw development of a new generation of rehabilitation-oriented prisons, typically aimed at younger, more "treatable" people convicted of felonies.[39] These smaller prisons experimented with dormitory-style rooms in place of cells, combined with plentiful space for examining, training, educating, and treating inmates.

Throughout the 1960s, rising crime rates[40] likely led to a natural increase in prison overcrowding (although data is not easily available for this period). Most of this would have been concentrated in the Big House style prisons, with the newer, smaller prisons protected as much as possible. But Big House prisons, with their cellular design based on solitary confinement at night[41] (from the New York or "Auburn" model

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[35] Comment, *The Parole System*, 120 U. PA. L. REV. 282, 284–85 (1972).

[36] *See* Angelos & Jacobs, *supra* note 33, at 102–07 (explaining that through the 1970s and 1980s overcrowding of prisons was "not viewed as unconstitutional per se"—rather, courts had to determine if "crowding has caused deprivation of basic human needs before they can order relief").

[37] *See* Rosalind K. Kelley, Comment, *Sentenced to Wear the Scarlet Letter: Judicial Innovation in Sentencing—Are They Constitutional?*, 93 DICK. L. REV. 759, 763 (1989) (noting the rise in the use of the penitentiary system "during the nineteenth and twentieth centuries . . . , which became the primary goal of punishment in the early 1900s").

[38] Evans, *supra* note 9, at 523.

[39] *See* LYNCH, *supra* note 5, at 2 ("[D]uring the 1970s, faith in the rehabilitative ideal that had prevailed in penology for the past century began to erode among criminal justice practitioners, academics, and policymakers."). For one of the most ambitious such efforts in California, see ELLIOT STUDT ET AL., C-UNIT: SEARCH FOR COMMUNITY IN PRISON 56 (1968) (describing rooms with windows and doors rather than bars at Deuel Vocational institution, which was designed for younger prisoners).

[40] *See* Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1032–34 (2010) (recounting several of the reasons for the rise of crime rates of the 1960s).

[41] On the design of the Big House style prison, see REBECCA MCLENNON, THE CRISIS OF MASS IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941, at 56 (2008) ("[C]ellular incarceration . . . of the convicts by night and their impressment into silent, congregate labor . . . by day").

that had won out over its full-time solitary confinement competitor in Pennsylvania in the nineteenth century),[42] set some hard limits on overcrowding. One might have been able to place two prisoners in those cells, but any more than two was hard to configure, let alone manage without riots. More importantly, these prisons lacked flexible space in which more prisoners could be held. Indeed, the original Auburn style prisons had mainly cell tiers and factory-style spaces.[43] Removing the (increasingly archaic) industrial equipment and putting in bunk beds would have been a possibility to create more space, but that would have required completely abandoning any pretense of reform inside prison, which remained a key premise behind parole. Fortunately, parole offered an imperfect way to regulate the prison population.

B. *Parole and the Regulation of Prison Populations*

Parole has typically been promoted as either a means of incentivizing efforts at rehabilitation by prisoners, or criticized as a mechanism that undermines the deterrence of the criminal law by offering the hope of leniency in the end. Students of prisons as organizations, however, have tended to see parole as a mechanism to help prisons manage population pressures.[44] In most states, it is local officials, police, sheriffs, prosecutors, and judges who determine how many people will be sent to prison through felony convictions, and in turn, sentenced to a term in state prison. In contrast, prison officials have no power to refuse admission to a person sentenced by a court (unless they are in an emergency), but they may be able to influence exits from prison through parole. This is complicated by the fact that in most states the paroling authority had (or still has) some independence from the prison administration.[45] Even so, the paroling authority is part of the same executive branch of state government, and subject to pressure from the chief executive to avoid the scandal that would ensue following a riot or escape resulting from intolerable overcrowding.[46]

The most systematic effort to study parole as a regulator of state prison populations, was based on the research by Sheldon Messinger and his

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[42] *See* Ryan S. Marion, Note, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 218 (2009) (contrasting the Auburn style prison with the harsher, less productive Pennsylvania model for penitentiaries).

[43] *Id.*

[44] *See* Peter B. Hoffman & Michael A. Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 HOFSTRA L. REV. 89, 90 (1978) (recognizing the variety of governmental actors that play a role in the conviction and sentencing process).

[45] *See id.* at 92–93 (noting the considerable "discretion to control . . . [prisoners'] release date[s]" through the "parole function," and arguing for the "creation of independent releasing authorities . . . [in the form of] parole boards").

[46] *See id.* at 116 (highlighting that "[t]o alleviate overcrowding, a parole authority can make immediate but smaller changes more equally throughout the prison population").

colleagues on the California prison population before 1980, and showed that parole release rates did increase during times of heightened overcrowding.[47]

The other mechanism through which parole administration can influence prison population is administrative decisions to return to prison people previously released, on the basis of a parole violation (that has not also resulted in a new criminal conviction). In times of population pressure, parole authorities can use their powers to reduce the number of parolees returned to prison on parole violations. Research, again on California, has shown that it is very likely that this happened during Governor Ronald Reagan's second term—when the increasing crime rate resulted in increasing pressure on the prison population, and the anti-tax Governor wanted to avoid expensive new prison construction.[48]

C. *Overcrowding and the Eighth Amendment*

Despite being critical to many successful Eighth Amendment claims during an era of federal efforts to reform state prisons, overcrowding never received definitive constitutional treatment as a distinct evil, but instead only as part of a "totality of circumstances" that constituted cruel and unusual punishment.[49] For example, in upholding a sweeping order against Arkansas' overcrowded prisons, the Supreme Court noted that crowding exacerbated problems like violence, and inadequate medical and dental care.[50] Accordingly, courts were more likely to invoke "basic human needs" such as "food, clothing, medical care and safe and sanitary living conditions[,]"[51] "unnecessary [or] wanton [infliction of pain,]"[52] and "minimal measure of the necessities of civilized life."[53]

Moreover, when the Supreme Court faced two cases presenting the issue of overcrowding without extensive records showing these other conditions, the majority refused to find a constitutional violation.[54] "Both cases make it clear that double-bunking and exceeding design capacity are

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[47] *See* Richard A. Berk et al., *Prisons as Self Regulating Systems: A Comparison of Historical Patterns in California for Male and Female Offenders*, 17 LAW & SOC'Y REV. 547, 548, 573 (1983) ("Our argument . . . [is] that prison officials have, with an eye toward crowding, attempted to regulate growth, and that parole in particular has been applied to this end.").

[48] Rosemary Gartner et al., *The Past as Prologue: Decarceration in California Then and Now*, 10 CRIMINOLOGY & PUB. POL'Y 291, 292 (2011).

[49] Angelos & Jacobs, *supra* note 33, at 102.

[50] Hutto v. Finney, 437 U.S. 678, 682 n.6, 684 (1978).

[51] Walker v. Schult, 717 F.3d 119, 125 (2d Cir. 2013). For a glimpse into prisons' recognition of these "basic human needs" around the time of *Hutto*, see NICHOLAS N. KITTRIE & ELYCE H. ZENOFF, SANCTIONS, SENTENCING, AND CORRECTIONS: LAW, POLICY, AND PRACTICE 380, 382–84, 396 (1981).

[52] Angelos & Jacobs, *supra* note 33, at 105 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

[53] *Id.* at 105.

[54] *Rhodes*, 452 U.S. at 348; Bell v. Wolfish, 441 U.S. 520, 542 (1979).

not, in and of themselves, impermissible. The minimum requirements for inmate housing recommended by experts and model standards are not mandated by the Constitution."[55]

According to *Bell v. Wolfish*, a case applying the Due Process Clause to pretrial custody in a jail setting, overcrowding only violates the Constitution when it causes "genuine privations and hardship over an extended period of time."[56] Additionally, in *Rhodes v. Chapman*, an Eighth Amendment case on a prison setting, the Court stated that overcrowding only became a constitutional problem when it led to "deprivations of basic human needs" and "wanton and unnecessary infliction of pain."[57]

III. *RHODES V. CHAPMAN*: THE LOST CHANCE TO STOP MASS INCARCERATION

Rhodes marks the beginning of the end for the period of expansive federal rights for prisoners.[58] Although it left in place many precedents establishing overcrowding as part of unconstitutional conditions, and plenty of room for willing district courts to distinguish its outcome, *Rhodes* signaled a decisive shift back in the direction of the once dominant "hands off" rule that *sub voce* was said to have all but insulated state prisons from federal court challenges. The rhetoric of Justice Powell's majority opinion, with a sneering rejection of a right to comfortable prisons, fits right in line with the increasingly punitive and degrading "tough on crime" rhetoric that was becoming firmly established in the electoral branches of the state and federal governments. All of this would be enough for contemporary reformers to see *Rhodes* as one of many decisions by the Supreme Court in the 1980s and 1990s that permitted the war on crime and ultimately mass incarceration to run its course. *Rhodes* has a particularly standout role, however, in mass incarceration. Put simply, an enforceable one-person, one-cell rule for long-term imprisonment (the kind of per se rule that the Court was eager to reject) would have ended mass incarceration in its cradle. Prison populations in the states had already been growing for nearly five years when *Rhodes* was decided.[59] Stimulated in part by federal court orders to relieve overcrowding, states were beginning to launch prison construction programs that would multiply by several times the entirety of the prison estate that had been created up to that time. But despite the unprecedented wave of new prisons, most state systems remained

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[55] Angelos & Jacobs, *supra* note 33, at 106.

[56] *Wolfish*, 441 U.S. at 523, 542.

[57] *Rhodes*, 452 U.S. at 339, 347.

[58] MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 47–48 (1998).

[59] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS 1925–81, at 1 (1982), http://www.bjs.gov/content/pub/pdf/p2581.pdf [https://perma.cc/A426-WYT7].

overcrowded throughout the prisoner boom, overwhelmed by sentencing laws that raised prison years faster than the states could afford to build prisons. Double celling would become a norm in the prison systems of mass incarceration. Had double celling in long-term prisons been found unconstitutional in 1981, states would have been compelled to undergo the kinds of revisions of their sentencing and parole laws now being undertaken. Instead, new laws were piled on in the 1990s, increasing time served in prison, eliminating the opportunity for parole procedures to address prison overcrowding, and establishing mass incarceration as a new kind of penal model.

A. *The Single Cell Standard in Correctional Thought*

The single cell standard dismissed by the Supreme Court as an aspirational, rather than constitutionally required norm, had been embraced by the two leading norm-setters for United States prisons during this period, the American Correctional Association's Commission on Accreditation for Corrections and the Federal Bureau of Prisons. The amicus brief filed by the United States in *Rhodes* is devoted to calling attention to the then quite recently promulgated "Federal Standards for Prisons and Jails," establishing "one inmate per cell or room" and further stating sixty square feet as the appropriate size for this type of cell.[60] As the appended charts further showed, the federal government in the early 1980s was still adhering to what the amicus brief called a "firm federal policy that there be no double celling in long-term correctional facilities."[61] The Commission's Manual of Standards for Adult Correctional Institutions embraced the same standards.

In many respects the one-person, one-cell norm was a product of the golden age of prison sociology. Studies by sociologists like Gresham Sykes and Sheldon Messinger established in vivid terms the pains of imprisonment and the loss of the major anchor points of adult identity in prison.[62] From this perspective, the single cell was much more than an issue of comfort or discomfort. Taking people already reeling from the degradation ceremonies surrounding incarceration, and placing them in a cell with another inmate—someone likely in prison because of anti-social behavior and attitudes—risked a "loss of dignity" and "profound attacks on the [prisoner's] image or sense of personal worth."[63]

Penal experts also emphasized the danger of violence. Prisons in the 1970s and 1980s were already undergoing profound transformation even

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[60] Brief for the United States as Amicus Curiae at 1–2, *Rhodes*, 452 U.S. 337 (No. 80-332).
[61] *Id.* at 2.
[62] Brief of Respondents at 22, *Rhodes*, 452 U.S. 337 (No. 80-332).
[63] *Id.* at 22.

before the arrival of the mass incarceration generation.[64] The breakdown of the old industrial model of prison labor placed greater strain on the inmate social order to address the boredom and deprivations associated with incarceration without the socializing benefits of the barter economy, which a production-oriented prison labor system allowed.[65] This was considerably exacerbated by racial transformation, as a once overwhelmingly white prison population became more closely divided.[66] The result was a tense brew of race-based prisoner organizations, some of them inspired by social change and revolutionary politics.[67] Nor was the potential for violence theoretical in 1980. The Attica uprising and the massacre that followed the retaking of the prison highlighted the powerful tensions both uniting and dividing prisoners in older state prisons suffering from the older style prison overcrowding.[68] Far from being abstract or aspirational, the district court in *Rhodes* listened to prison experts that were extremely concerned about the potential for violence at the Southern Ohio Correctional Facility (SOCF).[69] After another decade of worsening overcrowding, those concerns were realized when prisoners' resentment over medical care issues led to one of the worst riots and longest prison takeovers in contemporary correctional history.

B. *The Court's Uncomfortable Prison Standard*

The district court's order in *Rhodes*, which barred the use of double celling at SOCF except for emergencies,[70] was a clear example of the kind of overreach by federal courts in reforming state prisons that was becoming a common complaint from state and federal politicians.[71] This would in the 1990s lead to the Prison Litigation Reform Act, formally limiting the jurisdiction of federal courts over state prison defendants.[72] The order amounted to a per se rule against double celling, establishing a single cell as an Eighth Amendment right.[73] Instead of being based on careful fact-finding, this per se rule was imposed by the district court based

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[64] JOHN IRWIN, PRISONS IN TURMOIL (1980).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] Chapman v. Rhodes, 434 F. Supp. 1007, 1016–17 (S.D. Ohio 1977), *aff'd*, 624 F.2d 1099 (6th Cir. 1980)), *rev'd*, 452 U.S. 337 (1981).

[70] Rhodes v. Chapman, 452 U.S. 337, 367 (1981) (Brennan, J., concurring).

[71] *E.g.*, Wendell Rawls Jr., *Judges' Authority in Prison Reform Attacked*, N.Y. TIMES (May 18, 1982), http://www.nytimes.com/1982/05/18/us/judges-authority-prison-reform-attacked-courts-trial-third-four-articles-efforts.html [https://perma.cc/HPU6-RKSL].

[72] Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified as amended at 18 U.S.C. §§ 3624(b), 3626 (2012), and in sections of 28 and 42 U.S.C.).

[73] *Chapman*, 434 F.Supp. at 1021.

on abstract standards taken from aspirational documents.[74] From this perspective, the case fits into the broader backlash against judicial activism that was coming from the Supreme Court, and later Congress, around the prison issue during the 1980s and 1990s.[75] In retrospect, we can also see that the case reflects, at best, a profound misunderstanding by the Supreme Court of the transformations in American penality that were producing mass incarceration.

As a piece of judicial review, *Rhodes* is a stunning if utterly disingenuous piece of de novo review of facts. Cherry-picking a couple of phrases and facts from a tremendously rich and complicated record, the majority and concurrences recast the entire findings, and then unceremoniously found that the district court had abused its discretion by ignoring this new set of findings.[76] The district court found SOCF a prison saddled with a permanent overpopulation of nearly 40% and likely to grow, which was overwhelming the few forms of out of cell prison activity available to prisoners, raising the risk of violence throughout the prison, and forcing a large minority of prisoners to coexist inside their cell with another prisoner.[77] The district court found it significant that most SOCF prisoners were there on long terms, calling for life or a long determinate sentence, and that they had typically been convicted of violent crimes or had been transferred from other prisons due to behavior problems.[78]

It was in this context of a maximum-security prison holding long-term prisoners with serious risks of behavior problems that the district court found double celling caused an unacceptable risk of "physical and mental injury from long term exposure."[79] As Justice Marshall wrote in his spirited dissent, "the facility described by the majority is not the one involved in this case."[80] Instead, without visiting the prison or bothering to reference much of the record, Justice Powell described a prison that was recently built and "top flight" at that.[81] A place, in line with modern correctional goals, that included a library, gymnasiums, and classrooms.[82] The Court acknowledged the reality of double celling, but dismissed this as a minor problem.[83] The Court seemed particularly taken with the fact that

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[74] *See id.* (citing the National Sheriff's Association Handbook on Jail Architecture, the National Sheriff's Association Manual on Jail Administration, the National Council on Crime and Delinquency Model Act for the Protection of the Rights of Prisoners, and the Report of the Special Civilian Committee for the study of the United States Army Confinement System).

[75] *See generally* LYNCH, *supra* note 5.

[76] *See* Rhodes v. Chapman, 452 U.S. 337, 339–69 (1981).

[77] *Id.* at 343, 349 n.14.

[78] *Id.* at 343.

[79] *Id.* (citing *Chapman*, 434 F. Supp. at 1021).

[80] *Id.* at 369–70 (Marshall, J., dissenting).

[81] *Id.* at 340 (quoting *Chapman*, 434 F. Supp. at 1009).

[82] *Id.*

[83] *Id.* at 337.

SOCF organized its cells in the modern pod style around day rooms that allowed a common area for television, games, and recreational activities;[84] ignoring the fact that use of these common areas might in fact be quite high risk for an overcrowded and tense prison population riven along racial lines.[85] For the Court, the absence of a proven relationship between the prison population rise and the rate of violence made irrelevant the district court's detailed assessment of the views of experts for both sides on the threat of violence.[86] In this light, the double celling standard amounted to a requirement that prisons be comfortable. Yet, even assuming the "theory that double celling inflicts pain," the majority saw no constitutional violation.[87] Instead, they were willing to stipulate that the Constitution does not "mandate comfortable prisons" and that prisons like SOCF "cannot be free of discomforts."[88]

C. *The* Rhodes *to Mass Incarceration*

For distinguishing purposes, it is attractive going forward to embrace the Court's dominant narrative of the case. If the district court in *Rhodes* had sinned by placing an abstract aspirational right on a record devoid of actual evidence of mental and physical suffering, the case left plenty of room for other district courts, so inclined to ignore *Rhodes'* light of very different kinds of findings.[89] In retrospect, however, *Rhodes* should be seen as significant for its deliberate effort to ignore the mounting signs that American penology was undergoing change. For decades, state prison systems had been focused officially on rehabilitation, and in some states departments of corrections were created after World War II to promote professionalization and treatment orientation.[90] The Federal Bureau of Prisons in particular, after the harsh years of Alcatraz in the 1930s and 1940s, became highly treatment oriented in the 1960s and 1970s with a model for highly modern, secure, and treatment-oriented prisons with little

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[84] *Id.* at 341.

[85] *See, e.g.*, CAL. STATE AUDITOR, HIGH RISK UPDATE—PUBLIC SAFETY REALIGNMENT AND THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION (2015), https://www.auditor.ca.gov/pdfs/reports/2015-609and2015-610.pdf [https://perma.cc/P9YY-WZN5].

[86] *Rhodes*, 452 U.S. at 347–50.

[87] *Id.* at 348–49.

[88] *Id.*

[89] Indeed, Margo Schlanger's work shows that despite *Rhodes*, prisoner litigation remained quite active until the Prison Litigation Reform Act gave rise to a sharp decline in 1995. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 6, 1555–706 (2003).

[90] *See, e.g.*, *1940–1945*, FLA. DEP'T CORRECTIONS, http://www.dc.state.fl.us/oth/timeline/1940-1945.html [https://perma.cc/HQV7-47PY] (displaying the post-war founding of the Florida Department); *Historical Timeline*, TENN. DEP'T CORRECTION, https://www.tn.gov/assets/entities/correction/attachments/HistoricalTimeline.pdf [https://perma.cc/DAL7-8BH7] (indicating the bifurcation of two older departments post-war to form the Department of Correction).

overcrowding.[91] The individualized orientation of punishment in these states, coupled with parole and the existence of a much larger public mental health system, also meant that those with serious mental health problems could be channeled out of the prison system.[92]

Although only a few years into the new more punitive era, the record in *Rhodes* suggests the new elements that would come to define mass incarceration, including rapid population growth (the prison opened in 1972 and was overcrowded by 1975),[93] the concentration of long-term prisoners with declining opportunities for release,[94] and the large numbers of prisoners who were entering with a known history of serious mental illness.[95] The Supreme Court chose to ignore these warnings and treated the overcrowding problem at SOCF as a modest difficulty in the face of what was otherwise a "top-flight first-class facility."[96] The Court dismissed permanent overcrowding as irrelevant unless the record showed actual breakdowns in essential infrastructures or provisions like food.[97] The Court ignored the building mental health crisis with the reassurance that there was "no evidence of indifference by SOCF staff to inmates' mental or dental needs."[98] The only problems the Court acknowledged were in the dilution of programs that were arguably rehabilitative.[99] To treat delays in delivery of rehabilitative services as cruel and unusual punishment would be to "wrench the Eighth Amendment from its language and its history."[100]

The case was doctrinally significant, the Court's first occasion to review what was framed as a "pure conditions case," i.e., not raising other evidence of abuse (like excessive use of force).[101] Rights advocates and the liberal justices who concurred likely were relieved that the increasingly conservative majority had not called into question the legitimacy of this

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[91] *See Historical Information*, FED. BUREAU PRISONS, https://www.bop.gov/about/history/timeline.jsp [https://perma.cc/QS4J-S25U] (stating that in 1959, "medical model" gains traction).

[92] *But see* DARRELL STEINBERG ET AL., STANFORD LAW SCH. THREE STRIKES PROJECT, WHEN DID PRISONS BECOME ACCEPTABLE MENTAL HEALTHCARE FACILITIES? (2015), http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/632655/doc/slspublic/Report_v12.pdf [http://web.archive.org/web/20160421211538/http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/632655/doc/slspublic/Report_v12.pdf].

[93] *Rhodes*, 452 U.S. at 341.

[94] *E.g.*, *id.* at 357 n.6 (Brennan, J., concurring).

[95] Chapman v. Rhodes, 434 F. Supp. 1007, 1017 (S.D. Ohio 1977), *aff'd*, 624 F.2d 1099 (6th Cir. 1980)), *rev'd*, 452 U.S. 337 (1981) ("[A] substantial number of the inmates are victims of some form of emotional or mental disorder.").

[96] *Rhodes*, 452 U.S. at 341 (quoting *Chapman*, 434 F. Supp. at 1009).

[97] *See id.* at 342 (disputing the claim that overcrowding overwhelmed the prison by pointing to the quality of the prisons' infrastructure).

[98] *Id.*

[99] *Id.* at 343.

[100] *Id.* at 348.

[101] *Id.* at 345.

class of Eighth Amendment cases,[102] instead setting a seemingly higher bar for proof of actual harm.[103] In retrospect, the case signaled a chill on protection of prisoner rights in state prisons just as the states were moving rapidly away from rehabilitation and mechanisms like parole, toward a system of uncontrolled growth, mass incarceration, and chronic/hyper overcrowding.[104] Not only did the majority miss the last chance to stop mass incarceration in its tracks, their singular failure to recognize the emerging elements placed their call for greater deference to state officials directly in the stream of an independent shift by state officials toward indifference to the well-being of prisoners. Just as the federal judiciary needed to be alerted to an emerging threat to human dignity, the Court used the occasion of this particularly sharp dressing down of a federal trial judge to encourage those courts to stand down.

> In discharging this oversight responsibility, however, courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved change of being useful, law-abiding citizens.[105]

IV. THE NEW OVERCROWDING AS A NEW PENOLOGY

To a striking degree, the record in *Rhodes* anticipates the full flowering of mass incarceration including: the flow of prisoners with serious mental problems, the permanence of overcrowding and double celling, new prisons that are relatively decent in terms of food, heat, and shelter, but which increasingly lack the ability to deliver services.[106] Most importantly, *Rhodes* opened the door to chronic hyper overcrowding of the sort manifest in the *Rhodes* record but unrecognized by the Court.[107]

A decade later in an article titled, *The New Penology: The Emerging*

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[102] *Id.* at 352–53 (Brennan, J., concurring).

[103] *Id.* at 349 (majority opinion).

[104] *See* David R. Cianflone, *Prisons: Confinement and the Eighth Amendment:* Rhodes v. Chapman, 3 U. BRIDGEPORT L. REV. 363, 380 (1982) (discussing a transition away from prisoner's access to the courts and towards allowing prison administrators and state legislators to handle the problems stemming from overcrowding in prisons).

[105] *Rhodes*, 452 U.S. at 352.

[106] *See* Lauren Salins & Shepard Simpson, Note, *Efforts to Fix a Broken System:* Brown v. Plata *and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153, 1155 (2013) (describing current prison conditions caused by overcrowding in California).

[107] *See Rhodes*, 452 U.S. at 348–49 (discussing the prison conditions that the district court found in violation of the Eighth Amendment, and subsequently finding them unpersuasive).

Strategy of Corrections and Its Implications,[108] Malcolm Feeley and I argued that the rise of historically unprecedented prison populations was forcing an abandonment of traditional penological concerns with punishment, rehabilitation, and deterrence, creating instead a new penology based on managing whole populations through control strategies aimed at risk and variable security levels of custody.[109] The hardening of chronic hyper overcrowding embedded this new penology deep into contemporary correctional practice.[110] The new overcrowding reshaped routine prison life and organization.[111] A new style of post-rehabilitative prison aimed at maximizing the numbers of people confined with attention only to security.[112] A new emergency style of governing prisons made security the only consideration and promoted ways of dealing with prisoners as a mass, and through collective forms of punishment like lockdowns, riot tactics, and special weapons.[113]

A. *The New Post-Rehabilitative Prison*

The new model of imprisonment in California and other states removed any elements of rehabilitation from the prison experience and removed parole as an incentive for good behavior or a way to reduce the prison population.[114] Instead, the singular goal of imprisonment was becoming incapacitation, the premise that once incarcerated, the person imprisoned could not commit crimes against the public safety.[115] As a result, the new prisons that were built during the 1980s and 1990s lacked serious attention to health, education, or treatment; they were supersized containers for prisoners of various risk levels.[116]

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[108] 30 CRIMINOLOGY 449 (1992).

[109] *Id.* at 450, 455.

[110] *See id.* at 470 (concluding that the "new penology" has contributed to increased prison populations).

[111] *See id.* (describing some of the changes to the prison system, and linking those changes to overcrowding).

[112] *Id.* at 455–57.

[113] *See, e.g.*, Laura McFarland, *Powhatan Prison on 15th Day of Lockdown*, RICHMOND TIMES-DISPATCH (Jan. 29, 2016), http://www.richmond.com/news/local/central-virginia/powhatan/powhatan-today/article_4a15779a-c6ea-11e5-80d3-6bac8176d973.html [https://perma.cc/US8R-QEFM] (describing an extended lockdown of the Powhatan Reception and Classification Center in Virginia after receiving tips about smuggling within the prison); Joseph Bernstein, *Why Are Prison Riots Declining While Prison Populations Explode?*, ATLANTIC (Dec. 2013), http://www.theatlantic.com/magazine/archive/2013/12/have-a-safe-riot/354671/ [https://perma.cc/7FBY-P7TJ] (attributing fewer riots in prisons to the introduction of elite security forces similar to SWAT teams that put down prison disorder of any kind).

[114] *See* SIMON, *supra* note 14, at 111 (describing how the goals of the California penal system were to separate criminals from the general population for as long as possible).

[115] *Id.* at 23.

[116] *Id.* at 5–6.

Unlike SOCF,[117] these prisons were built with the expectation that they would be double celled routinely and that the infrastructure could hold even more prisoners without threat to basic health and safety.[118] Soon, even the day areas that the Supreme Court had found so important as a safety valve in *Rhodes* were placed into use as large dormitories with so-called "bad beds"—three level bunk beds spaced inches apart in the former day use areas of the prison.[119] In echoes of *Rhodes*, but this time unchallenged by the majority on the Supreme Court, a special three judge trial court in *Coleman v. Schwarzenegger* found that in those conditions, "inmate-on-inmate violence is almost impossible to prevent, infectious diseases spread more easily, and lockdowns are sometimes the only means by which to maintain control."[120]

B. *Emergency Government*

The expert witnesses in *Coleman-Plata* testified that the super-sized nature of California's prisons made them virtually impossible to manage through ordinary correctional methods when they were not overcrowded and impossible to govern without a state of emergency once they became chronically hyper overcrowded.[121] Internally, wardens had to fall back on lockdowns to address frequent breakdowns in order—transforming every level of incarceration into the supermax-like experience of being in cell or bunk twenty-three hours or more a day.[122]

C. *Security as a Singular Value*

What is a prison that is not concerned about security? The prisons of mass incarceration, designed as post-rehabilitative warehouses and driven through overcrowding to governing by emergency, are thrown back on security in a way that is all but exclusive of other values. Overcrowding forces all considerations other than security inside the prison to recede, as overtaxed managers turn from one crisis to another.[123] This emergency/security ethos feeds back into a correctional culture among staff that emphasizes weapons, riot suppression, and labeling of prisoners

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[117] *See* Chapman v. Rhodes, 434 F. Supp. 1007, 1011 (S.D. Ohio 1977)), *aff'd*, 624 F.2d 1099 (6th Cir. 1980)), *rev'd*, 452 U.S. 337 (1981) (describing how increased prison populations forced the Southern Ohio Correctional Facility to double-cell inmates).

[118] SIMON, *supra* note 14, at 51–52.

[119] *Id.* at 113–14.

[120] Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, slip op. at 7 (E.D. Cal. Aug. 4, 2009) (final opinion and order, combined with *Plata v. Schwarzenegger*, No. C01-1351 TEH (N.D. Cal Aug. 4, 2009)).

[121] SIMON, *supra* note 14, at 114.

[122] Brown v. Plata, 131 S. Ct. 1910, 1927 (2011).

[123] SIMON, *supra* note 14, at 120.

as threats without human features of vulnerabilities.[124] This emergency ethos was replicated at the system level when the Governor himself placed the entire system under a state of emergency in 2006 in order to use extraordinary powers to move some prisoners out of state and into private prisons.[125]

V. *BROWN V. PLATA*: THE BIRTH OF A NEW OVERCROWDING JURISPRUDENCE?

Brown v. Plata,[126] which upheld a sweeping population reduction order against California's chronic hyper overcrowding after finding that relieving overcrowding was essential to remedying existing systemic constitutional violations for failure to provide adequate mental healthcare[127] and failure to provide adequate medical care,[128] casts no direct doubt on the validity of *Rhodes v. Chapman*.[129] Yet a careful reading of *Plata* suggests that the Court may be prepared over time to reduce *Rhodes* to its facts by recognizing the validity of remedying overcrowding. While *Rhodes v. Chapman* is only mentioned twice in the opinion (once by the majority to distinguish it, and once by Justice Alito in dissent to apply it and overrule the lower court),[130] overcrowding is mentioned more than seventy times, more than sixty in the majority opinion alone. A big part of the reason is the Prison Litigation Reform Act (PLRA),[131] a law that reflects the post-*Rhodes* ethos of mistrust of federal court interventions in state prison systems (one that grew directly out of state anger over overcrowding litigation much like *Rhodes*).[132] Without naming overcrowding, the PLRA singles out prison population reduction orders for more exacting burdens. Since overcrowding is certain to be the mediating condition, which precipitates a judicial decision that a population reduction remedy is necessary, this part of the law is, in effect, statutory protection of state prison overcrowding, which provides further evidence that this

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[124] *Id.* at 121.

[125] *Prison Overcrowding State of Emergency Proclamation*, CA.GOV, https://www.gov.ca.gov/news.php?id=4278 [https://perma.cc/BY2F-NFTG] (last visited Mar. 6, 2016).

[126] *Brown*, 131 S. Ct. at 1927.

[127] *See* Coleman v. Wilson, 912 F. Supp. 1282, 1298 (E.D. Cal. 1995) ("The obligation to provide for the basic human needs of prisoners includes a requirement to provide access to adequate mental health care.").

[128] *See* Plata v. Schwarzenegger, 603 F.3d 1088, 1091 (2010) ("The complaint alleges that the State has provided inmates with inadequate medical care in violation of the Eighth Amendment and the Americans with Disabilities Act.").

[129] Rhodes v. Chapman, 452 U.S. 337 (1981).

[130] *Brown*, 131 S. Ct. at 1944; *id.* at 1959 (Alito, J., dissenting).

[131] Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified as amended at 18 U.S.C. §§ 3624(b), 3626 (2012), and in sections of 28 and 42 U.S.C.).

[132] LYNCH, *supra* note 5, at 190 (describing the state's evolving strategy to strip prisoners of the power to bring lawsuits).

constitutional norm (or non-norm under current jurisprudence) may be of singular importance in ending mass incarceration. Under the PLRA, the three-judge court (itself a special burden requiring more judges to agree before a population reduction order) must make a series of findings about the necessity and effect order.[133]

Plata is most visible in the decision in the remarkably different way that the majority chooses to read the record here, acknowledging many of the very things that the Supreme Court sneeringly dismissed in *Rhodes*. In part, this reflects the Court's recognition that mass incarceration itself has changed the nature of the prison and the presumptions about state expertise and state democratic accountability that influenced the *Rhodes* decision. In what follows, I read *Plata* as a turn in the road of Supreme Court prison conditions precedent that could lead, not especially fast, to a reduction of *Rhodes* to its facts.

A. *Discomfort, Torture, and Dignity*

The majority opinion in *Plata* reads like the opinion Justice Marshall might have written in *Rhodes*. Overcrowding is recognized to be a matter not of discomfort, but of disease, disability, delay in treatment, and resulting pain and death. The threat of violence, and the inability of correctional officers to offer realistic hope of rescue given the triple bunk "bad bed" sections of the prison is seen as a real one. Interestingly, here the Court does not demand statistical showings that the violence is more than what you would expect based on the increased population.

One major difference is simply the scale of overcrowding. The figure chosen by the three-judge court in the district court decision leading up to *Plata* as the target for reducing overcrowding sufficiently to permit remedy of the unconstitutional conditions was 137.5%,[134] the precise level of overcrowding recognized by the Court as not a violation in *Rhodes*. This is perhaps a coincidence, but it may also reflect the enduring precedential influence of *Rhodes* that the Court did not accept the prisoners' argument for reducing overcrowding altogether. However, the record established that for most of the period in contestation, California had operated at more than 200% of design capacity—and in various prisons closer to 300%.[135] While the Supreme Court could treat some level of double celling as unlikely to undermine the basic decency of the correctional regime in *Rhodes*, the total uniformity of double and triple celling, as well as the "bad beds," placed California in a different place. The Court in *Plata* seemed to signal just this

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[133] 18 U.S.C. § 3626 (a)(2)(B) (2012).

[134] Coleman v. Schwarzenegger, Nos. CIV S-90-0520 LKK JFM P, C01-1351 THE, 2010 WL 99000, at *1 (E.D. Cal. & N.D. Cal. Jan. 12, 2010).

[135] *Brown*, 131 S. Ct. at 1924, 1934.

in appending three photographs to the majority opinion, two of them depicting the "bad bed" sections.

The second major difference is the super-salience of mental illness as well as other chronic physical illnesses and disabilities. While there was evidence in the *Rhodes* record that more prisoners were entering SOCF with serious mental illnesses[136] the *Plata* case reflected a record built up over some twenty years of litigation on mental health,[137] and nearly fifteen on medical care.[138] The characterization of the prison population as severely disease-burdened[139] and the continuing independent court findings on the failure of California to provide adequate medical care[140] changed the nature of the overcrowding conversation. Overcrowding in these conditions, with this level of disease burden, truly risks tortuous suffering and the ever-present risk of the same. The new overcrowding, with its chronically ill prisoner population, creates what I have called "torture on the installment plan,"[141] which blurs the line between discomfort and torture—what may be discomfort to a healthy prisoner becomes torture to an unhealthy one.[142]

The *Rhodes* opinion went out of its way to minimize talk of human dignity and humanity under the Eighth Amendment;[143] the *Plata* opinion amplified them, noting that prisoners have a right to "human dignity" that survives their imprisonment and which prisons must respect.[144] If, as Justice Kennedy stated in *Plata*, "dignity animates the Eighth

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[136] *See* Chapman v. Rhodes, 434 F. Supp. 1007, 1017 (S.D. Ohio 1977), *aff'd*, 624 F.2d 1099 (6th Cir. 1980), *rev'd*, 452 U.S. 337 (1981) ("[A] substantial number of the inmates are victims of some form of mental disorder. One expert testified that in a maximum security prison of any size some 15% of the inmates may be expected to be schizophrenic.").

[137] *See Brown*, 131 S. Ct. at 1926 (outlining *Coleman v. Brown*, which commenced in the 1990s and involved a class of seriously mentally ill California prisoners).

[138] *See id.* at 1926–27 (outlining *Plata v. Brown*, which commenced in 2001 and involved a class of state prisoners with serious medical conditions).

[139] *See id.* at 1927 (citing a report that found overcrowding to increase the incidence of infectious disease in a California prison); *id.* at 1933 ("A medical expert described living quarters . . . where large numbers of prisoners may share just a few toilets and showers, as 'breeding grounds for disease.'"); *id.* at 1933 n.7 (recounting the testimony of corrections officials who described outbreaks of disease, including one who described widespread staph infections among prisoners, recalling that they were "bleeding, oozing with pus that is soaking through their clothes when they come in to get the wound covered and treated").

[140] *Id.* at 1922 ("This case arises from serious constitutional violations in California's prison system. The violations have persisted for years. They remain uncorrected.").

[141] SIMON, *supra* note 14.

[142] *Id.*

[143] *See* Rhodes v. Chapman, 452 U.S. 337, 346–47 (1981) (discussing Eighth Amendment analysis, noting that it prohibits punishments which "involve the unnecessary and wanton infliction of pain," but failing to mention human dignity or humanity in its analysis).

[144] *See* Brown v. Plata, 131 S. Ct. 1910, 1928 (2011) ("Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment").

Amendment,"[145] it is possible that overcrowding violates the Eighth Amendment whenever it subjects the prisoner to experiences that ordinary members of the non-imprisoned society would experience as a serious insult to their humanity. This includes being forced to urinate and defecate in the direct visual and audible presence of others, being denied access to visits and educational opportunities in prison during prolonged lockdowns, or being deprived of decent facilities to clean one's self.

B. *Democracy and Distrust*

Even if *Plata* broke no new Eighth Amendment grounds, its contrast with *Rhodes* in its approach to deference to state elected and appointed officials is noteworthy.[146] *Rhodes* went out of its way to instruct trial judges not to "assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system."[147] Below, the three-judge trial court explicitly recognized the pathological politics of mass incarceration as relevant to their decision to order that the state produce a population-reduction plan:

> Tough-on-crime politics have increased the population of California's prisons dramatically while making necessary reforms impossible. As a result the state's prisons have become places "of extreme peril to the safety of persons" they house, while contributing little to the safety of California residents.[148]

While the Supreme Court did not repeat this observation, the majority was quick to dismiss the state's argument that they should be trusted to resolve the problem. They cited the state of emergency declared by the then-sitting governor,[149] as well as the findings of a state commission that overcrowding was an extreme danger,[150] as indicators that the state did not

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[145] *Id.*

[146] *Compare id.* at 1928 ("Courts must be sensitive to . . . the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals."), *with Rhodes*, 452 U.S. at 361–62 (Brennan, J., concurring) ("[T]his Court and the lower courts have been especially deferential to prison authorities . . . . Courts must and do recognize the primacy of legislative and executive authorities in the administration of prisons; however, if the prison authorities do not conform to constitutional minima, the courts are under an obligation to take steps to remedy the violations.").

[147] *Rhodes*, 452 U.S. at 352.

[148] Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 887 (E.D. Cal. 2009) (citations omitted).

[149] *See Brown*, 131 S. Ct. at 1924 ("In 2006, then-Governor Schwarzenegger declared a state of emergency in the prisons, as 'immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding.'").

[150] *Id.*

have the situation under control and was unable to act effectively without judicial intervention.[151]

VI. CONCLUSION: A SINGLE CELL RULE IN THE EIGHTH AMENDMENT

In *Bell v. Wolfish*, the Supreme Court noted that there was no "one man, one cell" principle "lurking" in the Due Process Clause of the Fifth Amendment,[152] and in *Rhodes v. Chapman*, the Court pointedly refused to recognize a constitutional right to comfortable prisons.[153] If overcrowding was too diffuse a harm to receive constitutional protection under the (perhaps already imaginary) conditions of late penal welfarism in SOCF, then the new overcrowding, with its permanence, its hypertrophic status, and its operation within a prison estate built without concerns for rehabilitation and filled with a disease-burdened prison population proved to be a different circumstance. The line between discomfort and torture simply cannot be drawn under such conditions.

There are many sound public policy arguments to support this, as there were in 1981 when the Supreme Court rejected the views of the Department of Justice and the American Correctional Association.[154] Today, we know much more about the perverse consequences of degrading conditions on future compliance with the law.[155] The new overcrowding assures that degrading treatment is a routine feature of imprisonment in America, a factor that may explain why our recidivism rates are roughly twice what they were in the 1970s.[156] But even if policymakers should continue to believe that crude incapacitation is the best value they can obtain from prisons, they must still operate them in a way that preserves essential human dignity. A fair and balanced look at the evidence today about what prison life is like in the warehouse prisons of mass

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[151] *See id.* at 1923 (noting that although the conditions of California prisons have "fallen short of minimum constitutional requirements" for years, judicial intervention was appropriate because no remedy had proven sufficient).

[152] Bell v. Wolfish, 441 U.S. 520, 542 (1979).

[153] Rhodes v. Chapman, 452 U.S. 337, 349 (1981).

[154] *See id.* at 356 (Brennan, J., concurring) (noting that the Justice Department, among other authorities, recommended sixty square feet of space per prisoner as the minimal acceptable standard); *id.* at 343 n.7 (majority opinion) (noting that the trial court accepted contemporary studies regarding living quarters space in correctional institutions, including one by the American Correctional Association that recommended a minimum of sixty square feet).

[155] *See, e.g.*, TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 14 (2002) ("[D]eference develops . . . when people are treated fairly by legal authorities, and people's willingness to consent and cooperate with legal authorities is rooted in their judgments about the degree to which those authorities are using fair procedures.").

[156] U.S. DEP'T OF JUSTICE, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984 (1996), http://www.bjs.gov/content/pub/pdf/hcsus5084.pdf [https://perma.cc/J7J8-NGLQ]; *Reentry Trends in the U.S.*, BUREAU JUST. STAT., http://www.bjs.gov/content/reentry/recidivism.cfm [https://perma.cc/VJ5B-URYN].

incarceration suggests that conserving dignity requires a room of one's own.