STRATEGIES, VALUES, AND THE EMERGING GENERATION OF ALTERNATIVES TO INCARCERATION

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This article argues that a new generation of alternatives to incarceration is emerging, and that this development presents important value questions which need to be confronted and resolved. The article seeks to identify dangers associated with recent reforms and to help initiate a search for values to guide the development of future programs. The first half of the article identifies major factors that have prompted recent changes in alternative programs, emphasizing the evidence that expansion of nonprison penalties historically has resulted in an increase in social control without a reduction in imprisonment. This part of the article also reviews shortcomings of earlier efforts to promote alternatives and then describes recent changes in strategy and in program features.

The last half of the article addresses some of the issues that are raised by the review of recent reforms. It considers the trend among reformers toward emphasizing pragmatic considerations in advocating and designing new programs. While increased strategic sophistication is needed, this part of the article focuses on hazards associated with current strategies. The arguments and tactics being employed present both the risk of generating a new set of objectionable programs and the risk of perpetuating the attitudes and expectations that remain the greatest obstacles to reduction of imprisonment. Thus, in the long run, current strategies may yield little impact on incarceration and may even result in expansion of the overall level of criminal justice intervention.

I

CHANGING STRATEGIES IN PROMOTING ALTERNATIVES TO INCARCERATION

The late 1960's brought new calls for reforms in the development of alternatives to incarceration. Although advocacy of noninstitutional pro-

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grams and penalties had been commonplace since the turn of the century, these new calls for reforms reflected a change in focus on the part of reformers.

In the period from 1900 to 1965 (the period that Rothman has characterized as the Progressive era)[1], the use of probation and parole increased dramatically; however, this increase reflected a desire to individualize treatment. Reformers viewed probation and parole as suitable alternatives to incarceration only when the rehabilitative needs in an individual case did not require confinement. Even in the face of a series of revelations of brutality, wretched conditions, and corruption within the prisons of the time, Progressive-era reformers maintained that rehabilitation could be accomplished through confinement. Reformers sought to improve prison conditions—classification, programs, facilities, and personnel—as the remedy for the evils that were revealed.[2]

The period after 1965 (which Rothman has labeled post-Progressive)[3] has been characterized by growing disillusionment with the results of prison reform efforts and spreading disenchantment with the idea that rehabilitation can be achieved through imprisonment.[4] While many virtues have been ascribed to alternatives to incarceration or community-based sentencing alternatives, the pervasive use of the word "alternatives" reflects the driving force of post-Progressive reformers—a desire to reduce the use of imprisonment. Progressive-era reformers saw problems with prisons and tried to

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a paper which, while still unfinished, led me to consider the issues addressed here. I also would like to express my appreciation to Alan T. Harland, Chair and Associate Professor, Department of Criminal Justice, Temple University, for helping me explore the ideas and values discussed. Responsibility for what has made it to paper here, however, must rest with me.

1. D. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 12 (1980).

2. *Id.* at 117-58.

3. *Id.* at 12.

4. As the National Advisory Commission on Criminal Justice Standards and Goals put it:

> [T]he failure of major institutions to reduce crime is incontestable. Recidivism rates are notoriously high. Institutions do succeed in punishing, but they do not deter. They protect the community, but that protection is only temporary. They relieve the community of responsibility by removing the offender, but they make successful reintegration into the community unlikely. They change the committed offender, but the change is more likely to be negative than positive.
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> It is no surprise that institutions have not been successful in reducing crime. The mystery is that they have not contributed even more to increasing crime. Correctional history has demonstrated clearly that tinkering with the system by changing specific program areas without attention to the larger problems can achieve only incidental and haphazard improvement.

NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 1-2 (1973) [hereinafter cited as CORRECTIONS].

improve them; reformers of the post-Progressive era see prisons as the problem and try to find alternatives to them.[5]

The report, *Corrections,* issued in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals,[6] stimulated reform efforts based on the assumption that expansion of alternative programs would lead almost automatically to a reduction in imprisonment. The Commission's prescriptions for reform contrasted the desirability of community programs with the undesirability of confinement:

> The prison, the reformatory, and the jail have achieved only a shocking record of failure. There is overwhelming evidence that these institutions create crime rather than prevent it. . . .
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> . . . In view of the bankruptcy of penal institutions, it would be a grave mistake to continue to provide new settings for the traditional approach in corrections. The penitentiary idea must succumb to a new concept: community corrections. Therefore, the Commission recommends a 10-year moratorium on construction of institutions. . . . The moratorium period should be used for planning to utilize noninstitutional means. This planning must place maximum emphasis on expansion of community correctional programs and development of alternatives to incarceration.
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> At the same time, every effort must be made to phase out existing mega-institutions at the earliest possible time. To do so will require a large and immediate increase in use of alternatives to incarceration. . . .[7]

The main focus of the *Corrections* report, including its most scathing attacks, was directed at institutions. However, the report also argued that, at least in its current state, the entire criminal justice system was so counterproductive that any alternative that diverted offenders out of the system was desirable;[8] moreover, the earlier in the process diversion occurred, the greater the advantages.[9] The creation of a range of alternative dispositions was regarded both as a means of providing substitutes for imprisonment and

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5. The prison poses grave problems as both a physical entity and as an ideological symbol: "We are saddled with the physical remains of last century's prisons and with an ideological legacy that has implicitly accepted the objectives of isolation, control, and punishment. . . ." CORRECTIONS, *supra* note 4, at 2. *See generally* M. SHERMAN & G. HAWKINS, IMPRISONMENT IN AMERICA: CHOOSING THE FUTURE (1981) [hereinafter cited as SHERMAN].

6. CORRECTIONS, *supra* note 4.

7. *Id.* at 597.

8. *Id.* at 74.

9. *Id.* at 76.

as a vehicle for facilitating an overall reduction of intervention by the criminal justice system in offenders' lives.[10]

In its final chapter on priorities and implementation strategies, the *Corrections* report provided this formula for change: "The blueprint for corrections must read: more alternatives, more programs, more professionals to conduct these programs, and more public involvement in the processes of corrections."[11] This rallying cry was adopted by reformers across the country. Increased federal funds aided reformers in their drive to implement new programs. Many citizens became involved in the correctional process as advocates, volunteers, advisory board members, and supervisors of offenders who were studying or working in the community.

There is a growing sense, however, that development of these non-institutional programs has not served their underlying goals. Numerous programs continue to claim that they divert offenders from the criminal justice system, or, at least, minimize offenders' penetration into the system. Unfortunately, this does not seem to be the case.[12] As Austin and Krisberg's review of a growing body of evidence indicates, alternative programs have in fact created:

1. *Wider Nets:* Reforms have increased the proportion of persons whose behavior is regulated by the state.
2. *Stronger Nets:* Reforms have strengthened the state's ability to control citizens by increasing its powers to intervene in their lives.
3. *Different Nets:* Reforms have transferred jurisdictional authority from one agency to another or created an entirely new control system.[13]

Other reviews of a variety of alternative programs have come to similar conclusions. In the working paper, *A Guide to Restitution Programming,* it was reported that "[i]n almost every restitution program studied to date, restitution has been used in an add-on fashion, even where the original

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10. After arguing that the great powers inherent in crime control and correctional methods should be applied with much greater selectivity and restraint, the Commission concluded that,

> every effort should be made to keep juveniles and adults out of the justice system. Secondly, every effort should be made to minimize a juvenile's or an adult offender's penetration into the correctional system . . . . At each critical step, efforts should be made to exhaust and select the less rejecting, less stigmatizing recourses before taking the next expulsive step.

Id. at 76-77.

11. *Id.* at 597.

12. Austin & Krisberg, *The Unmet Promise of Alternatives to Incarceration,* 28 CRIME & DELINQ. 374, 377 (1982).

13. *Id.*

program objectives included reducing the intrusiveness of the system."[14] A review of forty-three post-1975 studies on restitution and community service revealed that "one of the most consistently reported findings in the body of evaluation work is that restitution [and community service] projects and programs established for the purpose of diverting offenders from custodial confinement generally do not fulfill this mission."[15] Sherman and Hawkins compared the use of imprisonment, probation, and jail sentences in a number of states and concluded that states with relatively high per capita use of confinement also tend to have relatively high per capita use of probation. They suggest that some states may impose harsher penalties across the board than other states and that increased use of probation does not necessarily lead to reduction of confinement.[16]

The conclusions of studies such as these are incorporated into numerous contemporary writings which warn of the dangers of widening the net through general advocacy of alternatives. Not surprisingly, a growing body of literature attempts to analyze why faith in alternatives to incarceration, as a means of de-emphasizing imprisonment, was misplaced.[17]

A. Failures in the Push for Alternatives in the Seventies

There is a growing consensus that programs which were intended to serve offenders who otherwise would be incarcerated have generally failed to reach that population. This consensus has forced an examination of the factors that caused this failure. Recent assessment efforts, combined with the increasing need to alleviate prison and jail overcrowding, have led to some shifts in strategy.

Until recently, reformers mostly emphasized efforts to increase the range of dispositional options available to sentencers. They developed programs which allowed offenders to be sentenced to perform community

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14. A. HARLAND, M. WARREN & E. BROWN, A GUIDE TO RESTITUTION PROGRAMMING 56 (Working Paper No. 17, 1979) (published by the Criminal Justice Research Center).

15. J. HUDSON, B. GALAWAY & S. NOVACK, NATIONAL ASSESSMENT OF ADULT RESTITUTION PROGRAMS 57 (1980) (final report to the National Institute of Law Enforcement and Criminal Justice).

16. SHERMAN, *supra* note 5, at 44-45.

17. *See, e.g., id.;* D. ROTHMAN, *supra* note 1; J. IRWIN, PRISONS IN TURMOIL 153-80 (1980); S.D. Gottfredson & R.B. Taylor, The Correctional Crisis: Prison Population and Public Policy (undated) (available from the National Criminal Justice Reference Service); Byrne & Yanich, *The Ideology of Incarceration and the Cooptation of Correctional Reform,* in CRIMINAL CORRECTIONS: IDEALS AND REALITIES 15-30 (J. Doig ed. 1983); Doleschal, *The Dangers of Criminal Justice Reform,* 14 CRIM. JUST. ABSTRACTS 133-52 (1982); Austin & Krisberg, *Wider, Stronger, and Different Nets: The Dialectics of Criminal Justice Reform,* 18 J. RESEARCH CRIME & DELINQ. 165-96 (1981); J. BLACKMORE, THE MINNESOTA COMMUNITY CORRECTIONS ACT: A POLICY ANALYSIS (1982) (prepared for the National Institute of Corrections).

service, make financial restitution to victims, or reside in community residential centers. In addition, shifts were advocated in the ratios of offenders processed into various dispositions; for example, reformers argued that a larger proportion of offenders should be placed on probation. Several major difficulties associated with such efforts appear to have contributed to their lack of success.

1. Mixed, Fuzzy, or Counter-Productive Goals and Target Populations

Few of the early post-Progressive alternative sentencing programs were created with the overriding explicit goal of providing a direct substitute for incarceration. While some programs were billed as alternatives to incarceration, most programs were promoted either simply as alternatives or as a way to increase the sentencing options available to judges. Some programs professed not to have explicit goals; program staff simply announced the creation of programs and waited to see who would be sent to participate in them. Other sentencing options were developed in response to more specific concerns, for example, to provide an alternative for traffic offenders who were unable to pay fines or to respond to the need of a volunteer bureau for unpaid labor.[18]

Many programs were designed to reach groups of offenders who were not likely to be incarcerated. For example, many programs utilized eligibility criteria (e.g., misdemeanants; persons convicted of first property offense) or exclusions (e.g., no history of alcohol or drug use; no prior record) which almost guaranteed that they would not reach a prison-bound population. Much of the literature on alternative programs focused on their applicability to categories of offenders for whom incarceration seems wrong as a matter of principle (e.g., mentally ill and retarded persons, children, and marijuana users). Alternative programs were described as useful for everyone from elderly first-time shoplifters and under-age beer drinkers to white-collar offenders who are "not really criminals." Many program initiators adopted a trickle-up approach, starting their programs with minor offenders in order to avoid opposition and establish credibility, with the hope that they would eventually reach offenders involved in more serious offenses.

In trying to convince decision-makers to employ new programs, reformers often argued that their program was significantly different from and more effective than conventional nonincarcerative dispositions. It was easier to convince judges that a new program was more effective than the standard array of nonconfinement options than to persuade them that the program could satisfy the interests traditionally met by confinement. Thus, to the extent that shifts in dispositional choices occurred, they generally

18. *See, e.g.*, M.K. HARRIS, COMMUNITY SERVICE BY OFFENDERS 6 (1979) (prepared for the National Institute of Corrections).

resulted in greater levels of intervention in the lives of lesser offenders. There was little success in redefining the group of offenders for whom incarceration was deemed appropriate.

Although the designers, operators, and users of these earlier alternative programs may have had noble intentions, a side effect of their efforts was a diminished potential for alternative programs to serve as true alternatives to incarceration. While it may be beneficial for first-time misdemeanor or traffic offenders to participate in alternative programs, such programs are unlikely to also be regarded as appropriate for felony offenders who would otherwise go to state prison.

2. *Lack of Confidence in Alternative Programs and an Increasingly Harsh Climate*

The common perception that alternative programs involve little more than a slap on the wrist has hindered the application of these programs to prison-bound offenders. The populations of most of the earlier alternative programs were deemed to be low-risk, nonserious offenders; consequently, extensive monitoring and enforcement efforts seemed both unnecessary and unjustified. Thus, experience with these programs reinforced the ideas that alternatives cannot impose significant enough penalties or provide appropriate supervision for serious offenders. Also, alternatives were often promoted as being primarily rehabilitative, thus increasing the perception that these programs coddled and gave breaks to criminals.

At the same time, the heavy rhetorical emphasis on the need to develop alternatives to incarceration led to an impression that alternative programs served primarily otherwise prison-bound offenders. Despite the fact that most program participants never faced a high probability of imprisonment, it is common to hear assertions that any offender who could possibly be kept in the community is placed in an alternative program.

The above considerations have fueled the currently prevalent view that alternatives have been tried and that these do-gooder approaches did not alleviate our crime problem. A conclusion is drawn that the only way to combat crime is to crack down and start sending more offenders to prison for longer terms.

3. *Insufficient Attention to Political and Professional Interests*

Many reformers have come to share Sherman and Hawkins' view that "[t]he failure of the prisons' critics has been their assumption that general pronouncements about alternatives will affect practice."[19] Many reformers

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19. SHERMAN, *supra* note 5, at 108.

believed that the existence of more sentencing alternatives would result in those alternatives being widely used in a manner consistent with the reformers' intentions. Simply providing decision-makers with more options, however, meant that decisions about how the programs would be used were left to various officials who did not necessarily seek the same goals.

A large number of individuals play a role in making dispositional decisions. Legislators, sentencing judges, and parole board members generally have the most impact. However, important decisions can also be made by prosecutors, defense attorneys, juries, probation officers, psychiatrists and other behavioral scientists, and correctional administrators. Unfortunately, reformers have not spent much time developing incentives for the various decision-makers to employ alternatives to incarceration. General pronouncements by reformers will generally have little influence, partly because the benefits of nonincarcerative sentences are widely regarded as falling mainly on offenders—a notoriously politically powerless group—and partially because the decision-makers must bear the heat when decisions result in new crimes and headlines.

It is not necessary to ascribe conscious resistance to decision-makers in explaining their failure to utilize alternatives as reformers had envisioned. Bureaucratic inertia is undoubtedly a major force. Many officials in the criminal justice system go about their activities paying little attention to innovations that come and go. Efforts of reformers not familiar with common patterns and practices of specific criminal justice systems stand little chance of achieving their desired result. For example, a recent study of felony cases in a number of cities found that guilty pleas made up the majority of the dispositions and almost all of the convictions.[20] Thus, efforts to institute alternative sentencing programs that did not consider the roles played by prosecutors and other key actors were bound to be ineffective.[21]

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20. K. BROSI, A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING 35 (1979).

21. The Vera Institute of Justice in New York emphasizes the importance of these considerations:

> The Criminal Court caseload tends to consist of a few frequently recurring offense types—what David Sudnow refers to as "normal crimes." Prosecutors and defense attorneys seem to learn the types of dispositions that the other side expects in these routine cases. One gets a sense that, over time, precedents get established that suggest what disposition will be viewed as an acceptable outcome of plea negotiation for each type of incident. These norms are what Arthur Rosett and Donald Cressey have termed "going rates." To the extent that plea negotiations take place within such a framework, efforts to introduce a new disposition as an alternative to jail will face substantial difficulties until the parties mutually identify it as appropriate for cases where the going rate has been jail. And this necessary adjustment to the set of "going rates" must be worked out over time, in individual cases, no matter how vigorously any one policy-maker or program may argue for the principle that the new disposition ought to substitute for short jail terms.

B. Shifts in Strategy Prompted by Earlier Failures: The New Generation of Alternatives

As awareness of the shortcomings of the reform efforts of the sixties and seventies has grown, shifts in strategies and changes in programs have begun to occur. The reform efforts of the eighties reflect new attention to the justification, definition, and implementation of alternatives to incarceration. Many of the emerging trends are direct responses to problems with earlier efforts. Most notably, reducing prison populations has become a much more explicit goal around which most strategic considerations focus. Reformers are devoting careful attention to identifying and reaching offenders who would otherwise be incarcerated. New approaches which attempt to influence the behavior of dispositional decision-makers are being devised. Reformers are more closely examining the role discretion plays in decision-makers' determinations, the way the criminal justice system operates, and the merits of intervening at different points in the system.

1. New Attention to Influencing Dispositional Decisions

Reformers have devised a variety of approaches designed to influence dispositional decisions. Approaches designed to reduce the number of offenders sentenced to penal institutions, front-door options, include the following:

1. Providing better advocacy for the use of alternative programs (e.g., contracting for individualized sentencing proposals; improving defense services; modifying presentence recommendation practices).
2. Modifying existing programs to enhance credibility (e.g., intensifying probation supervision).
3. Broadening input into sentencing decisions (e.g., creating community-review boards or instituting case review by community-corrections program personnel).
4. Providing incentives or disincentives (e.g., subsidizing development of noncustodial options and penalizing certain custodial sentences).
5. Developing new policies or guidelines (e.g., adopting statewide sentencing or parole guidelines).
6. Prohibiting or mandating (e.g., closing the front door by court order; mandating commitment quotas; overturning sentences).

Recent efforts to reduce the use of incarceration also include a number of approaches designed to reduce the length of stay in institutions. These back-door options include the following:

1. Modifying individual sentences or sentencing structures (e.g., using shock probation, revise-and-revoke authority, or author-

ity to resentence to alternative sanctions after some portion of the sentence has been served; revising the penal code; abolishing parole and adopting new policy on sentence length).

2. Expanding the placement authority of department of corrections (e.g., screening at intake for community placement; transferring custody to mental health or medical programs; increasing furloughs, work or study releases, and halfway house and group home commitments).
3. Modifying parole or other early release provisions (e.g., adopting presumptive release on first eligibility, shock parole, or parole guidelines; granting emergency authority to release prior to first eligibility; revising good-time policy).
4. Expanding executive clemency (e.g., granting special commutations; revising pardon policy or criteria).
5. Adopting population caps and emergency-release mechanisms.

The most recently developed reform strategies also reflect the growing use of measures that blur the distinction between front- and back-door options. For example, offenders who have been sentenced to prison, slated for probation revocation, or begun to serve time are instead targeted for placement in alternative programs.[22]

VERA INSTITUTE OF JUSTICE, THE NEW YORK COMMUNITY SERVICE SENTENCING PROJECT: DEVELOPMENT OF THE BRONX PILOT PROJECT 9 n.3 (1981) (footnote omitted).

22. A distinction can be made between alternative programs designed to reduce imprisonment and other population reduction techniques that are not tied to any specific alternative program. Many reformers have begun to focus less on programs designed as alternatives to incarceration and more on regulating prison use directly.

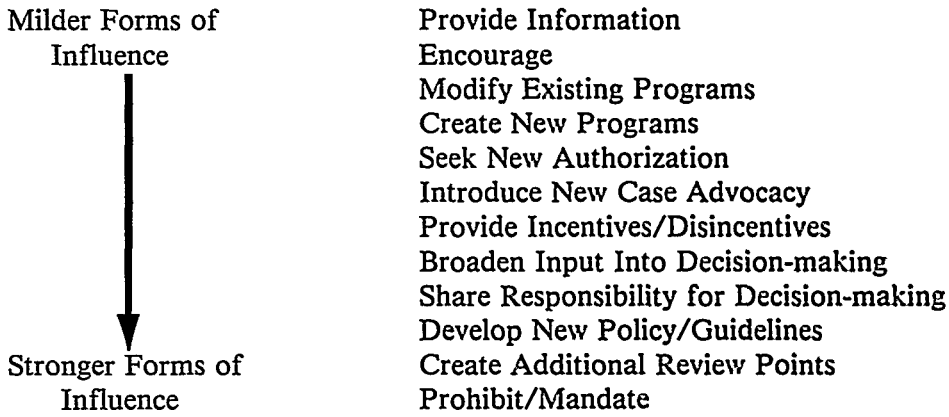
A number of new projects have developed a comprehensive policy analysis process designed to involve decision-makers in a systems-change approach to reducing overcrowding. In addition, significant changes in law, policy, procedures, or case processing have begun to affect prison and jail population levels. For example, some states have altered their sentencing policy and/or adopted prison population limits with procedures that reduce prison populations when the limits are exceeded.

The Minnesota Sentencing Guidelines offer a striking example of this approach. The Minnesota Sentencing Guidelines Commission (MSGC) linked the development of sentencing policy to available correctional resources. The Commission decided that its decisions should not force the legislature to appropriate funds for new facilities. At the same time the Commission wanted to avoid a situation where offenders would be sent to overcrowded prisons or where pressures of overcrowding would cause the sentencing guidelines to be diluted or nullified. Thus, MSGC focused on how to best use existing facilities provided by the legislature. This resulted in the adoption of a population cap which constrained sentencing policy. Interestingly enough, this served to facilitate resolution of divergent views among Commission members because it forced them to choose which offenders it was most important to imprison. *See* MINNESOTA SENTENCING GUIDELINES COMMISSION, PRELIMINARY REPORT ON THE DEVELOPMENT AND IMPACT OF THE MINNESOTA SENTENCING GUIDELINES (1982); *see also* von Hirsch, *Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Sentencing Guidelines Commission,* 5 HAMLINE L. REV. 176-80 (1982). Von Hirsch notes that the Commission did not make a normative judgment about how much the

As Figure 1 illustrates, the various approaches being used to influence dispositional decisions in the criminal justice process can be conceptualized along a continuum that ranges from mild, indirect influence to strong, direct influence or control.

Figure 1

Approaches for Influencing Use of Alternatives to Incarceration



The approaches listed above do not exhaust the possible methods of influencing or controlling dispositional decisions. Moreover, reformers differ on where a given method falls along the continuum. The important point is that reformers are increasingly aware of the range of approaches that can be employed to increase the use of alternative programs.

Traditional efforts to promote the use of alternatives to incarceration tended to focus on the milder, less direct methods on the continuum. Typical approaches included providing information to decision-makers, advocating greater use of alternatives, modifying existing programs or creating new ones, and modifying laws to give decision-makers a greater range of sentencing options. However, as reformers recognized the general ineffec-

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state ought to rely on incarceration apart from a consideration of existing resources. *Id.* at 179.

Other states have adopted prison population ceilings that depend upon increased use of parole when the ceilings are reached. *See* R. MATHIAS & D. STEELMAN, CONTROLLING PRISON POPULATIONS: AN ASSESSMENT OF CURRENT MECHANISMS (Working Paper No. 7, June 1983) (published by the Prison Overcrowding Project) [hereinafter cited as MATHIAS].

tiveness of those indirect means, they began to advocate adoption of the more direct approaches on the continuum.

The emerging new pattern of program development reflects a conscious effort by reformers to define and shape alternative programs to enhance their acceptance and use for prison-bound populations. One strategy that reformers are employing to enhance the credibility and increase the acceptance of alternative programs as replacements for confinement is to adopt more stringent and more numerous sanctions. A wide variety of conditions, requirements, penalties, monitoring or control mechanisms, and services can potentially be adopted as elements of nonincarcerative programs. In earlier reform efforts, a single element often served as the sanction that was to replace incarceration. However, the most recent program definition, undertaken to achieve a more predictable and extensive impact on imprisonment, has adopted multiple elements. Traditional programs, such as probation, are being modified and expanded to obtain greater control over the participants in the program.

An appreciation of the differences between older reform efforts and more recent alternatives to incarceration requires an understanding of the new approaches used to influence dispositional and placement decisions as well as the changes in the nature of the programs themselves. Although describing all of the emerging approaches is beyond the scope of this paper, I will provide a few examples of recently developed alternative programs in order to clarify the features outlined above.

2. Program Features of the New Generation of Alternatives

Several jurisdictions are attempting to reduce incarceration by employing defendant-oriented advocates to develop individualized plans for offenders that judges will consider at the sentencing hearing. The nonprofit National Center on Institutions and Alternatives, for example, operates a Client Specific Planning (CSP) program that focuses on serious offenders.[23] The Center only develops alternative dispositions for an offender when the offender's defense attorney assures them that incarceration is likely unless the judge can be persuaded that the CSP plan is a suitable alternative. The program tries to help judges and prosecutors justify the alternative sentence by including in each plan specific controls on the defendant, paybacks, and treatment services, and by requiring endorsement of the plan by at least six people.

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23. Miller & Hoelter, *There Are Alternatives,* in UPDATE ON LAW-RELATED EDUCATION 11-13, 64 (Fall 1982) (published by the American Bar Association). Approximately 95% of their work has been with felons, 40% of whom have committed violent offenses. *Id.* at 64.

The overriding goal of each plan is to avoid or minimize incarceration by establishing conditions for accountability, supervision, personal responsibility, and remorse.[24] Each plan specifies the individuals who will work with the offender, the programs that the offender will participate in, and the frequency and duration of the plan's conditions. Examples of controls employed in CSP plans include probation supervision, third-party monitoring, and placement in a work-release center or halfway house. Paybacks consist of financial restitution to victims, unpaid community service, and payments to the court or to substitute victims, such as a gamblers' assistance center. Treatment elements might include psychological counseling or therapy, job placement, and participation in a gambling, drug, or alcohol assistance program. Other special conditions may be employed, such as a prohibition on contacts with victims or a requirement to read and report on a book dealing with battered women.

To increase the likelihood of reaching a prison-bound population, some programs only accept participants who have been sentenced to a state prison. Many programs also provide localities with state funding incentives to retain offenders.[25] For example, the Incarceration Diversion Unit of the Lucas County, Ohio, Adult Probation Department was formed with state funds in 1978, as "a formal, structured program to divert offenders that have been sentenced to a term in a penal institution."[26] Program screening

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24. *Id.*

25. *See* COUNCIL OF STATE GOVERNMENTS, STATE SUBSIDIES TO LOCAL CORRECTIONS: A SUMMARY OF PROGRAMS (1977); COUNCIL OF STATE GOVERNMENTS, STATE SUBSIDIES TO LOCAL CORRECTIONS (1977). These two pamphlets outline the scope, variety and forms of many of the state subsidies that have been made available to local corrections programs in recent years. Of particular interest here are the financial subsidies that are tied to performance, especially those that were designed to reduce population pressures on state facilities. In 1973, for example, the Minnesota Legislature adopted a comprehensive Community Corrections Act in an attempt to reduce the state's prison population. The Act gave counties a financial incentive to develop local correctional programs and a financial disincentive against committing nonserious adult offenders or juveniles to state institutions. The Act empowered the Commissioner of Corrections to grant subsidies to counties that developed local comprehensive correctional plans. In addition, counties under the Act were initially charged for the use of state institutions for nonserious adult offenders (defined as those whose commitment offense carried a statutory maximum of five years or less) and for all juveniles. This per diem "chargeback" encouraged counties to use their grants to develop programs that dealt with the targeted offenders at the local level and provided pressure on the counties to limit commitments. *Id.; see also* P. MCMANUS & L. BARCLAY, COMMUNITY CORRECTIONS ACT TECHNICAL ASSISTANCE MANUAL (undated) (published by the American Correctional Association).

26. E. Latessa, The Fourth Evaluation of the Lucas County Adult Probation Department's "Incarceration Diversion Unit" 2 (Aug. 1, 1982) (available from the Criminal Justice Program, University of Cincinnati). A fourth year evaluation concluded that the program diverted 196 offenders from prison through April 1982, which amounted to reducing state commitments from the county by 17.5%. *Id.* at 74. Comparison with a matched sample of regular probationers with similar demographic characteristics and problems showed that the

excludes offenders who qualified for regular probation, nonprobatable offenders, offenders who were transferred from another county, and extremely dangerous offenders.[27]

The Lucas County program combines reduced probation officer caseloads with intensive service provisions. Probation officers are assigned to a maximum of twenty-five cases. Officers are responsible for making four contacts with each client per month, for assessing the client's needs, and for negotiating a performance and service contract.[28] The contracts typically include provisions requiring vocational training, employment and educational services, budgeting and financial services, and individual and group counseling.[29]

The state of Virginia operates a Community Diversion Incentive (CDI) program that combines post-sentence diversion, increased input into dispositional decisions, individualized sentence planning, and financial subsidies to participating localities.[30] Adult offenders who have been sentenced to incarceration for committing nonviolent offenses can be referred by the sentencing judge to a local Community Corrections Resources Board (CCRB). The CCRB, which is appointed by local officials, reviews the presentence report and diagnostic evaluations.[31] It then may recommend a community-treatment plan which it develops with the offender. Then the judge can suspend the prison sentence and place the offender on probation under the plan's conditions. Elements commonly appearing in the plans include counseling, educational and vocational placement, job placement, alcohol and drug abuse counseling, unpaid community service, financial restitution, and residential care. The program added a residential placement option and expanded to include misdemeanants in 1982.[32]

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diversion group had significantly more prior involvement with the police, courts, and corrections, a finding that adds more weight to the belief that participants would have been incarcerated in the absence of the program. *Id.* at 20-24, 74.

27. *Id.* at 4.

28. *Id.* at 3, 11.

29. *See Id.* at 26.

30. Dept. Criminal Justice Services & Va. State Crime Comm'n, An Assesment of the Community Diversion Incentive Act (Dec. 6, 1982) [hereinafter cited as Community Diversion].

31. Following the initial intake interview, service providers under contract conduct evaluations, including psychological and psychiatric, vocational ability, educational, medical, and substance abuse evaluations. *Id.* at 14.

32. *Id.* at 15-17. An evaluation of the program completed after 21 months of operation concluded that 159 individuals from 10 sites had been diverted from institutional care. The evaluation compared the demographic characteristics and criminal histories of CDI clients, nonviolent probationers, and nonviolent new prison commitments to see if the intention of diverting offenders who would have been incarcerated rather than being placed on probation was being accomplished. It was concluded that overall, "CDI clients appear to be more similar to the new nonviolent commitments." *Id.* at 44-45.

Intensive Supervision Programs (ISPs) are being attached to probation or parole agencies in a number of jurisdictions to serve as an alternative for offenders otherwise likely to be incarcerated.[33] There are numerous alternative points in the criminal justice process at which candidates are considered for ISP participation. Programs in Georgia, New York, and Texas accept probationers who have been sentenced directly to intensive supervision, whose initial prison sentences have been modified, or against whom probation-revocation proceedings have been initiated.[34] ISPs in New Jersey and Wisconsin choose participants who are serving prison sentences. In New Jersey, offenders in certain categories can apply for resentencing to the ISP after they have spent between thirty and sixty days in prison.[35] Wisconsin's ISP accepts offenders meeting specific criteria who are then released ninety days prior to their established mandatory release dates.[36] The Washington program screens participants who are at a number of different stages in the criminal justice process.[37] Although program designers generally stress post-sentence selection in order to increase the likelihood that the ISPs' participants would otherwise be incarcerated, only New Jersey and Wisconsin do not allow judges to sentence offenders directly to their programs.[38]

Intensive Supervision Programs differ in the degree of supervision that they provide. Caseloads vary from twenty-five offenders supervised by a team of two probation officers (in Georgia) to a maximum of forty offenders supervised by a single officer (in Texas). Requirements for contacts between offenders and officers also vary—from five contacts a week (in Georgia) to a minimum of three contacts a month (in Texas).[39] In addition, all ISPs reviewed combine intensive probation supervision with a number of other sanctions and services, generally included, in part, to make the programs politically acceptable. The goals promised, the range of officials and citizens involved, the multiple elements included, and even the language in the programs' descriptions tend to be designed to attract support from all quarters.

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33. *See* C. Baird, Report on Intensive Supervision Programs in Probation and Parole (July 1983) (prepared for the Prison Overcrowding Project).

34. *Id.* at 21, 38-39, 48-54. The New York ISP, for example, was not targeted initially for otherwise-incarcerated offenders; it simply provided extra supervision for probationers identified as high risk. The part of the program now designed to work with offenders otherwise likely to go to prison was initiated after statistical analysis indicated that the regular probation ISP population was similar to a portion of the prison population. Now staff screen probation-eligible cases for those for whom incarceration has been recommended or is being considered, using criteria developed to flag likely program candidates. *Id.* at 50-51.

35. *Id.* at 57-61.

36. *Id.* at 57-59.

37. *Id.* at 21, 38.

38. *Id.* at 57-61.

39. *Id.* at 5, 17-20.

The program description for New Jersey's ISP clearly illustrates this.[40] The New Jersey program is designed to test whether an "intermediate form of punishment, one which would be less costly than prison, but much more onerous [and much more restrictive] than traditional probation, will achieve the criminal justice objective of deterrence—general and specific—as well as rehabilitation."[41] Based on the concept of social control within the community, the program promises "continuous monitoring to ensure that the applicant is meeting his goals and that his compliance with generally accepted standards of behavior is absolute" and that "[f]ailure[s] will result in immediate reincarceration."[42] "No backsliding will be permitted. Compliance must be complete and ongoing."[43] The program has been "carefully designed to present a realistic and tough-minded approach."[44] It will afford a limited number of incarcerated individuals "an opportunity to work their way back into the community under intensive supervision provided they present a plan which gives full assurance . . . that their return will result in a positive social adjustment and will not jeopardize the public's safety."[45] Yet the program will deal "positively and constructively with offenders."[46]

New Jersey's program is structured to provide input, participation and review to various interested persons. Eligibility and screening criteria are designed to pick participants who "will not be repugnant to public sensibilities, and for whom there is a reasonable probability of success."[47] Strong emphasis is placed on selecting participants who take affirmative action to enter the program and who evidence sincere motivation and commitment to carrying out its demands. Incarcerated offenders must apply for admission, develop detailed statements of personal needs and goals, and formulate specific plans to govern their activities in the community. Each applicant must also obtain a Community Sponsor "who will be responsible for the applicant's actions"[48] while in the program. The sponsor's responsibilities include monitoring compliance with curfews and other special conditions of the offender's plan, assisting the offender in obtaining community resources, and maintaining regular contact with the offender's probation officer.[49] The prisoner's plan must also identify additional community

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40. Admin. Office of the Courts, State of N.J., Intensive Supervision Program (May 5, 1983) [hereinafter cited as Intensive Supervision] (on file at N.Y.U. Review of Law & Social Change).
41. *Id.* at iii.
42. *Id.* at 1.
43. *Id.* at 4.
44. *Id.* at iii.
45. *Id.* at iv.
46. *Id.* at iii.
47. *Id.* at 1.
48. *Id.*
49. *Id.* at 20-21.

members who will assist the Community Sponsor. Members of this Network Team will help supervise the offender's community service work, monitor work attendance and habits, work with the offender during free time on weekend nights, and randomly call and visit the offender to check on curfew or home-detention status.[50]

An ISP Screening Board reviews all the material that is assembled on applicants and their plans. The material includes pre-sentence reports; court, institutional, and police records; statements solicited from the sentencing judge, prosecutor, victim/complainant, and local police; reports from Community Sponsors and Network Teams; a tape recording of the ISP officer's interview with the applicant; and the ISP officer's evaluation of the applicant, the plan, the Community Sponsor and the Network Team. The Screening Board verifies that the applicant is not disqualified for committing a violent offense or for receiving a parole ineligibility term. The Board also evaluates the applicant's sincerity, motivation, and ability to meet the obligations of the plan, assesses the probability of successful program completion, and "considers community expectations and reactions"[51] before recommending a participant for program entry.

A Resentencing Panel, created by an order of the Chief Justice of the Supreme Court of New Jersey and composed of three Superior Court judges, considers incarcerated offenders' motions for conditional release to enter the Intensive Supervision Program. The Panel also has the authority to resentence program participants who fail to fulfill satisfactorily the requirements of the program.[52] The Panel reviews the applicant's material, which is forwarded by the Screening Board. If the Panel determines that an applicant is eligible, it will grant the resentencing application but adjourn the hearing for a ninety-day trial period, place the applicant on recognizance to the Community Sponsor, and require adherence to the plan and specified conditions. After the trial period, the participant may reapply to the Panel for another ninety-day release period. If the Panel concludes that during the first trial period the offender remained "dedicated to his goals,"[53] it will continue his release pending resentencing for a second ninety-day trial period. Successful completion of this second trial period will trigger a resentencing hearing at which the offender is resentenced to the original term of incarceration, less time served, with the sentence suspended subject to continuing compliance with the plan and conditions of ISP. Continuation hearings to assess compliance occur every four months throughout the release period. Intensive supervision will continue for a minimum of one year up to the maximum term imposed or five years, whichever is less.[54]

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50. *Id.*
51. *Id.* at 5.
52. *Id.* at 8.
53. *Id.* at 6.
54. *Id.*

Finally, another significant feature of New Jersey's ISP is the number and extent of conditions that an offender must fulfill when placed in a community under intensive supervision. The minimum standards for offenders in the ISP include procuring full-time employment or vocational training, completing sixteen hours of community service per month, developing a weekly plan and maintaining a daily diary showing activities and accomplishments, and participating in weekend and evening group counseling or other activities scheduled by the ISP officer, including drug/alcohol counseling, psychological evaluations and treatment, urine monitoring, family counseling, and financial counseling. In addition to fulfilling these minimum standards and complying with any additional details of an individual's program plan, offenders will initially be required to be in residence every evening from 10:00 p.m. to 6:00 a.m. and may be subject to other periodic home detention periods.[55]

Delaware's Supervised Custody program provides an example of a back-door approach that involves increased input into decision-making and the creation of additional review points. In response to a 1977 federal court order, the Department of Corrections began utilizing a state law that authorized the Department to release prisoners "for necessary rehabilitative purposes."[56] Unfortunately, the increased number of releases, combined with a lack of control over the program's participants, produced a few sensational crimes. Rather than simply ending the practice of early release, staff from the Department of Corrections designed a new program and received legislative authorization for it.

The new program was initiated in 1980. Prisoners incarcerated in a state institution are eligible for consideration for supervised custody unless they fall into certain excluded categories (i.e., those convicted of class A felonies; those having mandatory minimum terms, detainers, or pending charges; those being held for bail default; and those who have assaulted staff or used force in an escape). Eligible offenders are ranked by a team of multidisciplinary corrections employees on the basis of such factors as conviction offense, time served, past record, and institutional adjustment. The resulting priority list then goes through three additional levels of review. The classification committee from the offender's institution, an Institutional Release Classification Board consisting of the superintendents from five institutions and three civilian members, and the Chief of the Bureau of Adult Corrections all must agree to a prisoner's release.[57]

Delaware's Supervised Custody program involves a multistage phased re-entry process from institutionalization to regular parole supervision or release. As space becomes available, approved prisoners are assigned to a

55. *Id.* at 28-31.
56. MATHIAS, *supra* note 22, at 10.
57. *Id.*

prerelease center where they spend a minimum of ten days attending work and instruction seminars. During this phase, program staff inform offenders of program requirements, check on families and employers, develop treatment arrangements, and conduct record checks for open charges or detainers.

During the second phase, prisoners are transferred to a work-release center where they engage in employment release and additional instruction. The names of participants are provided to the state police. A contract that includes a staff-approved host/sponsor and an employer is developed; it governs the offender's participation for the rest of the program. Staff make visits to the participant's home and employment site and help develop a second contract agreement between the prisoner and the host.

After spending at least two weeks in the work-release center, a prisoner is eligible for release to supervised custody. He or she will live with the approved host, follow curfew and other requirements, and return to the work-release center every seventy-two hours for interviews and for blood and urine tests. At any point during the program, prisoners can be removed and returned to the institution for disciplinary or attitudinal problems or for a failure to report as required. Successful participants are released from supervised custody when their sentences are completed or when they are paroled or pardoned.[58]

II

TAKING STOCK OF WHERE THE NEW GENERATION OF ALTERNATIVES MAY BE LEADING: THE DANGERS OF LETTING STRATEGIES OVERSHADOW VALUES

Rothman has cautioned that "those who would attempt to do good today have much to learn from the history of reform."[59] In exploring the Progressive-era reforms (probation, the indeterminate sentence, parole, the juvenile court, and the reformatory), Rothman questions why "reforms so often turn out to be in need of reform."[60] He argues that the reforms were successful because there was an alliance of "conscience" and "convenience"—the conscience being supplied by "benevolent and philanthropic-minded men and women"[61] and the convenience by administrators who derived practical, operational advantages from the innovations. While acknowledging that "[f]or reform proposals to find a constituency among administrators may well be a precondition for the success of any movement," Rothman argues that "this Progressive alliance undercut the aims of

58. *Id.*
59. D. ROTHMAN, *supra* note 1, at 9-10.
60. *Id.* at 5.
61. *Id.*

the original design. What remained was a hybrid, really a bastard version—one that fully satisfied the needs of those within the system but not the ambitions of reformers."[62]

Task forces and commissions on overcrowding are now meeting across the country. Reformers are forming alliances with administrators, public officials, and others who are seeking ways to cope with rapidly growing confined populations and the administrative, legal, and economic nightmares associated with overburdened systems.[63] While these alliances may be beneficial, reformers may outsmart themselves if they let attention to strategies overshadow attention to values.

Prisons and jails have almost uniformly been described as evil, brutalizing, soul-destroying places. Without rehearsing the string of horrors that virtually any examination of imprisonment in America produces, suffice it to say that many reformers share Federal District Judge James Doyle's widely quoted view as to the ultimate value of imprisonment:

> I am persuaded that the institution of prison probably must end. In many respects it is as intolerable within the United States as was the institution of slavery, equally brutalizing to all involved, equally toxic to the social system, equally subversive of the brotherhood of man, even more costly by some standards, and probably less rational.[64]

Today, however, reformers downplay or ignore arguments that set forth the evils of imprisonment and the value of decarceration because they believe that such arguments are either a waste of time or strategically unwise. They assert that it is unnecessary to focus on philosophical and moral objections to imprisonment when practical considerations by themselves demand a movement toward alternatives to incarceration. As one widely distributed booklet on overcrowding puts it,

> [p]rison overcrowding is not something we can build our way out of. We need billions of dollars just to house the current prison population under minimal standards of decency, and the funds are not available. Even if we could lay hold of the necessary money, it would take too long to build new prisons, and we cannot build them fast enough to keep up with the rapidly rising prisoner count. . . .[65]

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62. *Id.* at 7.

63. *See generally* J. MULLEN, AMERICAN PRISONS AND JAILS (1980).

64. Morales v. Schmidt, 340 F. Supp. 544, 548-49 (W.D. Wis. 1974), *rev'd*, 494 F.2d 85 (7th Cir. 1974); *see also* Harris & Dunbaugh, *Premise for a Sensible Sentencing Debate: Giving Up Imprisonment*, 7 HOFSTRA L. REV. 417 (1979).

65. K. KRAJIK & S. GETTINGER, OVERCROWDED TIME: WHY PRISONS ARE SO CROWDED AND WHAT CAN BE DONE 25 (1982).

These reformers believe that the public and political climate demands harsher treatment and longer sentences for offenders. They focus, therefore, on the pragmatic advantages of alternative programs because these are more likely to attract popular support. Veterans of earlier advocacy efforts have been sobered by the net-widening that resulted from focusing on the inherent desirability of reducing imprisonment or developing positive community-based alternatives. These reformers are modifying their approach and attempting to develop rationales and alternative penalties that will be accepted by a fearful public and by political hard-liners.[66]

While such concerns have obvious merit, it is time for reformers to take careful stock of the strategies they are employing, and to consider the effect of their tactics on the goals that the reformers hope to achieve ultimately. The remainder of the paper examines five specific dangers associated with reformers' current tactics.

First, by focusing on the need to alleviate prison crowding rather than on the desirability of reducing incarceration, reformers run the risk of being ill-prepared to counteract plans to dramatically expand confinement institutions. Second, by arguing that innovative nonprison penalties serve crime-control interests better than the conventional array of alternatives, the possibility arises that net-widening will reach ever greater dimensions as these tougher new sanctions are applied to offenders who were previously subject to less onerous sanctions. Third, by failing to articulate and promote their principles and values, reformers risk developing alternatives that are themselves objectionable. Fourth, while short-term diversion from incarceration may be achieved by basing alternative programs on the same values and assumptions that rationalize and justify imprisonment, the long-term result may be to further legitimize and perpetuate imprisonment. Fifth, there is a danger that short-range reforms based on promises of strong social control and the use of a wide range of methods for achieving such control

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66. The reluctance of reformers to advocate alternatives to incarceration on moral and ethical grounds reflects the impact of a common perception that no one is interested in the philosophical concerns motivating reformers and also the fear of supplying those who oppose alternatives to confinement with additional ammunition. As Rothman has noted, "[i]t is not unusual to support a program on the basis of the enemies it makes. . . ." D. ROTHMAN, *supra* note 1, at 114. In examining why Progressive reformers failed to back off and re-examine what was being done to probation and the other innovations they had supported, Rothman concluded that,

> the opponents who lined up against probation appeared so crude in their thinking that reformers thought it impossible to do anything except line up against them. When the alternative to probation seemed to be to lock up and throw away the key on all criminals, small wonder that men of good faith stuck to their innovation.

Id. Similarly, when the primary challenges to alternatives to incarceration have been that they are too lenient, too liberal, and too lackadaisical, the tendency of reformers to increasingly devote themselves to pragmatic concerns is understandable.

will, over the long run, be counterproductive to achieving an overall de-escalation in our punishment practices.

A. The Risk that Efforts Focused on Alleviating Crowding Cannot Stem Expansion of Prison Systems

For those of us who regard the social institution of imprisonment as a grave social problem[67]—even in its most uncrowded manifestations—it is dangerous to focus on the overcrowding problem and to ignore the underlying issues. The overcrowding crisis demands immediate concern and attention. However, the danger remains that officials will conclude that the political costs of adopting decarceration strategies outweigh the financial costs of increasing imprisonment. The prison system expansion that may result will obviously exacerbate the underlying problem.

This is not a purely theoretical risk. Despite the awesome economic costs associated with an attempt to build our way out of overcrowding, reports in early 1983 from fifty-three correctional systems in the United States and Canada indicated that only a handful of systems are not planning or engaging in the expansion of existing facilities or the building of new ones. Many systems are undertaking more than one major project.[68] State spending on construction and expansion has doubled or more than doubled every year of the past decade. It is estimated that 700 new prisons are in the works, with 100,000 new cells being added at the state level alone.[69] Temporary housing—i.e., modular units and tents, converted military facilities, mental hospitals, and other existing buildings—is being utilized to expand capacity until new facilities are completed.

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> It is very important that besides looking at the penal system as a means to solve problems, we should also have another perspective on the system. This other perspective means that *we have to look upon the penal system as a social problem in itself.* If it is true that the output of the system is evil, if the system's impact on the society is as big as I think it is; if the social costs of the system are spread so unevenly over the already existing injustices; then the penal system is a very important social problem. *It is a more important social problem than many of the social problems we are using the penal system to solve.*

K. MADIGAN & W. SULLIVAN, CRIME AND COMMUNITY IN BIBLICAL PERSPECTIVE 54 (1980).

68. CONTACT, INC., 8 CORRECTIONS COMPENDIUM 1, 7-11 (1983).

69. Philadelphia Inquirer, Oct. 14, 1982, at 1A, 28A-29A; *see* G. Funke, Who's Buried in Grant's Tomb?, Economics and Corrections for the Eighties and Beyond (undated) (published by the Institute for Economic and Policy Studies) (on file at N.Y.U. Review of Law and Social Change). Adding 100,000 new state prison cells could represent an estimated $70 billion commitment (in 1982 dollars) over 30 years, based on Funke's calculations that a new 500-bed institution will require outlays of $135 million for construction and $210 million for operation over such a period (100,000 cells divided into 200 institutions, each with 500 beds, at $350 million per institution).

Even where decision-makers are exploring and utilizing alternatives to incarceration, such measures are generally only being undertaken in addition to substantial expansion of prison capacities. Many alternatives are regarded as short-range expedients, to be employed only until new confinement capacity is available. Reformers who have promoted alternative programs by arguing that they are the only practical solution to prison overcrowding are finding themselves without an adequate foundation for resisting prison expansion policies when practical objections are overcome.[70]

B. The Risk of a New Round of Net-Widening and Strengthening

There are undeniable signs that at least some progress is now being made in using alternatives as a substitute for incarceration. However, empirical evidence showing that the new generation of alternatives has significantly reduced incarceration remains largely unavailable.[71] The pressures to widen the net should not be underestimated; few of even the most well-intended and carefully designed programs have proved successful in reducing, rather than expanding, social control. Even where evidence suggests that innovative programs have had some effect on incarceration, the potential for sustained impact is threatened by factors such as the complexity and expense of fulfilling program promises and the controversy and backlash that some of the programs have generated.

Even the most enthusiastic supporters of Minnesota's Community Corrections Act agree that the Act increased commitments to local jails, that offenders who remained in the community generally experienced greater levels of supervision and control, and that any impact on state incarceration was slight.[72] Virginia's Community Diversion Incentive Act shows early evidence of diverting some offenders from prison, but the numbers affected have been very small. Moreover, recent expansion of the program to misdemeanants and inclusion of the possibility of residential commitments raises the possibility that the emphasis of the program will shift from diverting those who face substantial state prison terms to dealing with lesser offenders in new ways. Intensive supervision programs in Georgia, Washington, Texas, and New York allow judges to sentence offenders directly to the programs, opening the possibility that intensive supervision will be applied

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70. At the risk of sounding like Gordon Liddy, it appears that the primary obstacle to reducing confinement may be the lack of will to do so. Even with a strong commitment, it would be extremely difficult to move away from our long-standing reliance on incarceration. As long as the prevailing sentiment seems to be that we need more rather than less imprisonment, there is little prospect that attention to overcrowding will result in substantial decarceration.

71. *But see supra* notes 26, 32.

72. *See* J. BLACKMORE, *supra* note 17.

to offenders who would otherwise receive less restrictive nonincarcerative penalties. Programs like New Jersey's Intensive Supervision Program promise to achieve so much and impose so many requirements on offenders that it remains unclear whether the program will be able to maintain its promises and also achieve a significant number of successful program completions. In short, reformers have not yet developed alternative programs that clearly avoid net-widening while maintaining an effective impact on incarceration.[73]

C. The Risk of Creating a New Generation of Objectionable Programs

While reformers' emphasis on the pragmatics of reducing imprisonment is both necessary and understandable, their failure to also articulate and promote values and philosophies to guide the development of alternatives may result in a range of objectionable new penalties. Focusing too exclusively upon the goal of reducing prison overcrowding results in prior philosophical questions and goals being downplayed or ignored; if they are raised at all it is only in response to challenges raised by the opponents of alternatives. To the extent that these objections are likely to be raised by the "protagonists for law and order and severe penal sanctions,"[74] the framework within which alternatives must be justified takes on the repressive, punitive, controlling attributes that are currently associated with imprisonment and criminal justice in general. As a result, reformers are reduced to a futile, but nonetheless damaging, effort to try to out-prison imprisonment by constructing alternatives that are equally painful, intimidating, and incapacitative. By engaging in this effort, reformers run the risk of creating a new generation of punishments that may indeed be better than prison but are nevertheless inconsistent with important goals and values.

While philosphical and normative issues are more theoretical (and hence, more conducive to controversy and divergent views) than pragmatic assessments, our history, jurisprudence and major philosophical traditions provide some widely accepted principles. While subject to varying interpre-

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73. A recent proposal to implement across-the-board reductions in the presumptive sentences in Minnesota's Sentencing Guidelines as a means of keeping the guidelines effective in avoiding prison overcrowding failed to win Commission approval. It is unclear whether other changes that would fulfill that objective will be adopted. Michigan's Prison Overcrowding Emergency Powers Act reportedly has been used to such an extent that correctional officials believe it is losing the potential to be effective on a continuing basis. Legal challenges to Illinois' early release program resulted in the program being so restricted that its power to alleviate crowding has been almost totally eliminated.

74. Christie notes that "[m]oralism within our areas has for some years been an attitude or even a term associated with protagonists for law and order and severe penal sanctions, while their opponents were seen as floating in a sort of value-free vacuum." N. CHRISTIE, LIMITS TO PAIN 10 (1982).

tations and imputations of weight, these principles can serve as a starting point in an assessment of the emerging generation of alternatives to incarceration. Included among the important and widely shared principles are the values of rationality, procedural regularity, equality, deference to liberty interests, and concern for humanity and decency.

Rationality requires approaches that are reasonably connected to the attainment of goals. Innovations should be principled, as opposed to random, arbitrary or irrational; this requires goals and policies (as well as decisions in individual cases) that are clear, explicit, and publicly known. Rationality also requires decisions based on reliable and valid information which advances the articulated goals.

Procedural regularity is necessary to protect offenders from arbitrary or erroneous decisions; they must be afforded due process protections.

> Because the correctional process involves the use of governmental authority over the liberty of individuals, it must be fair as well as effective, that is, it must conform to notions of decisionmaking regularity and responsibility that normally accompany governmental action of a coercive nature. . . . [The] same safeguards against unfairness that characterize the criminal trial and, increasingly, pretrial decisionmaking, should be imposed upon the correctional process. . . .[75]

The principle of equality requires that benefits and burdens be fairly apportioned. Sanctions should be applied and administered without bias. Differences in treatment among similarly situated persons must not be based on invidious distinctions such as race, sex, religion, or socioeconomic status.

Deference to liberty interests requires that interventions which are less intrusive to individual rights and autonomy be preferred over more drastic interventions. It places value on restraint and parsimony, preferring to avoid or minimize infringements on liberty. Considerations of the liberty interests affected by criminal sanctions "should be part of a more general recognition of the limitations of punishment, and the existential realities of punishment"[76] of any sort. In this context, the desire to decrease, rather than expand or strengthen, the net of social control assumes special significance.

Concern for humanity and decency reflects the hope that evolving societies will be increasingly marked by compassion, sympathy, and respect. Development of a more humane, caring, and benevolent society goes be-

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75. D. FOGEL, WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS 227 (1975) (quoting R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH AND CONDITIONS OF SENTENCE 86 (1969)).

76. Thomson, *Rethinking Probation As a Justice Pursuit*, in PROBATION AND JUSTICE (forthcoming).

yond the elimination of cruel and unusual punishments; it involves a continuing quest for higher standards of decency and good will and an ever decreasing resort to harsh, brutal, debilitating, and degrading sanctions.

Reformers who are developing a philosophy of criminal justice to assess specific laws, policies, and practices will interpret and weight the above-described principles in a variety of ways. My vision of the path to a more harmonious and peaceful society is the pursuit of economic and social justice combined with a continuing effort to maximize caring and respect and to minimize coercive intervention in individual lives. My preference is to employ positive rather than negative means in these efforts. While it is difficult to delineate precisely what "positive means" encompasses, I am thinking of means such as persuasion, nonviolent action, positive reinforcement, personal example, peer support, and the provision of life-sustaining and life-enhancing services and opportunities.[77] I believe that we will be most likely to discover and employ positive means when we attempt to be guided by values such as generosity, loving-kindness, and humility and when we seek not only to reduce pain, misery, and suffering[78], but also to enhance the autonomy, moral development, and dignity of the individual. While it may seem impossible today to respond to crime using cooperative, voluntary, and reconciliatory techniques, I believe the adoption of a preference for such means can serve as a basis for evaluating and shaping proposed reforms.

Assessed in light of these widely-accepted principles and my own values and preferences, the latest generation of alternative programs presents many troublesome features. No coherent philosophy or rationale has been articu-

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77. See F. KNOPP, INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS (1976) for further elaboration on such means and the values that lead to preferring them.

78. Christie has made the moral argument that "it is right to strive for a reduction of man-inflicted pain on earth." N. CHRISTIE, *supra* note 74, at 10. He acknowledges possible objections to that position, recognizing possible merit in a belief that pain can make people grow, become more mature, or receive deeper insight. But he sees even more clearly that we also have experienced the opposite: "[p]ain which brings growth to a stop, pain which retards, pain which makes people evil." *Id.* at 11. In the final analysis Christie argues:

> I cannot imagine a position where I should strive for an increase of man-inflicted pain on earth. Nor can I see any good reason to believe that the recent level of pain-infliction is just the right or natural one. And since the matter is important, and I feel compelled to make a choice, I see no other defensible position than to strive for pain-reduction.
>
> One of the rules would then be: If in doubt, do not pain. Another rule would be: Inflict as little pain as possible. Look for alternatives to punishments, not only alternative punishments . . . . [M]y position can be condensed into views that social systems ought to be constructed in ways that reduce to a minimum the perceived need for infliction of pain for the purpose of social control. Sorrow is inevitable, but not hell created by man.

Id.

lated to guide the development of many of the programs. Program designs have been shaped more by the political winds of the moment than by a body of knowledge about how best to attain articulated goals. The "promise them anything" and "try to satisfy everyone" approaches are very much with us.

Criteria for admission, continuance, and completion in many of the new programs are highly discretionary. Penalties are variable, not only among offenders but also throughout the duration of an offender's participation, as supervisors' assessments of needs or risks change. Participation often is considered a privilege and may be denied or revoked, in some cases summarily, on technical grounds, and with no review.[79] Lacking clarity, finality, predictability, and common procedural protections, many programs invite the arbitrary exercise of power.

The discretionary criteria also create the possibility that similarly situated offenders will be treated differently, thus compromising equality interests. While little direct evidence is available, there is still good reason to fear that debilitating and severe penalties are applied disproportionately to minorities.[80]

The new generation of alternatives seems to reflect an "if in doubt, penalize, restrict, and intervene more" orientation. Instead of trying to differentiate among cases in which punitive, rehabilitative, deterrent, incapacitative, compensatory, or reparative interests might seem to be most prominent, many new programs seem willing to apply measures designed to serve all of those interests to every offender. Programs almost seem to be competing among themselves to offer the highest number of contacts between supervisor and offender, the most restrictive conditions, and the most onerous and time-consuming obligations.

The strong emphasis given to community corrections in the 1973 *Corrections* report was tied to the National Advisory Commission's view that because

> crime and delinquency are symptoms of failure in the community as well as in the offender himself . . . a fundamental objective of corrections must be to secure for the offender contacts, experiences, and opportunities that provide a means and a stimulus for pursuing a lawful style of living in the community.[81]

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79. The program description for New Jersey's ISP, for example, states: "There will be no administrative or judicial review at the several levels of eligibility established under the Program, nor any appellate review of the Panel's substantive decision." Intensive Supervision, *supra* note 40, at 8, 15.

80. An evaluation of Virginia's Community Diversion Incentive Act program found that "[b]lack males were under-represented in CDI when compared to new nonviolent prison commitments." Community Diversion, *supra* note 30, at 44. A Texas study found that offenders admitted to the state prison system were three times as likely to be of Hispanic descent than those admitted to the Intensive Supervision Program. C. Baird, *supra* note 33, at 31.

81. CORRECTIONS, *supra* note 4, at 3.

The Commission argued that services provided to offenders in the community should be designed to

> strengthen the weak, open new channels to the erratic, and avoid openly reinforcing the intimidation that is latent in the relationship between the offender and the state.
>
> The objective is to motivate each offender by the incentives that motivate most citizens toward orderly social life.[82]

Many of the new programs seem to be based on a view that the objective is to intimidate the offender and that surveillance, surprise visits, searches, and threats produce the best motivation. This new generation of alternatives seems to favor using repressive means in trying to secure obedience and control. Many programs reflect a belief that it is not only appropriate, but also highly desirable, to exercise ongoing domination and control over offenders' daily lives; they demand strict adherence to behaviors and conditions developed on the basis of prevailing assumptions about how offenders should live. Even components of the new programs that could be construed as offering benefits and needed services, such as education, counseling, treatment, and employment, are presented as additional opportunities for control. Ironically, despite the absence of voluntarism and self-determination in many of the new programs, offenders are also expected to exhibit "sincerity and motivation" in complying with the detailed plans provided for them.[83]

As we enter 1984 and face the prospect of confronting "every fantasy of technological fascism,"[84] it is important to consider whether striving to

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82. *Id.* at 223.

83. Much of the flavor of intensive supervision programs is reminiscent of earlier efforts at coerced treatment that have been thoroughly criticized by leading theorists in the field. *See, e.g.*, N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); A. VON HIRSCH & K. HANRAHAN, THE QUESTION OF PAROLE: RETENTION, REFORM, OR ABOLITION? (1979). The modern brand of treatment encompasses a broad definition of treatment, including "anything done to, with, or for the offender for the purpose of reducing the probability of new criminal acts." D. GOTTFREDSON & M. GOTTFREDSON, DECISIONMAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION 174 (1980). Recent programs reflect a greater willingness to employ aversive stimuli (specific deterrence) than formerly was common among community programs.

Some of the discussion presented in *Struggle for Justice* in its critique of coerced treatment may apply to the new programs being considered:

> It will make a critical difference for the future of democracy whether our institutional and noninstitutional environments encourage the creation of morally autonomous, self-disciplined people who exercise judgment and purposefulness from their own inner strength, or whether instead they tend to stunt the human potential by training programs that, as with animals, condition their subjects to an unthinking conformity to inflexible, externally imposed rules.

AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 44-45 (1971).

84. D. FOGEL, *supra* note 75, at xviii, 277.

secure individual deterrence, incapacitation, and obedience through electronic monitoring, peer and official surveillance, blood and urine testing, drugs, warrantless searches, humiliation, and intimidation is the kind of community-based corrections we have had in mind.[85] Even short of the more extreme measures, it is important to consider how "control in the community," a phrase increasingly heard, squares with our values.

D. The Risk of Perpetuating the Values that Support Imprisonment

Besides the fact that the new alternatives may themselves be objectionable, it is especially important to assess the long-term effect that reforms may have on incarceration if they are based on the same values and assumptions that justify imprisonment. Even if a particular program succeeds in replacing imprisonment for a particular set of offenders, it is important to consider the long-range effects of the strategy that underlies the program.

The philosophies and values that underlie many of the new alternative programs are the same ones that underlie incarceration; differences are in degree, not in substance. Like incarceration, many of the emerging programs are based on a repressive, crime-control ideology which is used to rationalize substantial intrusions on individual liberty and autonomy, ongoing intervention in the minutiae of offenders' daily lives, an atmosphere of distrust, a lack of due process protections, and an emphasis on the tenuousness and revocability of any privileges or benefits granted.

It is doubtful that reformers can make any real progress toward reduction of imprisonment if their efforts are shaped and limited to satisfy the strident demands of the present harsh political climate. Constructing alternatives in the mold of imprisonment is more likely to reinforce the goals and values that support imprisonment. Significant movement away from the practice of imprisonment cannot be anticipated as long as alternatives are developed from a dominantly pragmatic point of view without careful consideration of the underlying values and goals.

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85. The GOSSlink, "a device to permit the monitoring of the presence or absence of individuals at a specific location," is now being marketed by National Incarceration Monitor and Control Services, Inc. (NIMCOS) "as the 1980's major breakthrough in the monitoring of non-incarcerated prisoners and probationers." "The system operates with a transmitter (GOSSlink) strapped to the ankle of an individual who has been sentenced to home curfew or house arrest." Information from materials distributed by NIMCOS.

A recent article described current alternatives to incarceration experiences in one county in Georgia. The 1,600 residents on probation for nonviolent offenses such as burglary, forgery, illicit drug use, and chronic drinking problems are subject to random, unannounced and warrantless police searches of their homes and possessions. They also can be forced to undergo breath analyzer and lie detector tests and to give urine and blood samples. If a urinalysis shows evidence of marijuana use, the probationer is given a lie detector test to help police find dealers; then the probationer is sent to jail for seven days. If marijuana is found a second time, a 90-day jail sentence is imposed. Probation is revoked if such evidence is found

E. The Risk of Contributing to an Overall Escalation of Social Control

We must finally consider how successful we will be in achieving a long-term de-escalation in our punishment practices and a net decrease in social control through the criminal justice system if we base our short-range reforms on values and assumptions that tend to glorify social control and expand the range of methods available to achieve it. Professional, political, and public willingness to accept alternatives to incarceration has been seriously impeded by the generally repressive and pessimistic context within which the debate on appropriate criminal sanctions has been framed in recent years. The result has been an unbalanced emphasis on the problems of crime and the management of the criminal justice system at the expense of attention to the problems inherent in the institutions of imprisonment and punishment in general. What is needed now is a systematic refocusing on the problematic nature of these two institutions and a concerted effort to foster a professional and public climate that will be more productive of and receptive to positive alternatives to imprisonment and punishment generally. A vision of a future free of social conflict is unrealistic. A future in which human strife and conflict are approached in ways more compatible with principles of social and economic justice, and with greater respect for human dignity and individual liberty, may be within our grasp and is certainly worth pursuing.

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a third time. L.A. Times, June 8, 1983, at 22-23, col. 1. Reportedly, some offenders in Georgia who perform community-service work as a condition of their sentence are now required to don white uniforms which mark them as offenders. Offenders elsewhere have been ordered to undergo chemical castration.