

# INSTITUTIONAL RESPONSES TO PRISON CROWDING

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## I

### INTRODUCTION

The primary title of the colloquium for which this paper was prepared is "The Prison Overcrowding Crisis." Two aspects of this title deserve mention. First, it is widely acknowledged that our prisons are now in crisis. Apparently a relatively new addition to the English language, "crisis" is used in pathology to describe "[t]he point in the progress of a disease when an important development or change takes place which is decisive of recovery or death; the turning point of a disease for better or worse. . . ." <sup>1</sup> In the mid-sixteenth century, Traheron defined the term thusly: "*Crisis* sygnifyeth judgemente, and in thys case, it is vsed for a sodayne change in a disease." <sup>2</sup> Common usage now refers to "[a] vitally important or decisive stage in the progress of anything; a turning point," <sup>3</sup> and, reflecting perhaps Traheron's emphasis on "judgemente," <sup>4</sup> "a state of affairs in which a decisive change for better or worse is imminent; now applied *esp.* to times of difficulty, insecurity, and suspense. . . ." <sup>5</sup> Thus, in the early seventeenth century Sir B. Rudyard reported that "this is the Chrysis of Parliaments; we shall know by this if Parliaments live or die." <sup>6</sup> A contemporary chronicler might well substitute "prisons" for "Parliaments." We might also hope that decisions being made at this crucial time will better—not worsen—the monumental problems of prison crowding. The points to stress are that we *are* making decisions about prison crowding; that this *is* a turning point; and that we *may* change affairs, either for better or for worse.

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1. 2 THE OXFORD ENGLISH DICTIONARY 1178 (J. Murray ed. 1933) [hereinafter cited as DICTIONARY].

2. TRAHERON, VIRGO'S CHIRURG. VL i. DICT. TERMS (1543), *quoted in* 2 DICTIONARY, *supra* note 1, at 1178.

3. 2 DICTIONARY, *supra* note 1, at 1178.

4. More probably, this reflects the terms' roots in the ancient Greek for discrimination, decision, crisis. *See id.*

5. *Id.*

6. *Id.*

A second striking point about the title of the colloquium is that we persist in addressing the problem of "overcrowding." The term "overcrowding" strikes me as redundant, and quite possibly dangerous. Is prison crowding acceptable, only becoming unacceptable when the situation is so terrible as to require constitutional action? Consider an analogy: I may be bad, and you may be "more bad" than I; but that does not render me "good." We are both unacceptable.

What exactly is the prison crowding problem? How large a problem is it? What can be done about it? What has been tried? What has worked, and what has failed? Is it possible to develop remedies that focus solely on the institutions themselves, or must we consider the problem of crowding in correctional facilities within the larger context of the entire criminal justice system? These are the issues addressed in this paper.

## II

### THE MAGNITUDE OF THE PRISON CROWDING PROBLEM

Crowding in American prisons and jails is a national problem of epidemic proportion. In July of 1977, twenty-eight states and territories, as well as the District of Columbia, were either under court order or involved in litigation likely to result in court orders regarding confinement conditions or prison crowding.<sup>7</sup> By February of 1980, this figure had risen to thirty-two states and territories.<sup>8</sup> By the end of 1981, forty states and territories either were under court order or were involved in litigation; in only four of these states was the issue of crowding not central to the suit.<sup>9</sup>

It is often reported that the United States has an imprisonment rate that is among the highest in the world.<sup>10</sup> Although some have suggested that imprisonment rates tend to remain rather stable over extended periods of time,<sup>11</sup> others have recently disputed this hypothesis and reported patterns of long-term growth.<sup>12</sup> Regardless of this scholarly debate, no one can deny

7. A. RUTHERFORD, P. EVANS, J. FLANAGAN, D. FOGEL, I. GREENBERG & R. KU, *PRISON POPULATION AND POLICY CHOICES* 10 (1977) [hereinafter cited as RUTHERFORD].

8. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *IMPLEMENTATION OF REMEDIES IN PRISON CONDITION SUITS* 49-51 (1980).

9. T.P. Thornberry, J.E. Call, C.R. Swanson, M.M. Shedd & S. Mitchell, *Overcrowding in American Prisons: Policy Implications of Double-Bunking Single Cells* 123-28 (July 1982) (final report to the National Institute of Corrections) [hereinafter cited as Thornberry] (on file at N.Y.U. Review of Law & Social Change).

10. See, e.g., Doleschal, *Rate and Length of Imprisonment*, 23 *CRIME & DELINQ.* 51 (1977).

11. See Blumstein, Cohen & Nagin, *The Dynamics of a Homeostatic Punishment Process*, 67 *J. CRIM. L. & CRIMINOLOGY* 317 (1976); Blumstein & Cohen, *A Theory of the Stability of Punishment*, 64 *J. CRIM. L. & CRIMINOLOGY* 198 (1973).

12. See Berk, Rauma, Messinger & Cooley, *A Test of the Stability of Punishment Hypothesis: The Case of California, 1851-1970*, 46 *AM. SOC. REV.* 805 (1981); Rauma, *Crime and Punishment Reconsidered: Some Comments on Blumstein's Stability of Punishment Hypothesis*, 72 *J. CRIM. L. & CRIMINOLOGY* 1772 (1981); Blumstein, Cohen, Moitra & Nagin,

that imprisonment rates in the United States rose dramatically over the past decade. In 1970, the average incarceration rate for state and local jail inmates only was 167 per 100,000 civilian population. By 1978, this rate had risen to 195 per 100,000 persons.<sup>13</sup>

Discussion of state and local imprisonment rates, however, obscures the real nature of the problem. The actual number of prisoners in both state and federal institutions increased 60% in the last decade from 196,429 in 1970 to 314,457 in 1979. By the end of the third quarter of 1982, that number climbed to 405,371, more than twice the number of prisoners reported confined in 1972.<sup>14</sup> At the present rate of increase, the United States prison population will exceed one-half million persons before the end of 1984.<sup>15</sup> Four states—Texas, California, New York, and Florida—account for one-third of all state prisoners in the country.<sup>16</sup>

Standards for the minimum square footage available to an inmate for sleeping/confinement quarters have varied dramatically. The National Advisory Commission on Criminal Justice Standards and Goals recommends a standard of 80 square feet per inmate.<sup>17</sup> Other standards have been recommended by the Federal Bureau of Prisons (75 square feet), the National Clearinghouse for Criminal Justice Planning and Architecture (70 square feet), the United Nations (65 square feet), and the American Correctional Association (60 square feet).<sup>18</sup> One court imposed a "standard" of a minimum of 50 square feet per inmate.<sup>19</sup> Using the 60 square-foot standard specified by the American Correctional Association, it was estimated that in 1978 about 65% of the nation's state and federal prisoners were held in crowded conditions.<sup>20</sup> At the local level the problem may be worse. Although the proportion of inmates housed in crowded conditions in local jails is estimated to be about the same as the state and federal figure (about 67%),<sup>21</sup> the overall conditions in local jails are often worse than those of

*On Testing the Stability of Punishment Hypothesis: A Reply*, 72 J. CRIM. L. & CRIMINOLOGY 1799 (1981); Rauma, *A Concluding Note on the Stability of Punishment: A Reply to Blumstein, Cohen, Moitra & Nagin*, 72 J. CRIM. L. & CRIMINOLOGY 1809 (1981).

13. J. MULLEN, K. CARLSON & B. SMITH, 1 AMERICAN PRISONS AND JAILS: SUMMARY FINDINGS AND POLICY IMPLICATIONS OF A NATIONAL SURVEY 17, 151 (1980) [hereinafter cited as MULLEN].

14. Staff Report of the National Institute of Corrections (1982) (unpublished report) (on file at N.Y.U. Review of Law & Social Change).

15. *Id.*

16. *Id.*

17. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS (1973). The front door to the typical American home is about 20 square feet in size.

18. RUTHERFORD, *supra* note 7, at 11.

19. *Gates v. Collier*, 390 F. Supp. 482, 490 (N.D. Miss. 1975), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

20. MULLEN, *supra* note 13, at 51-90.

21. *Id.*

state and federal institutions, and a large proportion of persons confined in local facilities are held pending trial.

### III

#### THE COSTS OF PRISON CROWDING

We hear a great deal about the monetary costs associated with prisons, and these costs are truly staggering. Estimates of the annual costs of operation per inmate excluding the costs of the facilities themselves range from about \$10,000 per inmate per year to around \$40,000 per inmate per year.<sup>22</sup> The costs of prison construction are also phenomenal, ranging from about \$30,000 per bed<sup>23</sup> to about \$80,000 per bed or higher.<sup>24</sup> However, since most prisons are built with borrowed money (e.g., through issuing bonds or obtaining loans) current interest rates may drive the eventual price of a prison cell built in 1981 to well over \$200,000.<sup>25</sup> In 1978 New York State taxpayers spent \$285.5 million to keep some 19,000 people in prisons for one year.<sup>26</sup>

Unfortunately, we know rather less about the *human* costs of confinement in unconstitutionally inhumane conditions. Little has been written about the tolls exacted upon prison staff;<sup>27</sup> most of what we know about human costs relates to tolls exacted upon the inmates. Although the evidence available is at times conflicting, it has been reported that the incidence of violence increases with increasing population density in the institution.<sup>28</sup> Further, illness complaints increase with density increases.<sup>29</sup> Relations between prison crowding and hypertension have been demonstrated.<sup>30</sup> Prison

22. D. McDONALD, *THE PRICE OF PUNISHMENT: PUBLIC SPENDING FOR CORRECTIONS IN NEW YORK* 17, 55 (1980).

23. *Id.* at 51-52.

24. G.S. Funke, *Who's Buried in Grant's Tomb?*, *Economics and Corrections for the Eighties and Beyond* 3 (undated) (published by the Institute for Economic Policy Studies) (on file at N.Y.U. Review of Law & Social Change).

25. *See id.* at 5; D. STEELMAN, *OVERCROWDING IN NEW JERSEY: NO EASY ANSWERS TO A CRISIS IN CORRECTIONS* 10-11 (1981) (published by the National Council on Crime & Delinquency).

26. D. McDONALD, *supra* note 22, at 13, 55.

27. *See* F.W. BENTON & R.D. ROSEN, *NATIONAL SURVEY OF CORRECTIONAL INSTITUTION EMPLOYEE ATTRITION 1982* (published by the National Center for Public Productivity).

28. *See* Megargee, *Population Density and Disruptive Behavior in a Prison Setting*, in *PRISON VIOLENCE* 135 (A. Cohen, G. Cole & R. Bailey eds. 1976); Farrington & Nuttall, *Prison Size, Overcrowding, Prison Violence, and Recidivism*, 8 *J. CRIM. JUSTICE* 221 (1980); Nacci, Teitelbaum & Prather, *Population Density and Inmate Misconduct Rates in the Federal Prison System*, *FED. PROBATION*, June 1977, at 26.

29. *See* Paulus, Cox, McCain & Chandler, *Some Effects of Crowding in a Prison Environment*, 5 *J. APPLIED SOC. PSYCHOLOGY* 86 (1975) [hereinafter cited as Paulus]; King & Geis, *Tuberculosis Transmission in a Large Urban Jail*, 237 *J. A.M.A.* 791 (1977).

30. *See* D'Atri, *Psychophysiological Responses to Crowding*, 7 *ENV'T & BEHAV.* 237 (1975); D'Atri & Ostfeld, *Crowding: Its Effects on the Elevation of Blood Pressure in a Prison Setting*, 4 *PREVENTIVE MED.* 550 (1975).

death rates climb as prisons exceed capacity.<sup>31</sup> Apparently, then, the problems of prison crowding are not merely social ones; they also have physical, emotional, and occupational components.

#### IV

##### THE IMMEDIACY OF THE PRISON CROWDING PROBLEM

State and federal court orders have imposed legal immediacy upon the crowding problem, although the social and humanitarian costs have long been felt. During 1981, for example, thirty-one states were under court order to reduce crowding;<sup>32</sup> correctional administrators in these jurisdictions accordingly are faced with the prospect of developing immediate responses to those orders. Further, many of the court orders contained compliance timetables, lending further urgency to remedial efforts. In most jurisdictions, however, correctional officials have been unable to comply with the terms of these court orders<sup>33</sup> for a variety of reasons.

I stress the issue of immediacy because we appear too often to forget that the Constitution of the United States, as presently interpreted, forbids treating prison inmates in the manner in which the majority of states now treat them.<sup>34</sup> If the Constitution is to be upheld, we must work urgently to end the current stalemate between the courts and correctional administrators.

Prison construction is often suggested as a principal means of remedying the crowding problem. However, the costs associated with prison construction are tremendous, and this is a time of national fiscal constraint. Further, the time required for prison construction is prohibitive given the immediacy of the problem.

#### V

##### THE ETIOLOGY OF THE PRISON CROWDING PROBLEM

Where did this problem of prison crowding come from? The complete answer is not known; the issues involved in prison crowding and, particularly, in the recent large increases in incarcerated populations are complex. Still, some evidence is available.

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31. See Paulus, *supra* note 29; King & Geis, *supra* note 29.

32. Thornberry, *supra* note 9, at 123-28.

33. S.D. Gottfredson & R.B. Taylor, *The Correctional Crisis: Prison Populations and Public Policy* 2-3, 11-13 (undated) [hereinafter cited as Gottfredson & Taylor] (available from the National Criminal Justice Reference Service).

34. See, e.g., *Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979); *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977); *Finney v. Arkansas Bd. of Corrections*, 505 F.2d 194 (8th Cir. 1974).

### A. Crime

It is now reasonably clear that increases in crime do not fully account for the dramatic increase observed in prison populations.<sup>35</sup> Indeed, attempts to analyze prison population changes on the basis of Uniform Crime Report statistics may be on shaky grounds, and should be viewed cautiously.<sup>36</sup>

A great deal of attention has been paid to a recent report by Peter Greenwood,<sup>37</sup> which suggests why the crime rate does not more accurately predict prison populations. Greenwood estimated individual probabilities of arrest for each of several criminal acts. For example, he found that the probability of arrest for a single act of robbery was approximately .06.<sup>38</sup> Estimates were also derived for the probability of conviction, and the probability of incarceration given conviction. The crucial point is that since these probabilities are multiplicative, there must be an enormous change in the number of crimes committed to produce even a moderate change in the absolute number of persons incarcerated. Although crime has increased dramatically in recent years according to FBI estimates,<sup>39</sup> this increase by itself cannot account for the even more dramatic increase in prison populations.

### B. Population Demography

The crime rate is not all that has changed in recent years. Since the 1950's, the age structure of our population has also changed dramatically. Recent work by Blumstein and colleagues has demonstrated that changes in prison populations can be related to changes in the size of the "crime-prone" population relative to the remainder.<sup>40</sup> In part, then, what we are observing is a result of demographic changes. Recent estimates indicate that *all other things being equal*, on demographic bases alone, we might expect to obtain some relief from the prison crowding problem in a decade or so.<sup>41</sup> The problem, of course, is that all other things are not likely to remain equal.

35. See Blumstein, Cohen & Miller, *Crime, Punishment, and Demographics*, AM. DEMOGRAPHICS, Oct. 1980, at 32 [hereinafter cited as Blumstein, *Crime*]; Blumstein, Cohen & Miller, *Demographically Disaggregated Projections of Prison Populations*, 8 J. CRIM. JUST. 1 (1980) [hereinafter cited as Blumstein, *Prison Populations*].

36. Clear, Harris & Record, *Managing the Costs of Corrections*, 62 PRISON J. 3, 9 (1982) [hereinafter cited as Clear].

37. P.W. GREENWOOD, *SELECTIVE INCAPACITATION* (1982).

38. *Id.* at 109.

39. T. FLANAGAN, M. HINDELANG & M. GOTTFREDSON, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 1979-403* (1980).

40. See Blumstein, *Crime*, *supra* note 35; Blumstein, *Prison Populations*, *supra* note 35.

41. See Blumstein, *Crime*, *supra* note 35; Blumstein, *Prison Populations*, *supra* note 35.

### C. Criminal Justice Policies

The criminal justice system is not one in which stability is to be expected. As an example, in the state of Maryland, the average length of stay in state prisons was virtually constant from the 1930's until 1975. Between the years of 1975 and 1979, however, the average length of stay almost doubled.<sup>42</sup> This change appeared to be due partly to changes in judges' sentencing patterns, and partly to changes in early release mechanisms, such as parole.<sup>43</sup> Thus, recently proposed "get-tough" legislation that mandates increased terms for repeat offenders, or that requires extensive sentences for certain offenses, can be expected to contribute further to the problems of prison crowding in that state and in others.

### D. Growth of the Criminal Justice System

Finally, it should be noted that criminal justice remains a "growth industry." During the 1970's, the number of police officers in this country increased by 21%; the number of prosecutors increased by 70%; and correctional personnel increased by 48%.<sup>44</sup> It is tempting to speculate on the nature of the relation between the growth of this industry and the growth of its "client" population.

## VI

### A CRISIS IN CORRECTIONS, OR A CRISIS IN CRIMINAL JUSTICE?

Most of this volume is devoted to issues that are not specifically correctional. Sentencing has received a great deal of attention, as have issues involving alternatives to traditional incarceration. This is reasonable, for it is clear that the current crisis is *not* simply a crisis in corrections; it is a crisis of the entire criminal justice system, and the entire criminal justice system must be actively involved in its resolution.<sup>45</sup> Thus, a volume such as this could well have included consideration of such issues as police practices, prosecutorial action, and parole, in addition to the addressed topics of sentencing and institutional responses.<sup>46</sup> One recently completed study, for example, attempted to define the dimensions underlying the problems of prison crowding using multivariate procedures, and discovered that of the six "dimensions" underlying the crowding crisis, only one was under the direct control of the correctional system and correctional administrators.

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42. Gottfredson & Taylor, *supra* note 33, at 8-10.

43. *Id.*

44. Clear, *supra* note 36, at 10.

45. Gottfredson & Taylor, *supra* note 33, at 18-20.

46. See M.R. GOTTFREDSON & D.M. GOTTFREDSON, DECISIONMAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION (1980) [hereinafter cited as M.R. GOTTFREDSON].

The remaining dimensions involved problems with which the correctional system alone simply cannot deal.<sup>47</sup>

Part of the responsibility for the present prison crowding problem lies in our confusion regarding the appropriate goals of a correctional system: reform, rehabilitation, reintegration, or restraint.<sup>48</sup> Not only are we confused over the proper aims of a correctional system, but many are increasingly disillusioned with treatment-oriented, rehabilitative goals.<sup>49</sup> Concern over the effectiveness of correctional treatment strategies has, in some quarters, hastened a preference for punitive or simple incapacitative strategies.<sup>50</sup> However, it is not yet clear whether incapacitative or deterrence strategies are any more effective than the now widely-disparaged—inappropriately, I think—treatment-oriented strategies.<sup>51</sup>

Although it may seem that the fragmented and conflicting goals and policies of judges, parole boards, prison administrators, police, prosecutors and others are major causes of the problems facing corrections, more than one study has recently demonstrated that the criminal justice system, in fact, generally shares correctional goals.<sup>52</sup> However, the various actors in the system tend to be unaware of this fact. In part, this may be due to the systematic screening processes which take place in the criminal justice system. It is known, for example, that the concept of “offense seriousness” is critical to decisions made by crime victims, by police officers, by prosecutors, by judges, by correctional administrators, and by parole boards.<sup>53</sup> Further, despite differences in the processing decisions being made, each group appears to use this information in similar ways. Yet, “offense seriousness” may represent a major area of dissension among the various criminal justice actors: police accuse judges of being soft, judges similarly accuse parole boards, and so forth. A problem that appears to result from the limited range of impact of the various actors is exacerbated by the fact that the actors at each succeeding stage feel that appropriate “screening” has already been achieved.

Regardless of the nature of these disagreements, the problems of prison crowding are problems for and of the entire criminal justice system. Without the active, aggressive, and coordinated efforts of all components of that system, we are likely to see little in the way of resolution.

47. Gottfredson & Taylor, *supra* note 33, at 18-20.

48. See V. O'LEARY, CORRECTIONAL POLICY INVENTORY: SCORING KEY AND INTERPRETATION (1970) (published by the National Council on Crime and Delinquency); M.R. GOTTFREDSON, *supra* note 46, at xvii-xxvi.

49. See Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUBLIC INTEREST 22 (1974); see generally D. LIPTON, R. MARTINSON & J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES (1975).

50. See Martinson, *supra* note 49, at 50.

51. NATIONAL RESEARCH COUNCIL, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 4-10 (1978).

52. See Gottfredson & Taylor, *supra* note 33, at 20-32; see generally R.A. BERK AND P.M. ROSSI, PRISON REFORM AND STATE ELITES (1977).

53. M.R. GOTTFREDSON, *supra* note 46, at 330-34.



## VII

## THE INSTITUTIONAL RESPONSES

Although prison crowding is a problem of and for the entire criminal justice system, not just correctional institutions, correctional administrators are central to its resolution. What has been tried? More importantly, what *could* be tried?

*A. Meaningless Institutional Options*

Correctional administrators sometimes simply ignore the problem. They continue to warehouse prison inmates in defiance of the Constitution, and thereby exacerbate the crowding problem.

One meaningless strategy often employed is to "redefine prison capacity." Correctional administrators house inmates in tents, quonset huts, and portable cells; they put beds in prison chapels, gymnasiums, classrooms, and corridors; they simply pack in more inmates. Maryland even attempted to moor an obsolete troop carrier in the state's (and one of the nation's) busiest harbor to expand capacity.<sup>54</sup>

Prison administrators can also refuse new admissions. However, experience suggests that this strategy does not work for long. Administrators can house state or federal prisoners in local jails, exacerbating the tremendous crowding problem in already inadequate facilities. Since many of these facilities are also under court orders, prisoners in some jurisdictions are routinely shuffled among state, federal, and local facilities.

*B. Meaningful Institutional Options*

Why do prison administrators often seem to do little to resolve the prison crowding problem? There are essentially only four approaches that may be taken, either singly or in combination, to remedy the problem of prison crowding. These are: (a) to reduce admissions to the prison system; (b) to accelerate releases from the prison system; (c) to build more prisons; and (d) to tolerate the status quo.<sup>55</sup> I will briefly examine each.

The first approach, reducing admissions to the prison system, is outside the control of correctional administrators. These so-called "front-door" options include such strategies as decriminalizing certain offenses, revising sentencing codes, and introducing sentencing guidelines. Alternatives to traditional incarceration, such as restitution or community service orders may also be developed.

Each of these strategies deserves attention. These front-door options are difficult to implement; they rely heavily on the cooperative efforts of a

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54. Gottfredson & Taylor, *supra* note 33, at 68.

55. RUTHERFORD, *supra* note 7, at 185.

large number of actors, including police, prosecution and defense officials, judges, and legislators.<sup>56</sup> Although it is necessary that correctional administrators be involved in the development of front-door options, correctional officials alone cannot control admissions. Running a prison is like operating a hotel without a reservation service; the prison administrator is typically unaware of who is coming, or for how long.<sup>57</sup>

A second approach is accelerating releases from the prison system. Prison administrators can have a direct impact through these "back-door" options which include systematic reclassification of offenders, screening for immediate community placement, and increased use of administrative good time.

Successful implementation of many of these options also requires the cooperation of actors who are outside the correctional system. For example, as recently as 1980, one parole board would only consider inmates in minimum security facilities. Yet, the initial security classification in this jurisdiction was made by the sentencing judge, and the correctional administration had no reliable procedure for the movement of inmates to lower custody levels.<sup>58</sup>

Many correctional administrators advocate the passage of some form of Emergency Powers Act. Such an act provides for sentence rollbacks (essentially a form of reduction) if capacity limits are exceeded for a specified period of time. Michigan, for example, has adopted this mechanism.<sup>59</sup> In keeping with our typology of strategies, these acts might be considered "trapdoor" options.

A third approach is to build more prisons. This, too, requires the cooperative efforts of a large number of persons and agencies. As mentioned earlier, this option alone is insufficient because of the immediacy imposed by court orders to reduce prison crowding.

In many jurisdictions, attempts to resolve the prison crowding problem through expansion programs have failed. Prison populations have exceeded capacity as soon as new prisons are opened. In Maryland, for example, the prison population currently grows at a rate of approximately 150 persons per month. At this rate of increase, the state could build a new 1,000-bed facility every year and never resolve their crowding problem. Furthermore, the state's prisons are *already* almost 3,000 persons above capacity.<sup>60</sup>

A final approach is to tolerate the status quo. As previously mentioned, some correctional administrators find this an attractive option and utilize it.

56. 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); M.K. HARRIS, REDUCING PRISON CROWDING: AN OVERVIEW OF OPTIONS (Working Paper No. 6, June 1983) (published by the Prison Overcrowding Project).

57. M.R. GOTTFREDSON, *supra* note 46, at xxii.

58. Personal communication with D.M. Gottfredson (1983).

59. MICH. COMP. LAWS ANN. § 800.7 (West 1982) (Prison Overcrowding Emergency Powers Act).

60. Gottfredson & Taylor, *supra* note 33, at 6-8.

In my experience, however, these correctional administrators would prefer not to tolerate the status quo, as would most judges, police officers, prosecutors, and legislators. Unfortunately, the problems of prison crowding appear so intractable, and its resolution appears to require much cooperation, that little *appears* to be happening other than tolerating the existing situation.

### C. Rational Correctional Decision-making

I suggest that there is a fifth approach to the problem of prison crowding. This alternative differs from the four previously discussed, although it combines elements of several. The strategy requires optimal use of existing facilities and resources, as well as alternatives to traditional incarceration. This can be achieved only through a program of rational correctional decision-making.

Correctional decision-making involves three interrelated elements: assessment, classification, and placement. *Assessment* refers to those decision-making processes associated with the understanding of inmate needs and security requirements. Each of these assessment decisions has an implicit (and increasingly, an explicit) predictive component. The concept of prediction is central to most general concerns of the criminal justice system.<sup>61</sup> This is true whether we are interested in the likelihood of escape, the likelihood of adjustment difficulties (e.g., assaultive or other undesirable behavior within the institution), or, as discussed in detail elsewhere in this volume, the likelihood of continued criminal involvement.

*Classification* refers to the process of assigning assessed inmates to groups, based on similarity with others in the group. The classification decision also has a predictive component. It is assumed implicitly (and often demonstrated empirically)<sup>62</sup> that the more similar persons are in terms of assessed risks and needs, the more similarly they may respond to programming efforts. Classification is necessary to ensure appropriate placement in the variety of programs and settings within our correctional system.

*Placement* refers to the assignment of inmates to programs and locations that match their needs and that consider the risks they present to correctional programs. This process ensures that both the needs of the inmate and of society are satisfied.

#### 1. Constraints Imposed by Prison Crowding

What happens to vocational, educational or counseling programs in correctional institutions when the prison capacity is dramatically exceeded? Unfortunately, these programs are usually dramatically curtailed or discon-

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61. M.R. GOTTFREDSON, *supra* note 46, at 334.

62. See S.D. GOTTFREDSON & D.M. GOTTFREDSON, SCREENING FOR RISK: A COMPARISON OF METHODS (1979) [hereinafter cited as S.D. GOTTFREDSON & D.M. GOTTFREDSON]; UNDERWOOD, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408 (1979).

tinued, imposing obvious and severe limitations on potential placements and correctional decision-making.

It is necessary to determine, within existing resource constraints, what correctional decisions are possible and the best way to make them. For example, Minnesota has, in the context of sentencing, developed a classification and placement policy based, in part, on the evaluation of correctional resources.<sup>63</sup> The Minnesota experiment is an exercise in classification and placement with decision rules designed to avoid increased prison crowding. The key to the process is an understanding of available resources and the constraints these resources impose on the classification/placement decision. In the Minnesota experiment, the decisions are outside the authority of correctional administrators. Could a similar model of rational classification and placement be of value within the correctional system?

## 2. Correctional Decisions

Correctional administrators are responsible for making a variety of assessment, classification, and placement decisions. Some of the decisions involve inmate needs—such as counseling, and educational or vocational training. Other decisions involve issues of control, security, and public safety. Although many issues are common to both types of correctional decisions, for simplicity I will focus on the latter.

Correctional systems tend to be organized in terms of security requirements. Maximum security institutions are typically characterized by the devotion of facilities and staff to the principal concern of inmate control. Maximum security prisons often provide fewer training programs than lower security institutions. Minimum security institutions are generally less concerned about control and more interested in providing inmate programs. Medium or mixed-level security institutions or programs typically attempt to provide a balance between control and inmate programs.

Many inmates can be effectively placed in community-based facilities, such as halfway houses and community correctional centers. In these situations, different control issues emerge, often requiring collaboration between correctional officials, police, and other social service providers. Upon release from correctional facilities, inmates usually remain under some sort of supervision, typically parole. To facilitate the inmates' eventual return to society, correctional programming attempts to move inmates to lower levels of security at appropriate times.

Unfortunately, most current correctional programming systems are (a) archaic, (b) highly subjective and unreliable, (c) unsystematic, (d) not explicit, and, not surprisingly, (e) ineffective. This state of affairs has engen-

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63. 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. 164 (1982).

dered considerable criticism, resulting in an increasing propensity to assign inmates to higher levels of security than may be necessary. This propensity, in turn, greatly exacerbates the prison crowding problem.

### 3. *Rational Correctional Decision-making*

A major focus of this volume is the issue of selective incapacitation, an issue increasingly visible in public discussion and the academic and practitioner communities. The Greenwood report<sup>64</sup> received a great deal of attention, and focused discussions of sentencing policies and practices on this important issue.

Correctional administrators, however, confront a rather different problem. With regard to the sentenced individuals in their custody, correctional administrators must make appropriate placement decisions making optimal use of available resources. Current crowding problems, court orders to decrease prison populations, and increasing fiscal constraints require consideration of the issue of "selective deinstitutionalization."

Selective deinstitutionalization is neither the same issue as, nor the other side of the coin of, the concept of selective incapacitation. The latter has the potential to increase prison crowding, despite the claims of its proponents. Judges and legislators, acting under real or perceived public pressure may promote selective incapacitation, which in turn can increase sentence length in some cases. There is no guarantee that these decisionmakers will also recognize the need to promote alternative non-prison programs for offenders who do not require incapacitation.

The concept of "selective deinstitutionalization" requires the development of programs of rational corrections classification that consider issues of inmate needs, societal risk, and agency resources. How can rationality be incorporated into this complex decisionmaking process? One successful method provides decisionmakers with statistical assessment devices which specifically address societal risk or inmate needs.<sup>65</sup> Social scientists have aided correctional decisionmakers in this way for more than sixty years. Although even the crudest devices have been valuable, increasingly sophisticated methods are being used to develop predictive assessment devices.<sup>66</sup> Statistical assessment devices are both more reliable (e.g., dependable) and more valid (e.g., work better) than the intuitive or subjective predictions commonly used in correctional settings.<sup>67</sup> Finally, as several authors have

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64. P.W. GREENWOOD, *supra* note 37.

65. See Burgess, *Factors Determining Success or Failure on Parole*, in *THE WORKINGS OF THE INDETERMINATE SENTENCE LAW AND THE PAROLE SYSTEM IN ILLINOIS* (A.A. Bruce ed. 1928); Glaser, *The Efficacy of Alternative Approaches to Parole Prediction*, 20 *AM. SOC. REV.* 283 (1955).

66. See S.D. GOTTFREDSON & D.M. GOTTFREDSON, *supra* note 62; H.F. SIMON, *PREDICTION METHODS IN CRIMINOLOGY* (1971).

67. See P.E. MEEHL, *CLINICAL VERSUS STATISTICAL PREDICTION* (1954); Gough, *Clinical versus Statistical Prediction in Psychology*, in *PSYCHOLOGY IN THE MAKING* 520 (L. Postman

noted, intuitive and statistical decision methods can often be used together in mutually supportive ways.<sup>68</sup>

One recently proposed scheme for correctional classification includes several components of the process described here.<sup>69</sup> The proposal stresses cooperation among the judiciary, correctional administrators, and parole authorities. With recent attitudinal studies demonstrating the overriding salience of the goal of incapacitation, this proposed decisionmaking tool would assess the extent to which incapacitation was a goal of the incarcerative sanction imposed. The proposal also suggests partial reliance upon an empirical assessment of the risks that a particular inmate may pose to society.

By combining judgments of the need for the incapacitation objective with empirical risk assessments in a matrix format, appropriate levels of control and security may be determined on both purposive and statistical bases. It may also be possible to identify offenders for whom sanctions other than incarceration may be appropriate. The proposed device is flexible, and, given accurate knowledge of agency resources, its use could improve our ability to appropriately classify persons within those resource constraints.

## VIII

### RATIONAL LONG-TERM PLANNING

Each of the various strategies discussed in this paper must be considered to enable rational long-term correctional planning. Correctional administrators—indeed, the entire criminal justice community—must seriously examine front-door options. It is therefore heartening that so much of this volume is devoted to this consideration. Similarly, we must carefully consider available back-door options; strategies of rational correctional classification, such as those discussed here, can be helpful. However, cooperation and care are in order. If we do not carefully develop and implement these front- and back-door options, we may increasingly have to rely on the “trapdoor.” Such reliance is not likely to satisfy anyone.

We must, of course, carefully consider the construction of new and better prison facilities. In this era of national fiscal constraint, we also, however, must consider the enormous costs of construction programs. Estimates of required prison capacity must carefully consider demographic changes in our society. Finally, we must remember that prison populations do not simply reflect the dynamics of past trends.<sup>70</sup> Prison populations are

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ed. 1962); Dawes, *A Case Study of Graduate Admissions: Application of Three Principles of Human Decision Making*, 26 AM. PSYCHOLOGIST 180 (1971).

68. See S.D. GOTTFREDSON & D.M. GOTTFREDSON, *supra* note 62; J. MONAHAN, *PREDICTING VIOLENT BEHAVIOR* (1981); Underwood, *supra* note 62.

69. Gottfredson & Taylor, *supra* note 33, at 32-39.

70. See RUTHERFORD, *supra* note 7, at 13.

subject not only to shifts in crime trends and population composition, but also to social and political influences, and resource constraints.

### *A. Evaluation*

Evaluation is extremely important, yet often overlooked in the policy-planning process. This volume presents a discussion of how we might change the system in order to have an impact upon the prison crowding problem. A rational process of policy change includes not only design and implementation of strategies for change, but also careful and systematic assessment of such changes. Only by including an evaluation component in the policy process can we engage in a truly rational process.

### *B. Education*

There is a tremendous need for solid, factual information about crime, the criminal justice system, prisons, prisoners, and correctional policy. I speak not simply of educating the public, although that is, of course, sorely needed. Rather, those in the criminal justice system itself need to educate themselves. They accuse each other of working at cross-purposes. Decisions made at one point in the criminal justice process may render decisions made at other stages ineffective. Often little attention is paid to the effects of decisions made by one agency on the workloads or resources of another agency; yet the effects are often considerable.

Recent studies indicate that the basic goals of the different actors in the criminal justice system are generally similar.<sup>71</sup> They appear to use the same kinds of information, albeit for somewhat different purposes, in the same kinds of ways.<sup>72</sup> Before problems of prison crowding can be resolved, those involved in criminal justice must begin to educate each other about their roles, their resources, and their requirements.

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71. Gottfredson & Taylor, *supra* note 33, at 20-32.

72. See M.R. GOTTFREDSON, *supra* note 46.

