Literature Review

PUNISHMENT POLICY OPTIONS

by

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Certainly, decision-makers are faced with very difficult choices among limited options, when they wish to control incarceration costs. This problem is exacerbated by the fact that no single individual or organization has final authority or capacity to promote proactive steps toward costs management. Rather, it is a conglomerate of trial judges, legislators, executive administrators and opinion-makers to whom this role falls.

Yet the realities of incarceration cost control are straightforward. The single, most expensive incarceration policy is that which seeks to increase capacity through new construction or substantial renovation. Policies which result in empty cells do not, on the other hand, lead to commensurate savings in monies, because the prison's operating costs will remain relatively fixed. Hense, the most cost-efficient policy is one which results in exact equality between prison capacity and demand for space.

To save money, demand for space must be managed so that it does not exceed capacity. To the extent that this strategy is not possible, costs will increase. This is the decision-maker's dilemma: To what degree can demand be managed or regulated, and to what level of capacity can expansion be affordable.

In effect, policy-makers must decide which combination of these options is acceptable, fiscally and programmatically. In this review, the choice between managing capacity versus managing demand is subjected to closer examination. Current mechanisms for altering capacity -- continued use of existing facilities, or crowding; and new construction, with consideration given to the manipulation of institution custody level and inmate classification -- are explored for their legal and fiscal feasibility? Following this discussion is a critical assessment of the three arenas -- system entry, punishment location and system exit -- in which demand may be regulated. In the selections which follow, Krisberg and Austin documented and explain the failure of alternative punishment policies to relieve the demand for incarceration; Harris provides a matrix which depicts the potential of each key decision-makers at every point in the criminal justice system to proactively manage that demand; and Funke outlines a framework for comparing the costs of alternative punishments which takes the ideas of limited supply and excessive demand into account.

STRATEGIES DIRECTED TOWARD MANAGING CAPACITY

The Use of Existing Facilities

Crowded conditions -- in which a facility's population exceeds its designed, rated capacity -- persist in the correctional facilities of virtually every state. Were even the most conservative of accepted standards regarding minimum cell space to be applied, however, the dimensions of this problem would be greatly magnified.[1] Substantial evidence exists regarding the adverse effects of overcrowding on inmate behavior and prison management.[2] Under conditions of crowding, prisoners suffer emotional and physical deterioration, and the incidence of violence escalates. In the same setting, faced with tightened resources, prison

officials are forced to abandon rational criteria for program decision-making, and assign inmates to services on a space-available basis. The failure to address inmates' needs exacerbates problems at every point in the system.[3]

Yet in most states, judges continue to sentence offenders to terms of incarceration in spite of these circumstances. With over twenty states under court order[4] to imporve the quality of living conditions in their correctional facilities and thousands of inmate complaints awaiting litigation, [5] a picture of the degree to which higher courts are willing to tolerate contemporary incarceration practices is beginning to emerge. Landmark cases such as Rhodes v. Chapman [6] and Bell v. Wolfish, [7] in which the double-celling of inmates was held not to be unconstitutional, may come to be interpreted as high-level endorsements of the crowded conditions which pervade American prisons and jails. In reality, these Supreme Court decisions are a great deal more narrow than such interpretations might suggest.

Traditionally, federal courts have involved themselves in the affairs of prison administration with an unconcealed reluctance. Even as late as Rhodes, it was admitted that:

> [i]n discharging this oversight responsibility, courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens.[8]

In spite of their reticence, the courts have acknowledged a responsibility to protect the Eighth Amendment right prohibiting the cruel and unusual punishment of inmates. Where violations of this right have been demonstrated, courts have not hesitated to express indignation. At its most lenient, this has taken the form of the enforced upgrading of substandard conditions or procedures at individual institutions. At the most extreme, courts have removed state-wide penal systems from the authority of corrections officials and placed them under the administration of some other body. In Pugh v. Locke[9] Alabama's entire penal system was wrested from prison authorities and placed it into the receivorship of the governor. In the words of one U.S. public health officer, the correctional institutions in that state were "wholly unfit for human habitation according to virtually every criterion used by public health inspectors."[10] Medical, food and sanitary provisions were either inadequate or non-existent. Facilities were dangerously understaffed, and inmates, whose numbers far exceeded space available in each of Alabama's institutions, remained idle for lack of program opportunities. Violence -- and vermin -- reigned. Complaints such as these are echoed in prison-related litigation nationwide.

The legitimacy which the Rhodes and Bell decisions brought to the practice of double-celling in no way serves as a disclaimer to these demonstrations of judicial condemnation by the lower courts. That the conditions of

confinement in many prisons substantiate claims of cruel and unusual punishment was disputed by neither decision. Yet the issue faced by the Court in Rhodes and Bell was not whether these same conditions violated the Constitution, but whether the 8th amendment was violated by one specific practice of double-celling, in itself. The Court found this was not true:

> [w]e disagree with both the District Court and the Court of Appeals that there is some sort of "one man, one cell" principle lurking in the Due Process Clause of the Fifth Amendment. While confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment, nothing even approaching such hardship is shown by this record.[11]

A failure to demonstrate deprivation at the Southern Ohio Correctional Facility (SOCF) was similarly emphasized by the Supreme Court in Rhodes. The capacity of the SOCF (described by the District Court as an "unquestionably top-flight, first-class facility") [12] to provide adequate sanitation, medical care and food apparently had not been compromised by double-celling, nor was the incidence of violence heightened. Nor did the practice "create other conditions intolerable for prison confinement."[13] That hours of cell confinement were in most cases restricted to only that part of the day designated for sleeping received major emphasis in both decisions.

Recognition of the Court's evaluation of conditions at the MCC and the SOCF in addition to the particular complaint (double-celling) in question is critical to the understanding of the import of these two decisions. While Rhodes and Bell may be viewed by some as contrary to the sentiments promulgated throughout previous judicial activity in regard to prison life, the maintenance of the "totality of conditions" precedent begun in 1969 in Holt v. Sarver[14] is a more accurate representation of the Supreme Court's philosophy in these cases. This practice advanced in Laaman v. Helgemoe:

> The totality of the conditions of confinement must be considered in determining the extent to which the state is obligated to provide opportunities to stave off degeneration and to minimize impediments to reform...[the] touchstone is the effect upon the imprisoned.[15]

A second, more subtle basis for the Bell and Rhodes decisions is the distinction between double-celling and overcrowding. In Costello v. Wainwright, "testimony indicated the relationship between overcrowding and adequate health care, and violence;" [16] in Pugh v. Locke, overcrowding was responsible for "compounding" all other defects of the Alabama penal system.[17] Due perhaps, to limitations on the hours of cell confinement at both the MCC and SOCF, and to the prevention of degenerative effects throughout other areas of these same facilities, no crowding was documented by the higher court, despite double-celling.

The decision facing corrections officials, judges and legislatures is whether increased use of existing facilities stretches prison resources beyond capacity. The answer to this question must be patterned upon the conditions set forth in Rhodes and Bell, with continued attention focused on the "totality of confinement" criterion. For many jurisdictions, this will make the expanded utilization of existing facilities a most restrictive and unlikely option.

New Prison Construction

The high costs of new prison construction have been outlined in a previous section. Although prohibitive from a cost standpoint, circumstances may arise which necessitate the construction of additional facilities. Older prisons, fallen into continual disrepair and housing outmoded, inefficient physical plants, can make repair or renovation financially infeasible. The need for compliance with correctional standards can make new prison construction desirable, although specific standards regarding capacity may require the replacement of older prisons with new facilities.

Yet if new prison construction is sought for the purposes of expanding, rather than merely replacing a jurisciction's institutional capacity, there are a number of financial considerations even beyond the amortized capital debt which indicate that increasing the "supply" of incarceration may be a significantly more costly option than would be the expansion of other corrections programs.

Fixed vs. Variable Costs

Typically, comparisons of program costs are based on various estimates of service to individual clients. Generally, the average cost of incarcerating an inmate is calculated by dividing an institution's operating costs by the number of its inmate days (the number of inmates incarcerated in a one year period times the number of days incarcerated). What makes the per diem rate of prisons so much greater than that of other punishment options is the composition of its "fixed" costs, and the financially dominating character of those costs over its "variable" costs in the total operating expenditure figure.

Fixed costs are those which remain relatively unaffected by changes in the inmate population. Predictably, these constitute the greatest portion of operating costs: physical plant and grounds maintenance; small equipment and energy costs; the support of administrative and intake services, and of the security, custodial and program staff. Variable costs cover food, clothing and supplies, and are affected by changes in population. In calculating the per client price of service delivery, fixed costs figure significantly, in that operating costs per inmate increase with decreases in the population total. The most cost-efficient institution is, necessarily, one which consistently operates at full capacity. The provision of program services is a case in point. In community-based programs involving little or no incarceration, medical, educational and vocational services can be purchased from the community on a per diem basis, eliminating the need for an additional minimum number of staff to provide these services in-house. Whenever provision of in-house services is necessary, as it is in a prison, this minimum number of

personnel will always be required. Although additions to staff may follow large increases in population, there is a point at which the costs of these services cannot be reduced. It is easy to see why programs which involve fewer fixed costs are more efficient from this viewpoint.

Recent scrutiny of the comparative costs of community-based punishment options and incarceration[18] has indicated that in terms of operating expenditures exclusing capital costs, community-based programs are frequently as costly as those involving incarceration. What makes the two options financially comparable is the fact that staff salaries and benefits comprise the greatest portion of the operating costs of any corrections program. A qualitative difference between the two approaches, however, is found in the composition of the staff. In community-based programs, staff are predominantly administrative or program personnel; in prisons, they are largely the security force and are less variable when manipulation of costs is intended.

The Relationship Between Security and Prison Cost

Much of the costs of new prisons will depend upon the security classification of the institution to be built. Typically, the higher the security classification, the higher the construction costs and the more intense additional capital precautions, such as perimeter securtiy, will be.

Despite considerable advances in electronic surveillance equipment, and the subsequent reduction in the need to "guard" against escapes, even our most recently constructed prisons tend to be huge steel and stone fortresses patterned after the earliest of penological structures. Much has been written on the adverse effects of institutional structures such as these on human behavior.[19] In the prison setting, structural effects translate into frustration, hostility and violence. In the process, inmates come to view their untrustworthy keepers as vehicles for their own protection against the aggression of fellow inmates. In Ramos v. Lamm, in which conditions at the maximum security unit of the Colorado State Penitentiary were declared unconstitutional, "the evidence indiate[d] that the architecture of the cellhouses...constribute[d] to the violence and illegal activity between inmates."[20] In light of circumstances such as these, both corrections officers and inmates acknowledge the need for expanded security forces. In 1980, a U.S. Court for the District of Columbia awarded maximum security inmates at the Lorton, Virginia, prison $600,000 to cover the expenses of their legal battle to obtain more corrections officers at the city facility.[21] In addition to the award, the court increased the number of security staff at the institution from 122 to 152, the number called for by correctional standards.

Generally, the structure of many facilities discourages reductions in security personnel according to decreases in the inmate population. Disjointed wings or cell blocks surrounding a central receiving area comprise a structure not uncommon to many correctional facilities in this country. Consequently, inmate-staff ratios diminish in importance next to the need to maintain a minimum number of staff in various separated areas of the same facility. The point is that typical prison and jail architecture, of itself, may create a set of needs which helps to inflate the costs of incarceration.

Most alarming, of course, is the fact that the assumptions which underly the "need" for various architectural differences among minimum, medium and maximum security structures have never been examined.

The Relationship Between Classification and Prison Cost

A growing number of critics have pointed to the inadequacy, inconsistency and often times meaninglessness of many inmate classification systems which question, if not undermine, the need for expensive, high security institutions.[22]

Although reliable guidelines for inmate classification do exist, they may bear little resemblance to systems in use. Prior to the violence at the New Mexico State Penitentiary, it was noted that despite the absence of written standards or procedural guidelines, 85 percent of the inmates at that institution were classified as medium security.[23] A major reclassification effort undertaken on Alabama's prison population in 1976 revealed that minimum or even community levels of supervision would have been suitable for half of the inmates, although only ten percent had been so rated; that two-thirds of the medium security inmates could be reclassified as minimum; and that at least half of the population at one maximum security institution would not have been confined in this most stringent option had that state's own classification criteria been applied.[24] Similar overuse of unnecessarily restrictive incarceration measures surfaced in a recent nationwide survey of jails and prisons.[25] The problem is exacerbated by the lack of correspondence between the type of programs needed by inmates, given their classification, and actually available program slots. Too often, inmates tend to be placed in overly restrictive settings, from which point disciplinary problems are usually reclassified into yet another more restrictive setting.[26]

Classification becomes a significant cost issue whenever inmates are inappropriately placed -- whether by error or for lack of space elsewhere -- in more expensive, high security institutions. When these facilities become filled to and beyond existing capacity, as they are currently, the unfortunate aftermath is the creation of a spurious need for additional medium or maximum level institutions.

STRATEGIES DIRECTED TOWARD MANAGING DEMAND

There are three general arenas in which incarceration costs may be controlled through the purposeful use of new punishment policies. Policies directed toward entry attempt to better regulate the selection of offenders for terms of incarceration. Location policies are designed to increase the variety of punishments available, while implementing cost-effective programs which control costs of punishment. A third alternative is to establish exit policies which allow for termination or reduction of incarcerative sentences so that demand for space is regulated. In recent years, several programs have been developed in each of these arenas which illustrate some of the potential for cost control, as well as the disadvantages, inherent to each area.

But it is crucial to recognize that these policies act as cost controls only when they reduce the demand for incarceration to a level at or below the existing capacity. That is, each of these programs must actually displace demand for incarceration onto other programs which do not require expansion of capacity.

Since any new program also represents substantial costs (e.g., development, administrative and operational expenses), no "per inmate" costs are saved by the mere implementation of new programs. Savings are realized only when the new program prevents the need for capital expenditures to increase capacity.

Thus, the central question facing the users of demand-management strategies is whether such policies will actually modify demand, when practiced. It is in relation to this issue, for each of the three arenas (entry, location and exit) that attention is focused for the remainder of this essay.

Entry Policies

Regulation of demand at the entry stage is focused on the selection of offenders for incarcerative dispositions. These policies work in two general ways: First, they restrict the number and type of offenders to be prosecuted; and, second, they restrict the sentencing options of judges for offenders who have been prosecuted.

Entry policy controls have been very popular in recent years, but serious questions have been raised regarding their efficacy. Primarily, these questions concern the degree to which entry policies actually influence incarceration demand. Critics of entry policies argue that they have actually "widened the net of social control" by increasing the number of persons formally processed, without decreasing levels of incarceration. Yet, early screening of cases remains a logical way to reduce the number of persons eligible for incarceration. Apparently, the answer lies in carefully planning the development and implementation of entry programs.

An examination of the application of two entry policies -- pre-trial diversion and sentencing guidelines -- illustrates a major problem with entry control.

Pre-Trial Diversion

Pre-trial diversion functions as an entry control through the avoidance of prosecution in cases which are only marginally criminal. Often, offenders who have special problems (e.g., drug addiction) which cause their criminal behavior are felt to be appropriate for this sanction. In its summary report, the President's Commission on Law Enforcement and the Administration of Justice[27] recommends the use of such alternative procedures to deal with "the many offenders who clearly need some kind of treatment or supervision, but for whom the full force of criminal sanctions is excessive."

The difficulty with pre-trial diversion has been that too often these programs have not meaningfully reduced the number of cases processed by the criminal justice system. Indeed, one study found that a court employment project actually increased the number and breadth of cases formally processed by the justice system.[28] Apparently it is the manner in which diversion programs are implemented that helps to determine whether they will be successful at reducing court processing or saving jail incarceration costs.[29]

The use of community service as a criminal justice sanction has been one of the most promising diversionary programs of recent years. The penalty involves sentencing offenders over the age of 17 to up to 240 hours of unpaid public service work, performed in lieu of a prison term. One evaluation[30] of the British practice found that 90 percent of court-referred participants had a prior criminal record, and that 40 percent had previously been incarcerated.

Unlike Great Britain, the community service sentencing option has not been widely used in the United States as an alternative to imprisonment. For example, one Oregon-based program employed community service for only minor offenders such as drunk drivers, shoplifters and vagrants.[31]

Perhaps the most ambitious application of community service sentencing in this country has taken place in New York City under the auspices of the Vera Institute of Justice. Here, as in Great Britain, an agency apart from the courts determines program eligibility and community service placement. To be eligible, offenders must have extensive prior records which indicate that an incarcerative sanction would be inevitable. Thus, the program insures that its efforts reduce the pressure of prison populations.[32]

Sentencing Guidelines

Recently, policy-makers have turned to sentencing guidelines as a mechanism for controlling the number and length of terms of imprisonment. Basically, guidelines provide the sentencing judge with a narrow range of sentencing options which may be applied to the offender. One notable guidelines project in Minnesota,[33] based on the premise of maintaining existing levels of prison populations, implemented guidelines expressly designed to avoid increases in prison crowding. It should be noted, however, that not all guidelines systems automatically translate into stable rates of imprisonment. Barry and Kennedy [34] have shown how rather minor changes in guidelines values can translate into fairly substantial differences in eventual prison populations. Ironically, a recently proposed set of guidelines in Pennsylvania [35] was rejected by the legislature largely for its "leniency," even though the developers projected that it would lead to greater levels of incarceration. Thus it appears that guidelines will prove to be a helpful alternative only when a conscious effort has been undertaken to make them commensurate with existing incarceration resources.

Both of these reforms -- diversion and guidelines -- illustrate the central problem facing cost control reforms implemented at the entry stage:

will their operation actually influence incarceration demand in the expected direction? Too often, pre-adjudication reforms have simply proved to be punishment add-ons, expanding the scope of the criminal justice system to include minor offenders rather than restricting its full impact to only the most serious.

The problem is that, in order to reduce incarceration demand, these programs must be designed and implemented in a manner that is suitable for serious offenders who would otherwise be handled more severly. Experience suggests that doing so is not an easy or automatic outcome of these programs.

Location Policies

Most jurisdictions have a very limited number and breadth of options available for punishing offenders. As a consequence, decision-makers often find themselves choosing between fairly weak probation sanctions and maximum security prison for most offenders. It is the lack of policy choices that drives many decision-makers to rely more heavily on traditional incarceration, with the consequential need for additional prison space and the costs of its provision.

The point to be emphasized is that punishment policy is to a great extent limited by the range of punishment options available to decision makers in different branches of government. In highly inflexible punishment jurisdictions, prison crowding can become an intractable problem which leads to the increasingly costly policy of adding new prisons. Jurisdictions characterized by flexible punishment options may be able to better manage crowding by increasing the capacity of one cost-efficient options or another. The key lies in how various types of punishments are distributed among all offenders under social control rather than in how much total punishment is meted out.

The cost implications of various policies can also be illustrated. Table 1 shows the relative total costs for three different approaches to punishing a set of 10,000 offenders, ranked according to seriousness of the case. Thus, the total costs for punishment decline as one makes more extensive use of a range of punishment alternatives other than prison and probation. Yet this table, aside from using arbitrary costs per person per year estimates, is unrealistic because the most important cost-control issue has been omitted -- current capacity. That is, if the jurisdiction's capacity is, say, 4,500 prison inmates, then the savings associated with more flexible punishment policy emphasis will be less than is indicated, since the major portion of the institutions will have to be operated even if some of the institutions will have to be operated even if some of the cells are unoccupied (unless population reductions reach a point which permits wholesale closing of a prison). On the other hand, a capacity of 2,500 vastly underestimates the cost of Policy I, since it requires the establishment of 1,800 new cells -- or more than triple the $90 million figure.

Table I: Illustrated Punishment Policy Costs for 10,000 Offenders

(NA=Not Available)

Level of Seriousness of Offender	Policy I			
	Community Service - Restitution	Probation (Intensive)	Confinement	Parole & Other Release
Cost of Option	$500/Year	$750/Year	$20,000/Year	$1,000/Year
Very High (1,000)	NA*	NA	100%	NA
High (2,000)	NA*	20%	60%	20%
Moderate (3,000)	NA*	25%	50%	25%
Low (2,000)	10%	40%	20%	30%
Very Low (2,000)	25%	50%	10%	15%
Total Cost	$90,612,500			
#Imprisoned	4,300			

Level of Seriousness of Offender	Policy III			
	Community Service - Restitution	Probation (Intensive)	Confinement	Parole & Other Release
Cost of Option	$500/Year	$750/Year	$20,000/Year	$1,000/Year
Very High (1,000)	NA	25%	50%	25%
High (2,000)	NA	40%	30%	30%
Moderate (3,000)	20%	50%	15%	15%
Low (2,000)	40%	50%	5%	5%
Very Low (2,000	60%	40%	0	0
Total Cost	$38,962,500			
#Imprisoned	1,650			

Level of Seriousness of Offender	Policy II			
	Community Service - Restitution	Probation (Intensive)	Confinement	Parole & Other Release
Cost of Option	$500/Year	$750/Year	$20,000/Year	$1,000/Year
Very High (1,000)	NA	10%	75%	15%
High (2,000)	NA	30%	40%	30%
Moderate (3,000)	10%	40%	25%	25%
Low (2,000)	25%	50%	10%	15%
Very Low (2,000)	40%	40%	5%	15%
Total Cost	$57,675,000			
#Imprisoned	2,600			

Exit Policies

Exit policies have a number of distinct advantages over other approaches. These policies attempt to shorten the duration of incarcerative punishments, typically by reducing average prison stay. Consequently, this approach takes advantage of minimal levels of incapacitative and deterrent crime control potential by insuring that a larger number of perisons receive at least some imprisonment. The logic of exit policies is supported by the fact that sentences in the U.S. run substantially longer than those of other comparable industralized countries.[36] The efficacy of exit policies can be illustrated by the most common routine method of activitating release -- parole -- and a new approach to situational release policies -- emergency release.

Parole

Parole releases comprised over 70 percent of all prison releases in 1978.[37] State-specific parole practices can have a significant impact on each state's capacity to use parole as a means to regulate its prison populations. A nationwide survey of release procedures undertaken in 1980 by the American Foundation[38] found that states which had initially met with some degree of prison crowding but then experienced a decline in their correctional populations were those which maintained more discretionary parole boards which generally required shorter periods of time served prior to release. Likewise, states which consistently encountered overcrowding were found to be those parole boards conformed to a "grid" or "matrix" system, by which offense, behavior type, etc., served as determinants of the release decision. Legislative attempts to limit parole discretion have recently surfaced in Florida and Oregon through the enactment of parole guidelines.[39] The passage of presumptive parole in Maryland and New Jersey has provided those states with a vehicle for setting the parole date at first eligibility. The question is whether carefully structured release practices, such as were enacted in these states, are sufficiently fixed that the flexibility needed to regulate populations in prison has been eliminated. As usual, the dilemma which faces policy-makers is whether to allow enough discretion to permit flexible system responses at the risk of disparity and unpredictability of policy practices. Some programmatic options for increasing the kinds of offenders granted parole can, however, be identified.

Well established supervised release practices such as furloughs can shorten sentence length and accelerate the flow of offenders through the system, in addition to serving the adjustment needs encountered by inmates who are about to make the transition to an unstructured environment. Although 47 states are authorized to use furloughs, only 32 report using this option. Connecticut has exercised a plan in which contiguous 15 day furloughs are granted to inmates nearing release. Revisions in Maryland's furlough program now allow up to 90 days leave in a single year.[40] Delaware has instituted a supervised custody program as a specific option for controlling institutional populations.

Emergency Release

Among the most recent approaches to handle prison crowding is the legislative placement of emergency release powers in the hands of the executive branch. The prototype for this approach was first passed in Michigan.[41] This law creates a "cap" for statewide imprisonment which must not be surpassed. If prison counts exceed this number, the chief executive is allowed to exercise unique powers to release certain low-risk inmates on a pre-determined schedule based on the seriousness of the offense, the prior-record and the amount of time already served. Thus, the legislature empowers the executive to maintain prison populations at no greater than constitutionally permissible levels.

DISCUSSION

It may be concluded from this review that the decision of how best to control prison costs flows from analyses of (1) existing capacity of prisons in relation to demand for space; (2) capacity of current punishment options being used; and (3) capacity of feasible new or strengthened options. Only once such analyses have been completed does it become possible to manage the costs of punishment policy.

Yet, the simple institution of a new punishment option does not guarantee that incarceration demands will be reduced or controlled. To the contrary, many programs which on paper appear to control the demand for prison space in practice fail to affect incarceration levels; instead they are directed toward less serious existing offenders. Thus, in relation to incarceration policy approaches to cost control, it must be emphasized that:

- The most direct method to control incarceration costs is to place limits on demand for incarceration so that it does not exceed capacity.

- Programs designed to control incarceration demands often fail to do so, because they are applied to non-incarcerated offenders. This is particularly true of "entry" policies and, to a lesser extent, "location" policies.

- Most jurisdictions lack the flexibility in available punishment necessary to develop sound programs of controlling incarceration costs. This problem has been exacerbated by recent movements toward sentencing reform which abolish parole in favor of mandatory sentences.

- The most promising approaches for managing demand may be those that operate at the exit arena, reducing the length of incarcerative terms given to offenders.

- If a new correctional punishment approach is to be truly effective at controlling costs, it must be implemented toward that end, with reduction in demand for incarceration as its direct intent.

SECTION 4: NOTES

[1] The application of a requirement of 60 square feet of floor space would "displace" ninety percent of the population of 87 state and federal facilities operating in 1978. See Joan Mullen and Bradford Smith, American Prisons and Jails Volume III: Conditions and Costs of Confinement (Washington, D.C.: U.S. National Institute of Justice, 1980) p. 56.

[2] See, for example, Carl B. Clements, "Crowded Prisons: A Review of Psychological and Environmental Effects," Law and Human Behavior 3 (1979): p. 217-25; Carl B. Clements, "The Relationship of Offender Classification to the Problems of Prison Overcrowding," Crime and Delinquency 28 (January 1982): p. 72-81 (Hereinafter cited as "Classification"); David P. Farrington and Christopher P. Nuttall, "Prison Size, Overcrowding, Prison Violence, and Recidivism," Journal of Criminal Justice 8 (1980): p. 221-231; and Hans Toch, "Prison Environments and Psychological Survival," in Perspectives in Law and Psychology: The Criminal Justice System, ed. B.D. Sales (New York: Plenum Press, 1977).

[3] The cyclical effects of overcrowding on system performance are explained in Clements, "Classification", supra note 2.

[4] For a more precise figure of the number of states under court order, consult American Civil Liberties Union, National Prison Project, Inter-Office Status Report -- The Courts and Prisons (most recent memo).

[5] On March 31, 1978, 8186 suits had been filed by inmates regarding prison conditions. See Mullen and Smith, supra note 1, p. 33.

[6] Rhodes v. Chapman, __U.S.__, 101 S.Ct. 2392 (1981), p. 69.

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

[8] Rhodes v. Chapman, 101 S. Ct. 2392, 2401 (1981).

[9] Pugh v. Locke, 406 F. Supp. 318 (MD Ala. 1976), aff'd as modified, 559 F. 2d 283 (CA5 1977), rev'd in part or other grounds, 438, U.S. 781 (1978) (per curiam).

[10] Ibid, p. 323-324.

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

[12] Chapman v. Rhodes 434 F. Supp. 1007, 1009 (S.D. Ohio, 1977).

(13] Rhodes v. Chapman, 101 S.Ct. 2392, 2399 (1981).

[14] Holt v. Sarver, 309 F. Supp. 363 (ED Ark. 1970).

[15] Laaman v. Helgemore, 437 F. Supp. 269, (N.H. 1977): p.317-323.

[16] Costello v. Wainwright, 397 F. Supp. 20, 34 (MD, Fla. 1975), aff'd 525 F.2d 1239 (CA5), vacated on rehearing on other grounds, 539 F.2d 547 (CA5 1976) (en banc),rev'd, 430 U.S. 325, aff'd on remand, 553 F.2d 506 (CA5 1977) (en banc) (per curiam).

[17] Pugh v. Locke, 406 F. Supp. 381, 325 (MD Ala. 1976).

[18] See, for example, National Council on Crime and Delinquency, A New Correctional Policy for California: Developing Alternatives to Prison (San Francisco: NCCD Research Center, 1980).

[19] See, for example, I. Altman, Environment and Social Behavior: Privacy, Personal Space Territory and Crowding (Monterey, Ca.: Brooks/ Cole, 1975): A.H. Esser, "Cottage Fourteen: Dominance and Territoriality in a Group of Institutionalized Boys," Small Group Behavior 4 (1973): pp. 131-146; Norman Johnson, "Supportive Architecture for Treatment and Research," The Prison Journal 46 (Spring-Summer 1966): pp. 15-22; David Marreno, "Spatial Dimensions of Democratic Prison Reform: Human Space and Political Participation in Prison," The Prison Journal 57 (Autumn-Winter 1977): pp. 31-42; and H.M. Proshansky et al., ed., Environmental Psychology (New York: Hold, Rinehart and Winston, 1970).

[20] Ramos v. Lamm, 639 F. 2d 559, 573 (CA10 1980), cert. denied ___U.S.___(1981).

[21] Doe v. District of Columbia USDC DC (1980).

[22] See, for example, Carl B. Clements, "The Future of Offender Classification--Some Cautions and Prospects," Criminal Justice and Behavior 8 (March 1981): pp. 15-38; and (hereinafter cited as "Future") E.I. Megaree, "The Need for a New Classification System," Criminal Justice and Behavior. 4 (June 1977): pp. 107-14.

[23] Clements, "Crowded Prisons," supra note 2, p. 218.

[24] Clements, "Classification," supra note 2, p. 75.

[25] Mullen and Smith, supra note 1.

[26] The criticisms of classification practice named here and below have been taken from Clements, "Future," supra note 22 and elements, "Classification," supra note 2.

[27] The Presidents' Commission on Law Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society (Washington, D.C.: U.S. Government Printing Office, 1967) p. 133.

[28] Franklin E. Zimring, "Measuring the Impact of Pre-Trial Diversion from the Criminal Justice System," University of Chicago Law Review 31 (1974): p. 241.

[29] Diane C. Gottheil, "Pretrial Diversion: A Response to the Critics," Crime and Delinquency 25 (1979): p. 65

[30] James Beha, Kenneth Carlson and Robert H. Rosenblum, Sentencing to Community Service (Washington, D.C.: U.S. Government Printing Office, 1977).

[31] Anne Newton, "Sentencing to Community Service and Restitution," Criminal Justice Abstracts 11 (September 1979): pp. 441-42.

[32] See Vera Institute of Justice, The New York Community Service Sentencing Project -- Development of the Bronx Pilot Project (New York Vera Institute of Justice, 1981).

[33] For a description of this project, see Robert Mathias and Diane Steelman, Controlling Prison Populations: An Assessment of Current Mechanisms, (draft), report to the National Institute of Corrections by the National Council on Crime and Delinquency, Hackensack, New Jersey, March 1982 (mimeo).

[34] Donald M. Barry and Timothy L. Kennedy, "An Empirical Comparison of Guidelines Structures in Two States," in Richard F. Sparks, Bridget A. Stecher, Jay S. Albanese and Peggy L. Shelly, Stumbling Toward Justice: Some Overlooked Research and Policy Questions About Statewide Sentencing Guidelines, Final report of the Evaluation of Statewide Sentencing Guidelines Project supported by Grant No. 78-NI-AX-0147 awarded to the School of Criminal Justice, Rutgers University by the National Institute of Justice, U.S. Deaprtment of Justice.

[35] Robin Lubitz, personal communication; see also Pennsylvania Bulletin Vol. II, No. 42, Saturday, October 17, 1981, Part II (Pennsylvania Commission Sentencing's Proposed Sentencing Guidelines).

[36] See, for example, Richard A. Salomon "Lessons from the Swedish Criminal Justice System: A Reappraisal", Federal Probation 40 (September 1976): pp. 40-48.

[37] Uniform Parole Reports, Parole in the United States: 1979 (San Francisco: National Council on Crime and Delinquency, 1980).

[38] Becki Ney et al., Release Procedures (Philadelphia: The American Foundation, Inc., 1980).

[39] Michael Kannensohn, A National Survey of Parole-Related Legislation Enacted During the 1979 Legislative Session, Uniform Parole Reports (San Francisco, CA: National Council on Crime and Delinquency, 1979) p. 11.

[40] Ney et al., supra note 38.

[41] See Steelman and Mathias, supra note 33, for a discussion of this option.

[42] For a discussion of this law, see Diane Steelman, Overcrowding in New Jersey: No Easy Answer to the Crisis in Corrections (Hackensack, NJ: National Council on Crime and Delinquency, 1981) pp. 12-13.