CORRECTIONS IN CONTEXT: Policy Options for Control of Intake, Length of Stay and System Capacity in West Virginia

Richard A. Ball

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FOREWORD

The Institute for Public Affairs at West Virginia University is pleased to present the third in a series of Policy Monographs that address significant public policy issues facing the state of West Virginia. Each monograph provides an overview of a particular problem and presents an array of options for consideration by West Virginia's policymakers.

Policy Monograph Series No. 3, *Corrections in Context: Policy Options for Control of Intake, Length of Stay and System Capacity in West Virginia,* focuses on one of the most perplexing problems in American society, how to deal effectively, efficiently, and fairly with the rapidly growing number of inmates in our nation's correctional facilities. Given existing fiscal constraints and fundamental disagreements concerning the causes and cure for crime, it should not surprise the reader that this monograph does not provide a single, overriding solution to solve all of West Virginia's correctional system's problems. Instead, it analyzes a number of available options and explores the experiences of other states. It is hoped that this monograph will stimulate public discussion and informed commentary as West Virginia continues to refine and reflect upon its approach to solving the many issues facing our correctional system.

The opinions expressed in this monograph are those of the author and do not necessarily reflect the views of the Institute for Public Affairs or of West Virginia University.

Robert J. Dilger
Director
Institute for Public Affairs

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CHAPTER 1

INTRODUCTION

The United States is currently incarcerating its citizens in record numbers, generating enormous pressures on our correctional systems. In 1989, the total number of inmates in federal and state prisons increased by 115 percent, reaching 710,054, a record number. The number of sentenced prisoners per 100,000 residents reached 274, another record. In 1989, the typical state prison operated at 107 percent of its highest rated capacity and the federal prison system operated at 163 percent of its highest rated capacity. At the present time, 41 states and the District of Columbia have been ordered by judges to limit their prison populations, improve conditions in their prison systems, or both (Wilson, 1990).

In West Virginia attention has so far centered around the need for replacement of the penitentiary at Moundsville. Although present construction plans represent solid progress, they will not solve all the problems in the long run. Following an earlier effort aimed at exploring policy options for replacement of the penitentiary and the possible privatization of corrections within the state (Ball, 1989), the present monograph addresses some of the deeper issues.

Because of time and resource constraints this effort cannot pretend to be exhaustive. Many states faced with similar problems have either established a statewide task force or affiliated themselves with one of the cooperative programs funded by the federal government. Current correctional problems are simply too complex to be approached without such a major effort. The task force approaches have proceeded by bringing together informed representatives with a range of expertise from the various areas affected by correctional problems. States employing this approach have then allocated sufficient resources for necessary data collection and data analysis, allowing the task force to conduct a thorough, informed give-and-take policy analysis leading to an outline of policy options along with recommendations. Because of

the complexity of the process, these task forces are usually given a minimum of two years to complete their work.

The cooperative programs have proceeded by appointment of a coordinating body in each of the cooperating states and a sharing of information and technical assistance. Through these efforts the states involved have been able to draw upon the best available expertise on matters of correctional policy ranging from sentencing reform to prison architecture. The complexity of the issues has required that these states plan for a period of three to five years of intensive effort.

Neither of these approaches has been taken in West Virginia. Instead, the present monograph must rest upon the author's own concentrated efforts over a period of several months. Rather than providing a detailed picture, it is intended as a beginning.

The immediate correctional problem facing West Virginia was detailed at length in the earlier monograph. The present effort will begin somewhat differently by analyzing the larger national context, which is the outcome of a clash between constantly rising rates of incarceration, the trend toward the so-called "warehousing" of prisoners, and the movement for protecting the rights of these same prisoners. Having done that, it will be possible to turn to an examination of the many options available for dealing with correctional pressures in West Virginia in the light of this analysis.

These policy options will be subdivided into (1) alternatives for controlling prison intake, (2) possibilities for reducing average length of stay in correctional facilities, and (3) means for improving the carrying capacity of the correctional system. In each case an effort will be made to outline policy options that might be considered by policymakers both inside and outside state government. Not only are there various alternatives open to the Legislature, but there are possible options available for consideration by prosecutors, the defense bar, the judiciary and both public and private noncriminal justice agencies. At the same time, policy options will be described from among those available to probation and parole agencies, the Department of Corrections and the Office of the Governor.

Almost everyone concerned agrees that correctional issues in the state have been addressed in a piecemeal fashion over the past decade. And almost everyone concerned agrees that one of the principal obstacles to comprehensive planning is the lack of information. If this monograph succeeds in establishing the need to gather such information and for long-range, systematic policy approaches based on an overview of the entire criminal justice process, from the passage of legislation creating a "crime" to the processes of prosecution, defense, adjudication and correctional management, it will have served its purpose.

CHAPTER 2

THE LARGER CONTEXT

Across the United States, the pressures put on correctional facilities by the sheer weight of numbers, combined with the tendency to give low funding priority to these institutions, has led to a significant deterioration in their physical environments, an erosion of programs, and a sharp decline in inmate and staff morale. At the same time, a loss of faith in the rehabilitation ideal, or at least in the capacity of such institutions to succeed in efforts at rehabilitation, has meant less willingness to invest in the resocialization of prisoners and a drift toward what has been called a "warehousing" mentality. Yet because rising incarceration rates and "warehousing" trends have run directly counter to the powerful movement recognizing inmate rights, a clash was inevitable. Understanding this clash and the possible options for dealing with it in West Virginia and elsewhere depends in part on a grasp of each of these three interconnected trends.

A. *Rising Incarceration Rates*

Throughout the United States the trend toward locking up more and more of the population has placed a heavy burden on correctional systems. From the time the National Prisoner Statistics (NPS) program was initiated in 1926, the peak year for the national incarceration rate had been 1939, with a rate of 137 per 100,000 citizens, coming after years of the Great Depression. With the mobilization of young men draining off much of the crime-prone population during WWII, the incarceration rate fell throughout the 1940s, reaching a low of 105 incarcerated inmates per 100,000 citizens in 1947. By 1961 that figure had increased to 119 per 100,000 citizens. Then, during the 1960s and early 1970s, the incarceration rate declined, perhaps partly because of the more lenient political climate and partly because of the "drain-off" of the crime-prone population due to the conflict in Vietnam.

By 1974, the incarceration rate began to climb again, and it has continued to climb in an alarming trajectory, despite declining crime rates and the fact that many of the incarcerated are not violent offenders. By 1983, 438,830 people were incarcerated in state and federal correctional institutions (Bureau of Justice Statistics, 1984). In just one decade the size of the incarcerated population had doubled, reaching the highest figure in the history of the nation (Austin and Krisberg, 1985).

In 1984 the General Accounting Office forecast that by 1990 the overall prison population alone might reach 566,170, a figure not only much higher than ever before but one that, combined with a projected increase in the jail population, would represent an astronomical incarceration rate of 227 inmates per 100,000 citizens, by far the highest in U.S. history. Although some felt this estimate overly alarmist, the projected figure was actually reached and surpassed in 1988, when approximately 650,000 prisoners were incarcerated in state and federal prisons and another 300,000 were incarcerated in local jails (Bureau of Justice Statistics, 1989). By the end of 1989, the number of prisoners incarcerated in state and federal prisons reached 710,054 and the combined incarceration rate, counting inmates in both prisons and jails, had increased to 274 per 100,000 citizens (Wilson 1990).

By 1989, the combined growth rate for jails and prison populations in the U.S. was the equivalent of three new 400-bed prisons *every week* (Bureau of Justice Statistics, 1989). The federal penal system was operating at 63 percent over its highest rated capacity, despite the fact that 12 new institutions had been built since 1979, with additional facilities acquired from private institutions and the military (National Institute of Justice, 1988b; Wilson 1990). More than two-thirds of the states were facing serious overcrowding problems, and 41 states, including California, Connecticut, Massachusetts and Texas, were under court order to relieve the overcrowding (Heritage Foundation, 1988).

B. *National Trends and Forecasts*

Any attempt to forecast future pressure on correctional systems in terms of rates of incarceration must be built upon an analysis of four separate factors. These include (1) changes in the overall pattern of crime rates, (2) demographic shifts for the subpopulations at highest risk, (3) shifts in economic conditions and (4) trends in criminal justice policies (Austin and Krisberg, 1985). However, it must be recognized that any forecasts for incarceration rates in West Virginia may depart considerably from the national trend. West Virginia is not as urban as most other states and its demographic characteristics are such that it has relatively few members in subpopulations at highest risk for

incarceration. Thus, any forecasting attempts for West Virginia's incarceration rates must take into account West Virginia's unique characteristics.

Nationwide, crime rates increased during the 1980s. However, there is considerable disagreement over what has caused crime rates to increase. Because there is no consensus over the cause of the increase, there is no consensus on what those rates will be in the near future. The National Research Council has explored the issue, but the relationships remain unclear (Blumstein et al., 1978).

There is a general consensus that demographic trends have a direct relationship with crime rates because it is known that certain demographic groups have much higher rates of arrest and incarceration than do others. For example, the rates are high among young men and are particularly high among young, black men. As a result, the higher the proportion of young men expected in the population, the higher will be the arrest and incarceration forecast and the greater the projected pressure on correctional facilities. Changes in the proportion of especially high-risk demographic categories such as young, black men will raise the arrest and incarceration rate forecast appreciably.

For the nation as a whole, the demographic projection is for a gradual decline in the proportion of the male population in the high-risk age groups (Bureau of the Census, 1984). But although the white male population between 20 and 29 years of age is declining, the population of black males in that age category is expected to increase until at least the year 2080 (Bureau of the Census, 1984). As a result, the projected decline in the incarceration rate associated with the drop in the proportion of young males in general may be offset by the increase in the proportion of young, black men with their much higher rates of arrest and incarceration. Furthermore, these projections have not taken into account the projected rapid growth of the proportion of Hispanic males in the population, an important omission in that Hispanic males also show higher arrest and incarceration rates than the male population as a whole (Austin and Krisberg, 1985).

Economic conditions may also play a significant role in future rates of incarceration, with some maintaining that rates of imprisonment are highly correlated with poverty levels and unemployment rates. This impression is certainly reinforced by the figures cited earlier, where the incarceration rates peaked during the Depression. But although specific studies have explored the relationship between increases in the male unemployment rate and subsequent growth of the prison population (Brenner, 1976), the connection between economic conditions and rates of incarceration remains fuzzy (Austin and Krisberg, 1985). Part of the problem is that the relationships seem to be

indirect, and part of the problem is that they may be mediated by other variables, including the demographic factors already discussed (Cohen, 1981; Thornberry and Christenson, 1984).

Although incarceration rates are affected by overall trends in crime rates, demographic changes, and shifts in economic conditions, it is important to emphasize that the most significant factor by far has always been criminal justice policy itself. The dramatic rise in the incarceration rate that took place during the 1980s can be traced mainly to harsher sentencing. At the same time, the movement to restrict parole has tended to increase the incarceration rate by operating from "the other end of the pipeline." On the one hand more and more of those arrested were being incarcerated and on the other fewer and fewer were being released.

As Allen Breed, former Director of the National Institute of Corrections, testified before Congress in 1983, "Jail and prison populations must be seen as less the result of such . . . indicators as the baby boom and the crime rate than as the result of basic policy decisions reflecting beliefs about how we deal with offenders," meaning that ". . . solutions lie not with jailers and wardens, but with key decisionmakers spread throughout the criminal justice system" (quoted in Cory, 1988:4). Those wishing to deal with correctional pressures may not be in a position to do much about demographic trends, overall crime rates or general economic conditions, but they are in an excellent position to alter the key variable—criminal justice policy. Whether they wish to do so is another matter, but this monograph will discuss a multitude of options available.

C. *Trends in West Virginia*

The situation in West Virginia makes incarceration forecasting especially hazardous. There is real need for a Forecasting Model to provide some best estimates. At this point, the low crime rate and general demographic patterns for West Virginia tend to suggest a likely decline in the size of the incarcerated population over the next decade. On the other hand, changes in economic conditions and criminal justice policies may tend to produce the opposite effect, leading to higher rates of incarceration and even more pressure on correctional facilities in the state.

As for the influence of the crime rate, West Virginia has for some years boasted the lowest official crime rate in the nation (Federal Bureau of Investigation 1989). Despite questions concerning the accuracy of these figures, they do indicate that West Virginia has a much lower crime rate than that prevailing in American society as a whole (Black, 1970; Garofolo, 1977).

Demographic shifts in West Virginia should reduce pressures on its correctional facilities. It is widely recognized that West Virginia has experienced a drop in population over the past decade, and the 1990 census is likely to document this general population decline. Moreover, there are reasons to anticipate that the decline may be especially pronounced among young males, who may be leaving the state in significant numbers to seek employment elsewhere. Given the very low proportion of the black population in West Virginia, it is highly unlikely that the reduction in the size of the crime-prone population of young males as a whole will be counterbalanced by any increase in the subpopulation of young, black males in the state. It would take a considerable shift in these figures to add large numbers of offenders to the rolls of the incarcerated. Moreover, further out-migration of young males may lower the crime rate even further, assuming that neither economic conditions nor changes in criminal justice policy operate powerfully enough to counter the effect.

The impact of economic conditions on West Virginia's incarceration rate is very hard to assess. Unfortunately, West Virginia has experienced some years of especially difficult economic circumstances. Should these conditions continue or worsen, the impact may be seen both in an increasing crime rate and a greater willingness to protect public and private property by incarcerating those offenders who are apprehended, such as occurred nationally during the Depression. However, it should be noted that the low crime rate has persisted for years despite a per capita income below the national average and that previous economic "booms and busts" have not produced wide fluctuation in these rates.

Thus, it would appear that the only factor likely to increase pressures on the correctional institutions of the state significantly is the same factor that offers an opportunity to decrease this pressure dramatically—change in criminal justice policy itself. If demographic trends are operating to reduce pressure and economic conditions have less than a significant effect, then criminal justice policy is of even greater importance in dealing with rates of incarceration in West Virginia than in many other states. Beyond the incarceration rate itself, however, lies the problem of correctional financing associated with the "warehousing" issue.

D. *Inmate "Warehousing"*

The burgeoning of the prison population during the 1970s and 1980s, combined with a loss of faith in the rehabilitation ideal and a decline in spending on domestic programs in general, led to a national trend toward a "warehousing" mentality. Those in corrections continued to plead for funds to

maintain physical facilities and provide programs for inmates, but the public response consisted of either ignoring the issue or calling for a "lock 'em up and throw away the key" policy. Facilities became more and more crowded, and programs of education and rehabilitation tended to lose their funding support.

E. *Indexes of Correctional "Warehousing"*

Until fairly recently, indexes of correctional "overcrowding," and later of "warehousing," relied on a ratio of institutional population to rated capacity, design capacity or operational capacity. Rated capacity is the number of inmates or beds assigned by some authority to that particular institution. Design capacity is a term referring to the number of inmates planned for when the facility was constructed. Operational capacity is the official figure representing the number of inmates that can be accommodated given a particular facility's staff, existing services and functioning programs.

Under this approach, if an institution has been defined as having an adequate "capacity" to house 500 inmates and is found to be housing 501, then it is by definition "overcrowded," although not in practice "sufficiently so" to require that anything be done. Specific percentage figures can be cited to show the extent to which the institution is operating "over capacity," giving an impression of precision. Unfortunately, this impression can be very misleading, especially if it does not take into consideration the combination of factors suggested by American Correctional Association standards.

Rated capacity, for example, can refer to the original design capacity, to some figure based on subsequent design modifications, to the number of inmates that certain officials have decided is appropriate for one reason or another, or to many other bench marks. And it is not uncommon for the particular bench mark chosen to vary over time depending on circumstances, including budget requests, political pressure and changes in administration. It is difficult to be sure just what "operating within capacity" really means.

The more objective measures of crowding developed in recent years have defined capacity in terms of square feet of space and related measurable units, providing indexes of (1) spatial density, (2) social density, and (3) mobility (Mullen, 1985a). But, although each of these measures is very important, none captures the essence of the totality of conditions comprising "institutional characteristics" (Mullen, 1985a). They are, however, useful when applied in concert with other indices.

Spatial Density

Groups setting standards for prison capacity have tended to converge on a measure of spatial density calling for 60 square feet of confinement space per

inmate—roughly the size of the average bathroom (Mullen, 1985a). This does not strike most observers as lavish waste of space. Yet according to a survey conducted in 1978, two-thirds of all state prisoners lived in space below this minimum standard (Mullen and Smith, 1980).

Social Density

While simple measures of spatial density appear rather precise, they may tell less about the psychological aspects of warehousing than is usually suggested. The problem is that the experience of privacy, although related to spatial density, does not bear a one-to-one relationship to it. One study has suggested that once space per inmate exceeds 50 square feet, the number of people present and the arrangement of the space may be more important factors in the onset of illness, death, suicide and disciplinary problems than the amount of space allotted per inmate (McCain et al., 1980).

Mobility

The temporal factor is as important as the spatial factor in determining whether an institution is overcrowded because the sheer amount of time spent in a given space may make it more or less stressful. For example, one measure of overcrowding/warehousing refers to the amount of time inmates are confined to their cells. However, using any one of these measures alone as an indicator of overcrowding is probably inadequate because spatial density is associated with social density and both tend to lead to less inmate mobility. This tends to be the case because of the heightened tension, to which the staff responds by "locking down" inmates and restricting their movements within the institution, even when they are allowed outside their cells.

F. *Institutional Characteristics*

As Mullen (1985a) has pointed out, the use of so-called "objective measures" may also be deceptive, in that the experience of crowding/warehousing is in many ways a consequence of general environmental factors such as the age of the facility, its food service and sanitation practices, and its lighting, air quality, and availability of programs for exercise, work, recreation, and medical care. This acknowledges that crowding is only part of the larger problem of "warehousing," which some courts have designated in terms of the "totality of conditions" characterizing a facility. Lack of adequate programs is as important as actual inmate population density, perhaps in some ways more important.

G. *The Impact of "Warehousing"*

Deterioration of correctional institutions poses both moral and management problems and reduces the likelihood that any of the basic goals of imprisonment

will be realized. Many, of course, either refuse to face the moral problems or deny that they are, in fact, "problems" at all. Instead, they hold the view that a different moral code can and should be applied to convicts. Also, many refuse to face management problems or even the question of correctional "goals." Instead, they define them as issues to be dealt with by those who run the prisons rather than as issues which ought to concern policymakers or the public. Such is not the position of this monograph.

Moral Issues

As Mullen (1985a) has stressed, there are serious moral issues associated with the inhumane treatment of human beings which comes as a both a direct and indirect result of overcrowded and deteriorated prisons. To what extent do current concepts of human decency allow for the cramming together of inmates in a way which is damaging to them physically, mentally and morally? Prison life is at best rather harsh, and it is morally questionable whether the state should contribute to the further debilitation, degradation and demoralization of the inmate by adding to the likelihood of stabbing, beating, extortion, sexual assault and even homicide that comes with inadequate and overcrowded facilities. It may be argued that the inmates are, after all, convicted felons entitled to "lesser eligibility" than the most deprived of law abiding citizens. Or it may be asked, as Mullen (1985a:33) does, "Do two wrongs make a right?"

The impact of inadequate and overcrowded facilities on physical debilitation is well documented (McCain et al., 1976; King and Geis, 1978; Walker and Gordon, 1980). Not only hypertension but tuberculosis, heart disease, diabetes and a host of other physical problems have been traced in part to the chronic stress induced by deteriorating conditions. Under a "warehousing" approach where adequate medical care is not readily available, a prison sentence may represent a sentence to permanent physical damage.

Inmate degradation is a fact of life under crowded conditions with inadequate programs. Inmates are degraded by being ignored and treated as worthless (Toch, 1977). They are degraded by a prevailing "warehousing mentality" which treats them as "things" to be jammed together with a minimum of attention except for numbers and schedules (Toch, 1985). The lack of ongoing programs means that inmates are not able to experience the formation of "respectable" links between themselves and staff members, whether teachers, counselors or work supervisors, leading to further depersonalization (Glaser, 1964).

Progressive inmate demoralization is an understandable result of the debilitation and degradation described. Without ongoing activity, there are no distractions and no way to give meaning to the passage of time, leading to a

demoralizing sense of time "dragging" by in such a way that "time does you instead of you doing time" (Toch, 1985). Under these circumstances, the search for ways to confer meaning on the passage of time, to vent frustration or simply to keep busy easily leads to activities such as violence or sexual brutality, which add to inmate demoralization.

Management Problems

Crowded conditions and program inadequacies compound the problems normally associated with administering an institution devoted to the custody of convicted felons. The dangers of riots, escapes and general disturbances are greatly increased. But these are symptoms of a deeper problem, which has to do with the greatly increased stress resulting from the constant intrusion of inmates into the personal lives of one another. This stress is damaging to both physical and mental health (D'Atri, 1975; Gavin et al., 1980). It tends to increase the occurrence of disciplinary infractions among inmates in general (Megargee, 1977; Nacci et al., 1977) and in some cases leads to extreme violence (Ellis et al., 1974). Even in cases where no overt discipline problems are apparent, withdrawal, depression, and other mental health problems develop (Toch, 1985).

"Warehousing" tends to complicate daily management and to disrupt routine. This disruption itself has been shown to increase disciplinary problems. In fact, it is the combination of crowding and disruption that most overheats the prison atmosphere (Toch, 1985). Not only is disruption a corollary of crowding and program inadequacy, but inmates in crowded facilities are subjected to more frequent transfers, which, even when they reduce the overcrowding for a short time, disrupt the lives of those who are transferred and destabilize the environment. At the same time, the congestion greatly increases the probability that inmates who "rub each other the wrong way" will be brought into contact. Programs have no room, space is placed at a premium, and inmates are increasingly "locked down" in their cells because there is nowhere else to put them. Each of these aggravating factors feeds on the others in such a way as to produce an explosive buildup of tension.

The idleness that comes with crowded conditions, inadequate programs, and a deteriorating physical environment adds to management problems both real and perceived. In real terms, idleness means more time for inmates to brood and less access to stress-reducing activities. In the perception of correctional staff, this lack of activity means that the inmates are more and more "on their own" and less and less subjected to institutional routines, leading to a sense of loss of control. Response to this sense of loss of control often follows a pattern of "cracking down" so that fairly minor infractions become the basis for disciplinary segregation.

Although classification is one of the keys to successful correctional management as well as to the success of educational, vocational and rehabilitation programs, it too tends to collapse under the pressure of crowded, inadequate facilities. In order to manage a correctional institution properly, it is essential that the administration maintain a sound system of administrative and disciplinary classification and keep the two separate. In terms of administrative segregation, it is important that certain inmates be kept separate from others in order to reduce friction and facilitate the operation of the institution. At the same time, it will undoubtedly be necessary to respond to certain infractions with measured discipline, including punitive segregation under appropriate conditions for an appropriate period of time.

Crowded conditions and program deficiencies tend to interfere with utilization of this basic management tool. Most experts agree that a prison is too crowded for classification to operate optimally when more than 85 percent of its cells are occupied (Toch, 1985). Extra beds provide the space necessary to juggle inmates. Those being segregated because they are dangerous or vulnerable or simply because they are being subjected to initial classification or to reclassification can be placed in spare space until assignments can be determined and arranged.

Correctional staff often ask us to remember that they too are "locked up" in the institution for the shift. The management problems produced by overcrowding and deterioration add tremendous stress to their working day. It is difficult to handle so many at a time, and it is certainly difficult to find the time to establish any sort of rapport with individual inmates. The sheer numbers combined with the transience of the population and the severe tension build higher the barrier which already divides inmate and staff member (Ellis, 1982). These pressures in turn lead to increased staff turnover and the consequent presence of a larger proportion of staff less experienced at correctional management.

"Warehousing" produces debilitation, degradation and demoralization among institutional staff members just as it does among the prisoners (Lombardo, 1981; Ross, 1981). Staff also develop stress-related medical problems, and rates of alcoholism and mental illness increase under crowded conditions with less than adequate programs (Lombardo, 1981). Association with these conditions tends to degrade those working there and to produce progressive demoralization (Ross, 1981). Frustrations are more likely to be taken out on inmates, who, after all, are being subjected to dehumanization in any case—and with the apparent approval of the larger society.

The Goals Issue

The more pressured the correctional system, the more difficult it is to realize the various goals justifying incarceration in the first place. Incapacitation is a goal even more difficult to attain than is usually the case. Deterrence becomes less likely. And rehabilitation is an almost impossible goal under the circumstances.

Incapacitation is difficult to achieve under conditions where some felons must be released early to make a place for others. For those who suggest that the incapacitation goal can be achieved through the construction of additional institutions, the research findings must be disappointing (Krajick and Gettinger, 1982). Two of the most respected studies estimate that crime would go up by only four or five percent if half of all offenders were released tomorrow, with at most an eight percent increase if prisons were abandoned entirely (National Research Council, 1978).

Incapacitating criminals has relatively little impact on crime rates because we apprehend and imprison only a small percentage of the criminal population. Moreover, the incapacitative effect tends to come only after the bulk of an offender's crimes have already been committed. For example, nearly half of all offenders arrested for violent crimes are under 18 years of age while the peak age at which offenders are sent to prison is in the early to mid-20's. This means that convicted and incapacitated offenders are always being replaced by a new set of recruits who have yet to be caught (U.S. Department of Justice, 1980).

Using imprisonment to deal with crime by incapacitating criminals is probably impossible for other reasons as well. Many crimes, for example, are committed by groups. Because the average serious crime involves 2.1 perpetrators, removal of one of the members of the group will simply result in the group's recruiting new members (U.S. Department of Justice, 1980). And because members come and go, there are still many offenders "on the street" even when an entire group is apprehended and imprisoned.

Some have suggested that we turn to "collective incapacitation," giving more and longer sentences to all convicted felons, but the costs would be prohibitive (Krajick and Gettinger, 1982). A decade ago the National Academy of Sciences (1978) estimated that to achieve a 10 percent reduction in crime, California would have to increase its prison population by 157 percent, New York by 263 percent and Massachusetts by more than 310 percent. The costs would be enormous and the gain modest. In short, the goal of incapacitating the bulk of offenders is a forlorn dream.

As for "selective incapacitation," the notion of somehow locating and locking up the small group of offenders who commit most of the serious crimes, the problem is that we have no adequate means of distinguishing them. Some

attempts at prediction have produced as many as 19 mistakes for every correct identification (Krajick and Gettinger, 1982). Lacking appropriate means of identifying this "hard core," there is a danger that the criminal justice system may turn to subjective indications, incarcerating some offenders for long terms simply on grounds of race, family background or some other bias.

Turning to the basic deterrence goal, the evidence is overwhelming that rather than deterring the offender from further criminal activity, crowded facilities without sufficient programs tend by their debilitating, degrading and demoralizing effects to harden and embitter the inmate, thus actually increasing the likelihood of further and more serious offenses (Sykes, 1958; Glaser, 1964; Toch, 1975). As one author has written: "Motivated inmates lose motivation, semitrusting inmates lose vestiges of trust, and those who are bitter become even more bitter at the way they are treated in prison" and "Mental health problems of all kinds escalate where coping failures lower self-esteem, which further reduces coping competence" (Toch, 1985: 64, 66).

The frequently stated goal of rehabilitation is difficult to advance under crowded conditions with inadequate programs. For example, although inmate classification has been described as a basic management tool, its second major purpose is to match inmates with available programs, staff and other inmates to foster their rehabilitation. When an institution becomes too crowded or when programs are not readily available, ". . . the inevitable consequence . . . is that security risk becomes the only classification criterion that is generally used," and while ". . . officials would suffer if a hardened offender . . . were discovered in a low custody setting," it is still true that, "There is . . . little risk in leaving such an offender illiterate, should the only available walled prison contain no classrooms" (Toch, 1985:64).

It seems clear that rising rates of incarceration coupled with the problems created by "warehousing" inmates would have led to serious problems for correctional systems under any circumstances. The moral issues would have become more pressing, management problems would have escalated, barriers to the realization of any of the goals of correction would have become more difficult to overcome, and growing inmate unrest would have led to an eventual day of reckoning. However, both the rising incarceration rate and the "warehousing" trend ran headlong into another powerful trend—the growing movement for prisoners' rights. It is the latter movement that has forced correctional systems into their present crisis and generated the need for policy options to reduce the growing pressure on staff and facilities.

H. *The Prisoners' Rights Movement*

Over a century ago, in *Ruffin v. Commonwealth* (1871) the inmate was described

as a "slave" of the state, to be granted or denied institutional privileges without explanation. But by the 1960s things had changed, and the courts were intervening on behalf of inmates' rights in the areas of habeas corpus, civil rights, due process, and the Eighth Amendment with increasingly regularity, with results for West Virginia that have been described in the earlier monograph (Ball, 1989).

Habeas Corpus and Civil Rights

Even under *Ruffin* an individual incarcerated under state or federal authority had long been recognized as still entitled to habeas corpus relief, as guaranteed by Article I, Section 9 of the United States Constitution, the federal *Habeas Corpus Act* and various state habeas corpus laws. For example, in the case of *ex parte Hull* (1941) the U. S. Supreme Court ruled that a state and its officials may not abridge or impair an inmate's right to apply to a federal court for a writ of habeas corpus.

Although the traditional use of the habeas corpus writ has been to contest the legality of the incarceration itself, near the end of WWII the Sixth Circuit U.S. Court of Appeals in *Coffin v Reichard* (1944) held that suits challenging the conditions of confinement were proper under the federal habeas corpus law, setting the stage for the later prisoners' rights movement.

Despite the *Coffin* decision, the law still required that inmates in state institutions exhaust all remedies at the state level before seeking relief through a federal writ of habeas corpus. This hurdle was later removed as part of the civil rights movement of the 1960s. In the case of *Monroe v Pape* (1961) the United States Supreme Court resurrected the long-dormant Section 1983 of the Civil Rights Act of 1871 when it ruled that citizens could bring Section 1983 civil rights suits against state officials into the federal courts *without first exhausting state judicial remedies.* In addition to the possibility of being awarded monetary damages, this direct route to the federal courts was the major advantage of a Section 1983 suit compared to a writ of habeas corpus.

Due Process

During the 1960s inmates began to challenge institutional disciplinary procedures through the due process clauses of the Fifth and Fourteenth Amendments. Initially, the courts took a narrow approach. Due process relief in disciplinary cases was restricted to situations in which "arbitrary and/or capricious" behavior on the part of the correctional authorities could be clearly established. But early in the 1970s, in *Wolff v McDonnell* (1974), the U.S. Supreme Court greatly extended prisoners' rights with respect to disciplinary measures. Although at the time the Court limited such due process guarantees

to proceedings that could result in solitary confinement or loss of "good time," subsequent decisions, based on the Eighth Amendment's "cruel and unusual punishment" clause, broadened these rights.

Eighth Amendment Rights

The U. S. Supreme Court's recent rulings on the Eighth Amendment's "cruel and unusual punishment" clause has also served to further broaden inmates' rights. Prior to the 1970s, the Eighth Amendment was applied only to punishments inflicted against individual convicts rather than to deplorable prison conditions resulting from the lack of adequate funding or from poor management in general (Angelos and Jacobs, 1985). However, in a series of important court cases beginning in the early 1970s, lawyers for the prisoners began to cite a host of issues including violence, inadequate medical care, overcrowding, lack of exercise and recreation and inadequate educational, vocational and rehabilitation programs as representing a "totality of conditions," which taken together constituted "cruel and unusual punishment" under the Eighth Amendment. Such an approach made it unnecessary to rest the argument upon an allegation of one particular violation of prisoners' rights. In *Alabama v Pugh* (1978), the U.S. Supreme Court acknowledged some of the implications of the "totality of conditions" argument, and it soon became a favorite means of attacking prison conditions.

Generally speaking, prisoners are now accorded rights not only to adequate medical care but a certain amount of exercise and recreation to remain in proper physical and mental condition. Those deprived of sufficient exercise and recreation may be regarded as subject to "cruel and unusual" punishment, especially if other "warehousing" conditions also exist. At the same time, most jurisdictions have come to accept rehabilitation as one of the goals of correction with correctional facilities expected to provide rehabilitation services and such services considered as possible prisoners' rights.

With the *Pugh* decision and later rulings such as that in *Rhodes v Chapman* (1982), the U.S. Supreme Court continued to extend the right to protection under the "totality of conditions" concept. By the middle of the 1980s most courts were holding that the sum of deplorable conditions may be unconstitutional even if the individual conditions taken alone are not (Angelos and Jacobs, 1985). In *Ruiz v Estelle* (1980) the entire Texas prison system was ruled unconstitutional, and by the late 1980s more and more prisons were being found unfit by the federal courts (Inciardi, 1988). Thus, the rising rates of incarceration and the "warehousing" trend had encountered stiff judicial resistance, and nearly every state undertook a search for new policy options to control intake, reduce length of stay, and better manage existing carrying capacity.

CHAPTER 3

POLICY EXPLORATIONS IN OTHER STATES

In 1973, the National Commission on Criminal Justice Standards and Goals for Corrections completed the most sweeping review of corrections in the U.S. ever conducted, issuing a series of detailed recommendations in the form of "standards" to be applied and "goals" to be sought. The following year, the Commission on Accreditation for Corrections was created to work with the American Correctional Association to develop and issue ten sets of standards covering all aspects of corrections. At the state level, those concerned with correctional problems responded either by creating special task forces or entering into cooperative efforts with other states to address their correctional problems. Some states combined both approaches.

A. *The Task Force Approach*

In an effort to address the problems facing their correctional systems, a number of states made use of specially appointed task forces. Two of the most effective task forces operate in Ohio and Oregon. It is instructive to observe that both states put most of their efforts into data collection and analysis.

In Ohio, the Governor's Committe on Prison Overcrowding (1986) developed an extensive set of recommendations. During its explorations, the Committee stressed the need for additional information and, above all else, that in their haste to construct new facilities policymakers do not forget more basic issues involving the nature and application of criminal law. This lesson is central to the present monograph.

In Oregon, the Governor's Task Force on Corrections Planning (1988) concluded by agreeing with Ohio's position that the major problem facing correctional planning is the need for information. Thus, one of its major recommendations called for state legislation to formally establish a Criminal

Justice Information System User's Group. This group was given the responsibility to develop and coordinate standards and procedures.

In Oregon, the User's Group included the Department of Corrections, the State Court Administrator, the Department of State Police, the Crime Analysis Center, the Criminal Justice Council, the Board of Parole, county prosecutors, local law enforcement, county community corrections, juvenile departments, and the Mental Health Division. Through such coordination, computer-generated information can be shared almost instantaneously. These cooperative efforts are to be coordinated by a new Criminal Justice Information Division. West Virginia can learn much from this example.

B. *The Cooperative Effort Approach*

One of the major state cooperative efforts in corrections was initiated by the creation of the National Jail and Prison Overcrowding Project (NJPOP). It was organized and staffed by the Center for Effective Public Policy, a nonprofit consulting group, and funded by the National Institute of Corrections (NIC) and the Edna McConnell Clark Foundation. The mandate was to develop and advocate measures to control overcrowding and to work for systemic changes that could bring corrections systems under more rational control. Twenty-three states applied for funding, and in late 1981 the following four states were selected to participate: Colorado, Michigan, Oregon and South Carolina. This so-called "first generation" of state projects began work in April 1982 (Cory, 1988). In April 1984, three "second generation" projects were funded in Louisiana, Ohio and Tennessee and two special state "policy panels" on jail overcrowding were established in Oregon and South Carolina.

The political environment in each of the states was a major factor in determining which states would be selected to participate in these projects (Cory, 1988). Selection criteria included the urgency of the corrections problem, the degree of problem awareness among political leaders, the readiness of corrections officials to cooperate, the willingness of policymakers to regard additional construction as only one of many possible responses, freedom from extreme personal, political or ideological tensions, and the presence of corrections reform "champions." Collectively, these states benefited from increased credibility, the existence of a national information network, the research materials developed and training seminars conducted as part of the project, the availability of "second opinions," the expertise of the national staff, and a pool of nationally recognized consultants (Cory, 1988).

The experience gained from these efforts can be of considerable benefit to West Virginia. According to NJPOP, the various states involved in the project faced three fundamental roadblocks. These were identified as (1) "tunnelvision,"

(2) the "brush fire mentality," and (3) political rigidity (Cory, 1988). Because NJPOP concluded that these problems were likely to be the same in almost every state, it may be useful to address each.

"Tunnelvision"

"Tunnelvision" was identified as a persistent problem in each of the participating states. Because the criminal justice system tends to be so fragmented, policymakers often fail to think comprehensively about it. Where sheriffs and correctional administrators tend to identify insufficient cell space as the cause of overcrowding, judges may think the problem stems from inflexible sentencing policies. Considerations of "turf" tend to mean that policymakers consciously or unconsciously move to protect existing empires or attempt to build new ones.

"Brush fire mentality"

The "brush fire mentality" pattern often dominates corrections policy because policymakers frequently define their jobs as responding to the current crisis. Unfortunately, this often leads to "band-aid" approaches that may "stop the bleeding" temporarily, but only add to the problem later. Moreover, it was discovered that policymakers were often rewarded for these "quick reactions" even when these reactions tended to worsen things in the long run.

Political rigidity

The problem of political rigidity was identified as one of the most ubiquitous problems facing correctional policymaking. Correctional debate is most often characterized by much heat and little light. Political polarities dominate debate, and partisanship tends to rule the day. In virtually every state involved with NJPOP this problem lead to some splintering of efforts and impeded development of creative solutions.

C. *Two Case Studies: South Carolina and Louisiana*

Availability of external resources and the chance to "compare notes" and learn from one another led each state to take a somewhat different view of its correctional system and to consider alternatives that probably would not have been examined without the opportunity to reflect on what others were doing. This must be regarded as a crucial part of any state's efforts to develop correctional alternatives. No matter how creative the local policymakers may be, it will be difficult for them to conceive of and give consideration to all of the possibilities that have been developed and tried across the U.S. Case studies of states such as South Carolina and Louisiana, both in some ways similar to West Virginia, provide examples.

South Carolina

At the beginning of its involvement with NJPOP, a number of the members of the South Carolina group, including the South Carolina Commissioner of Corrections, advocated passage of a state emergency powers act. The proposed legislation, empowering the governor to order the early release of inmates approaching the end of their sentences, had already been considered and rejected by the South Carolina legislature during an earlier session. Those opposed had objected that such a law (1) would make elected officials responsible for the early release of certain prisoners and (2) would set a rigid, legal limit on the capacity of the state prison system. The situation had stalemated.

The stalemate was broken when South Carolina embraced the idea of beginning with a basic "problem-solving approach" involving reconsideration of the basics of the debate (Cory, 1988). This began with a survey of the types of inmates in the correctional system. The results of the survey surprised many of the participants. For example, it was discovered that more than 400 inmates were imprisoned for writing bad checks or failing to make child support payments, and a total of 40 percent of those locked up were imprisoned for nonviolent property offenses. These and other survey results led to the conclusion that many inmates could be released without much political risk or danger to the community.

In South Carolina a new definition of correctional system capacity based on the concept of "safe and reasonable operating capacity" emerged from the overall review. This figure actually exceeded design capacity by some 20 percent, and it served as a foundation for development of consensus around more effective utilization of the total system. Similar reconsideration derived from examination of the work in other states provided a means of working through most issues. "We learned that on matters on which there appeared to be 180-degree differences you can reach consensus," one of the participants reported (Cory, 1988:17).

Louisiana

In 1985, Louisiana committed itself to constructing three new state prisons, a commitment that had been made without consultation with the state's criminal justice officials. The resulting confusion led the state legislature to pass a comprehensive "correctional growth planning act" designed to bring some order to the situation. The process is worth a brief review.

During the 1980s Louisiana, like West Virginia, went through a significant economic downturn. As in West Virginia, the worsening economic conditions coincided with the development of severe crowding problems at deteriorating

state correctional facilities, leading to court intervention. Although the legislature had approved plans during the early 1980s to construct five new prisons, the fiscal crisis made it obvious that such facilities could not be built.

Nevertheless, the construction of new prisons continued to draw powerful political support, precisely because they could be built in those areas hardest hit by the economic slump, providing needed jobs and a boost to local economies. Although differing in a very important way with respect to the question of funding, this, too, parallels the situation that emerged in West Virginia in the early months of 1989, at which time a private corporation offered to build and staff with local residents two prisons to house inmates from the District of Columbia. In Louisiana, the political pressure prompted the state legislature in 1985 to authorize $150,000,000 in bonds to finance construction of three new prisons, again without consultation with criminal justice leaders in the state.

Fortunately, NJPOP had been operating for some time in Louisiana, providing a vehicle through which coordination might be achieved. The NJPOP state project combined forces with the Governor's Prison Overcrowding Policy Task Force to draft and seek adoption of the "correctional growth planning act" mentioned earlier. Passed during the 1986 session of the legislature, this act grants new oversight and planning responsibilities to the state's Commission on Law Enforcement and the Administration of Justice (Cory, 1988). Beginning in 1987, the Commission was directed to provide to the legislature and the governor monthly projections of Louisiana's jail, prison and probation trends. The Commission was also directed to make "correctional impact statements" on all proposed changes in state sentencing laws and to take a leadership role in any future jail or prison construction plans. At the same time the state was prohibited from appropriating any correctional construction funds without a detailed "condition of need" report from the Commission, with the report required to include a cost/benefit analysis of community corrections options to incarceration.

D. *The Bureau of Justice Assistance Prison Capacity Program*

Concerned with correctional pressures nationwide, the Bureau of Justice Assistance (BJA) has recently funded a Prison Capacity Program, with chief responsibility for coordination and technical assistance in the hands of the National Council on Crime and Delinquency (NCCD). The Program involves 14 participating states including Connecticut, Florida, Hawaii, Indiana, Louisiana, Montana, Nebraska, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas and Wisconsin. Part of the technical assistance is under subcontract to the Correctional Services Group (CSG).

As of January 1988, 10 of the 14 participating states were under court order to rectify prison crowding or conditions. Several faced fines in the event of noncompliance, and several faced possible court orders to release inmates. Pressures on each state were severe.

Many of the participating states have either used existing task forces or developed similar task forces to coordinate activities. Nine of the task forces were appointed by the governor, two by the legislature, and one by the corrections department. Texas, on the other hand, took a different approach. It convened an intensive three-day conference under the direction of the governor. This conference pulled together 40 business, civic, criminal justice and state government leaders and culminated in a formal statement of recommendations.

Each of these states proceeded by first developing or adopting a projection model to forecast patterns of offender movement through system "pipelines." While some states developed their own projection models, others adopted a highly sophisticated model already developed and tested by NCCD. For example, in Ohio the Governor's Committee on Prison Crowding (1986) adopted the NCCD model with minor changes tailored to fit the situation in that state. The model has the capacity to provide 10-year base projections as well as to estimate the potential impact of policy changes. Such a model might be worth consideration in West Virginia.

Any projection model should be updated semiannually and maintained on a regular basis. Validity is dependent upon comprehensive, timely and accurate data, and it is important that the data base be updated frequently. In Ohio, projections on the prison population are to be provided to the legislature every six months with impact assessment provided so as to assess the effect of policy changes as requested. Start-up costs amounted to approximately $125,000 to hand-gather the basic data and computerize it with approximately $35,000 budgeted for operating costs per year (Governor's Committee on Prison Crowding, 1986).

Seven of the states participating in the Prison Capacity Program have undertaken efforts to develop or improve Correctional Information Systems to get a better grasp of monitoring and planning. For example, Oregon has awarded a major contract to Abt Associates to complete an evaluation of the current Community Corrections Act, and Oklahoma has prepared to submit a 3-5 year plan to improve the various components of the criminal justice system (NCCD, 1988b). South Carolina has concluded a survey of the 45 sheriffs in the state in an effort to obtain baseline data on prisoner flow, while Hawaii, Nebraska, Rhode Island, South Carolina and South Dakota have begun studies of their prison classification systems (NCCD, 1988b).

Six of the 14 participating states have initiated studies of sentencing practices. While in some states, such as Florida, the study will focus upon the impact of recent sentencing reforms, other participating states have chosen to concentrate upon measuring current sentencing practices to assess disparity and the impact of alternatives to incarceration (NCCD, 1988a). Louisiana and Oregon have obtained BJA funding and are proceeding to develop sentencing guidelines, and Louisiana had by mid-1988 prepared 52 separate impact statements for their state House Committee on the Administration of Criminal Justice (NCCD, 1988c).

Six of the states participating in the Prison Capacity Program—Texas, Wisconsin, Hawaii, Oklahoma, Oregon and South Carolina—have initiated Planning and Systems Coordination Projects. These are designed to "improve the criminal justice system and to bring together key decision makers from all branches of government and the criminal justice community and provide them with accurate and timely information on important criminal justice issues, and create a forum whereby rational decisionmaking can take place" (NCCD, 1988a:3). Such an effort merits consideration in West Virginia.

E. *Implications for West Virginia*

The collective experience of the various states suggests that any solution to correctional pressures must involve consideration of an array of policy options combined in a comprehensive approach. Such strategies range from policies for control of intake into correctional systems to alternative means for reduction of average length of stay. At the same time, considerable emphasis must be placed on means to improve their ability to handle the prisoners entrusted to them (the carrying capacity of the correctional systems). The following chapter will investigate these options in detail.

CHAPTER 4

POLICY OPTIONS FOR REDUCING CORRECTIONAL PRESSURES: INTAKE CONTROL

A comprehensive approach to correctional pressures in West Virginia must give consideration to a broad range of possible options. In summary, these include (1) intake control, (2) adjustments in length of stay, and (3) improvements in system capacity. The first may be accomplished in part by movements toward decriminalization, decreasing the number of imprisonable offenses through greater use of nonincarcerative punishments, and restructuring of responsibilities within the criminal justice system. The second may be approached at the "front end" by changing sentencing policy or at the "back end" by increasing the use of parole, granting "good time," or other strategies. In addition, the carrying capacity of the correctional system can be improved not only by constructing new facilities, but also by making more efficient use of existing facilities.

The first broad policy option for dealing with correctional pressures lies in intake control strategies governing the flow of inmates into the correctional system. However, it must be noted that in most states the use of various "alternatives to incarceration," such as diversion programs, formalized restitution, community service, and intensive probation, that have been developed have not resulted in dramatic reductions in the number of people incarcerated. Over the past two decades the number of citizens locked up has doubled (Ball et al., 1988).

In spite of the relatively recent "lock 'em up" trend, the increasingly severe pressure on correctional resources has led many states to consider basic changes designed to slow intake into jails and prisons. Many different policymakers at many different levels both within and outside West Virginia state government

can play important roles here. Options are available to the Legislature, prosecutors, the defense bar, the judiciary, public agencies outside the criminal justice system itself, private agencies, probation and parole agencies, the governor, and to state correctional authorities themselves. These will be reviewed in turn.

A. *Legislative Options for Intake Control*

Legislative options available for reducing the intake of offenders into state prisons include (1) pure decriminalization, (2) reclassification/downgrading of offenses, (3) substitution of noncriminal responses for certain offenses, (4) revision of penal and/or sentencing codes through methods including provision for alternatives to custodial sentencing such as setting of special conditions for probation, development of community-based programs, probation enhancement, intensive supervision, use of financial options, direct sentencing to halfway houses, intermittent confinement, or "house arrest," (5) a presumption for use of less drastic means, (6) creation of a Sentencing Commission to set guidelines, and (7) restructuring of state and local responsibility for offenders (Harris, 1984; Petersilia, 1987; Cory, 1988). There are a variety of possibilities available under each rubric, each of which has been tried at a number of locations across the U.S.

Pure Decriminalization

By the early 1980s straightforward decriminalization had been undertaken in 34 states and territories in the case of public inebriation, which is now often redefined as an illness rather than a crime (Harris, 1984). Although no one expects imprisonable offenses to be decriminalized in the near future, decriminalization of less-severe offenses can have an effect on correctional systems. For example, decriminalization of public drunkenness allows some imprisoned inmates to be returned to local jails where bed space is now available and, at the same time, provides for a more effective public policy that treats alcoholics through detoxification and medical intervention rather than jailing. West Virginia has already moved in this direction and could move much further if policymakers wished.

Reclassification/Downgrading

Downgrading proceeds by reexamining criminal codes in an attempt to reconsider policies with respect to certain offenses that may have been handled too harshly. As several studies have indicated, the United States is characterized by a recurrent pattern of punitive overreaction to the dramatization of its social problems (Sutherland, 1950; Ball, 1979; Gusfield, 1981). We

often respond with unnecessarily harsh measures which are so counterproductive as to aggravate the problem they were supposed to solve and create additional problems at the same time. Reflection in the cool light of hindsight often suggests that such penalties can be reduced.

Substitution of Noncriminal Responses

The use of noncriminal responses provides an alternative to outright legalization while still retaining a certain degree of penalty (Shane-Dubow et al., 1985). In many cases it is possible to replace the use of the criminal justice system with civil regulation. It is also possible to employ a variety of administrative options in lieu of criminal penalties. For example, some states first responded to the problem of refusal to make child-support payments by jailing the offender. Now, they garnish wages instead. While it may be that few of the penalties leading to imprisonment might find direct substitutes in civil or administrative procedures, a number of offenses now leading to jailing could be handled in this way.

Revision of Penal or Sentencing Codes

Another way to reduce intake into jails and prisons is to move toward revision of penal and/or sentencing codes (Petersilia, 1987). There are many ways in which sentencing codes can be altered so as to control prison intake. Indeed, the earlier examination of the trend toward increased incarceration of the U.S. population during a time of declining crime rates suggests that a general reconsideration of sentencing severity may be in order. For those who may take this as a "liberal" position with implications of "coddling criminals," it must be emphasized that from the mid-1980s on, one of the gubernatorial leaders in such sentencing reform was the noted conservative political figure, Governor duPont of Delaware.

Special Conditions for Probation

There are several techniques for providing alternatives to incarcerative sentencing, including setting special conditions for probation such as restitution and community service (Harris, 1979). These have the advantage of providing for the official denunciation or "reprobation" of an offense while at the same time providing direct "reparation" to the victim. In many cases this provides an effective means to restore public confidence in the law without ejecting the offender from his or her community (Ball, 1979). While it is important to demonstrate to the public that offenders are being punished for their crimes, it is also worth recognizing that punishment can take place in the community itself in a relatively "normal" atmosphere that contributes something to the self-worth of the offender.

Expansion of Community Corrections

Several states have moved recently to deal with the pressures on their correctional facilities by expanding their community corrections systems through passage of specific legislation backed by funding (Cory, 1988). These include Tennessee, Minnesota, Oregon, Kansas, Virginia and Missouri. For example, in 1986 Community Corrections Boards were appointed by co-operating counties under an optional plan in Tennessee. These Boards then drafted plans for diverting eligible offenders, who in the case of Tennessee were defined as those with no known history of violence or drug-related behavior, into newly developed community corrections programs. Once the plans were approved by the Tennessee Department of Corrections, the counties could apply for part of the $3.5 million appropriated by the legislature for this purpose.

Probation Enhancement

Louisiana has moved to deal with correctional pressures through probation enhancement. In 1985 the Louisiana Legislature authorized hiring of additional probation officers in a program designed to reduce probation officer workloads and allow for more intensive supervision (Cory, 1988). This program has become especially appealing to the judges of that state, giving them much more confidence in the probation system and leading to greater use of probation by many judges there (Petersilia, 1987; Cory, 1988). As West Virginia proceeds with the further professionalization of its probation officers, this option may become even more appealing.

Intensive Supervision Programs

One of the most recent trends toward nonincarcerative options is the development of Intensive Supervision Programs (ISP), which have become a popular alternative in recent years (Erwin and Bennett, 1987). Such programs, which provide for close surveillance and careful monitoring of offenders supported by a greatly reduced caseload on responsible probation officers, have been implemented in at least one county in 40 states (Petersilia, 1987). First initiated on a large scale in Georgia, statewide programs are now in effect in Arizona, Connecticut, Florida, Massachusetts, New Jersey, New York, Illinois, Oklahoma, Texas, Utah, Vermont, and Virginia. Through such a program, the Incarceration Diversion Unit of the Lucas County, Ohio, Adult Probation Department has been credited with a 20 percent reduction in the county's commitment to state prisons and a $410,000 savings in incarceration costs during the first few years of operation (Harris, 1984).

Financial Options

In addition to creative uses of probation, financial options such as fines may be made more widely available as still another alternative to custodial sentencing. Many countries use a "day fine" system of penalties as a means of scaling the amount of the fine to the offender's ability to pay. According to the "day fine" system, a per diem amount is assigned to each eligible offender according to his or her financial situation. This figure is then multiplied by the number of penalty days according to the severity of the offense. In Sweden more than 90 percent of all offenses are disposed of by fines, generally by using the "day fine" method (Harris, 1984).

Direct Sentencing to Halfway Houses

Another community-based option is direct sentencing to halfway houses or other community residential facilities (Harris, 1984; Petersilia, 1987). Although commonly used as a strategy for moving an inmate from prison into the community through a gradual, controlled process of reentry, some states allow for commitment to such facilities in lieu of institutional incarceration in a jail or prison. Obviously, this strategy provides an alternative for offenders deemed in need of greater monitoring than could be accomplished, for example, by intensive supervision, but not requiring institutionalization. It makes available a degree of custodial sentencing without adding to intake problems of jails and prisons when these are unnecessary.

Intermittent Confinement

The extent of custodial sentencing may be reduced by allowing for intermittent confinement involving weekends, nighttime, or some other period, as has already been accomplished in 30 states (Harris, 1984). This penalty, which places the offender in a probation situation during time spent outside the correctional facility, serves to provide the public with a sense of punishment and to impress the offender with a "lock-up" experience without isolating him or her with consequent job loss, breakdown of family ties and a host of other problems that aggravate the situation. Although some judges in West Virginia are experimenting with this policy, legislative support could encourage much wider use (McCarthy, 1987).

"House Arrest"

West Virginia has already moved forward with experimentation involving the new "house arrest" option using electronic monitoring of offenders in the home (Ball et al., 1988). Several states, including Florida, Kentucky and New Mexico, pioneered this alternative in the mid-1980s. Under this sentencing

option, offenders are "wired" with an electronic ankle bracelet. The bracelet serves as a transmitter, with a receiver fixed in the home telephone. If the offender moves more than 150 feet from the telephone, the transmitter-receiver signal contact is broken, and a telephone call is automatically placed to a central location notifying monitors that the offender has left the home. To this point, the evidence suggests that such "house arrest" can reduce jail populations significantly, while, at the same time, provide protection for the public by keeping offenders "off the street" (Ball et al., 1988).

Presumption of Least Drastic Means

As far back as the early 1970s the National Commission on Criminal Justice Standards and Goals for Courts (1973) recommended a policy of least restrictive penalty. The goal was to achieve sentencing that would not restrict liberty more than necessary. In 1979 the American Bar Association advocated a presumption of least drastic means, delineating seven sentencing alternatives and recommending that judges be required to impose the least severe of them that would satisfy legitimate sentencing purposes (Harris, 1984). Adoption of a presumption of least drastic means also goes against much current sentiment, but it is undeniably cost effective, and it reduces pressure throughout the criminal justice system. It is worth consideration in West Virginia as in other states.

Sentencing Commissions

Minnesota, Pennsylvania and other states have moved to create sentencing commissions to prepare guidelines, in some cases partly for the purpose of controlling prison intake. Sentencing institutes, initiated at the federal level in 1958, are often used to disseminate the ideas of these commissions, while sentencing councils, which were started in 1960 in the federal court for the Eastern District of Michigan as a method of providing for greater consistency in sentencing, can also be used to reduce pressure on correctional system (Inciardi, 1990).

Restructuring State and Local Responsibilities Offenders

Prison intake could be reduced if there was a restructuring of the current responsibilities held by state and local government authorities. These include (1) providing incentives for communities to retain offenders, (2) redefining local responsibility for lesser offenders, and (3) adopting comprehensive community corrections laws (Harris, 1984). The most commonly cited example of providing incentives to retain offenders was the adoption in California of a probation subsidy program to provide monies to counties for reducing their

commitments to state prison. By the early 1980s Virginia had adopted a Community Diversion Incentive Act which provided participating localities funds for each offender that was bound for state prison but was retained locally instead (Harris, 1984).

Although statutes typically distinguish between offenders to be sent away to state facilities and those to be incarcerated in local jails according to certain traditional length-of-sentence criteria, there is no reason that legislatures need to be rigidly bound to sentence length (Inciardi, 1990). It is within the power of legislatures to make these distinctions based not only on sentence length but also upon type of offense, need for rehabilitation programs, potential for violence, security risks and a variety of other criteria. Through redefining local responsibility for lesser offenders, legislative bodies can reduce the temptation to reduce local expenses by "dumping" offenders on the state.

As indicated earlier, some states have adopted comprehensive community corrections laws in an effort to restructure state and local responsibility for offenders. In 1973 Minnesota passed a Community Corrections Act that incorporated a financial incentive to counties to develop local correctional programs, a financial disincentive to committing nonviolent adults or juveniles to state institutions, a local decision-making structure and a revised state role in planning, training, evaluation and setting of standards (Harris, 1984). Other states have adopted similar legislation, and it would appear that such efforts as the National Jail and Prison Overcrowding Project and the Prison Capacity Program are now leading more and more states in this direction (Cory, 1988).

C. *Prosecution Options for Intake Control*

Although prosecutors may not come to mind immediately when one considers methods of controlling prison intake, the prosecutors of West Virginia are in an excellent position to assist in this effort. Prosecutors might consider expanding their knowledge of nonincarcerative alternatives and adopting appropriate policies on sentencing recommendations. Both approaches can make a huge difference.

Expansion of Knowledge of Nonincarcerative Alternatives.

The National District Attorneys' Association has already initiated a Prosecutorial Alternatives to Incarceration Project in an effort to develop and provide information on alternatives to incarceration (Harris, 1984). This project was designed to identify successful alternatives now in existence and to disseminate information to other prosecutors so that they could consider their use. Given the importance of prosecutors in determining prison intake and influencing length of stay, one obvious means for reducing both is to acquaint them with the available alternatives (Petersilia, 1987).

Adoption of Appropriate Policies on Sentencing

Some prosecutors are reluctant to consider recommendations for nonincarcerative penalties because they do not want to appear to be too soft or lenient in an environment stressing a "lock 'em up" approach (Shane-Dubow et al., 1985). But many of these same prosecutors are receptive to approaches that provide greater attention to the needs and "rights" of victims. Programs such as the restitution and community service options discussed earlier do precisely that. Thus, the political appeal of the "tough" prosecutor can be matched in some ways by the appeal of the prosecutor who shows concern for the victim of the offense and "forces" the offender to "make things right" rather than simply taking a pound of flesh for the state (Ball, 1979).

Prosecutors have always had to exercise their discretion in selecting which cases to prosecute, how to set charges, whether to accept a plea bargain and if so within what limits, how to handle the case in court and what sentencing recommendation to offer upon a conviction. It is widely acknowledged that such discretion is necessary if the business of the court is to proceed. In some instances, it may prove useful to seek alternatives to custodial sanctions so that time and energy can be spent on more serious cases.

D. *Defense Bar Options for Intake Control*

Just as the policies of the prosecutor have a major impact on both prison intake and the length of time spent in prison, so can the policies of the West Virginia defense bar. Options for the defense include (1) defendant-oriented presentence reports, (2) retention of private agencies to prepare assessment and recommendations for nonincarcerative penalties, (3) appeal of custodial sentences, (4) expansion of knowledge of nonincarcerative options, and (5) representation for offenders in probation revocation proceedings (Harris, 1984). Together, the use of these options can have a significant effect upon jail and prison intake.

Defendant-Oriented Presentence Reports

Although it consumes valuable time, the defense bar can make a contribution to both prison intake reduction and the lessening of the length of correctional stays by preparing memoranda that support noncustodial sentences. It is also possible for the defense to submit memoranda that will prepare the way for early release through parole or other mechanisms. Such material can have an effect either at time of sentencing or sometime later in the correctional process, where it may provide the information and rationale facilitating decisions for release from overcrowded or otherwise deteriorated facilities.

Retention of Private Agencies for Preparation of Assessments and Recommendations for Noncustodial Penalties

Where possible, the defense can consider contracting with private agencies to develop presentence materials supporting noncustodial penalties. Realistically, contracting with private agencies is likely to occur only in those cases where the defendant has substantial resources available. Indeed, this is one of the means by which the criminal justice system can be manipulated in favor of lighter sentences for the affluent. But the services of such agencies as the National Center on Institutions and Alternatives, which offers Client Specific Planning services, can be used much more widely.

Appeal of Custodial Sentences and Expansion of Knowledge of Noncustodial Options

Given increasing correctional pressures, it may be easier to win on appeal of custodial sentences. If it is possible to show that such institutional custody is unnecessary and out of proportion to the offense and it can be demonstrated that available correctional facilities are inadequate, such appeals may constitute a successful strategy. It would appear that some courts are more willing than in the past to consider appeals on these grounds, so it is increasingly important that the defense bar itself become acquainted with the various nonincarcerative options that may be suggested.

Representation of Offenders in Probation Revocation Proceedings

In recent years offenders have been granted greater rights with respect to representation by attorneys in probation revocation hearings (del Carmen, 1982). Probation is less and less considered as a disposition to be granted and revoked at the will of the court without supporting evidence or basic due process. Because revocation of probation is an important step that will very likely result in incarceration, representation by the defense bar is crucial as a possible means of reducing intake by including only those offenders actually in need of such a penalty.

E. *Judicial Options for Intake Control*

Judges in states such as West Virginia already differ considerably in their impact on prison intake, with some judges tending to imprison more than others. Options available to the judiciary that can have an appreciable impact on reducing intake include (1) expanded use of nonincarcerative sanctions, (2) requiring that presentence reports explore the possibility of such sanctions in lieu of incarceration, (3) increased use of specialized assessments or diagnoses, (4) use of sentencing guidelines, (5) appellate review of sentences, and (6)

increased use of sanctions less than revocation for probation or parole violations (Shane-Dubow et al., 1985; Harris, 1984; Petersilia, 1987). Each of these options gives the judiciary power to affect the situation, provided, of course, that the particular members of the judiciary involved support such actions in general or regard prison conditions as justifying resort to them under special circumstances.

Expanded Use of Nonincarcerative Sanctions

Even if both the prosecution and defense advocate alternatives to incarceration, the power to invoke such options rests with the judge. Time after time, studies of sentencing alternatives have concluded that it is the judge who usually initiates their consideration in the first place (Petersilia, 1987; Ball et al., 1988). Sometimes this is the result of the general judicial climate of certain courtrooms and sometimes it comes about because the judge has initiated specific action designed to expand alternatives. One example of the latter was the work of Judge Love of New Mexico, who first conceived the idea of electronic monitoring of offenders, saw to it that the necessary equipment was engineered, sought permission from the New Mexico Supreme Court to adopt electronic monitoring on a trial basis, and proceeded to do it (Ball et al., 1988).

Requiring That Presentence Investigation Reports Examine Noncustodial Sanctions

Although it is within the power of prosecutors and the defense bar to take greater initiative in seeing to it that presentence investigation reports give close attention to the possibility of alternatives to incarceration, realism requires one to acknowledge that it is the judge who has the primary influence here. Given the pressure of time, neither the prosecution nor the defense is likely to push the issue unless the judge expresses real support, except in certain cases where the offender has financial or social resources available.

Increased Use of Specialized Assessment or Diagnoses

In especially dramatic or peculiar cases it is common for the court to order special assessments of particular offenders in an effort to determine whether the offender should stand trial, what pleas may be appropriate, which disposition should be considered, and/or to obtain in general a greater understanding of the offender. Unfortunately, there is a tendency to ignore the possibility of some medical, psychological, or social influences that might make a great difference in sentencing if discovered, as long as the offender seems "typical" and the offense fits the "proverbial characterization" with no especially "peculiar" circumstances (Sudnow, 1965). Not only does this mean that the offender is more likely to be jailed or imprisoned inappropriately, but it also

means that offenders with severe but undiagnosed medical or psychological problems tend to be forced into correctional facilities where they contribute more than their share to constitutionally questionable conditions.

Although it is obvious that increased use of offender assessments can provide guidance to the judge and reduce the burden on corrections, it is once again important to acknowledge fiscal reality. Given the "pay now or let someone else pay later" situation, it is worth considering whether local jurisdictions might not be offered incentives for closer investigation of the medical, psychological and social factors surrounding a variety of offenders and offenses. The cost might be more than offset by savings realized by the correctional facilities that would not have to provide the staff time required to supervise and deal with the unusual problems of certain offenders who really have no place being there (Gottfredson and Gottfredson, 1979).

Use of Sentencing Guidelines

As indicated earlier, legislative bodies can take the initiative in moving toward sentencing guidelines that can not only reduce prison intake but also provide for greater uniformity in sentencing across their state and a much greater sense of equity. Some judges have not left this to their state legislatures. Instead, they have moved to have guidelines adopted within their own jurisdictions and to encourage judges elsewhere in their state to adopt them. Although it is notoriously difficult to "coordinate" the work of judges because they tend to be protective of their courtroom autonomy, it is possible for the judiciary to exert a greater influence over its members. These issues can be debated at judicial conferences, discussed in newsletters, and argued among judges themselves in an effort to achieve some consensus through a sharing of ideas and experience (Inciardi, 1990).

Appellate Review of Sentences

Appellate review of sentences was once a fairly rare phenomenon and remains more or less a means of exerting some control over individual judges who actually impose sentences beyond the legal limit or stray much further from the general legal parameters than can be tolerated. It is possible that such review will become more common. The conservative trend across the U.S. may be working against appellate review of sentences, but the larger trend toward rationalization and standardization is still encouraging it. Such review is not likely to have an enormous impact on prison intake, but to the extent that it develops, it will tend to reduce rather than increase intake.

Increased Use of Sanctions Less Than Revocation for Probation or Parole Violations

Many violations of probation or parole conditions represent "technical violations" rather than the commission of additional crimes. In these instances the probationer or parolee has broken one or more of the rules governing the probation or parole status, perhaps by being seen with certain companions, failing to report to the probation or parole officer on time, failing to make mandated restitution payments or some similar violation (Gottfredson et al., 1978). In such cases it is important that the judge support the actions of the probation or parole officer, who is usually operating with a heavy caseload and major monitoring responsibilities, but this does not require revocation (Studt, 1978). If the judge has acted earlier to ensure that there is a range of options available short of revocation, it will be possible to turn to these when the occasion demands, without being forced to take the most drastic step available.

F. *Other Options for Intake Control*

Just as the courts can implement a variety of options providing for alternatives to incarceration, much can be accomplished by other public agencies and by agencies in the private sector. Correctional intake can be reduced through (1) programs and services for offenders with special needs, (2) assistance with presentence investigation reports, (3) community supervision, (4) advocacy, and (5) the development of community-based facilities (Harris, 1984).

Organizations devoted to providing programs and services for offenders have become very common across the U.S. For example, a regional community-based program called PACT (Prisoner and Community Together, Inc.) now operates programs for offenders in six Indiana cities and in Chicago (Harris, 1984). PACT programs include supervision of offenders engaged in restitution and community service, operation of a victim/offender reconciliation program, operation of community residential centers for men recently released from prison along with men in prerelease programs and work-release programs, and advocacy for community-based programs in general. In South Carolina, the Allston Wilkes Society provides similar services as well as citizen volunteers to assist prisoners in parole hearings (Harris, 1984).

G. *Probation and Parole Agency Options for Intake Control*

Probation and parole agencies are extremely important in determining who goes to prison. They can have a significant effect upon prison conditions through policies that address unnecessary intake by (1) expansion of presentence investigation report functions, (2) reorganization to provide non-traditional supervision and compliance monitoring, (3) revision of revocation

policies, (4) adoption of differential supervision levels, (5) decreased length of probation and parole supervision, and (6) increased use of contract probation (Duffee, 1980; Fogel, 1984; Harris, 1984). Together, these offer a wide variety of alternatives.

During the past five years, West Virginia has made great strides in the professionalization of its probation officers and in increasing their awareness of these options. Through the creation of the first M.A. program for probation officers in the U.S., the state has laid the foundation for a much-expanded community corrections approach if this option is approved. Probation officers now receive graduate instruction in courses including "Probation and the Legal System," "Probation Management," and "Probationer Service" that incorporate the latest of the options to be described (Smith and Ball, 1988).

Expansion of Presentence Investigation Report Functions and Nontraditional Reorganization

As professionalization of probation and parole continues, both probation and parole officers should be delegated responsibilities commensurate with their training and expertise (Fogel, 1984). Although much of this responsibility will focus upon the preparation of presentence investigation reports that can lay out for the court alternatives to incarceration, it is increasingly recognized that both the probation and parole officer must move away from the traditional counseling models toward the "community resource management" model (Cromwell et al., 1985; Duffee, 1988). The latter requires the officer to integrate his or her efforts more closely with the community, drawing upon available resources that can be pulled together and tailored to fit the needs of a particular offender. One of the most important aspects of this process is that it demands the involvement of other public and private agencies in the community. The probation and parole officer must become a catalyst in such development. It is crucial that this be accomplished given the tight fiscal restraints placed on both probation and parole agencies, who need all the help they can get (Cushman, 1985).

By 1989 most of the probation officers in West Virginia had completed a new graduate course incorporating the community resource management approach. This course covered in some detail the role of the probation officer as a "broker" of community resources. As this option becomes more familiar across the state, it offers significant possibilities for some reduction of intake into institutional corrections.

Revision of Revocation Policies

Revision of revocation policies is, of course, a strategy that may be initiated formally by the judge or by shifts in the decision-making of the probation or

parole officer on the scene. The greater the pressure on correctional systems, the more consideration the officer might give to some means of handling violations short of a revocation that sends the offender into such institutions (Studt, 1978). Given current public attitudes, probation and parole officers will need support for any move in this direction.

Adoption of Differential Supervision Levels and Decrease of Supervision Length
Many offenders placed on probation and some on parole status require relatively little supervision. At the same time, there are others who are in need of closer supervision to reduce the risks of technical violations or further offenses that might result in incarceration (Petersilia et al., 1985). In recent years more and more probation and parole agencies have adopted some form of differential supervision designed to adjust surveillance, monitoring and assistance to better meet offender needs and to assess the relative risks posed by the offender's release into the community. Both differential supervision and reduction of length of supervision allow the officer to spend more time and energy on higher-risk offenders (Erwin and Bennett, 1987).

Increased Use of Probation Contracts
Both probation and parole have often been criticized for setting vague conditions. However, the movement toward offenders' rights has forced officers to specify more clearly the exact conditions governing the probation or parole status, and an agreed-upon contract tends to protect all sides here (del Carmen, 1982). Such contracts have several merits. They emphasize in writing the responsibility of the offender for holding up his or her side of the arrangement. They make almost impossible the resort to excuses by which the offender tends to rationalize any failure to abide by the conditions. And they ensure that few offenders will be incarcerated because of misunderstandings on one side or the other or because of any possible bias on the part of the officer.

H. *Gubernatorial Options for Intake Control*
Throughout the U.S. many governors have begun to exert leadership in promoting some of the actions already described. Because the criminal justice system is really a congeries of loosely connected and often conflicting realms rather than an integrated "system," it often falls to the state's chief executive to draw things together. Several governors have appointed blue-ribbon commissions to study specific problems such as overcrowding (one of the best was Ohio's Governor's Committee on Prison Crowding, 1986). Other governors have elected to form task forces charged with much broader long-range planning (one of the best was Oregon's Governor's Task Force on Corrections Planning, 1988).

The various options considered under the heading of "legislative options" are really in many ways also gubernatorial options. It is often up to the governor to initiate legislative action, or to develop such action in concert with the legislature as Governor Caperton did with Senate Bill 389, the legislation clearing the way for replacement of the penitentiary at Moundsville. And when legislation is enacted, its implementation will depend to a considerable extent upon the position taken by the governor, as recent conditions in West Virginia indicate quite clearly.

Although the earlier discussion of correctional impact statements indicated the way in which some legislative bodies have proceeded, requiring such impact statements is also one option available to the governor. For example, this is an option available with respect to the major "privatization" issue now facing West Virginia, where the Batman Corporation has proposed to relocate prisoners from the District of Columbia facility located in Lorton, Virginia, to the rural counties of West Virginia. The advantage of such an impact statement option is the clear data base it could provide as justification for whatever decision seemed most proper. The disadvantage, of course, lies in the complications it might introduce into delicate political negotiations.

Perhaps the most important role for a governor is the impact that he or she can have by publicizing correctional issues and mobilizing public sentiment. Several state governors have made corrections a priority concern. In doing so, they have been able to generate public support for experimentation with many of the new options discussed throughout this monograph.

CHAPTER 5

POLICY OPTIONS FOR REDUCING CORRECTIONAL PRESSURES: CONTROLLING LENGTH OF STAY

Pressures on correctional facilities have not only been aggravated by the trend toward incarceration of more offenders but also by the trend toward increased length of stay. Since 1976 at least 15 states have adopted determinate sentencing laws which fix the length of stay by law and block the use of early release strategies such as parole. During the same period, 37 states have passed mandatory minimum sentence laws for particular offenses, a policy that also places tight constraints on length of stay. And even when some discretion remains available, parole boards have tended to catch the "get tough" spirit of the times and have grown increasingly conservative in their release policies (Cory, 1988).

Given that sentences in the U.S. tend to be much more severe than in other industrialized societies, the enormous costs involved, and the fact that lengthy imprisonment may aggravate rather than ameliorate crime problems, there is a clear need to reconsider policies affecting length of stay. There are many options available to address the length of stay issue. Many states have undertaken efforts that are worth consideration by policymakers in West Virginia.

A. *Legislative Options for Controlling Length of Stay*

Some of the legislative options available to control length of stay include (1) revision of penal and sentencing codes, (2) revision of "good time" credit, (3) adoption of presumptive parole on first eligibility, (4) authorization of placement of pregnant offenders in the community, and (5) repeal of mandatory sentences (Harris, 1984; Petersilia, 1987; Cory; 1988). Although

specific options such as those for dealing with pregnant offenders are not likely to be of appreciable help to less-populated states such as West Virginia, most of the available options can have major impacts.

Revision of Penal and Sentencing Codes

Because the U.S. has among the lengthiest prison sentences in the world, reductions that place a state even a little closer to policies in most industrialized countries can reduce the prison population dramatically (Shane-Dubow et al., 1985). As costs escalate and pressure builds within correctional facilities, many states have begun to reconsider the movement toward harsher sentencing, either through reduction of sentence length or creation of sentencing commissions to set guidelines. For example, in 1981 the North Carolina legislature, which had moved earlier to establish presumptive sentences through a Fair Sentencing Act, acted to reduce their state's sentences by 25 percent for certain offense categories (Harris, 1984).

Revision of "Good Time" Credits

Most states have in place policies based on statutory authority that reduce the amount of time served as a reward for good behavior, and many different means exist for providing such incentives. Michigan decided to reinstate its "good time" policy after having revoked it earlier. In 1978 a referendum issue called "Proposal B" eliminated "good time" in Michigan. Average length of stay for inmates then increased sharply, and riots broke out in 1981. A new "good time" bill was introduced into the Michigan Legislature in 1983. Although given little chance of success because of the requirement that it attain a two-thirds majority, circumstances had deteriorated so dramatically in Michigan prisons that the bill was adopted. The new law permits inmates to earn 10 days off their minimum sentences for each month of "good time" served (Cory, 1988). In Tennessee, the legislature proceeded somewhat differently than in Michigan. Its existing policy had applied "good time" credits to an inmate's maximum sentence. In 1985 this was changed so that the credits applied to the inmate's minimum sentence as defined as their parole eligibility date (Cory, 1988). Although traditionally "good time" has been granted for avoiding infractions, there is no reason why it cannot also be awarded for positive behavior, including participation in work, schooling and a host of other programs. Under this approach, the inmate is rewarded not only for "staying out of trouble," but also for accomplishing something positive.

Adoption of Presumptive Parole on First Eligibility

Presumptive parole is another interesting legislative approach to correctional problems. In New Jersey their parole law assumes that a prisoner will be

released the first time they are eligibile for parole unless there is a preponderance of evidence that suggests that, if released, the prisoner will commit another crime (Harris, 1984). This policy has the effect of shifting the burden from the inmate to the parole board. Under the usual circumstances, the presumption is that the inmate must show why he or she should be released. Under the "presumptive parole" policy, the parole board must show why the inmate should *not* be released. Adoption of such an option certainly goes against the traditional perspective on inmate rights, but fits well with the changing views of the past two decades and is at least worth consideration as an option in West Virginia.

Authorization to Place Pregnant Women Offenders in the Community

Although not likely to have much impact in less populated states, programs such as the "Shared Beginnings" project operating at the Federal Correctional Institution at Pleasanton, California, show promise for providing some reduction of length of stay for selected offenders (Harris, 1984). Under the "Shared Beginnings" project, pregnant women offenders are allowed to leave the institution to live in a community residential facility during the last several months of pregnancy and for several months after their babies are born. Even in states where there are too few eligible pregnant women offenders to make such a program worthwhile, the program serves as an example of possibilities that might be extended to other categories of offenders (Allen et al., 1985).

Repeal of Mandatory Sentences

As indicated earlier, the trend toward mandatory sentences has been one source of expanded prison populations in many states. While motives for the adoption of mandatory sentencing included a desire to reduce sentencing disparity and to increase both the length and the certainty of punishment, research has not shown either effect (Inciardi, 1990). Prosecutors, judges and juries have found different means of circumventing any "mandatory" action when faced with an offender who does not seem to fit the arbitrary sentence set in advance. When legislators and the public realize that the disparity problem has not been resolved at all and that the chief effect has been to cost the state a great deal of money by increasing length of stay, it may be possible to move toward consideration of repeal.

B. *Prosecution Options for Controlling Length of Stay*

Prosecutors can have an influence on the length of prison stays through their sentencing recommendations to the judge and by endorsing combination penalties to decrease custodial stays (Harris, 1984; Shane-Dubow et al, 1985;

Petersilia, 1987). As is widely recognized, judges run some risks when they appear to side consistently with the defense against the approach of the prosecutor, who is seen as "representing the people." At the same time, defense attorneys are often forced to plea bargain a more lengthy term of incarceration than necessary to accommodate a prosecutor who adheres to the harshest sentencing policies. Because prosecutors have considerable influence, the position that they take on these issues will be of real importance.

Sentencing Recommendations

Just as the prosecutor concerned with prison conditions can consider somewhat different sentencing policies designed to reduce the number of offenders incarcerated unnecessarily, he or she can also consider recommendations reducing the length of stay once incarcerated. As with policies reducing prison intake, prosecutors may at times feel as if they are running counter to the public's "lock 'em up" sentiment. However, there is a greater likelihood of public support if it can be demonstrated that a long incarceration will place a heavy burden on the taxpayer.

Endorsement of Combination Penalties to Decrease Stays

Part of the problem of setting appropriate punishment lies in the fact that there are different and sometimes conflicting goals. There is the common desire for *retribution,* the urge to see appropriate retaliation against the wrongdoer and to see him or her "pay" for the crime. But there is also the goal of *deterrence,* the aim to prevent the offender from committing another offense and of others to follow his or her bad example. There is also the goal of *rehabilitation,* the desire to see the offender actually "learn the error of his ways."

Unfortunately, proponents of these different goals represent traditions that operate in different universes of discourse and who do not even speak the same language. While the first speaks the language of moralism and the second the language of rational utilitarianism, the third has tried to confine itself to a "scientific" rhetoric emphasizing "treatment" and "therapy." Throughout the debate, the problem has been that those involved have tended to take an absolutistic stance, as if defense of their own position depended on demolition of the others. The fact is that many sorts of penalties can be structured so as to represent different combinations of retribution, deterrence and rehabilitation stress (Ball, 1979). The use of intermittent incarceration, of halfway houses, and of furloughs combined with restitution, community service and other sanctions may serve the sense of justice while balancing the various goals debated.

C. *Defense Options for Controlling Length of Stay*

The defense bar can have a significant impact not only the flow of offenders into state correctional facilities but also the time spent there once incarcerated. And

the possible impact is by no means confined to effective plea bargaining or presentation of mitigating argument at trial. The defense bar can play an important role through such activities as monitoring of contracts affecting time served and representing offenders at parole hearings. More than two decades ago the American Bar Association (1968) issued a fairly extensive review of such "post-conviction remedies." Together, they can have an appreciable effect on the average length of stay in correctional facilities.

Monitoring of Contracts Affecting Time Served

If they can be put into place, the defense bar can make good use of contracts affecting time served. When such contracts are signed, they can commit the parties to mutual obligations. The correctional authorities can be committed to providing programs and avenues of progress through the correctional system. The inmates can be obligated to participate in the programs and to successfully complete certain agreed-upon performances. Although some will react negatively to this option because it may have the appearance of "bargaining" with the offender, it is has been used by institutions for juveniles for many years as a means of "differential treatment" (Ball, 1974). Once the contracts are negotiated, the chief role of the defense involves monitoring to assure that programs are being provided as contracted so that there is ample provision for the inmate to demonstrate successful completion and attain early release.

Representation of Offenders in Parole Hearings

The offenders' rights movement has not only provided more protection during probation revocation proceedings, but it has also opened the door to greater legal representation at time of parole hearings (Cromwell et al., 1985; Early and Early, 1986). Although for some the issue is largely one of due process, representation is one way of making an effort to see to it that those deserving of release are no longer held unnecessarily. In a time when parole boards may be less willing to run a risk without stronger arguments in favor of release, the defense bar can often cooperate by supplying some. In states such as West Virginia a strong and motivated defense bar can have a significant impact.

D. *Judicial Options for Controlling Length of Stay*

The policies of the judiciary obviously have a great deal to do with the length of time offenders remain imprisoned. While no one is likely to suggest that West Virginia judges should begin to hand down overly lenient sentences just to be sure that correctional facilities avoid legal challenges, there is much that the judiciary can consider in an effort to ensure that they are not incarcerated for terms longer than required in the interests of justice (Inciardi, 1990). Specific

examples of judicial action that can make a difference include (1) issuing shorter sentences in some cases, (2) appellate review of sentences, and (3) use of intermediate or "shock" confinement (Harris, 1984; Petersilia, 1987; Cory, 1988).

Shorter Sentences

Prison sentences in the U.S. are among the highest in the industrialized world, yet there is no real evidence that severity of sentence is a significant factor in deterrence (Blumstein et al., 1978). On the contrary, those who have studied the so-called "crime school" effect suggest that lengthy sentences actually tend to increase the likelihood of further crime once the offender is finally released. Time in prison serves to break the offender's ties to law abiding groups and strengthen ties to lawbreakers. Prison introduces the offender to criminal techniques as it generates hostility and encourages habits of violence (Duffee, 1989; Allen and Simonsen, 1989). Ideally, therefore, the most appropriate sentence may be that which is just long enough to satisfy the sense of justice and not a bit longer.

Appellate Review of Sentences

The role of appellate courts in reviewing sentencing has already been discussed, and it is applicable to length of stay as to the incarceration decision itself. Without trying to set judicial policy, it is worth noting that West Virginia is frequently cited as a state in which a conviction for auto theft results in more prison time than does a rape conviction in 16 other states (New York *Times,* 1981). Although the use of sentencing guidelines, sentencing councils and other strategies for avoiding gross disparities in sentencing and arbitrarily harsh sentences are probably superior approaches to the intervention of an appellate court, the latter may prove appropriate on occasion.

Use of Intermittent or "Shock" Confinement

Different jurisdictions within the U.S. have developed policies by which the offender can be given intermittent sentences, serving time on weekends or at night only. Under the concept of "shock confinement" the offender is given what may be a deterrent "shock" of actual incarceration but with the incarceration replaced by some other sanction before it does too much damage. Some judges use "split sentences" or "shock probation" with a short incarceration followed by probation. Still others retain jurisdiction for a time by sentencing the offender to incarceration, then resentencing them to probation after a brief period. This tactic might be more aptly called "shock confinement," but it is usually designated instead as "shock probation." Wider

use of these options could still provide some "retribution" and, at the same time, significantly reduce the length of incarceration and the damage to family and occupational ties (Petersilia, 1987).

E. *Other Options for Controlling Length of Stay*

Most of the options available to both public and private agencies outside the criminal justice system to reduce prison intake also apply to reduction in length of stay. When such programs are available, it is often possible to release offenders who are mentally ill, retarded, or in need of special attention to facilities better equipped to deal with their problems. In a similar way, presentence investigations conducted by outside agencies, even when they do indicate that incarceration is the appropriate decision, may suggest a shorter stay, and availability of community supervision by such agencies may permit early release. Thus, some of the organizations outside the criminal justice system that were cited earlier not only provide alternatives to incarceration which reduce prison intake but also handle offenders out on work release or parole. Under the heading of "privatization," the earlier monograph devotes an entire chapter to a discussion of these options (Ball, 1989).

F. *Correctional Options for Controlling Length of Stay*

A wide variety of parole options are now in use across the U.S. to assure that a prisoner's time is not extended further than necessary. These include (1) adoption of contract parole, (2) adoption of parole guidelines, (3) provision for special screening for early release, (4) use of "mini parole," (5) speeding up the parole hearing process, and (6) revision of revocation policies (Studt, 1978; Harris, 1984). Because the pressures on correctional facilities are felt most keenly by the facilities themselves rather than by legislative bodies, prosecutors, defense attorneys, agencies outside the criminal justice system, or probation agencies, the tendency is often to turn to some of these parole options very early.

Adoption of Contract Parole

As indicated earlier, some correctional systems have moved toward the option of "contract parole," in which the inmate's release date is specified in advance as the date on which he or she completes certain programs and meets certain specified conditions. The contract amounts to a "guarantee," and as such it may offer considerable incentive to the inmate, who has the release date in his or her hands. Perhaps the chief problem with the option is simply that it demands that programs be in place so that the inmate has the opportunity to perform.

Adoption of Parole Guidelines

Paroling guidelines serve to inform all concerned of the operating policies of the paroling authorities (Cromwell et al., 1985). They also facilitate planning by making it possible to determine average time to be served by different categories of prisoners. The Federal Parole Commission has adopted such guidelines, as have paroling authorities in states such as Oregon (Harris, 1984).

Provision for Special Screening for Early Release

West Virginia, Maryland and several other states have undertaken special reviews to determine which, if any, inmates could be considered for early release. Indeed, this is a policy that offers one of the few alternatives available in times when overcrowding becomes so severe that there is simply no space to house incoming inmates. The screening may be accomplished in several ways such as through empowering parole authorities to conduct the reviews or appointing members of the judiciary to sit for them. Such an expedient was employed as a result of the *Nobles v Gregory* (1983) decision dealing with conditions at the Huttonsville correctional facility.

Although screening for early release has the advantage of speed when speed is critical, the necessary rapidity of the process can convey a sense of expediency rather than justice. That is, an uninformed public can easily assume that those doing the screening have no concern for the "welfare of society" or the "rights of the victim" but are "siding with the inmates." The practice also puts the onus on those doing the screening while leaving the underlying problems unresolved.

Use of "Mini Parole"

Average length of incarceration can be reduced by different combinations of "intermediate punishments" (McCarthy, 1987). Faced with severe problems of crowding, Mississippi developed and implemented a concept of "mini parole" (Harris, 1984). The policy combines participation in work programs with parole supervision. Prisoners are considered for participation after serving one-fourth of their maximum sentences (adjusted by up to nine days per month off for good behavior).

Speeding Up the Parole Hearing Process

One persistent problem with parole has to do with the long-standing notion that it is a "privilege" granted by the state at the will and convenience of the state (Cromwell et al., 1985). Because of this attitude, and because parole hearings take time and cost money, they are sometimes held less frequently than might be desirable in terms of controlling length of stay (Cory, 1988). It is

not uncommon for prisoners to spend extra time in prison waiting for the hearing that will release them. While this may not trouble those who stress that parole is a privilege, it does contribute to crowding and adds to the burden of correctional expense carried by the taxpayer.

As part of its attempt to deal with its correctional problems, Mississippi has initiated a special form of parole called "supervised earned release" under which a special review team is empowered to approve release to intensive supervision after an inmate has served one year on a nonviolent offense (Harris, 1984). "Supervised earned release" requires frequent parole hearings, as does a new policy in North Carolina where the parole commission holds hearings every six months once an inmate has attained eligibility for consideration (Harris, 1984). Such policies add to the number of parole hearings to be managed, but they save money in the long run and also serve to reduce tension within correctional facilities.

Revision of Revocation Policies

Many parole violations are of a "technical" nature involving failure to meet certain imposed conditions rather than actual commission of a new offense. It is questionable whether these should result in revocation of parole, and parole officers tend to "cut a little slack" for their parolees by ignoring some of the violations (Cromwell et al., 1985). If tighter control seems necessary, it may be possible to use some alternative to reimprisonment. One example is the "house arrest" option described earlier. It can be imposed on parolees as well as on probationers (Ball et al., 1988). Under this option, the parolee who must be sanctioned for rule violation can be confined to his or her own home rather than returned to prison.

G. *Gubernatorial Options for Controlling Length of Stay*

Although reduction of length of incarceration represents a politically sensitive use of gubernatorial power, governors do have an effect on length of stay through commutation or pardon. Commutation is considered an especially appropriate option for prisoners who are aged, disabled, retarded, or have serious medical problems (Harris, 1984). Such inmates can be released to parole supervision in the community. Where a pardon usually implies that significant doubts have arisen about guilt or that powerful extenuating circumstances have been discovered which are sufficient to negate not only the remainder of the sentence but the conviction itself, commutation implies only a willingness to reconsider the severity of a penalty in the light of changed circumstances.

In 1979, Maryland used commutation or clemency for the early release of 1,029 prisoners, and one survey in the early 1980s revealed that 10 states reported regular use of commutation or clemency as a release mechanism (Harris, 1984). Still, it is obvious that such an approach puts a considerable political burden on the governor, who may be accused of favoritism, lack of concern about public safety, or worse. This being the case, it is likely that commutation or clemency will remain an option to be used either in dramatic cases involving favorable publicity or as something of a last resort when other options fail.

H. *Department of Corrections Options for Controlling Length of Stay*

While some in the criminal justice system have only a few options available for influencing length of stay, many possibilities are either presently available or can be made available to correctional authorities (McCarthy, 1987). These include (1) reclassification of offenders, (2) use of contract release, (3) screening for immediate community placement, (4) development of phased reentry, (5) development of increased opportunities for work credits, (6) expansion of services to increase offender skills and performance, (7) adoption of standards for disciplinary infractions, (8) increased use of administrative "good time," and (9) reduction of delay in processing of offenders (Krajick and Gettenger, 1982; Harris, 1984; Duffee, 1989; Allen and Simonsen, 1989). Each of these can make a significant difference in the length of time an inmate spends in institutional custody, and they are certainly worth consideration in West Virginia.

Reclassification of Offenders

Review of classification standards and the procedures used to implement the standards can be a major means of exerting control over length of stay (Allen and Simonsen, 1989). To avoid making a "mistake," which almost always means having been too "easy," correctional authorities can fall into a pattern of slowly "tightening up" their classification criteria so that they have unknowingly restricted things far beyond what others might deem necessary (Buchanan et al., 1987; Kane, 1987). For example, in 1976 an outside review team from the University of Alabama was retained by the State Board of Corrections to reclassify the prison population in response to a federal court order mandating a reduction of the prison population by 40 percent. The results are worth some reflection.

Where the Alabama Board of Corrections had classified 34 percent of the inmate population as requiring maximum security, the incoming team put only 3 percent in this category. At the same time, the team assigned minimum

security status to 32 percent of the population, where the Board had concluded that only 9 percent should be so classified. As Harris (1984) has pointed out, new facilities planned on the basis of the Board of Corrections work would have required 1,500 maximum security beds while planning based on the work of the review team would have called for only 100 new maximum security beds.

Use of Contract Release

The option of contract release has already been examined as a means by which other elements of the criminal justice system could play a role in controlling length of stay. However, correctional authorities are the key. It is their responsibility to develop and manage such release contracts. Unless they are willing to cooperate, this option cannot be expected to be successful. And, there is little chance that they will be able to do much of this in West Virginia unless additional resources make it possible.

Screening for Immediate Community Placement

The 1970s saw a great deal of progress in the development of screening devices (Gottfredson and Gottfredson, 1979). Departments of Corrections in different parts of the U.S. have been involved in programs for the sort of screening discussed earlier, and with some success. For example, Mississippi uses community-based restitution centers to review the cases of offenders sentenced to prison and recommend to the sentencing judge that selected offenders be assigned instead to community residential centers (Harris, 1984). To be eligible for consideration, offenders must be employable and willing volunteers, and they must not have lengthy criminal records. With average earnings of $4.65 an hour, these offenders reimburse the state at a rate of $35 per week for room and board and pay transportation costs, family support, and restitution while meeting other obligations. Upon successful completion of the immediate community release program at the residential center, offenders are assigned to standard probation supervision.

Development of Phased Reentry

In some of the more difficult cases, it may be necessary to move more cautiously with much greater control over the offender's entry into the community (Cromwell et al, 1985). Phased reentry has the advantage of providing tight supervision and assistance to the offender and considerable protection for the community. The process can sometimes become quite complex, but it can be an effective method of reducing even the pressure on maximum security facilities housing inmates who require close supervision. When the public is made to realize that most of these offenders will be reentering society at some point in any case, there is a much greater likelihood of acceptance of a phased reentry

program that allows some of these offenders out earlier but with tight control (Allen et al., 1985).

North Carolina offers one example of a state that has implemented phased reentry (Harris, 1984). Any prisoner within 13 months of unconditional release is eligible for participation in any of four different prerelease and aftercare programs, including unconditional release assistance, prerelease training, aftercare, and phased reentry parole. Unconditional release assistance is offered to those who do not receive reentry parole but wish assistance in obtaining a job or place to live. Prerelease training involves four weeks of assistance directed toward improving self-motivation, self-insight, and understanding. Aftercare is offered to those offenders who may not need specific job assistance or a place to live but are in need of some help in readjusting to the community. For offenders moving into phased reentry parole the state grants furloughs for as much as 30 days before release so offenders can find jobs, and the offenders are assigned to minimum security work release facilities upon release. As far back as 1980, 1616 offenders were under assignment to such facilities through the phased reentry program.

Ohio provides another example of such a program, in this using 26 halfway houses with an average of 20 prisoners each as transitional residences for offenders released from prison (Harris, 1984). In Oklahoma, the Department of Corrections has taken over 10 motels, operating them as community treatment centers holding 7,000 offenders, which amounts at any given time to 18 percent of the prison population of that state (Harris, 1984). Because of normal turnover, Oklahoma is able to release from 34 percent to 45 percent of its prisoners through such reentry centers. But even this figure is dwarfed by that prevailing in Oregon, where 80 percent of all state prisoners are released through their phased reentry centers. The more effective the phased reentry program, of course, the more quickly and efficiently inmates can be released from imprisonment and the less the pressure on the crowded and much more expensive correctional facilities.

Development of Increased Opportunities for Work Credit

While "good time" credits reward the offender with earlier release earned by proper behavior while in confinement, work credits can be used as an added incentive that may serve to instill work habits and help the community at the same time. Under these programs offenders earn credits by particular forms of work. Although traditionally the inmate might be paid a small sum for this, the newer programs may add the incentive of an earlier release date (Cory, 1988).

South Carolina offers a good example of a fairly successful work credit program. In 1978 South Carolina passed a Litter Control Act that authorized

the South Carolina Department of Corrections to grant "earned work credit" to prisoners for productive work performed outside correctional institutions. Such credit ranges from a minimum of one day earned for each seven days worked to a maximum of one day earned for each two days worked, depending on the level of work. Up to 180 days of earned work credit can be granted to a prisoner in any given year. Harris (1984) reported that for a given six-month period the South Carolina Department of Corrections estimated that this program reduced the state prison population by 434 inmates. Given the litter problem in West Virginia and the hopes for tourism as an economic development strategy, such an option may be worth consideration here.

Expansion of Services to Increase Inmates' Skills and Performance

It is widely recognized that one of the most effective ways to move inmates through correctional institutions is to provide services that can develop their skills and allow them to perform more effectively (Krakick and Gettenger, 1982). Without performance skills of a law-abiding sort the tendency to turn to criminal activity is stronger and the odds of recidivism higher. Much of the irony of corrections lies in the fact that crowded institutions have put a strain on correctional budgets, leading to a reduction in programs, which in turn adds to the likelihood of further pressure later. The West Virginia Supreme Court of Appeals in effect recognized just this in its *Cooper v Gwinn* (1981) decision affirming prisoners' rights to rehabilitation programs.

Adoption of Standards for Disciplinary Infractions

The problems of correctional facilities feed on themselves. As conditions deteriorate pressure builds within correctional institutions, affecting both inmates and staff. Increased staff turnover leads to supervision by less experienced correctional officers, often without sufficient training. All of this contributes to uncertainty as to exactly what constitutes behavior requiring disciplinary action (Duffee, 1989). Combined with the increased pressure, the result is that inmates may be "written up" by some correctional officers for infractions involving behaviors tolerated by others or may be cited for behaviors that have been ignored before. Clarification of standards for disciplinary infractions tends to reduce the number of "errors of judgment" on the part of both inmates and staff. Because disciplinary infractions often result in additional time served, any reduction will tend to reduce average length of stay. It must be noted, of course, that there is often the appearance that standards are clear and consistent because some policy statement affirms this. Only careful study can determine the extent to which policy on paper is policy in practice.

Increased Use of Administrative "Good Time"

Many states authorize the Commissioner of the Department of Corrections to grant administrative "good time," generally for meritorious behavior such as risking injury to assist a staff member. States such as Illinois have expanded this practice through the use of a special review committee. This committee meets monthly to compare population figures with capacity figures. When capacity is exceeded, the committee grants from 30 to 120 days off sentences for those nearing release, until the population falls back in line with capacity (Harris, 1984). Administrative "good time" can be a powerful management tool, serving not only to hold down the institutional population but to provide incentives for good behavior on the part of those still incarcerated (Duffee, 1989; Allen and Simonsen, 1989).

Reduction of Delay in Processing Offenders

Bureaucratic systems tend to be characterized by various "bottlenecks," and corrections is no exception. Careful review of each step by which inmates progress through an institution is in the interest of everyone concerned. Through such a review it may be possible to identify points at which decision-making and subsequent processing can be accelerated. One managerial option for corrections in West Virginia might involve just such a review, perhaps conducted by outside consultants through federal technical assistance funding.

CHAPTER 6

POLICY OPTIONS FOR REDUCING CORRECTIONAL PRESSURES: IMPROVING SYSTEM CAPACITY

In addition to policy options for control of correctional intake and length of stay, some of the most promising possibilities for dealing with increasing pressure on correctional systems focus on improvement of the carrying capacity of the systems themselves. There are two basic strategies. The first involves more efficient utilization of existing capacity. The second involves additional construction. The soundest policy is likely to combine some new construction with a data-based reconsideration of utilization policies across the entire system.

It is important to emphasize that any adequate examination of utilization issues must be based on adequate data. The original legislation establishing the Regional Jail Authority in West Virginia directed the Authority to complete by July 1, 1986, a comprehensive study of all prison and jail facilities in West Virginia. This study was to include an assessment of the physical conditions of confinement and the relative need for each institution within the total system. Unfortunately, this was done for the jails, but not for any other correctional facilities.

There is still a serious need for a comprehensive study of the entire West Virginia correctional system. Such a study could combine the expertise of West Virginia correctional officials with technical assistance available through federal funding, most likely with the National Institute of Corrections. Until such an investigation can supply the necessary data, this monograph must confine itself to suggesting certain general policy options.

Construction options themselves have been examined at length in the earlier monograph (Ball, 1989). Since that time, recent legislative action has led to a

general construction program combining relocation of the penitentiary at Moundsville with renovation/construction at other facilities, along with a systematic plan for construction of the remaining regional jails. Thus, the present monograph will focus on improvement of capacity through strategies for efficient utilization.

A. *Legislative Options for Improving System Capacity*

The West Virginia State Legislature may wish to consider a variety of options designed to improve correctional system capacity through more efficient utilization as well as through current construction plans. These include (1) establishment of standards and capacity limits for facilities, (2) expansion of placement options for the Department of Corrections, (3) adoption of emergency overcrowding measures, and (4) demands for accurate short-term and long-term cost information (Harris, 1984; Camp and Camp, 1987a; Cory, 1988; Donahue, 1988; Allen and Simonsen, 1989).

Establishing Standards and Capacity Limits for Facilities

The national study of U.S. prisons and jails mandated by Congress suggested that legislatures adopt capacity limit standards with specific emphasis on the amount of living space to be provided each prisoner (Harris, 1984). Although capacity limits to date have been largely set by the judiciary, legislative limits can serve to provide valuable leadership in this area. Legislative action makes it less necessary for the courts to intervene and demonstrates a commitment on the part of a state to deal with crowding. Such standards are a crucial part of any utilization plan.

Expansion of Placement Options for the Department of Corrections

The West Virginia Legislature can take several actions to make more efficient utilization of system capacity by expanding placement options for the Department of Corrections. Among the possibilities are (1) use of immediate screening for community placement, (2) extension of work release options, (3) expansion of temporary leave provisions and (4) authorization of contracts with local government, other public agencies or private organizations for placement of offenders (Harris, 1984; Camp and Camp, 1987a; Cory, 1988). Creative combinations of these possibilities can allow a Department of Corrections to release many offenders into excellent placements, relieving crowding and making institutional programs available to more inmates within the walls while greatly benefitting those placed (Duffee, 1989).

Although sentencing judges may not realize it at the time, correctional authorities often find that offenders sentenced to prison do not require that

degree of custody (Mullen, 1985a). Partly for this reason, the Governor of South Carolina has proposed that the Department of Corrections automatically screen all offenders committed to its supervision for nonviolent offenses with sentences of five years or less for possible placement on work release or supervised furlough (Harris, 1984). If supported by statutory authority, there is much that correctional officials can do to accomplish screening and community placement.

Efficient utilization is a more difficult problem than one might expect (Allen and Simonsen, 1989). For example, at the height of the overcrowding crisis in Tennessee as many as half of the state's minimum-security bed spaces were empty while maximum-security prisons were overflowing (Cory, 1988). This problem was solved only with passage of a new law that returned classification policy back to corrections officials by abolishing classification restrictions that required offenders convicted of certain stipulated crimes to serve maximum-security time.

States vary widely in the eligibility requirements they set for work release placement (Cory, 1988). Some limit participation to offenders within six months of institutional release. Others, such as Iowa, allow participation of offenders within a full year of institutional release. South Carolina, which has approximately 16 percent of its prison population out on work release, liberalized its policy in the early 1980s (Harris, 1984). The Governor of South Carolina has been so encouraged by the success of work release in his state that he has recommended expanding the availability of work release centers in every region of the state, extending eligibility for participation by not automatically excluding offenders convicted of violent crimes, and reducing the percentage of an inmate's term that has to be served before being eligible (Harris, 1984).

By the early 1980s, 47 states and the District of Columbia authorized furloughs to prisoners to visit families, to attend an event, or to go to a job interview. However, a survey showed that only 32 states reported using furloughs and then only for 72 hours or less (Harris, 1984). This is far from the potential seen in the early 1970s in several studies, including one conducted for the Robert F. Kennedy Youth Center in Morgantown (Ball, 1974). Still, as late as the mid-1980s, some states, such as Connecticut, continued to authorize back-to-back 15-day furloughs for prisoners who were to be released soon as a means of assisting their transition into the community (Harris, 1984). However, it can be expected that furlough programs will be used even more sparingly than ever for some time, partly because of the 1988 presidential campaign publicity surrounding a few notorious failures.

By the mid-1980s, there were 170 community-based prerelease facilities for adults that were operated by private organizations under contract to state or

federal agencies (Harris, 1984). Legislative support for such facilities is very important in that it demonstrates state commitment to the policy and guarantees that the programs have some basis for sustaining themselves over time (Cory, 1988). Where these facilities are unavailable or tighter custody is desired, at least 15 states contract with local jails to hold sentenced offenders, either until space becomes available in state institutions or as transitional placements for prisoners nearing prison release dates (Harris, 1984). In their lengthy study of these strategies, Camp and Camp (1987a) have provided a number of successful examples.

Adoption of Emergency Overcrowding Measures

Since 1981 about a dozen states have passed laws capping the acceptable population capacity of their prison systems (Cory, 1988). These laws establish emergency release procedures to be triggered in some states when capacity is approached, in others when capacity is reached, and in still others only when capacity is exceeded by some specified figure. The first of these Emergency Powers Acts was passed in Michigan in 1981. It provided that, if prison overcrowding persists for more than 30 days, sentences of all eligible inmates are to be reduced by 90 days, with the parole board to review the cases of those now eligible for release. Should such legislation become necessary, there are a number of options that West Virginia could consider (Mullen, 1985a).

For example, the Oklahoma legislature has adopted a Joint Resolution permitting the Director of Corrections to determine the maximum capacity of correctional facilities and to provide mechanisms for responding if the facilities reach these limits (Harris, 1984). The Connecticut legislature has authorized the Commissioner of Corrections to petition the superior court for modification of any inmate's sentence if it is determined that the number of sentenced inmates exceeds the maximum limit permissible to maintain standards in accordance with acceptable correctional practices (Harris, 1984). Other states have taken different actions toward the same end by establishing some triggering mechanism for controlling prison population under emergency conditions when intake control measures and strategies for control of length of stay have failed to stem the pressure on prison capacity (Allen et al., 1985).

Demanding Accurate, Short-Term and Long-Term Cost Information

Costs of correctional construction are very difficult to estimate (Allen and Simonsen, 1989). It is important that state legislatures find means to obtain more accurate information on this subject. Of the 31 prisons for which construction was begun between 1980 and 1986, 26 ran over the original cost estimates, one by more than $10 million (Harris, 1984). By the middle of the

1980s, the cost of one bed in newly constructed facilities was ranging from $18,000 for minimum security to $78,000 for "supersecurity" maximum custody, and more recent figures run in the range of $100,000 for a maximum security cell.

Operational and maintenance costs must also be carefully calculated and verified (Duffee, 1989). For example, Colorado opened two new prisons with a total capacity of 720 at the end of the 1970s. However, because these facilities replaced the old territorial prison 240 beds were actually lost to the total Colorado correctional system. Nevertheless, 160 new employees were added to the Colorado Department of Corrections, and the annual operating budget increased by 28 percent in 1980–81 and by another 16 percent in 1981–82 (Harris, 1984). Part of these increased operating expenses may have resulted from development of facilities that required more staff to provide adequate supervision (Mullen, 1985a).

B. *Defense Bar Options for Controlling System Capacity*

Aside from all the actions available to the West Virginia defense bar as means of controlling prison intake and length of stay, there are also several methods of affecting system capacity. These include (1) using crowded and/or substandard facilities, (2) appealing sentences to inappropriate facilities and (3) seeking lower custody placements.

Instead of bringing actions against an entire facility, defense counsels can appeal sentences of individual offenders (American Bar Association, 1968). This more particularized approach allows challenges not only to facilities that fail to meet standards but also to those that do not fit the particular offender's security requirements or special needs, or that unnecessarily restrict access to family or needed services. The defense can also attack custody decisions in terms of the way classification criteria were applied to a particular offender, or the challenge can be directed against the classification criteria themselves. This more particularized approach may not represent a threat to an entire facility, but it has proved useful in challenging prison conditions and must be recognized as an increasing possibility.

C. *Judicial Options for Improving System Capacity*

Some of the judicial options for responding to problems with respect to the capacity of correctional systems overlap options for dealing with problems of intake and length of stay (Petersilia, 1987). For example, judges have refused to sentence offenders to substandard facilities, a practice that controls capacity by controlling intake. Judges have also approached the capacity issue by deferring sentencing or by delaying commencement of sentences for less serious offenders depending upon capacity ratios.

In countries such as the Netherlands, less-serious offenders are in effect given "reservations" for bed space at a future date when others have been released and space is open for them (Harris, 1984). Similar practices have been used for years in the U.S., even before prison crowding became a major problem. For example, offenders who did not pose a threat to the community have often been given some time to put their affairs in order before reporting to prison. In fact, there are many examples of traditional practices that have been used for other purposes that can be applied to the goal of controlling prison capacity in these new circumstances.

As is apparent from the extended discussion of the situation in West Virginia, state appellate courts and federal courts have stepped into the arena when no one else has handled intake, length of stay or problems of system capacity. It is generally agreed that actions of this nature should be resorted to with some reluctance. Unlike the legislature, the courts are not set up to develop policy, and unlike the executive branch, they are not organized for policy implementation. Thus, their role has tended to be one of ordering the other branches of government to develop and submit policy statements that can be examined for legal adequacy and then to take necessary actions to implement them within a reasonable time.

D. *Other Options for Improving System Capacity*

The same options for various agencies outside the criminal justice system with respect to control of prison intake and length of stay are also applicable to problems of system capacity. For example, social agencies that testify at hearings dealing with conditions in correctional institutions are especially effective as advocates for certain offenders with special needs, such as those who are mentally ill, retarded, addicted or alcoholic. Often, social agencies are able to bring to bear expertise that is badly needed in the assessment of these offenders. At the same time, they also let in a "breath of fresh air" by forcing those concerned to look at people and programs from a different perspective.

In New Jersey and California, the advocacy approach has gone beyond organizational representation at hearings. There, members of the community are asked to sign formal contracts with probation and/or parole agencies stating that they will serve as "community sponsors" (Petersilia, 1987). These community sponsors assume responsibility for assuring that probationers or parolees adhere to their court-ordered conditions and agree to notify the court if violations occur. It is entirely possible for community groups to exert some control over correctional system capacity by volunteering to provide some "sponsorship" assistance behind the walls (Allen and Simonsen, 1989). Even if this were confined to minimum security facilities, it could make for more

efficient utilization of system capacity by freeing staff resources for assignment to tighter security institutions.

E. *Gubernatorial Options for Improving System Capacity*

The various legislative options described throughout this monograph are, in many ways, also "gubernatorial options" because governors can provide the initiative or crucial support necessary for their success. Moreover, as chief executive it is the governor who directs the state criminal justice system as a whole. The leadership exerted by a governor is critical to the success of many of the options discussed.

The strategy of the Governor of West Virginia in initiating and implementing correctional alternatives for the State will be considerably affected by the recent reorganization of state government. Because this is a matter of such complexity, with many implications yet to be determined, this monograph does present other states' governors' efforts to improve system capacity. Much will depend in West Virginia on the energy and expertise to be found among those officials and agencies to whom responsibility for corrections might be delegated.

F. *Department of Corrections Options for Improving System Capacity*

In theory, correctional officials have available to them many options to exert control over system capacity. However, the truth is that practical availability is often governed by the budget, which really leaves power largely in the hands of the legislature. Nevertheless, correctional leadership is important, especially with respect to (1) establishment of standards and capacity limits, (2) contracting with private, governmental, or specialized programs for offender housing, supervision, and services, and (3) development of placement options.

Establishment of Standards and Capacity Limits

As has already been pointed out, corrections officials across the U.S. moved some time ago to establish some semblance of standards, including capacity limits, and many have sought accreditation as one means to meet these standards and to provide for their validation. The adoption of West Virginia Code & 31-20-9 directed the Jail and Prison Standards Commission to prescribe specific standards, prescribing in subsection (2) that they be promulgated "... on or before the first day of July, one thousand nine hundred eighty six." The result, the *West Virginia Minimum Standards for Construction, Operation and Maintenance of Prisons,* was completed on November 18, 1987, and sent out for public comment on January 3, 1988. The public comment period ended on February 10, 1988. The new standards covered the current

requirements of the National Fire Protection Association (NFPA), the Building Official and Code Administrators International (BOCA), the American Correctional Association (ACA), the National Sheriffs' Association (NSA), the West Virginia Department of Health, and court precedents deriving from recent lawsuits against several West Virginia prisons. In addition to *Crain v Bordenkircher,* one of the suits mentioned prominently was *Nobles v Gregory,* the suit dealing with conditions at the Huttonsville facility.

These standards are very impressive. However, their realization demands additional funding, staff training and political support for citizen involvement. In addition to covering academic and vocational education standards, library services, recreation, religious services, and social services, they deal with many of the options mentioned, including release preparation and temporary release. The standards even cover citizen involvement and the use of volunteers, in a manner somewhat similar to recent policy statements of the Federal Bureau of Prisons.

Contracting with Private, Governmental or Specialized Programs

The practice of contracting out for services has been used in West Virginia for many years, especially for certain specific services not easily provided by correctional personnel, such as college-level instruction on a part-time basis. There has been a tendency for correctional officials to prefer the use of their own personnel when possible, but the recent trend toward privatization, along with some feeling that the requisite expertise may not reside within the walls despite protestations to the contrary, has led to greater pressure for service contracting. Because this option really amounts to the further "privatization" of corrections, which is already the subject of considerable discussion in West Virginia, it was examined at length in the earlier monograph (Ball, 1989).

Expanding Placement Options

One example of expanded placement options is offered by the Texas Department of Corrections, which has undertaken a bold expansion of its innovative "quarter-house" halfway house facilities (residential centers that house mentally retarded prisoners) to take in probationers and parolees guilty of technical violations (Petersilia, 1987). There are many others. The possibility of expanded placement options for inmates in the West Virginia correctional system is, of course, likely to face the common problems associated with the risks of innovation (Duffee, 1989). It is common for the public to ask why prisoners are not being used to perform useful work in parks and on highway beautification projects or construction jobs and there is always an outcry when an escape or unsettling incident occurs.

G. *The Need for a Comprehensive Approach*

West Virginia policymakers are already aware of many of the strategies for reducing pressures on our correctional system. A number of state legislators have advocated several of the key strategies, and a few creative judges in West Virginia have developed and used a number of the judicial alternatives discussed. Certain correctional officials themselves have made clear their belief that construction of additional prisons is not the ultimate answer to their problems and that solutions probably lie in revision of criminal law. Thus, there is already a foundation upon which to build. The need is for a more comprehensive approach, an overall strategy if possible, or a coordinated effort at the very minimum.

Unless those concerned are willing to take a more comprehensive approach to the problem, some of the strategies outlined so briefly above might actually work at cross-purposes. Policies that force early release from correctional facilities only to return inmates to overloaded parole officers in the community may boomerang. Policies that divert offenders into private agencies without adequate monitoring may create more problems than they solve. Emergency Powers Acts can be used too frequently, resulting in public outrage and erosion of support for other programs. In short, coordination of options is a key to their success.

Beyond reducing conflict, coordination of options can provide for symbiotic effects where the positive results of one option are augmented by another, so that the sum of effects is greater than that of the strategies taken separately. Such coordination will require greater cooperation among various policymakers. It will also require a willingness to take some risks in the interest of learning what strategic combinations may work best in West Virginia.

CHAPTER 7

CONCLUSIONS

When correctional problems are considered in the larger context, it is clear that they center around the clash between the trend toward "warehousing" and the countertrend toward recognizing the rights of the incarcerated. Solutions to the fundamental problems facing correctional systems must rest on an understanding of each of the key factors involved. Thus, this monograph began with an analysis of the rising rates of incarceration and a discussion of some of the moral and managerial problems produced by "warehousing." It should be clear that none of the alleged goals of corrections can be achieved under such circumstances, even if there had never been a movement for prisoners' rights. But the legal challenges posed by the latter have forced the issue, so that every possible policy option must be examined in an effort to find strategies for dealing with the increasing pressures on our correctional systems.

Analysis of the rise in incarceration rates for the U.S. as a whole indicates that trends in the overall crime rate, demographic shifts in the size of the so-called "crime-prone" population, and economic pressures together cannot account for the enormous increase in the proportion of citizens locked up. Instead, the key factor is actually our criminal justice policy itself. This should be "good news" for policymakers in West Virginia, because criminal justice policy is the only one of these factors that is almost totally within their control. Thus, the correctional problem is more amenable to solution than are many others facing the State.

In an effort to outline the "warehousing" issue, this monograph has discussed some of the different indexes by which the extent of the problem can be gauged, along with some of the moral dilemmas and managerial problems created by such a situation. Because some have blamed most of these problems on the prisoners' rights movement, this monograph has tried to make it clear that the recognition of prisoners' rights may have forced the issue into the

courts, but it has only made more visible problems that are intrinsic to "warehousing." Dealing with these issues on a daily basis, correctional officials have been among the first to realize this. But, they have not received the support necessary to change things.

Many of the policy options already in place in other states offer strategies for approaching our correctional problems. Many of these alternatives would cost nothing. Many would save money in the short run, and almost all seem likely to save money in the long run. What they demand is a larger view, a more comprehensive assessment of broad criminal justice policy.

This monograph has examined many options available for dealing with pressing correctional problems in West Virginia. Given the high rates of incarceration and the fact that in West Virginia, as elsewhere, many of those incarcerated are not violent offenders, use of alternatives for controlling jail and prison intake could make an enormous difference. In addition, there are almost as many options available for reducing length of stay in our correctional facilities as there are for reducing prisoner intake. Moreover, there are quite a few options available for more efficient utilization of correctional system capacity.

The many policy alternatives presented in this monograph represent only the "tip of the iceberg." Readers familiar with courts and corrections will find that some of their favorite remedies may not have been mentioned. This is due in part to limitations of space and in part to the limitations of the author. However, it should be clear that a multitude of possibilities are available for our consideration. Given the success of recent strategies for replacement of the penitentiary at Moundsville after long years of delay, West Virginia may wish to consider the creation of a task force charged with the responsibility for making a more comprehensive review of criminal justice policy as it bears on our correctional system.

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