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PRISON OVERCROWDING: THE CONNECTICUT RESPONSE

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PRISON OVERCROWDING: THE CONNECTICUT RESPONSE—19 Conn. Pub. Act 84-505 (Regular Session).

I. INTRODUCTION

In the last decade, prisoner population in the United States has doubled to an unprecedented level, measuring 412,203 by the end of 1982.[1] The avalanche of new prisoners has produced what is popularly termed a "prison overcrowding crisis."[2]

The eighth amendment's ban on inflicting cruel and unusual punishment, made applicable to the states by the fourteenth amendment,[3] acts as a parameter for conditions of prison life. Prison population may not so greatly exceed capacity as to create an environment which would "shock the conscience" of a reasonable person.[4] Moreover, because state penal systems incarcerate the majority of new prisoners,[5] federal judicial intrusion[6] on state penal systems has grown dramatically in recent times.[7] The federal courts have responded with an increased willingness to find constitutionally mandated ceilings on state prison populations, in some instances ordering the release of prison-

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1. Jacobs, *The Politics of Prison Expansion*, 12 N.Y.U. REV. L. & SOC. CHANGE, 209, 238 n.92 (1984) (quoting Galvin, *Introduction: Prison Policy Reform Ten Years Later*, 29 CRIME AND DELINQ. 495, 496 (1983)).

2. *Id.* at 238.

3. Robinson v. California, 370 U.S. 660, 667 (1962); Lareau v. Manson, 507 F. Supp. 1177, 1192 (D. Conn. 1980), *aff'd in part and modified in part*, 651 F.2d 96 (2nd Cir. 1981).

4. Rochin v. California, 342 U.S. 165, 172 (1951).

5. Comment, *Prison Overcrowding-Evolving Standards Evading and Increasing Problem*, 8 NEW ENG. J. PRISON L., 249, 251 n.3 (1982).

6. "The two principal means of seeking federal judicial review of internal state prison practices are habeas corpus petitions and civil suits under 42 U.S.C. section 1983." Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 504 (1970-71). A section 1983 action appears preferable to a habeas corpus proceeding as a means of challenging state prison conditions because it allows a class action under rule 23(b)(2) of the Federal Rules of Civil Procedure. *Id.* at 505. "Class actions avoid mootness problems if a particular plaintiff is released, and also provide the basis for broad injunctive relief going beyond a particular prisoner's situation." *Id.* at 506. *See generally* Annot, 51 A.L.R.3d 111 (1973).

7. *Sentence Reform: Solution to Prison Cost Quagmire*, 96 L.A. Daily J., Sept. 15, 1983, at 4, col. 3 [hereinafter cited as *Sentence Reform*].

ers.[8] "[I]ndividual prisons or entire prison systems in at least twenty-four states have been declared unconstitutional under the eighth and fourteenth amendments, with numerous cases still pending."[9]

States have approached the dilemma with a variety of options: first, by constructing prisons in proportion to new population;[10] second, by incarcerating persons in tents,[11] prefab cells, warehouses,[12] mobile homes,[13] camps surrounded with barbwire,[14] inmate produced prisons,[15] or any other creative "lodging"; third, by accelerating the litigation process;[16] fourth, by sentencing persons "with an eye toward the available number of prison beds;"[17] and fifth, by adopting non-incarcerative systems and shorter prison terms.[18]

The first option, constructing new facilities, maintains an equilibrium between supply of prison resources and demand for them. The economic[19] and social[20] costs of constructing prisons, however, so stagger the public that construction may not be viable. Even if sufficient funding exists, the time needed to construct a prison[21] further burdens this option. The issue, however, must be addressed

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8. Jacobs, *supra* note 1, at 211. *See* Lareau v. Manson, 507 F. Supp. 1177, 1178 (D. Conn. 1980). The federal district court held that the Connecticut correction facility must not exceed its capacity of 390 persons and ordered a reduction of prisoner population within 45 days.

9. Comment, *supra* note 5, at 250.

10. Jacobs, *supra* note 1, at 210.

11. *Supervisors Explore 'Tent Jails' to Ease Chronic Overcrowding*, 96 L.A. Daily J., Dec. 15, 1983, Section II at 1, col. 5.

12. *Sentence Reform, supra*, note 7.

13. Conn. General Assembly, House Proceedings 6122 (May 7, 1984) (statement of Rep. Gelsi).

14. Conn. General Assembly, Senate Proceedings 2051 (April 26, 1984) (statement of Sen. Owens).

15. Conn. General Assembly, Senate Proceedings 2053 (April 26, 1984) (statement of Sen. Gunther).

16. Conn. General Assembly, Senate Proceedings 2046 (April 26, 1984) (statement of Sen. Owens).

17. *Keeping the Lid on Prisons*, 5 NAT'L L.J., Dec. 13, 1982, at 10, col. 2 [hereinafter cited as *Keeping the Lid on Prisons*].

18. Jacobs, *supra* note 1, at 239. An example is incarceration of only violent offenders, with emphasis on restitution for property offenders. *Keeping the Lid on Prisons, supra* note 17 at 10, col. 3.

19. Construction costs for building new maximum security institutions run as high as $70,000 per cell in New York State, exclusive of finance charges. Jacobs, *supra* note 1, at 217.

20. Site selection creates problems and seriously constrains prison expansion. Property owners fear reduction of property values, and danger from escapees: They object to living in proximity to institutions that symbolize to them violence, immorality, and degredation. *Id.*,

21. It takes four to five years to construct a prison. *Keeping the Lid on Prisons, supra* note 17 at 10, col. 3.

presently.[22]

The second option, implementing creative "lodging," also increases prison capacity. Theoretically, creative "lodging" represents a potentially infinite means of expanding prison resources. The political reality, however, suggests the general populace will not find it socially acceptable. Additionally, the cost of satisfying constitutional requirements such as maintaining adequate health and safety in creative "lodging" may actually exceed similar costs in traditional prisons.[23]

The third option, accelerating litigation, uses the pre-existing resources of the penal system in a more efficient manner. Accelerating the litigation process, however, increases the potential for injustice. The court focuses on caseload rather than justice. Plea-bargaining, used in 98 percent of all criminal cases,[24] threatens completely to engulf the judicial process.

II. PUBLIC ACT 84-505

In an effort to avoid having the federal courts dictate a solution to prison overcrowding[25] and to preserve the safety of correction officers and inmates,[26] the Connecticut legislature incorporated options four and five into Connecticut Public Act 84-505 (February Session), popularly termed the Overcrowding Emergency Powers Act. The act redefined the power structure in the state's penal system to ease the overcrowding problem. In drafting the Act, Connecticut followed the lead of Michigan[27] and several other states.[28] Section 1 simply provides definitions; Section 2 concentrates power within the authority of

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22. Conn. Joint Standing Comm. Hearings, Judiciary 825 (March 19, 1984) (statement of Mr. Carbone); Conn. General Assembly, House Proceedings 6183 (May 7, 1984) (statement of Rep. Tulisano).

23. Toilet, dining, and other facilities must be provided and "it's not so easy as people would think." Conn. General Assembly, Senate Proceedings 2032 (April 26, 1984) (statement of Sen. Owens).

24. Conn. General Assembly, Senate Proceedings 2037 (April 26, 1984) (statement of Sen. Santaniello).

25. The legislative history of Public Act 84-505 underscores strongly that the General Assembly intended the act primarily to avoid intervention by a federal court. *See* Conn. Joint Standing Comm. Hearings, Judiciary 822 (March 19, 1984) (statement of Mr. Carbone); Conn. General Assembly, Senate Proceedings 2055 (April 26, 1984) (statement of Sen. Schneller); Conn. General Assembly, House Proceedings 6173 (May 7, 1984) (statement of Rep. Coleman).

26. Conn. General Assembly, Senate Proceedings 2041 (April 26, 1984) (statement of Sen. Santaniello); Conn. General Assembly, House Proceedings 6149 (May 7, 1984) (statement of Rep. Tulisano).

27. The Michigan legislature enacted MICH. COMP. LAWS ANN. § 800.71 (1982), which is essentially the same in substance as Section 2 of Conn. Pub. Act 84-505. *Keeping the Lid on Prisons, supra* note 17 at 10, col. 3.

the Commission of Correction; Section 3 allows for limited judicial discretion; and Section 4 creates an intensive probation program.

A. *Section 2—Early Release by Commissioner*

Section 2(a)(1) provides an advisory commission to recommend to the Commissioner of Correction the capacity for incarceration of prisoners in the state's penal system. Although the determination of prison capacity arguably rests exclusively with the Commissioner,[29] the advisory commission allows for legislative input into the process. In the absence of the advisory commission, the Commissioner of Correction would be "the final sensor of all the people in the State of Connecticut, in relation to the fact that he determines how many people are going to end up in the institutions."[30]

Section 2(a)(2) provides the Commissioner the authority to promulgate regulations establishing the prison system's capacity. The Connecticut General Assembly's Regulation Review Committee may scrutinize his figure.[31]

Section 2(a)(3) specifies factors which the legislature mandated be taken into account in "formulating capacity." They are: sound correctional management principles; inmate health and safety;[32] maintenance of order and discipline;[33] availability of educational, therapeutic, and recreational programs;[34] and demand for available correctional bed space. It would be reasonable to infer that the specific factors chosen represent a response to the numerous court expres-

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28. According to the National Institute of Corrections, Georgia, Iowa, and New Jersey have enacted similar laws. *Id.*

29. The legislative history of Conn. Pub. Act 84-505 indicates that the General Assembly considered, but rejected, a proposal to give the Commissioner exclusive power to determine capacity. Conn. General Assembly, House Proceedings 6138-39 (May 7, 1984) (statement of Rep. Brouillet); Conn. General Assembly, House Proceedings 6168-69 (May 7, 1984) (statement of Rep. Dyson).

30. Conn. Joint Standing Comm. Hearings, Judiciary 819 (March 19, 1984) (statement of Chief State's Atty. McGuigan).

31. Conn. General Assembly, Senate Proceedings 2047 (April 26, 1984) (statement of Sen. Owens); Conn. General Assembly, House Proceedings 6116 (May 7, 1984) (statement of Rep. Tulisano).

32. Overcrowding, without justification, causes serious harm to the health and well-being of inmates and constitutes impermissable punishment. Lareau v. Manson, 507 F. Supp. 1177, 1178 (D. Conn. 1980). *See also* Arey v. Warden, Correctional Inst., 187 Conn. 324, 445 A.2d 916, 919 (1982).

33. Osborn v. Manson, 359 F. Supp. 1107 (D. Conn. 1973). The court stated that when determining a possible eighth amendment violation, it takes into consideration that prison authorities have legitimate concerns of security. *Id.* at 1111.

34. The potential for rehabilitation for inmates factors significantly in eighth amendment analysis. Comment, *supra* note 5, at 254.

sions of their relevance in determining possible violations of the eighth amendment.[35]

Section 2(b) imposes on the Commissioner the duty to declare a prison overcrowding emergency when the state's prison population exceeds one hundred ten percent capacity for thirty consecutive days.[36]

Sections 2(c) and (d) and (e) prescribe the technical procedures the Commissioner must follow in a prison overcrowding emergency. The subsections instruct the Commissioner to accelerate parole eligibility dates, thereby allowing him to release prisoners into community residences.[37] Particularly, the legislature intended the Commissioner first to release persons serving indeterminate or indefinite sentences.[38] Only necessity would permit the release of prisoners serving determinate sentences.[39]

Section 2(f) prescribes a limit as to those who may never be released, such as those convicted of capital felonies or those serving minimum mandatory sentences.[40]

Section 2(g) requires that the Commissioner explain his actions after emergencies to both the Governor and a joint standing committee of the General Assembly.[41]

B. *Section 3—Early Release by Judicial Discretion*

Section 3 allows for judicial discretion in an "early release program," but varies the scope of discretion according to the classification of the prisoner.[42] Judicial discretion is maximized if a prisoner is serving a definite sentence of three years or less. "[T]he sentencing court or judge may, after hearing and for good cause shown, reduce the sen-

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35. *See supra* notes 32, 33, 34.

36. Compare Connecticut's procedure to MICH. COMP. LAWS ANN. § 800.71 (1982) where the commissioner must inform the governor, who must declare the emergency. *Keeping the Lid on Prisons, supra* note 17, at 10, col. 3.

37. 1984 Conn. Acts 505 (Reg. Session).

38. The General Assembly intended Public Act 84-505 to release as few physically dangerous and violent individuals as possible. Inevitably, however, dangerous or violent prisoners will be released. Conn. General Assembly, House Proceedings 6119 (May 7, 1984) (statement of Rep. Tulisano).

39. "[T]o make punishment more certain, some states have moved to determinate sentencing, in which the initial courtroom sentence fixes a specific prison term, with no time off for good behavior behind bars." *Sentence Reform, supra* note 7, at 4, col. 5.

40. Mandatory sentencing is growing more politically attractive as wide-spread popularity exists in "being tough on crime." *Keeping the Lid on Prisons, supra* note 17, at 10, col. 5.

41. "Legislative decision making on prison issues is typically dominated by a handful of powerful legislators and a few crucial committees." Jacobs, *supra* note 1, at 226.

42. Compare to CONN. GEN. STAT., § 53a-39 (repealed 1984), which allowed the judiciary unlimited discretion to modify sentences upon good cause.

tence, order the defendant discharged, or order[43] the defendant discharged on probation or conditional discharge for a period not to exceed that to which he could have been previously sentenced."[44] The scope of judicial discretion is further restricted if a prisoner is serving a definite sentence of at least two years but not more than five years.[45] Despite the overlapping classifications for a prisoner serving a definite sentence between two and three years, the general proposition grants less judicial discretion for the prisoner with the greater sentence.

C. *Section 4—Intensive Probation*

Section 4(b) allows the judiciary to release prisoners serving definite sentences of between two and five years and to order that they be entered into an intensive probation program. "The purpose of intensive probation is to remove convicted persons from incarceration and place them in the community under close supervision and restriction to ensure public safety, reduce prison overcrowding and contribute to the rehabilitation of persons in the program."[46] Probation under section 4 is "intensive" because each probationer must contact his probation officer at least three times per week.[47] Weekly collateral contacts provide further monitoring.[48] Additionally, weekly testing checks probationers with a history of drug and alcohol abuse.[49] New Jersey, with a similar plan, has found that many prisoners only reluctantly participate in the program due to the extensive observation of probationer activities.[50]

III. ANALYSIS

The success of Connecticut Public Act 84-505 depends on two factors. In granting the Commissioner of Correction a massive concentration of power, the General Assembly weighed the efficiency attained against the potential for abuse. Commissioners must strictly adhere to the prescribed guidelines. Responsible behavior on their part will prevent the need for judicial intervention. Yet, institutional

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43. Compare to CONN. GEN. STAT. § 18-87(d)(c) (repealed 1984), which allowed the prisoner to remain incarcerated at his/her option.

44. 1984 Conn. Acts 505 (Reg. Session).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* "Collateral contacts" mean persons who have a relationship with the probationer.

49. *Id.*

50. Conn. General Assembly, Senate Proceedings 2049 (April 26, 1984) (statement of Sen. Owens).

realities naturally encourage Commissioners to release prisoners early or unnecessarily, as they would thereby make their job as prison manager easier.[51] Commissioners, moreover, face no political check, as they are not elected.[52] Serving in a non-political position allows Commissioners the ability to be objective in identifying a prison overcrowding crisis: their detrimental decisions, however, may go unchecked, at least until the judiciary or legislature has adequate time to react. The negative impact of the situation on public opinion should not be underestimated. Public dissatisfaction with the penal system already has reached its highest level.[53]

In addition, the success of the intensive probation program depends on funding.[54] Substantial costs are easily predicted. Administration and implementation of the program require many resources. Taxpayers may be reluctant to support the wages of probation officers, the costs of testing for drug abuse, and other necessary expenditures. In addition, the temptation to use the program as a "relief valve" will vary due to the fluctuation in the number of qualified prisoners. As of April 26, 1984, for example, Senator O'Leary observed that 25 percent of the prison population was ineligible for intensive probation.[55]

In Connecticut Public Act 84-505 the General Assembly has apparently constructed an effective device for solving short term prison overcrowding problems. Michigan has experienced positive results with its analogous statute.[56] The act's potential to alleviate overcrowding problems in the long run, however, is limited. The act focuses entirely upon the early release of prisoners, totally failing to address the issue of the recent radical increase of prison population. Dealing with the source of the problem would be more efficient than devising techniques to alleviate the negative effects of the penal system.

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51. Conn. General Assembly, House Proceedings 6128 (May 7, 1984) (statement of Rep. Shays).

52. *See supra* note 36.

53. General disillusionment exists as to whether the prison system provides either a deterrent or rehabilitative function. Jacobs, *supra* note 1, at 240.

54. As of May 7, 1984, approximately $227,000 had been appropriated to the program. Conn. General Assembly, House Proceedings 6172 (May 7, 1984) (statement of Rep. Coleman).

55. Conn. General Assembly, Senate Proceedings 2034-35 (April 26, 1984).

56. MICH. COMP. LAWS ANN. § 800.71 (West 1981). Conn. Joint Standing Comm. Hearings, Judiciary 830 (March 19, 1984) (statement of Commissioner Lopes); Conn. General Assembly, House Proceedings 6179 (May 7, 1984) (statement of Rep. Tulisano).

CONCLUSION

The Connecticut legislature created Public Act 84-505 in an effort to avoid having the federal courts dictate a solution to the prison overcrowding problem. The act satisfies the eighth amendment and, therefore, allows the state exclusive control of its penal system. The absence of cruel and unusual punishment prevents federal judicial intrusion. The act redefines the power structure within the state's penal system by concentrating enormous power in the office of the Commissioner of Correction and by creating an intensive probation program. The success of the act depends primarily on responsible behavior of the Commissioner of Correction and the availability of necessary funding.

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