

University of Michigan Journal of Law Reform

Volume 15

1982

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Frank T. Judge III
University of Michigan Law School

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Recommended Citation

Frank T. Judge III, *Relief for Prison Overcrowding: Evaluating Michigan's Accelerated Parole Statute*, 15 U. MICH. J. L. REFORM 547 (1982).

Available at: <https://repository.law.umich.edu/mjlr/vol15/iss3/4>

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RELIEF FOR PRISON OVERCROWDING: EVALUATING MICHIGAN'S ACCELERATED PAROLE STATUTE

The unprecedented growth of state prison populations during the past decade¹ has created a national prison overcrowding crisis.² State failure to respond to the emerging crisis has left corrections officials with substandard facilities.³ These inadequate

1. See 2 NATIONAL INSTITUTE OF JUSTICE, AMERICAN PRISONS AND JAILS 1-42 (1980) [hereinafter cited as 2 AMERICAN PRISONS]; U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1980 491-93 (1981) [hereinafter cited as SOURCEBOOK]; Krajick, *The Boom Resumes*, CORRECTIONS MAG., Apr. 1981, at 16, 16 (noting that prison population grew by 42% between 1975 and 1980).

Current figures show that the combined federal and state prison population increased more in the first six months of 1981 than in all of 1980. If this trend continues, the United States will have produced its highest prison growth rate in 56 years. N. Y. Times, Oct. 5, 1981, at 9, col. 1 (midw. ed.). Commentators have suggested a variety of reasons for the increase. See Krajick, *supra* at 17 (focusing on four factors to explain the increase: growing population, increasing crime rates, stiffer sentencing provisions, and more restrictive parole practices); 3 NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, THE NATIONAL MANPOWER SURVEY OF THE CRIMINAL JUSTICE SYSTEM, 13-14 (1978) (also focusing on five factors to explain the increase: changing population size and composition due to the post-World War II "baby boom," increased political emphasis on imprisonment, higher crime rate, longer sentences, and impact of unemployment and inflation); Lieber, *The American Prison: A Tinderbox*, N. Y. Times, March 8, 1981, § 6 (Magazine), at 26 (contending that the increase is due to a shift in legislative sentencing policies); 1 NATIONAL INSTITUTE OF JUSTICE, AMERICAN PRISONS AND JAILS 23 (1980) (citing the "baby boom," economic dislocations of unemployment and inflation, longer sentences, more serious crimes, and restrictive parole policies as the factors primarily responsible for the increase) [hereinafter cited as 1 AMERICAN PRISONS]. See generally 2 AMERICAN PRISONS, *supra* (documenting factors that have influenced the rise in prison population).

2. 1 AMERICAN PRISONS, *supra* note 1, at 12-19; cf. SOURCEBOOK, *supra* note 1, at 490 (noting that state inmates in many states are being housed in local jails because of overcrowding).

3. 1 AMERICAN PRISONS, *supra* note 1, at 12-19; see also 2 AMERICAN PRISONS, *supra* note 1, at 1; Hagstrom, *Crowded Prisons Pose a Budget Problem for this Law-and-Order Administration*, 13 NAT'L J. 1821, 1822 (1981) (contending that liberals who opposed prison construction in favor of non-traditional alternatives and conservatives who refused to "coddle" criminals by spending money on prisons are responsible for the lag in prison construction); Goldfarb & Singer, *Redressing Prisoners Grievances*, 39 GEO. WASH. L. REV. 175, 191 (1970) (noting that legislatures have not traditionally provided authority or funds for basic institutional changes); Cohn, *The Failure of Correctional Management Revisited*, FED. PROBATION, March 1979, at 10, 10-11 (corrections officials

prisons impose significant costs on both prisoners and the public; overcrowding physically endangers the incarcerated⁴ and heightens the potential for prison disturbances and destruction.⁵ Moreover, where overcrowding requires judicial intervention, the state's ability to design a cost-effective, long-term solution may be impaired.⁶

Many state correctional agencies have attempted to ease the crisis by initiating prison construction.⁷ The extent and potential impact of new construction, however, is confined by budget-

neglected to determine and pursue organizational objectives); Fogel, *The Politics of Corrections*, FED. PROBATION, March 1977, at 27, 28 (politicians care little about prisons or prisoners). See generally notes 17-18 and accompanying text *infra*.

4. Health problems are caused by the physical crowding of prisoners and by the inability of an overburdened staff to meet the basic needs of the expanded population. See, e.g., *Ruiz v. Estelle*, 503 F. Supp. 1265, 1277, 1280-81 (S.D. Tex. 1980), stayed pending appeal, 650 F. 2d 555 (5th Cir. 1981); *Anderson v. Redman*, 429 F. Supp. 1105, 1112-18 (D. Del. 1977). Studies have linked overcrowded conditions or perceptions of crowding with illness complaints, disciplinary infractions, deaths, suicides, self-mutilation, psychiatric commitments and violent confrontations between inmates and staff. See generally G. McCain, V. Cox & P. Paulus, *THE EFFECT OF PRISON OVERCROWDING ON INMATE BEHAVIOR* (1980); McCain, Cox & Paulus, *The Relationship between Illness Complaints and Degree of Crowding in a Prison Environment*, 8 ENV'T & BEHAV. 265 (1976); Megargee, *Population Density and Disruptive Behavior in a Prison Setting*, in *PRISON VIOLENCE* 135 (Cohen, Cole & Bailey ed. 1976); Nacci, Teitelbaum & Prather, *Population Density and Inmate Misconduct Rates in the Federal Prison System*, FED. PROBATION, June 1977, at 26; Walker & Gordon, *Health and High Density Confinement in Jails and Prisons*, FED. PROBATION, March 1980, at 53. But cf. J. Freedman, *CROWDING AND BEHAVIOR* (1975) (concludes high density does not have ill effects on those living in urban areas).

5. See generally OFFICE OF THE ATTORNEY GENERAL, STATE OF NEW MEXICO, *REPORT OF THE ATTORNEY GENERAL ON THE FEBRUARY 2 AND 3 1980 RIOT AT THE PENITENTIARY OF NEW MEXICO* (1980) (concluding that overcrowding added to the high level of tension at the penitentiary); OFFICE OF THE GOVERNOR, STATE OF MICHIGAN, *SPECIAL GOVERNOR'S COMMITTEE REPORT ON PRISON DISTURBANCES* (1981) (noting that overcrowding was a factor in the series of riots which occurred in May 1981 at the State Prison of Southern Michigan (Jackson), the Michigan Reformatory at Ionia, and the Marquette Branch Prison) [hereinafter cited as *REPORT ON PRISON DISTURBANCES*] (on file with the *Journal of Law Reform*); *REPORT OF THE JOINT COMMITTEE TO INVESTIGATE THE PRISON DISTURBANCES* (1981) (concluding that overcrowding contributed to the Michigan prison riots) [hereinafter cited as *INVESTIGATION OF PRISON DISTURBANCES*] (on file with the *Journal of Law Reform*). See also *CORRECTIONS MAG.*, Dec. 1981, at 3 (overcrowding cited as factor in hour-long riot at Indiana State Reformatory at Pendleton); *N. Y. Times*, Feb. 10, 1980, at 51, col. 1 (corrections officials nationwide fear prison disturbances will result from overcrowding); *N. Y. Times*, May 19, 1981, § 2, at 9, col. 2 (suggesting that overcrowding of New Jersey state prisons was a factor in the strangulation death of a guard).

6. See Dole, *Reversing Court Control of Corrections*, *CORRECTIONS TODAY*, Feb. 1982, at 24, 24.

7. By July 1980, state correctional agencies across the nation had begun construction of more than 60 prisons or prison additions at a projected cost of more than \$700 million. U.S. DEPARTMENT OF JUSTICE, *ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME 76* (1981) [hereinafter cited as *REPORT ON VIOLENT CRIME*].

ary restraints.⁸ Other crisis management measures — double celling,⁹ temporary housing,¹⁰ and retention of state prisoners in local jails¹¹ — also have been used to relieve prison overpopulation pressures. Prison populations, nevertheless, continue to exceed institutional capacity.¹²

Until recently, states that confronted prison overcrowding relied on one or more of three traditional remedies:¹³ construction of new prisons, enlargement of community corrections, and ad hoc¹⁴ regulation of prisoner intake and release. In 1981, Michigan enacted the Prison Overcrowding Emergency Powers Act¹⁵ (“the Act”) — a novel statutory measure designed to reduce the state’s prison population by accelerating parole releases during prison overcrowding emergencies. The Act has attracted the attention of correctional agencies and prison reform groups throughout the nation.¹⁶ Although the concept of reducing pris-

8. 1 AMERICAN PRISONS, *supra* note 1, at 125.

9. See, e.g., *Rhodes v. Chapman*, 452 U.S. 337 (1981) (double celling has been used in the Southern Ohio Correctional Facility since 1975); *Lareau v. Manson*, 651 F. 2d 96 (2d Cir. 1981) (double celling used in Hartford Community Correction Center); *Smith v. Fairman*, 528 F. Supp. 186 (C. D. Ill. 1981) (double celling used in the Pontiac Correctional Center).

10. In some New Jersey facilities, inmates sleep in storage rooms, lavatories, recreation rooms, hallways, classrooms, and trailers. *N. Y. Times*, Aug. 12, 1981, § 2, at 1, col. 1. In Alabama, 222 prisoners were ordered released by a federal district court because of “grossly inadequate facilities.” *N. Y. Times*, July 16, 1981, at 12, col. 1. In Texas, nearly 2,700 of the state’s 32,000 prisoners are living in army tents to reduce double and triple celling. *N. Y. Times*, Feb. 15, 1982, at 12, col. 4 (midw. ed.).

11. SOURCEBOOK, *supra* note 1, at 490. Indeed, the prison overcrowding problem is often shifted to county and city jails where state officials have housed thousands of prisoners awaiting transfer to state facilities. States have frequently reduced state prison populations in this manner to meet court orders. 1 AMERICAN PRISONS, *supra* note 1, at 37-39.

12. See *Krajick*, *supra* note 1, at 16.

13. See 1 AMERICAN PRISONS, *supra* note 1, at 119-24.

14. The term “ad hoc,” as employed in this Note, refers to measures that are informal, highly discretionary, and typically devised to meet an immediate emergency. These measures should be distinguished from formal statutory measures which are the product of traditional political processes.

15. MICH. COMP. LAWS ANN. § 800.71-79 (Supp. 1981).

16. The state legislature and Department of Corrections have received inquiries about the Act from correctional agencies and prison reform groups in over 25 states. Interview with James Boyd, Aide to the House Corrections Committee and Member of the Task Force on Prison Overcrowding, in Lansing (Oct. 8, 1981) [hereinafter cited as Boyd Interview I]; Interview with Gail Light, Public Information Director of the Department of Corrections, in Lansing (Nov. 17, 1981) [hereinafter cited as Light Interview]. Several state legislatures have adopted similar measures. See 1981 IOWA ACTS 11, § 3(1); CONN. GEN. STAT. §§ 18-87c, 18-87d (1981); S.J. Res. 14, 38th Leg., 1st Reg. Sess., 1981 Okla. Sess. Laws 1291.

In addition, the Michigan Act prompted the introduction of a recent Michigan House Bill authorizing county sheriffs to take emergency release measures after declaring a county jail overcrowding state of emergency. See H.B. 5328, 81st Leg., Reg. Sess. (1981).

oner sentences to relieve prison overcrowding is not new, Michigan is the first state to develop a statutory method of accelerating parole releases. The Act is responsive to the needs of prison administrators and prisoners as well as to the general public.

This Note describes and analyzes Michigan's Prison Overcrowding Emergency Powers Act. Part I reviews briefly current efforts to relieve prison overcrowding and concludes that traditional remedies are largely inadequate. Part II examines the early prisoner release statute and its implementation. Finally, Part III evaluates the statute's success in relieving prison overcrowding.

I. CURRENT RESPONSES TO STATE PRISON OVERCROWDING

The American prison system is not the product of a grand correctional scheme, but the result of layers of shifting custom and correctional policy.¹⁷ The failure of state legislatures to design a comprehensive correctional program and to confront inadequacies in the development of penal policies stems from the complexity of correctional reform and the political liability legislators associate with such reform.¹⁸ While neglect of correctional planning created a fertile environment for the current crisis, overcrowding is the direct result of conflicting public demands; increasing numbers of offenders are being imprisoned at the same time that budget cuts limit prison construction or development of alternatives.¹⁹ Nevertheless, state governments, spurred by the threat of increasing federal court intervention in prisons and prison systems,²⁰ have resorted consistently to a combina-

17. D. FOGEL, *WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS* 2 (1975); W. NAGEL, *THE NEW RED BARN: A CRITICAL LOOK AT THE MODERN AMERICAN PRISON* 154-55 (1973).

18. See Smith, *Prison Reform through the Legislature*, in E. WRIGHT, *THE POLITICS OF PUNISHMENT* 262-63 (1973); Wright, *Prison Reform and Radical Change*, in E. WRIGHT, *THE POLITICS OF PUNISHMENT*, *supra*, at 313, 321 (legislatures frequently fail to appropriate adequate funds for prisons because prisoners lack political leverage); NAGEL, *supra* note 17, at 154-55. See also Dole, *supra* note 6, at 24 (suggesting that if there are no major prison disturbances, the public is unwilling to spend money on offenders in prisons); Dionne, *Courts and Prisons*, N. Y. Times, Jan. 1, 1982, at 10, col. 1 (midw. ed.) (contending that prison construction is low in the order of current political priorities); cf. N. Y. Times, Jan. 2, 1981, at 14, col. 1 (midw. ed.) (emphasizing the complexity of criminal justice reforms and urging that politicians not rely on simple solutions).

19. 1 AMERICAN PRISONS, *supra* note 1, at 1-2, 12-19, 125-26. In *Rhodes v. Chapman*, 452 U.S. 337 (1981), Justice Brennan noted that increasing federal court intervention has resulted from inadequate funding of prisons in the face of steadily rising prison populations. *Rhodes* at 358-59 (Brennan, J., concurring).

20. Prisons or entire prison systems in 30 states, the District of Columbia, Puerto

tion of traditional strategies to relieve the overcrowding problem.

A. Prison Construction

Constructing new prison facilities is regarded commonly as the simplest means of alleviating prison overpopulation,²¹ and is frequently the keystone in state and federal plans.²² Most states, however, are either unable or unwilling²³ to meet the cost of prison construction needed for expanding prison populations. Federal proposals designed to subsidize state prison construction,²⁴ however, do not offer an adequate remedy. Despite the fiscal relief these measures would afford states, plans to fund prison construction without requiring responsible correctional planning²⁵ simply encourage the traditional "out of sight, out of mind" approach to criminal justice.²⁶ This approach eliminates accountability for sentencing decisions and undermines the de-

Rico, and the Virgin Islands are under court order to remedy substandard conditions. See generally AMERICAN CIVIL LIBERTIES UNION FOUNDATION, STATUS REPORT — THE COURTS AND PRISONS (1982) [hereinafter cited as STATUS REPORT] (on file with the *Journal of Law Reform*).

21. See 1 AMERICAN PRISONS, *supra* note 1, at 119; Lieber, *supra* note 1, at 60.

22. See Hagstrom, *supra* note 3, at 1821.

23. More than 30 states have either proposed building or have under construction at least one major correctional facility. Many of these states have found additional facilities so costly that they cannot afford staffing and operation once the addition is completed. Other states have had to abandon construction projects in progress due to cost overruns. REPORT ON VIOLENT CRIME, *supra* note 7, at 76; Hagstrom, *supra* note 3, at 1821.

24. Two proposals are presently under consideration. The Senate has proposed that a Criminal Justice Facilities Administration be created in the Justice Department to dispense federal subsidies of \$6.5 billion to states over seven years for construction and modernization projects. S. 186, 97th Cong., 1st Sess. (1981). The Attorney General's Task Force on Violent Crime has proposed federal legislation providing \$2 billion over four years for state construction of correctional facilities. REPORT ON VIOLENT CRIME, *supra* note 7, at 75. The current economic climate and federal fiscal policies may hinder congressional efforts to fund either broad program of prison construction. See Gentry, *The Reagan Corrections Program: Less Money, More States' Rights*, CORRECTIONS MAG., Dec. 1981, at 29, 31; Hagstrom, *supra* note 3, at 1821. See generally Dole, *supra* note 6 (discussing S. 186 and potential funding problems).

25. The Task Force concluded that establishing a review process or requiring states to develop long-range, comprehensive plans was undesirable. REPORT ON VIOLENT CRIME, *supra* note 7, at 77. Neither the Senate nor the Attorney General's proposed approach requires evidence demonstrating that more efficient or effective alternatives have been explored. See generally D. GORDON, DOING VIOLENCE TO THE CRIME PROBLEM: A RESPONSE TO THE ATTORNEY GENERAL'S TASK FORCE 7-11 (1981). But see S. 186, 97th Cong., 1st Sess. (1981) (requiring submission of a seven-year plan outlining a program for construction of facilities).

26. See NAGEL, *supra* note 17, at 148-49 (suggesting that prisons foster the illusion of a forceful response to crime, when in reality the criminal and the problem are simply removed from sight).

velopment of systemic reforms to resolve the overcrowding problem.²⁷

Although some prison construction may be needed,²⁸ commitment to a broad program of state prison construction presents several problems. First, the correctional benefits of conventional, closed institutions are questionable. Community-based programs appear to have had greater success in reintegrating offenders into society.²⁹ Second, a broad program of prison construction encourages imprisonment of offenders when state penal policies should strive to keep more nonviolent offenders out of prison.³⁰ Third, the scarcity of state resources demands that every crime control approach undergo cost-benefit analysis; massive prison construction is not the most cost-effective means of solving the overcrowding problem.³¹

27. See generally *id.*

28. Hagstrom, *supra* note 3, at 1823 (noting that while there is general acceptance of the need for prison construction, there is widespread disagreement over how much and what kind of prison construction is needed, as well as who should be in prison).

29. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 222-23 (1973) (concluding that major adult institutions operated by the states represent the least promising means of achieving rehabilitation and reintegration, and therefore institutional construction should be postponed until prisoners have been transferred — to the greatest extent possible — to community-based programs).

See also Martinson, *What works? — Questions and Answers about Prison Reform*, 35 THE PUBLIC INTEREST 22, 47 (1974) (concluding that community treatment inflicts less suffering on the offender than prison without posing an increased danger to the public); Wicker, *The Last Resort*, N. Y. Times, Sept. 19, 1980, at 27, col. 5 (illustrating the benefit of restitution as an alternative to incarceration).

30. Frank, *The American Prison: The End of an Era*, FED. PROBATION, Sept. 1979, at 3, 7. See NAGEL, *supra* note 17, at 149; Wicker, *The Wrong Answer*, N. Y. Times, Nov. 3, 1981, at 23, col. 1 (midw. ed.).

Two competing ideologies shape current prison policy. The first is derived from the liberal-utilitarian ideology of deterrence and correction. Proponents of this view argue that prison reform should attempt to keep people out of prison. Institutional incarceration can only be justified to sequester violent and dangerous offenders. The second ideology is founded in retributive justice. Proponents of this view support imprisonment as a form of retributive justice demanded by law and the victim. See generally, Frank, *supra* (tracing the tension between these two views).

31. Prison construction will not alleviate overcrowding in the short run because five years are likely to pass between the date of a decision to construct a prison and the date the first inmate enters. 2 AMERICAN PRISONS, *supra* note 1, at 2. Also, demographic shifts in population may naturally reduce prison populations through the next several decades. *Id.* at 115-18. Moreover, costs of construction, custody, security, and administration of new cells are substantial even if offset by federal subsidies. Gordon, *supra* note 25, at 10; see REPORT ON VIOLENT CRIME, *supra* note 7, at 76 (noting that the cost of constructing a maximum security facility is over \$70,000 per bed in many jurisdictions, the cost in medium security institutions can reach \$50,000 per bed, and expenditures for yearly operating costs generally range from \$10,000 to \$20,000 per cell). The decision to implement a broad prison construction program may also limit the opportunity of future generations to experiment with alternatives to incarceration. NAGEL, *supra* note 17, at 154-55.

B. *Enlargement of Community-Based Corrections*

Enlarging community corrections facilities is another means of reducing prison overpopulation. In general, community-based corrections permit residents to live and work in the community.³² Despite the rapid growth of community corrections programs since the late 1960's, community corrections facilities hold only a small percentage of the nation's state prisoners.³³ An increase in direct assignment of offenders and pre-release transfer of prisoners to community-based programs would reduce prison populations.³⁴

There are, however, several obstacles to the expansion of community corrections. A recent survey suggests that the vast majority of community corrections facilities can not serve more residents without violating corrections' housing standards.³⁵ Furthermore, local community opposition to the introduction of new facilities, as well as shifting correctional practices, and insuffi-

32. Community sanctions include: pre-trial and pre-sentence diversion and treatment programs; non-residential programs of post-conviction supervision (including traditional forms of probation); residential restitution and community corrections centers; pre-release programs and facilities; parole supervision and related post-release services. See 1 AMERICAN PRISONS, *supra* note 1, at 121.

Three justifications are frequently advanced for using community corrections: (1) treatment of offenders in the community is more humane than placement in traditional penal institutions — the offender can maintain ties with his family and friends, and remain in the job market; (2) successful reintegration into society can be accomplished most effectively in a community setting; (3) community rehabilitation is less expensive than incarceration. H. ALLEN, E. CARLSON, E. PARKS & R. SEITER, *HALFWAY HOUSES 1* (1978). See Blackmore, *Community Corrections*, *CORRECTIONS MAG.*, Oct. 1980, at 4, 4; Lieber, *supra* note 1, at 61.

33. See 1 AMERICAN PRISONS, *supra* note 1, at 69.

34. See 5 NATIONAL INSTITUTE OF JUSTICE, *AMERICAN PRISONS AND JAILS 23* (1980) [hereinafter cited as 5 AMERICAN PRISONS]. But see note 37 and accompanying text *infra*.

35. See 1 AMERICAN PRISONS, *supra* note 1, at 71-72. See generally 5 AMERICAN PRISONS, *supra* note 34, at 23-43 (reviewing the physical capacity, density and crowding in pre-release community centers). Current standards stipulate that community-based corrections facilities must provide each resident in a community residential unit with a minimum of 60 square feet of floor space. COMMISSION ON ACCREDITATION FOR CORRECTIONS, *MANUAL OF STANDARDS FOR ADULT COMMUNITY RESIDENTIAL SERVICES 14* (1977). The National Institute of Justice Survey, however, concluded that nearly one-third of all community corrections residents were provided with less than 60 square feet. 5 AMERICAN PRISONS, *supra* note 34, at 37. Similarly, current standards also suggest that a maximum of three residents be placed in each sleeping room and that no facility house more than 20 residents. J. McCARTY & T. MANGOGNA, *GUIDELINES AND STANDARDS FOR HALFWAY HOUSES AND COMMUNITY TREATMENT CENTERS 81* (1973); COMMISSION ON ACCREDITATION FOR CORRECTIONS, *supra* at xxi. The survey found that nearly half of all residents were assigned to units with three or more persons, and that only 47% of the surveyed facilities — housing a mere 23% of total community residents — limited the number of residents per facility to 20. 5 AMERICAN PRISONS, *supra* note 34, at 40.

cient funds are likely to inhibit expansion.³⁶ Even if these problems are surmounted, enlarging community corrections still may not reduce prison populations; the total number of persons under correctional control may multiply as the system's overall capacity is expanded.³⁷ Corrections officials fail frequently to distinguish this added capacity from replacement capacity when calculating the benefits that an expansion of community corrections facilities will provide.

C. Regulation of Prisoner Intake and Release

A recent congressionally-mandated survey of adult corrections suggests that regulation of prisoner intake and release responds more effectively to prison overcrowding than either prison construction or expansion of community corrections facilities.³⁸ Yet prior to the enactment of Michigan's accelerated parole statute, state efforts to relieve overcrowding by regulating prison intake and release were informal and highly discretionary.³⁹ The ad hoc application of these measures caused state officials to give scant attention to regulation of intake and release as a tool to relieve prison overcrowding.⁴⁰

1. *Prisoner Release*— Among states that presently employ ad hoc measures to regulate prison populations, accelerated parole is the most widely applied mechanism for controlling prisoner release.⁴¹ Although the traditional criteria for parole release are phrased in terms of individual rehabilitation and community safety, political pressure to reduce time served when prison overcrowding occurs has influenced discretionary parole decisions.⁴² Recent legislation in many states, however, has re-

36. See 1 AMERICAN PRISONS, *supra* note 1, at 69; Blackmore, *supra* note 32, at 5; Krajick, "Not on My Block": Local Opposition Impedes the Search for Alternatives, CORRECTIONS MAG., Oct. 1980, at 15, 15-16.

37. Expending alternative treatment resources on minor offenders may merely "widen the net of social control" by administering to those who otherwise might have avoided official scrutiny. See 1 AMERICAN PRISONS, *supra* note 1, at 10; Blackmore, *supra* note 32, at 13. See generally P. LERMAN, COMMUNITY TREATMENT AND SOCIAL CONTROL (1975).

38. See 1 AMERICAN PRISONS, *supra* note 1, at 125, 129-31.

39. *Id.* at 122-24.

40. *Cf. id.* (reviewing the infrequent implementation of informal measures to regulate intake and release of prisoners).

41. 1 AMERICAN PRISONS, *supra* note 1, at 122-23.

42. Once an offender is sentenced to prison, the parole board generally determines when he will be released. *Id.* This discretion has, on occasion, been influenced by political pressure resulting from prison overcrowding. *Id.*; A. VON HIRSCH & K. HANRAHAN, ABOLISH PAROLE? 14-16 (1978). See 1 AMERICAN PRISONS, *supra* note 1, at 123 (California

stricted parole discretion and thus limited the value of accelerated parole as a prison management tool.⁴³

Prisoner release can also be regulated through executive clemency,⁴⁴ expansion of good-time credits, and expansion of work credits.⁴⁵ Executive clemency, although widely available, is infrequently used to regulate prison populations.⁴⁶ Similarly, work credits and meritorious good-time credits have been employed to accelerate release in only a handful of jurisdictions.⁴⁷

2. *Prisoner Intake*—Prisoner intake, unlike release measures which are generally enforced by the parole board, is subject to the discretion of various government authorities. The legislature retains sole responsibility for formulating arrest procedure and setting prison terms, yet enforcement of these policies rests with

prison population was lowered by the parole board in the early 1970's to reduce corrections expenditures); A. RUTHERFORD, *PRISON POPULATIONS AND POLICY CHOICES* 50-60, 71-78, 185 (1977) (shifts in parole policy due to political pressure are believed to account for declines in prison population in Illinois from 1962 to 1974, and in Iowa from 1971 to 1972). Court ordered prison population reductions in Mississippi led to a redefinition of parole board policy and authority; the result was to permit "early parole" and "supervised earned release." *Id.* at 66-67.

43. 1 *AMERICAN PRISONS*, *supra* note 1, at 123. Support for the discretionary standard and the rehabilitative ideal have faded in the face of increasing acceptance of the "just deserts" and "justice model" standards. Both of the latter standards propose reduction of discretion in the criminal justice system through determinative sentences and decision-making guidelines. See generally FOGEL, *supra* note 17; M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973); TWENTIETH CENTURY FUND, *FAIR AND CERTAIN PUNISHMENT* (1976); A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENT* (1975); Rubin, *New Sentencing Proposals and Laws in the 1970's*, *FED. PROBATION*, June 1979, at 3; von Hirsch & Hanrahan, *Determinate Penalty Systems in America: An Overview*, 27 *CRIME & DELINQUENCY* 289 (1981). By early 1980, 27 states had mandatory sentencing laws for armed, violent, drug, or repeat offenses. See M. KANNENSOHN, *A NATIONAL SURVEY OF PAROLE-RELATED LEGISLATION ENACTED DURING THE 1979 LEGISLATIVE SESSION* 10 (1979).

The concept of sentencing guidelines has been viewed, unlike proposals for legislatively fixed sentences, as a useful step toward the development of a common law of sentencing. See Morris, *Punishment, Desert and Rehabilitation*, in *THE CRIMINAL JUSTICE SYSTEM* 739 (Zimring & Frase, eds. 1980); Krajick, *Parole: Discretion is Out, Guidelines are In*, *CORRECTIONS MAG.*, Dec. 1978, at 28, 28; Kress, Wilkins & Gottfredson, *Is the End of Judicial Sentencing in Sight?*, 60 *JUDICATURE* 216, 219-22 (1976).

44. 1 *AMERICAN PRISONS*, *supra* note 1, at 123; see generally R. GOLDFARB & L. SINGER, *AFTER CONVICTION* 316-58 (1973). Clemency includes executive pardon, commutation, reprieve, and amnesty. For the purposes of this Note, the most significant types of clemency are the pardon, which either exempts a convicted offender from all punishment or removes the civil disabilities associated with his criminal convictions, and the commutation, which lessens the severity of a prescribed penalty. GOLDFARB & SINGER, *supra* at 316.

45. 1 *AMERICAN PRISONS*, *supra* note 1, at 123. Goodtime credits and the analogous work credits were designed to aid prison management by encouraging good behavior. See GOLDFARB & SINGER, *supra* note 44, at 262.

46. 1 *AMERICAN PRISONS*, *supra* note 1, at 123.

47. *Id.*

the police, prosecutors, and the courts.⁴⁸ This dispersal of authority makes intake measures an unwieldy and unreliable mechanism for regulating prison populations.

In general, development of intake and release measures has been inhibited by the misperception that these mechanisms pose a threat to public safety.⁴⁹ The concept of early release stirs popular fears of corrections facilities freeing unreformed criminals into society.⁵⁰ Consequently, when money is available to construct space for prisoners, the general public — acting through its elected representatives — concludes frequently that the risk to safety justifies further imprisonment. It is primarily for this reason that regulation of prison population through intake and release measures has been neglected as an alternative to alleviate overcrowding.

D. Consequences of State Failure: Judicial Intervention

State failure to relieve prison overcrowding through prison construction, expansion of community corrections, or ad hoc regulation of prisoner intake and release repeatedly has prompted federal court intervention. Federal court decisions since the riots at Attica in 1971⁵¹ have established firmly that “the Constitution does not stop at the prison gate.”⁵² In instances where over-

48. *Id.*; M. ZALMAN, C. OSTROM, P. GUILLIAMS & G. PEASLEE, SENTENCING IN MICHIGAN 6-7 (1979) (contending that no one decision maker has complete control over sentencing disposition) [hereinafter cited as SENTENCING IN MICHIGAN].

49. *Cf.* 1 AMERICAN PRISONS, *supra* note 1, at 136 (noting the cost of setting a prisoner free is difficult to determine, but the cost of prison construction is relatively easy to calculate).

50. *See* Detroit Free Press, May 15, 1981, at 3, col. 2.

51. One of the worst prison disasters in United States history occurred at the Attica State Correctional Facility in upstate New York in September of 1971. The disturbances began on September 9, when a strike by members of a work detail erupted into violence that spread rapidly throughout the prison. The rioters were eventually confined to one cellblock and a yard, where they held more than 30 guards and civilian employees as hostages. In subsequent negotiations, the prisoners made 30 demands, 28 of which concerned improvements in the prison. Efforts to negotiate proved unsuccessful. On September 13, convinced that the situation was deteriorating, the authorities ordered state troopers, sheriff's deputies, and guards to storm the cellblock. Ten hostages and 29 inmates were killed during the assault. Two hostages were seriously injured by inmates. The riots at Attica focused public attention on the many problems plaguing state correctional systems — including overcrowding. *See generally* T. WICKER, A TIME TO DIE (1975).

52. *E.g.*, *Battle v. Anderson*, 447 F. Supp. 516, 524 (E.D. Okla. 1977), *aff'd*, 564 F. 2d 388 (10th Cir. 1977) (overcrowding in the Oklahoma State Penitentiary and the Oklahoma State Reformatory held violative of the constitution); *Capps v. Atiyeh*, 495 F. Supp. 802, 813 (D. Ore. 1980) (overcrowding in the Oregon State Penitentiary, the Farm Annex, and the Oregon State Correctional Institution violates constitutional standards);

crowding has been especially grievous⁵³ federal courts have abandoned traditional deference to state officials⁵⁴ and held entire state prison systems — or conditions in individual state prisons — unconstitutional.⁵⁵

see *Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (pretrial detainees have constitutional rights); *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) (prisoners in prison disciplinary proceedings have constitutional rights); *Cruz v. Beto*, 405 U.S. 319, 321-22 (1972) (upholding a prisoner's constitutional right to practice religious beliefs).

53. Prisons or prison systems in 28 states, the District of Columbia, Puerto Rico and the Virgin Islands are under court order based all or in part on overcrowding. See STATUS REPORT, *supra* note 20.

54. This deference, known as the "hands off" doctrine, has been abandoned by federal courts where prisoners have challenged living conditions as substandard. See note 52 and accompanying text *supra*. Under the "hands off" doctrine, which was frequently invoked until the mid-1960's, courts argued they lacked subject-matter jurisdiction to hear petitions challenging prison conditions. As a result, the administration of state correctional institutions was left entirely to the discretion of state officials. See Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L. J. 506, 508-09 (1963).

Several commentators have reviewed the decline of the "hands off" doctrine. See generally Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211 (1980); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473 (1971); Note, *Equitable Remedies Available to a Federal Court After Declaring an Entire Prison System Violates the Eighth Amendment*, 1 CAP. L. REV. 101 (1972); Comment, *Cruel But Not So Unusual Punishment: The Role of the Federal Judiciary in State Prison Reform*, 7 CUM. L. REV. 31 (1976); Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C. R. - C. L. L. REV. 367 (1977) [hereinafter cited as *Conditions of Confinement*].

55. See *supra* note 53.

The Supreme Court's recent decision in *Rhodes v. Chapman*, 452 U.S. 337 (1981), may temper federal court intervention in state prison systems. The Court, considering for the first time the restrictions which the eighth amendment places upon conditions in state prisons, held "double ceiling" was not cruel and unusual punishment. Justice Powell, writing for the majority, explained: "Courts certainly have a responsibility to scrutinize claims of cruel and unusual confinement," *Id.* at 352, "[b]ut conditions that cannot be said to be cruel and unusual under contemporary conditions are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Id.* at 347.

Powell termed a 1977 district court ruling that double ceiling is "cruel and unusual" for long-term prisoners in an otherwise properly run facility "an aspiration toward an ideal environment for long-term confinement." *Id.* at 349. Accordingly, he dismissed the significance of "rated capacity" figures as a means to determine when overpopulation has reached unconstitutional proportions: "The question before us is not whether the designer of SOCF [Southern Ohio Correctional Facility] guessed incorrectly about future prison population, but whether the actual conditions of confinement at SOCF are cruel and unusual." *Id.* at 350-51 n.15. See generally Note, *Eighth Amendment — A Significant Limit on Federal Court Activism in Ameliorating State Prison Conditions*, 72 J. OF CRIM. L. & CRIMINOLOGY 1345 (1981).

The decision may be too narrow to cripple other prison condition suits. Justice Brennan, concurring, wrote "to emphasize that today's decision should in no way be construed as a retreat from careful judicial scrutiny of prison conditions . . ." *Chapman*, 452 U.S. at 353. "[J]udicial intervention has been responsible, not only for remedying

Persistent judicial intervention, however, has not always proved beneficial. On the one hand, judicial involvement has served as a catalyst for upgrading prison conditions.⁵⁶ On the other hand, the judiciary's tendency to become a surrogate jail superintendent⁵⁷ has antagonized prison officials, endangering joint efforts among courts, prison administrators, and legislatures to improve prison conditions. Without the good will and cooperation of prison officials, courts cannot compel adoption of prison reform.⁵⁸ Judicial intervention, therefore, is best used only as a last resort.

some of the worst abuses by direct order, but for 'forcing the legislative branch of government to reevaluate correction policies and to appropriate funds for upgrading penal systems.'" *Id.* at 359, quoting 3 NATIONAL INSTITUTE OF JUSTICE, AMERICAN PRISONS AND JAILS 163 (1980) [hereinafter cited as 3 AMERICAN PRISONS]. Indeed, Brennan argued for less deference on the part of the federal courts than Powell, because many conditions of confinement, including overcrowding, "arise from neglect rather than policy. There is no reason of comity, judicial restraint, or recognition of expertise for courts to defer to negligent omissions of officials who lack the resources or motivation to operate prisons within limits of decency." *Chapman*, 452 U.S. at 362.

Lower courts have managed to distinguish *Chapman* on its facts. See, e.g., *Smith v. Fairman*, 528 F. Supp. 186 (C.D. Ill. 1981) (double celling at Pontiac Correctional Center held cruel and unusual punishment in violation of the eighth amendment); see generally Cohen, *The Lucasville Ruling: "The Constitution Does Not Mandate Comfortable Prisons"*, CORRECTIONS MAG., Aug. 1981, at 50, 51 (noting facts which distinguish *Chapman* from other prison condition cases). But see Note, *supra* at 1373 (concluding that *Chapman* undermines the totality of circumstances test by limiting the eighth amendment inquiry to whether prison conditions currently deny inmates a "minimal civilized measure of life's necessities").

Nevertheless, the decision in *Chapman* may discourage prison expenditures and reforms by complacent state legislatures. See Cohen, *supra* at 50 (arguing that *Chapman* is not very significant legally, but may be disastrous politically). John Manson, Connecticut Commissioner of Corrections, contends that imaginative programs to reduce prison populations "will kind of slip by the wayside, because they'll just look at *Chapman* and say, 'just cram another one in a cell.' It will put a crimp in legislation which attempts to deal with overcrowding." *Id.* at 51.

56. *Chapman*, 452 U.S. at 359 (Brennan, J., concurring); 3 AMERICAN PRISONS, *supra* note 55, at 163. See *Conditions of Confinement*, *supra* note 54, at 369-70; Gettinger, "Cruel and Unusual" Punishment, CORRECTIONS MAG., Dec. 1977, at 3, 3. But see Schuster & Widmer, *Judicial Intervention in Corrections: A Case Study*, FED. PROBATION, Sept. 1978, at 10, 11-16 (noting that prison conditions litigation rarely results in improved conditions).

Congress specifically recognized the benefits of court intervention when it passed the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1977 (Supp. IV 1980). The Act authorizes the United States Attorney General to bring suit in federal court on behalf of institutionalized persons who have been forced to endure unconstitutional conditions. See H.R. REP. 897, 96th Cong., 2d Sess., 9 (1980).

57. See Kaufman, *Prison Reform: A View from the Bench*, 67 A.B.A. J. 1470, 1470-71 (1981) (arguing it is not in the best interest of the judiciary or corrections officials for courts to encroach unduly on the state's role in managing prisons).

58. *Id.*; see Schuster & Widmer, *supra* note 56, at 16 (concluding that even when no bad faith is involved, poor communication and failure to understand correctional bureaucracy have impeded court ordered reform).

II. MICHIGAN'S APPROACH TO PRISON OVERCROWDING

Severe overcrowding has plagued Michigan's prison system since 1975.⁵⁹ Prompted by fears of prison riots⁶⁰ and federal court intervention,⁶¹ Governor William G. Milliken and the state legislature appointed a Joint Legislative/Executive Task Force on Prison Overcrowding in January of 1980 to examine the situ-

59. REPORT OF THE JOINT LEGISLATIVE/EXECUTIVE TASK FORCE ON PRISON OVERCROWDING i, app. (1980) [hereinafter cited as REPORT ON PRISON OVERCROWDING] (on file with the *Journal of Law Reform*). Michigan's prison system has been overcrowded by as many as 2,000 prisoners since 1975. Three weeks before the REPORT ON PRISON OVERCROWDING was issued, the state housed 15,095 prisoners, 1,628 more than the system's recommended capacity. *Id.*

The causes of overcrowding in Michigan include longer sentences, fixed sentences under a new gun law, and a decrease in good-time credits. The average time spent in detention in Michigan state prisons increased by 45% from 22 months to over 32 months between 1970 and 1980. State officials estimate that such an increase in average sentence requires an additional 5,000 beds in the prison system. REPORT ON PRISON OVERCROWDING, *supra* at app.

The "two year gun law" generally provides that a person in possession of a firearm during the commission of a felony shall be sentenced to a mandatory, concurrent two year prison term. Second and third convictions carry five and ten year terms. MICH. COMP. LAWS § 750.227(b) (1979).

Proposal B, approved by voters in November 1978, made good-time credits unavailable to offenders convicted under a long list of statutes until the minimum sentence had been served. MICH. COMP. LAWS ANN. § 791.233b (Supp. 1981). State officials estimate that if judicial sentencing patterns do not change, the statute will result in average sentence increases of 20 months for 53% of the prison population. Esquina & Pasman, *Much to Do About Good Time*, 58 MICH. B. J. 28, 29 (1979).

60. See REPORT ON PRISON OVERCROWDING, *supra* note 59, at 22:

[One] implication of an overcrowded prison system, perhaps the most dangerous and costly, is that of prison riots and disruptions. Since January 1, 1980, there has been a major prison riot and a series of minor prison disturbances across the nation. Although, with the exception of the New Mexico riot, they have not been serious, they do indicate the prevailing mood of the prison population in this country: unrest.

Reports indicate that overcrowding contributed to riots which occurred in May 1981 at the State Prison of Southern Michigan (Jackson), the Michigan Reformatory at Ionia, and the Marquette Branch Prison. See note 5 *supra*.

61. REPORT ON PRISON OVERCROWDING, *supra* note 59, at 22 ("These living conditions create a situation that invites judicial intervention — a situation occurring on a large scale across the country.").

State officials became especially concerned about the threat of federal court intervention following *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979) (state prison treatment and rehabilitation programs held violative of the fourteenth amendment). Boyd Inverview I, *supra* note 16. Several months after the issuance of the Task Force Report, a state circuit court confronted the overcrowding problem. *Human Rights Party v. Michigan Corrections Commission*, No. 76-19088-AA, slip op. (Ingham County Cir. Ct. Oct. 27, 1980). The court proposed a series of remedial measures should population continue to exceed prison system capacity: requesting the parole board to exercise its discretion in favor of parole; expanding the use of community-based facilities; transferring offenders to county jails. *Id.* Although the court retained jurisdiction to meet these terms or make other orders as necessary, it has taken no further action.

ation. The Task Force proposed both short- and long-term solutions to the overcrowding crisis.⁶² The final recommendation —

62. The Task Force recommendations included:

(1) continued funding of five prison facilities and construction of three additional regional facilities. REPORT ON PRISON OVERCROWDING, *supra* note 59, at 18.

Three of the approved facilities were completed by the fall of 1981.

(2) Enactment of Michigan House Bill 4106 as a site selection process for correctional facilities. REPORT ON PRISON OVERCROWDING, *supra* note 59, at 17. Although not related directly to the overpopulation problem, the creation of a formal process for community involvement in site selection was needed to reinforce the credibility of the Department of Corrections in locating sites and to facilitate the development of public support for a site once it had been located. *Id.*

This bill was enacted into law in 1980. MICH. COMP. LAWS ANN. § 791.216 (Supp. 1981).

(3) Initiation of a referendum to provide an income tax increase earmarked for prison construction. REPORT ON PRISON OVERCROWDING, *supra* note 59, at 19-20. The increase was proposed for a five year period and was expected to derive an annual revenue of approximately \$52 million. *Id.* at 19.

The increase was later defeated in a statewide referendum in November 1980. Detroit News, Nov. 6, 1980, at 3, col. 6.

(4) Expansion of community residential and alternative programs. REPORT ON PRISON OVERCROWDING, *supra* note 59, at 2-3. At the time of the Task Force Report, 1,763 residents, representing 12% of the total inmate population, were in community based programs. The Report recommended expansion of community residential programs — facilities holding pre-release prisoners — to a population capacity of 2,000. *Id.*

Shortly after the Task Force Report was issued, however, community residential program population was expanded to capacity. In addition, the growth of community alternative programs was halted by budget cuts in the Department of Corrections. Light Interview, *supra* note 16.

(5) Development of departmental rules to broaden and clarify the authority and availability of restitution and community service orders as conditions of probation. REPORT ON PRISON OVERCROWDING, *supra* note 59, at 4. Restitution, in conjunction with probation, was permitted by statute in Michigan. MICH. COMP. LAWS § 771.3 (1979). Community service orders were not specifically permitted, although some courts used them. These measures, according to the Task Force, were underutilized.

The authority and availability of restitution and community service orders as a condition of probation have since been broadened and clarified by statute. See MICH. COMP. LAWS ANN. § 771.3 (Supp. 1981).

(6) Extension of available jail time in conjunction with probation from six months to one year. REPORT ON PRISON OVERCROWDING, *supra* note 59, at 5. At the time of the Report, judges were restricted by statute from granting probation in conjunction with a sentence of more than six months in jail. The Task Force expected this proposal to reduce the number of short term commitments to state prisons.

In 1980 the recommendation was codified in Michigan law. See MICH. COMP. LAWS ANN. § 771.3(2)(a) (Supp. 1981).

(7) Enactment of financial incentives to encourage the development of alternative correctional facilities. REPORT ON PRISON OVERCROWDING, *supra* note 59, at 6.

This proposal is presently pending before the Corrections Committee of the Michigan Legislature. See H.B. 4418, 81st Leg., Reg. Sess. (1981).

(8) Creation of a full-time, non-civil service liaison position within the Department of Corrections. REPORT ON PRISON OVERCROWDING, *supra* note 59, at 7. This recommendation was designed to offer judges, prosecutors, the Department, and other local officials a means to communicate and develop ideas for innovative community-based correctional programs. *Id.*

(9) Implementation of sentencing guidelines to remedy the disparity in Michigan's sentencing system. *Id.* at 9. This proposal was designed to grant judges the option of

enacted into law as the Prison Overcrowding Emergency Powers Act⁶³ — took the form of a “last-resort” statutory measure designed to reduce Michigan’s prison population during prison

following the recommended sentence or imposing their own. If judges revised sentence guidelines so that imprisonment was recommended for fewer felons, or reduced guideline sentence durations, the net result would be to ease the state’s overcrowding problem. *Id.*; see generally SENTENCING IN MICHIGAN, *supra* note 48 (discussing sentence disparity in Michigan and recommending sentence guidelines).

(10) Adoption of the Michigan Second Revised Criminal Code (Final Draft 1979). REPORT ON PRISON OVERCROWDING, *supra* note 59, at 10. The proposed code codifies approximately 3,500 sections of existing law, as well as proposing new procedures that will ameliorate the overcrowding crisis. Among the provisions are presumptive sentencing and appellate review of sentences. These are expected to reduce disparities in sentence length under Michigan’s indeterminate sentencing system and thus lessen the burden on state prisons. *Id.* The proposed code also clarifies the availability of alternatives to incarceration.

(11) Amendment of the presumption in the parole board statute to favor the prisoner. *Id.* at 13. The decision to grant parole is governed by MICH. COMP. LAWS § 791.233 (1979), which requires that the prisoner prove he poses no threat to society. The Task Force proposed that the burden of proof be shifted so that the parole board would be required to justify a denial of parole by demonstrating that the prisoner had a poor prison record or a history of criminal activity. Absent this showing the prisoner would be paroled upon the expiration of his minimum sentence, minus good time where applicable. REPORT ON PRISON OVERCROWDING, *supra* note 59, at 13.

The Supreme Court in *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), may have foreclosed the benefits of this proposal by ruling that parole statutes which establish a presumption of parole may create an expectancy of release requiring some measure of constitutional protection under the Due Process Clause.

Legislation, however, is pending to streamline parole board procedures and remove some delays. H.B. 4162, 81st Leg., Reg. Sess. (1981).

(12) Intensive administrative review of prisoner files to assure that all prisoners eligible for release are identified in a timely fashion. REPORT ON PRISON OVERCROWDING, *supra* note 59, at 14.

The enactment of the Prison Overcrowding Emergency Powers Act did result in a more timely review of prisoner files. See *infra* notes 109 & 110 and accompanying text.

(13) Expansion of parole board and probation administrative staff to the extent necessary to implement the recommendations and maintain administrative efficiency. REPORT ON PRISON OVERCROWDING, *supra* note 59, at 15.

63. MICH. COMP. LAWS ANN. §§ 800.71-.79 (Supp. 1981). See REPORT ON PRISON OVERCROWDING, *supra* note 59, at 21-24. Governor Milliken signed the bill, introduced as H.B. 6049, 80th Leg., Reg. Sess. (1980), on January 26, 1981. Despite its seemingly controversial nature, the bill passed with little opposition. This may be explained in part by the *Human Rights Party* court order, see *supra* note 61. Studies comparing the cost of implementing the court order with the cost of implementing the proposed Prison Overcrowding Emergency Powers Act concluded that the latter was more cost-effective. See Department of Corrections Memorandum, *Hotchkiss Court Order vs. POEPA* (Nov. 6, 1980) (on file with the *Journal of Law Reform*); Interview with James Boyd, Aide to the House Corrections Committee and Member of the Task Force on Prison Overcrowding, in Lansing (Mar. 5, 1982) [hereinafter cited as Boyd Interview II]; see also House Fiscal Agency Memorandum from Dick McKean to Rep. David Hollister (Oct. 30, 1980) (reviewing the cost of implementing the court order) (on file with the *Journal of Law Reform*); Interview with Perry Johnson, Director of the Department of Corrections, in Lansing (Mar. 30, 1982) (noting that the court order was not attractive to corrections officials and legislators and thus created a favorable climate for the bill’s unobstructed passage) [hereinafter cited as Johnson Interview].

overcrowding "states of emergency."⁶⁴

A. *The Prison Overcrowding Emergency Powers Act*

The Prison Overcrowding Emergency Powers Act establishes a four-step procedure for reducing state prison population to rated design capacity.⁶⁵ To trigger the Act, the prison system⁶⁶ population must exceed rated design capacity⁶⁷ for thirty consecutive days. Once this initial condition is met, the State Corrections Commission certifies that fact to the governor.⁶⁸ The Commission must also certify that all administrative remedies⁶⁹ have been exhausted.⁷⁰

Following certification, the governor is required to declare a state of emergency within fifteen days. During the state of emergency the sentences of all prisoners serving established minimum prison terms under the state's indeterminate sentencing laws⁷¹ are reduced by ninety days.⁷² Shortening minimum

64. The Task Force emphasized that the Act would be implemented only if other legislation and executive efforts to reduce prison population did not eliminate overcrowding. REPORT ON PRISON OVERCROWDING, *supra* note 59, at 22.

65. MICH. COMP. LAWS ANN. §§ 800.71-.77 (Supp. 1981).

66. "Prison system" is defined as all correctional facilities operated by the Department of Corrections, other than community corrections centers or residential homes. MICH. COMP. LAWS ANN. § 800.72(b)-(c) (Supp. 1981).

67. "Rated design capacity" is defined as available bedspace that has been certified by the Corrections Commission, subject to applicable federal and state laws. MICH. COMP. LAWS ANN. § 800.72(d) (Supp. 1981).

The Corrections Commission calculated "rated design capacity" based on the original design capacity of the prisons plus the additional space that had been made available through the use of temporary housing. Rated design capacity at the time the bill was passed was 12,874, as certified by the Corrections Commission. Letter from Florence Crane, Chairwoman of the Corrections Commission, to Governor William G. Milliken (Mar. 30, 1981) (requesting declaration of a prison overcrowding state of emergency) [hereinafter cited as Crane Letter] (on file with the *Journal of Law Reform*).

Rated design capacity after January 1, 1984 will not include trailers, modular units, or other bedspace used as temporary housing for prisoners. MICH. COMP. LAWS ANN. § 800.78(2) (Supp. 1981).

68. MICH. COMP. LAWS ANN. § 800.73 (Supp. 1981).

69. No statutory criteria were established to determine what constituted exhaustion of administrative remedies under MICH. COMP. LAWS ANN. § 800.73 (Supp. 1981). The operative language of the Act states merely that "all administrative actions consistent with applicable State laws" must be exhausted. *Id.* See *infra* notes 122-28 and accompanying text.

70. MICH. COMP. LAWS ANN. § 800.73 (Supp. 1981).

71. MICH. CONST. art. 4. § 45 states: "The legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences."

The legislature has declared that when sentencing a felon for the first time, a court must not fix a definite term of imprisonment, but rather should set both a minimum and maximum term. MICH. COMP. LAWS § 769.8 (1979). This indeterminate sentencing provi-

sentences in this manner creates a larger pool of prisoners eligible for release on parole. Upon approval of these additional applications, the reduced sentences will decrease the size of the prison population.⁷³ The governor need not declare the emergency, however, if within fifteen calendar days of the request he finds that the Commission acted in error.⁷⁴

Should the ninety-day sentence rollback not reduce prison system population to ninety-five percent of rated capacity within ninety days of the declaration of the state of emergency, minimum sentences of all prisoners incarcerated in state prisons on that date will be reduced by an additional ninety days.⁷⁵ This "second stage" reduction will enlarge once again the pool of prisoners eligible for parole. As in the "first stage," the governor must rescind the state of emergency if at any point during the process the Corrections Commission certifies that the prison population has been reduced to ninety-five percent of rated de-

sion, however, does not apply to any person convicted of an offense for which the only punishment prescribed is life imprisonment. MICH. COMP. LAWS § 769.9(1) (1979).

72. MICH. COMP. LAWS ANN. § 800.74 (Supp. 1981). The Department of Corrections has interpreted this section to apply to all state prisoners except those serving life sentences, a flat sentence under the felony firearm law, prisoners released on court orders, and escapees and parolees. State prisoners in local jails or federal facilities under a contract with the Department of Corrections and those who have been committed to mental health facilities are eligible for sentence reduction. Prisoners in corrections centers and residential homes are also eligible. Memorandum from the Department of Corrections, Executive Office, to All Michigan Prisoners (Mar. 30, 1981) [hereinafter cited as Memorandum to Prisoners] (on file with the *Journal of Law Reform*). See also Department of Corrections, Director's Office Memorandum 1981-5 to Bureau Heads, Regional Administrators, Wardens and Superintendents (Mar. 30, 1981) [hereinafter cited as Director's Office Memorandum] (on file with the *Journal of Law Reform*).

State prisoners who earn good time credit will have 90 days reduced from their special good time minimum sentences. Those who cannot earn good time credit because they fall under Proposal B, see *supra* note 59, or the Habitual Offender Statute, MICH. COMP. LAWS § 769.10-.12 (1979), will have 90 days deducted from their calendar minimums. Memorandum to Prisoners, *supra*. But see *People ex rel. Oakland Prosecuting Atty. v. Bureau of Pardons and Paroles*, 78 Mich. App. 111, 259 N.W.2d 385 (1977) (prisoner sentenced under habitual offender statute may not be released on parole prior to expiration of minimum sentence imposed by the sentencing judge in absence of written consent of the judge or his successor). Offenders who enter or return to the prison system while the emergency is in effect are eligible for the reduction of sentence minimums. Memorandum to Prisoners, *supra*.

73. See Memorandum from House Corrections Committee and Speaker Bobby Crim to Members of the Michigan Legislature (Mar. 31, 1981) [hereinafter cited as House Memorandum] (on file with the *Journal of Law Reform*).

74. MICH. COMP. LAWS ANN. § 800.74 (Supp. 1981).

75. MICH. COMP. LAWS ANN. § 800.75 (Supp. 1981). This section does not distinguish between prisoners whose sentence minimums were already reduced under the first stage and prisoners whose minimums will be reduced for the first time. As a result, all eligible prisoners will receive sentence reductions. Boyd Interview I, *supra* note 16.

sign capacity.⁷⁶ The governor need not declare an end to the emergency if he finds the Commission erred in requesting the rescission of the state of emergency.⁷⁷

Finally, the Act contains three important provisos which apply throughout all phases of sentence reduction. First, new prison housing must have only single occupancy rooms or cells and must comply with state and federal standards for new prison housing and facilities.⁷⁸ Second, temporary housing is to be excluded from rated design capacity after January 1, 1984.⁷⁹ Third, the Act will not take effect if prison population exceeds rated design capacity as a direct result of loss of bedspace due to a natural disaster or deliberate destruction of property.⁸⁰

76. MICH. COMP. LAWS ANN. § 800.77 (Supp. 1981).

77. *Id.* The governor must find such an error within 15 calendar days of the Commission's request, or rescind the emergency. *Id.*

78. MICH. COMP. LAWS ANN. § 800.78(1) (Supp. 1981). After January 26, 1981, all new housing, as well as facilities purchased, leased, constructed, or converted by the Department of Corrections for use as a prison, must contain only single occupancy rooms or cells and comply with all applicable federal and state laws and the rules and regulations promulgated under those laws. *Id.*

79. MICH. COMP. LAWS ANN. § 800.78(2) (Supp. 1981). Rated design capacity after January 1, 1984 will not include temporary housing. *Id.*; see *supra* note 67. Task Force members agreed that temporary housing was undesirable and that it was important to set standards for housing. Boyd Interview II, *supra* note 63. The Department of Corrections advocated these changes in large part because double ceiling and temporary housing make efficient management of the prison system more difficult. Johnson Interview, *supra* note 63.

80. MICH. COMP. LAWS ANN. § 800.79 (Supp. 1981). The central intent of this section is to eliminate any incentive for prisoners to destroy property so as to trigger the sentence reduction provisions of the Act. Interview with Rep. Jeffrey D. Padden, Chairman of the Task Force on Prison Overcrowding and the House Corrections Committee, in Lansing (Mar. 25, 1982) [hereinafter cited as Padden Interview]; Boyd Interview II, *supra* note 63.

When bedspace is destroyed, the Corrections Commission must determine whether the loss resulted from a natural disaster or deliberate destruction. Although the governor has been granted no explicit authority to challenge this determination he may reject the Commission's request for a state of emergency. See *supra* note 74 and accompanying text.

The Michigan prison riots in 1981, see *supra* notes 5 & 60, illustrate how the proviso operates. During the riots, 150 beds were destroyed. The Commission concluded that the property was destroyed deliberately and, consequently, the rated design capacity was not reduced to reflect the loss. Deliberate destruction will not, however, preclude implementation of the Act if the prison population exceeds the unchanged rated design capacity.

One problem with the proviso is that it may permit overcrowded conditions to continue indefinitely without remedy. When bedspace is destroyed deliberately, rated design capacity does not reflect the actual capacity of the prison; on paper, the prison will appear to have more beds than it actually does.

The problem, however, need not prove fatal. For example, the majority of beds lost during the 1981 riots were located in temporary housing and thus will not be included in rated design capacity calculations after January 1, 1984. See *supra* note 79. The drafters of the proviso were well aware that one effect of this safeguard would be to increase overcrowding, yet they concluded that the proviso was necessary to ensure that the Act

B. Implementation of the Act

The Act was first employed on March 30, 1981, when the Corrections Commission notified Governor Milliken that the prison population had exceeded its capacity for thirty consecutive days⁸¹ and requested he declare the state's first prison overcrowding state of emergency.⁸² Although a lawsuit challenging the Act's constitutionality delayed the declaration,⁸³ the Governor announced a state of emergency on May 20, 1981, and thus triggered the first reduction stage.⁸⁴

The Department of Corrections estimated that the first ninety-day sentence rollback would make approximately 1500 prisoners eligible for parole.⁸⁵ Basing their predictions on the parole board's sixty percent approval rate for first appearance prisoner review, the Department calculated that the Act would result in the release of a thousand prisoners who would not otherwise have become eligible for parole during the ninety-day pe-

would be triggered only by "system-created" overpopulation. Padden Interview, *supra*; Johnson Interview, *supra* note 63; Boyd Interview II, *supra* note 63.

81. Crane Letter, *supra* note 67. The state's prisons were 175 prisoners above the rated design capacity of 12,874 on that date. Department of Corrections, Temporary Emergency Capacity Data by Week (Sept. 30, 1981) [hereinafter cited as TEC Data] (on file with the *Journal of Law Reform*).

82. Crane Letter, *supra* note 67.

83. The Governor was unable to declare a state of emergency within the statutory time period; an Oakland Circuit Court restraining order delayed the declaration. The restraining order, issued in response to a lawsuit filed by the Oakland County Prosecutor challenging the constitutionality of the Act, was subsequently vacated and the court dismissed the complaint. Oakland County Prosecuting Attorney v. Dept. of Corrections, No. 81-221225 CZ, slip op. (Oakland County Cir. Ct. Apr. 22, 1981). The Michigan Court of Appeals reversed on the grounds that the statute improperly granted powers to the Department of Corrections that should have remained exclusively within the purview of the governor. No. 57297, slip op. (Mich. App. Apr. 30, 1981).

The Michigan Supreme Court disagreed with the court of appeals and upheld the constitutionality of the Act. 411 Mich. 183, 305 N.W.2d 515 (1981) (per curiam). The court held that the Prison Overcrowding Emergency Powers Act was within the authority granted to the legislature by the constitution, see MICH. CONST. art. 4, § 45, and therefore did not constitute an encroachment upon the governor's commutation power. *Id.* at 194-95. After examining the Act's legislative history, the court concluded that it was designed as part of a broad-based program of correctional reform and was not formulated to usurp executive authority. *Id.* at 197.

Following the Supreme Court's decision, on May 20, the Corrections Commission certified that the prison was overcrowded and had exceeded rated design capacity for 69 days. After announcing that all administrative actions consistent with applicable state laws had been exhausted, the Commission again requested that the Governor declare a state of emergency. Department of Corrections News Advisory (May 20, 1981) (on file with the *Journal of Law Reform*).

84. Exec. Order No. 1981-4, 1981 Mich. Legis. Serv. 398 (West).

85. Department of Corrections, Press Release (Mar. 30, 1981) (on file with the *Journal of Law Reform*).

riod.⁸⁶ The second reduction stage, if needed, was expected to make an additional 1,400 prisoners eligible for parole.⁸⁷ Of that number, the Department predicted 850 would actually receive parole.⁸⁸

Although the prison system was overcrowded by 237 prisoners when the state of emergency was declared, state officials hoped to parole approximately a thousand prisoners over the ninety-day period because new prisoner commitments would fill most of the vacated space.⁸⁹ State officials expected one-half to two-thirds of the prisoners released to come from community-based programs.⁹⁰ As bedspace in community corrections facilities became available, eligible institutional prisoners would be transferred, thereby reducing total prison population.

The state of emergency lasted until August 24, 1981.⁹¹ During

86. Interview with William Kime, Deputy Director of the Department of Corrections Bureau of Programs, in Lansing (Mar. 30, 1982) [hereinafter cited as Kime Interview]; Department of Corrections Memorandum from Bill Kime to Director Johnson [hereinafter cited as Kime Memorandum] (June 2, 1980) (on file with the *Journal of Law Reform*).

87. See Kime Interview, *supra* note 86; Kime Memorandum, *supra* note 86.

88. House Memorandum, *supra* note 73, at 3. This prediction may be excessive because the Department of Corrections failed initially to recognize the degree to which the Act's language limits eligibility in the second stage. See *infra* notes 137-40 and accompanying text.

89. House Memorandum, *supra* note 73, at 5. If the Act required that the number of actual paroles be equivalent to the number of prisoners by which the system is overcrowded, prison population would remain at least equal to rated capacity. The prison system, therefore, would become overcrowded with each new commitment and the Act would continually come into play. As a result, prisoners would become eligible for parole far earlier than intended by the Act's drafters. *Id.*

90. *Id.*; see Department of Corrections, Press Release (May 14, 1981) (Perry Johnson, Director of the Department of Corrections, stated: "Using this new act is a responsible way to safely reduce prison population. It will not unduly threaten the safety of the community since all of the people to be paroled under this new act would have been paroled within 90 days anyway. Most of the prisoners paroled will be from our state's half-way houses and minimum security prisons."). Governor Milliken stated:

I think there is the impression among some that 1,000 hardened criminals are going to be released from Jackson Prison tomorrow. There will be some persons paroled from the institutions but most will come from minimum security, and this will not happen immediately. Field investigations must be made and parole plans approved by the Parole Board . . . I might point out that we normally parole about 4,500 people a year: that is simply the flow through the system. Use of this act will probably mean we parole 5,500 instead of 4,500. This isn't a cataclysmic event. The only thing particularly unique about this is the particular safety valve we are using. I would remind people again that the only people released as a result of this act will be people who would have been released within 90 days in any case.

Department of Corrections, Press Release (May 20, 1981) (on file with the *Journal of Law Reform*).

91. Exec. Order No. 1981-6, 1981 Mich. Legis. Serv. 751 (West). The request to rescind the prison overcrowding state of emergency was formulated on August 13, 1981 at

that time 875 prisoners received early parole.⁹² Between 500 and 600 of those prisoners would not have been released during that period but for the implementation of the Act. The remaining 275 to 375 prisoners carried minimum prison terms that would have elapsed at some point during the state of emergency, but because of the Act were paroled slightly before the expiration of their original minimum sentences.⁹³ As expected, the vast majority of prisoners released came from community-based programs rather than from institutions.⁹⁴

After the state of emergency was rescinded in August, 1981,⁹⁵

the Commission's regular monthly meeting after the Commission certified that the population of the state's prison system had fallen below 95% of rated design capacity. The request was immediately sent to the Governor. Department of Corrections, Press Release (Aug. 14, 1981) (on file with the *Journal of Law Reform*). If population had not dropped to 95% capacity by August 18, the second stage of sentence reductions would have been triggered. *Id.*

92. Addendum to August 1981 Monthly Report to the Director and the Corrections Commission (Sept. 29, 1981) [hereinafter cited as Addendum to 1981 Report] (on file with the *Journal of Law Reform*). Corrected release figures are noted in Minutes of the Meeting of the Joint Committee to Investigate Prison Disturbances (Aug. 19, 1981) at 3, in INVESTIGATION OF PRISON DISTURBANCES, *supra* note 5, at app.

The long term impact of sentence reductions during this state of emergency is not known. An estimated 8,000 prisoners received minimum sentence reductions, and until they are paroled it will be difficult to determine the total impact. *Id.*

93. Interview with Edward Turner, Chairman of the Parole Board, in Lansing (Oct. 8, 1981) [hereinafter cited as Turner Interview I]; Kime Interview, *supra* note 86; Letter from Gail R. Light, Public Information Director of the Department of Corrections, to Senator John McCune, Oklahoma State Senate (Oct. 28, 1981) at 2 (describing the implementation of the Prison Overcrowding Emergency Powers Act) [hereinafter cited as Light Letter] (on file with the *Journal of Law Reform*).

94. See Addendum to 1981 Report, *supra* note 92 (651 early releases during the state of emergency were from community residential programs).

95. Although state prison population was reduced to 95% capacity during the first stage of sentence reductions, fewer prisoners were released than anticipated. Compare *supra* notes 86 & 93 and accompanying text. The disparity is the result of mistaken calculation. First, the Department of Corrections predicted the Act's impact based upon the average number of all paroles, rather than those paroled upon fulfilling their minimum sentences only; second, estimates were based upon 1979 figures, as opposed to 1980 figures where eligibility had been reduced by statutory limitations on good-time credit. Minutes of the Joint Committee to Investigate Prison Disturbances (Aug. 19, 1981) at 3, in INVESTIGATION OF PRISON DISTURBANCES, *supra* note 5.

Increased prison commitments and longer sentences also may have accounted for a slower decline in population than was expected. Detroit News, Aug. 16, 1981, § 2, at 8, col. 12; see also Detroit News, Mar. 31, 1981, § 2, at 1, col. 5 (the climb in prison commitments may have been the result of Michigan's high unemployment rate).

Certification of the recently constructed Ypsilanti Maximum Security Prison and expansion of community residential programs during the state of emergency were of crucial importance in achieving the 95% capacity requirement and averting implementation of the second stage of sentence reductions. Interview with John Frye, Supervisor of the Department of Corrections Audit Control and Records Section, in Lansing (Mar. 5, 1982) [hereinafter cited as Frye Interview I]. Addition of the Ypsilanti prison increased rated design capacity of the prison system to 13,285 and raised the 95% capacity mark to

state prison population began to climb again.⁹⁶ While the population temporarily exceeded rated design capacity in January 1982, it did not remain above capacity long enough to trigger the Act again.⁹⁷ Corrections officials, however, still expect a prison overcrowding state of emergency to arise during 1982 that will necessitate further reduction of prison sentences.⁹⁸

III. EVALUATING THE PRISON OVERCROWDING EMERGENCY POWERS ACT

A. *Benefits*

Although the Prison Overcrowding Emergency Powers Act has not been tested extensively, it is apparent that this statutory method of regulating prison population holds many advantages over the traditional approaches to prison overcrowding. The costs of implementing the Act are far less than any other alternative under consideration.⁹⁹ Indeed, future declarations of a prison overcrowding emergency should entail less expense than the initial declaration due to adjustments made in the Department of Corrections' parole review schedule and records.¹⁰⁰

12,620. Department of Corrections, Press Release (Aug. 14, 1981) (on file with the *Journal of Law Reform*). Furthermore, despite the claim that community residential programs could not be expanded beyond a capacity of 2,000 prisoners without "undue risk to public safety," Light Interview, *supra* note 16, the community programs population was enlarged to 2,262 on August 19, 1981. Untitled and undated document compiled by John Frye, Supervisor of the Department of Corrections Audit Control and Records Section (charting weekly prison population from Jan. 9, 1981 to Mar. 17, 1982) [hereinafter cited as Frye Compiled Statistics] (on file with the *Journal of Law Reform*). It was during that week that the prison overcrowding state of emergency was rescinded. Department of Corrections, Press Release (Aug. 14, 1981) (prison population reduced to 12,407 on August 12 — 213 prisoners under the amended 95% capacity requirement) (on file with the *Journal of Law Reform*).

96. See TEC Data, *supra* note 81.

97. See Department of Corrections, Press Release (Feb. 1, 1982) (prison population reached 13,306 on January 27, 1982, 15 persons above the rated capacity of 13,291) (on file with the *Journal of Law Reform*); Frye Compiled Statistics, *supra* note 95.

98. Johnson Interview, *supra* note 63; Interview with Edward Turner, Chairman of the Parole Board, in Lansing (Mar. 5, 1982) [hereinafter cited as Turner Interview II].

99. Interview with Alvin Whitfield, Deputy Director of the Department of Corrections Bureau of Administrative Services, in Lansing (Mar. 30, 1982) [hereinafter cited as Whitfield Interview]. Cost considerations include the lost working hours of personnel loaned to the parole board by other departments, and out-of-pocket expenditures. No record was kept of the loaned time. The only significant out-of-pocket expenses involved payment of overtime wages to data processing operators. The total cost of administrative processing did not exceed \$10,000. *Id.*

100. *Id.*; Turner Interview I, *supra* note 93.

Equally important, the Act does not ignore substantive correctional reform; it maintains strict standards for new prison housing and facilities.¹⁰¹ All new housing must have single occupancy rooms or cells and must comply with state and federal laws¹⁰² and temporary housing is not to be included when assessing rated design capacity after January, 1984.¹⁰³

Furthermore, the Act is designed to achieve immediate prison population reductions without compromising public safety. The statute excludes prisoners serving life sentences and flat sentences under the felony firearm law from eligibility.¹⁰⁴ One-half to two-thirds of the prisoners likely to be released will come from community-based programs where they have been screened to ensure successful re-entry into society.¹⁰⁵ In addition, all released prisoners will be within several months of parole. Thus, advancing the date of release is not apt to imperil public safety. Indeed, a recidivism study suggests that early release prisoners are likely to commit only a negligible percentage of total felonies in a given year.¹⁰⁶

Finally, because the Act guarantees immediate relief to prisons — even while a protracted debate on prison reform is pending — court involvement in prison management is minimized.¹⁰⁷ With the spectre of judicial intervention removed, legislators have an opportunity to develop cost-effective, systemic reforms.

B. Potential Problems with the Act

Despite the Act's benefits, its use generates several potential

101. See *supra* notes 78 & 79.

102. MICH. COMP. LAWS ANN. § 800.78(1) (Supp. 1981).

103. MICH. COMP. LAWS ANN. § 800.78(2) (Supp. 1981).

104. See *supra* note 72.

105. House Memorandum, *supra* note 73; see *supra* note 90. Six hundred and fifty-one of the 875 prisoners released during the state of emergency in 1981 came from community residential programs. Addendum to 1981 Report, *supra* note 92. See Department of Corrections, Press Release (Sept. 24, 1980) and Department of Corrections, Press Release (Sept. 24, 1980), *infra* note 140. But see Light Letter, *infra* note 140.

106. Department of Corrections, Impact of 1981 E.P.A. Releases on Serious Crime (undated) (on file with the *Journal of Law Reform*). This preliminary study indicated that 117 prisoners who received early parole under the Act were arrested for state police index crimes in 1981 before their original minimum sentence expired. When compared with 1980 index arrest totals for the entire state population, the early parole total represents only two-tenths of one percent of all 1980 arrests. *Id.* The study reflects the arrests of all prisoners who received an early release during the entire year, not just those released during the state of emergency. State police index crimes consist of murder, rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft.

107. Padden Interview, *supra* note 80.

problems. None, however, should be deemed serious enough to justify abandoning the early release concept.

1. *Impact on Correctional Administration*— Implementation of the Prison Overcrowding Emergency Powers Act has affected traditional correctional administration in two important areas. First, the Act places new burdens on the correctional administrative process. When implemented in 1981, it caused an increase in the number of prisoner files requiring screening, updating, and verification.¹⁰⁸ In addition, the Department of Corrections was forced to prepare eligibility reports nine months prior to the expiration date of a prisoner's minimum sentence — rather than the customary six — to accommodate expected alterations in minimum sentences.¹⁰⁹ This change added to the burden of an already overworked administrative staff. While the field staff completed parole investigations at a rate nearly twice its normal load¹¹⁰ and the parole board heard cases at about twice the ordinary rate,¹¹¹ the administrative staff worked overtime and was forced to requisition clerical staff from other departments to meet the increased workload.¹¹² Nevertheless, despite the strains the Act placed on correctional administration, the additional costs needed to implement the Act were not prohibitive; total administrative expenses did not exceed \$10,000.¹¹³

Second, the Act may have affected adversely the application of legal standards in parole board hearings. In general, the decision to release a prisoner on parole rests entirely within the dis-

108. Turner Interview I, *supra* note 93; Light Letter, *supra* note 93. See generally Director's Office Memorandum, *supra* note 72. The procedures used to implement the Act included: a computer search to determine prisoners eligible for sentence reductions; computer production of revised time slips; computer control runs; distribution of revised time slips to counsellors and prisoners, as well as to prisons and the Department of Corrections in Lansing. Interview with John Frye, Supervisor of the Department of Corrections Audit Control and Records Section, in Lansing (Mar. 30, 1982) [hereinafter cited as Frye Interview II]. Files were manually altered by Department of Corrections personnel in the prisons and the central office. *Id.*

109. Turner Interview I, *supra* note 93. Prior to the Act's passage, parole eligibility reports were prepared six months before expiration of the prisoners' minimum sentences in order to allow adequate time for investigation by field staff into the parole plan. *Id.* This fulfilled state requirements that each prisoner receive a parole hearing before the Board at least one month prior to the eligibility date. MICH. COMP. LAWS § 791.235 (1979); Lane v. Department of Corrections, 383 Mich. 50, 173 N.W.2d 209 (1970). Preparation of parole eligibility reports nine months before each prisoner's minimum sentence was scheduled to expire ensured that there would be no administrative delays in releasing prisoners when the Act was invoked. Turner Interview I, *supra* note 93.

110. Light Letter, *supra* note 93; Turner Interview I, *supra* note 93.

111. Light Letter, *supra* note 93; Turner Interview I, *supra* note 93.

112. Light Letter, *supra* note 93; Turner Interview I, *supra* note 93.

113. See *supra* note 98.

cretion of the parole board.¹¹⁴ The board, however, does adhere to legislative guidelines which stipulate that no person may be released on parole "until the Board has reasonable assurance . . . that the prisoner will not become a menace to society or to the public."¹¹⁵ Immediately preceding and during the state of emergency there were large increases in the quantity of parole reports and hearings.¹¹⁶ Although the number of paroles during this period varied only slightly from the normal sixty percent approval rate,¹¹⁷ the length and quality of board hearings may have suffered as a result of the influx of prisoners eligible for parole.¹¹⁸ The parole board chairman, however, claimed that the state of emergency did not alter application of legal standards for parole review;¹¹⁹ in his view reports and hearings were adequate, despite the markedly increased workload of corrections officials.¹²⁰

114. MICH. COMP. LAWS § 791.235 (1979); *Lane v. Department of Corrections*, 383 Mich. 50, 60, 173 N.W.2d 209, 213 (1970).

115. MICH. COMP. LAWS § 791.233(1)(a) (1979). Before granting a parole release, the Board must have "satisfactory evidence that arrangements have been made for such honorable and useful employment as the prisoner is capable of performing, or for the prisoner's education, or for the prisoner's care if the prisoner is mentally or physically ill or incapacitated." MICH. COMP. LAWS § 791.233(1)(c) (1979).

In addition, the Department of Corrections General Rules provide criteria to assist the parole board in deciding whether to grant parole. The criteria include: criminal history, behavior in prison, and job skills. MICH. ADMIN. CODE R. 791.7715 (1979). The Board is encouraged to examine the totality of the circumstances before reaching a decision. DEPARTMENT OF CORRECTIONS, ADMINISTRATIVE RULES AND COMMENTARY VII-7 (1976) (commentary to R. 791.7715).

116. See *supra* notes 110 & 111 and accompanying text.

117. Turner Interview I, *supra* note 93.

118. Immediately preceding and during the state of emergency, prison counsellors were forced to write many more evaluations than normal. Turner Interview I, *supra* note 93. The Parole Board heard twice the number of cases as normal during that period. *Id.*

119. Turner Interview I, *supra* note 93. See *supra* note 115.

Parole Board Chairman Turner said the Board was not influenced by the state of emergency either to release more prisoners than required under the applicable legal standards or to inhibit releases due to a public concern about safety. Turner Interview I, *supra* note 93.

120. Turner Interview I, *supra* note 93. If parole is denied for failure to provide an adequate hearing, it is unlikely that the prisoner can advance a legal claim. Few legal guidelines have been established for the conduct of release hearings. See MICH. COMP. LAWS §§ 791.234-235 (1979); MICH. ADMIN. CODE R. 791.7701-7710 (1979). See also MICH. ADMIN. CODE R. 791.7715 (1979) (the prisoner is entitled to notice of criteria and standards employed by the Board in making its decision). If parole is granted improperly, the parole board retains authority to suspend and rescind the parole of a prisoner who has been given a parole date, but who has not been released. MICH. COMP. LAWS § 791.236 (1979); MICH. ADMIN. CODE R. 791.7720(1). Department of Corrections Rules provide that the prisoner be brought before the parole board and given a rescission hearing. MICH. ADMIN. CODE R. 791.7720(1). Furthermore, the parole order may be suspended and annulled where adverse information is received after release regarding behavior that occurred prior to release. MICH. ADMIN. CODE R. 791.7720(2).

2. *Problems with the Act's Language*— The wording of the statute poses three major difficulties in interpretation and implementation.

a. *Exhaustion of Administrative Action*— The Act states that exhaustion of administrative action is a prerequisite to implementation, yet it does not define "exhaustion."¹²¹ By declaring that all administrative actions "consistent with applicable state laws and the rules promulgated under those laws" must be exhausted,¹²² the statute establishes a condition, not a limitation upon the number or type of administrative measures mandated. The Corrections Commission has interpreted exhaustion of administrative actions to mean that before seeking a declaration of a state of emergency from the governor it must: (1) request the parole board to exercise discretion in favor of granting parole; (2) request the parole board, when considering the disposition of a parole violation, to exercise its discretion by imposing sanctions less severe than revocation whenever possible; (3) order expansion of community corrections programs; and (4) enter into agreements whenever possible to permit housing of state prisoners in county jails.¹²³ Nevertheless, even with these informal guidelines, the lack of a minimum standard has left the burden of proving exhaustion of administrative action on the Commission. Thus, contrary to the drafters' intent,¹²⁴ the statutory language permits a governor to obstruct enforcement by challenging the Commission's findings and demanding proof of exhaustion.¹²⁵

The parole board can use the doctrine of governmental immunity to shelter itself from tort liability for a decision to parole a prisoner who subsequently commits a felony while on parole. See *Seiss v. Bureau of Pardons and Paroles*, 74 Mich. App. 613, 255 N.W.2d 2 (1977); *Martinez v. California*, 444 U.S. 277 (1980). But see Note, *Holding Governments Strictly Liable for the Release of Dangerous Parolees*, 55 N.Y.U. L. Rev. 907 (1980) (arguing that parole institutions should be held strictly liable for injuries resulting from decisions to release).

121. See *supra* note 69.

122. MICH. COMP. LAWS ANN. § 800.73 (Supp. 1981).

123. Crane Letter, *supra* note 67.

124. Boyd Interview II, *supra* note 63. Representative Padden contended that requiring the governor to declare a state of emergency — provided he found the Corrections Commission had not acted in error — would permit the governor to challenge the Commission's findings and yet still facilitate a simple mandamus proceeding should the governor refuse to act. Minutes of the Joint Legislative/Executive Task Force on Prison Overcrowding (June 4, 1980) at 4-5, in REPORT ON PRISON OVERCROWDING, *supra* note 59.

125. MICH. COMP. LAWS § 600.4411 (1979) provides grounds for mandamus actions against public officials. However, Michigan courts have consistently held that the governor is not subject to mandamus, regardless of whether the act in question is ministerial or discretionary in nature. See *Born v. Dillman*, 264 Mich. 440, 446, 250 N.W. 282, 284 (1933); *Germaine v. Governor*, 176 Mich. 585, 588, 142 N.W. 738, 739 (1913); *Sutherland v. Governor*, 29 Mich. 320; 18 Am. Rep. 89 (1874).

The reason for this unintended shift in the burden of proof stems from the legislature's desire to ensure that the Act be utilized only as a last resort.¹²⁶ As long as the definition of administrative action remains open-ended, the Act requires the implementation of all means of prison population control — both traditional and non-traditional — prior to the declaration of a state of emergency. Moreover, inclusion of a specific definition would require frequent amendment to cover developments in non-traditional methods of prison population control. Although these legislative concerns are valid, formulation of a nonexclusive definition, which includes the administrative actions that should be exhausted, is more consistent with legislative intent; it reduces the governor's ability to obstruct the Act while assuring the public that the statute is essentially a last resort measure.¹²⁷ In any event, this is not a serious problem because a dispute between the governor and the Corrections Commission, an executive agency, is unlikely to arise.¹²⁸

b. Limitation on Sentence Reduction— The Act does not provide for a third sentence reduction stage in the event that the first two stages fail to reduce prison population to ninety-five percent capacity.¹²⁹ Furthermore, the statute does not specify grounds for rescinding the state of emergency after the second stage has expired.¹³⁰ Thus, if the second stage reduction fails to achieve its goal, the state of emergency will technically remain in effect despite the Act's inability to relieve the continuing cri-

126. Boyd Interview II, *supra* note 63. See *supra* note 64 and accompanying text.

127. Boyd Interview II, *supra* note 63. Drafters of the Act intended exhaustion of administrative remedies to include parole, community corrections placement, and extended furloughs. They chose not to incorporate this or any other definition because: (1) it might require frequent amendment to keep pace with developments in population control techniques; (2) a dispute between the governor and the Corrections Commission, an administrative agency, was regarded as unlikely; and (3) even if a disagreement arose the issue could be litigated. *Id.*

128. See *supra* note 127. The governor appoints the members of the Corrections Commission for six year terms. The term of some members, however, may extend beyond the duration of an administration. Boyd Interview II, *supra* note 63.

129. If the first stage of sentence reductions does not reduce state prison population to 95% of rated design capacity within 90 days of the declaration of the state of emergency, the Act clearly provides that prisoners' sentences will be reduced by 90 days. MICH. COMP. LAWS ANN. § 800.75 (Supp. 1981); see *supra* note 75 and accompanying text. The Act provides neither explicitly nor implicitly that additional sentence reductions will follow without the declaration of another state of emergency. Drafters of the Act admit they failed to anticipate the need for more than two sentence reduction stages. Boyd Interview II, *supra* note 63. See *supra* note 95.

130. The Act stipulates that the Corrections Commission can request the governor to rescind the state of emergency only if prison population is reduced to 95% rated design capacity during the state of emergency. MICH. COMP. LAWS ANN. § 800.76 (Supp. 1981); see *supra* note 76 and accompanying text.

sis.¹³¹ Overpopulation in Michigan prisons may never become so acute as to require three consecutive sentence reduction stages,¹³² yet several factors suggest that prison population will increase dramatically in the near future. First, after January 1, 1984, rated design capacity will no longer include temporary housing.¹³³ Second, prison facilities presently under construction are not scheduled to be completed until 1984-85.¹³⁴

The absence of statutory language providing for a third stage need not prove fatal. Under Michigan law, the governor holds broad executive authority to declare and rescind states of emergency.¹³⁵ Should prison population exceed ninety-five percent capacity at the end of two reduction stages, the governor may rescind the emergency and proclaim a new one.¹³⁶

c. Limited Eligibility for Second Reduction Stage— The language of the Act providing for a second reduction stage limits parole eligibility to “prisoners incarcerated in state prisons on that date who have established minimum prison terms.”¹³⁷ The date limitation refers apparently to the date the secondary stage of sentence reduction begins. This language is clearly the result

131. An exception exists where prison population declines without the aid of the Act after completion of the two sentence reduction stages. Because the state of emergency continues in theory ad infinitum until population is reduced to 95% rated design capacity, a drop in population to 95% of capacity anytime after the emergency is declared meets the condition for rescission.

132. According to Parole Board Chairman Turner, it is impossible to determine whether more than two sentence reduction stages will ever be required to attain 95% capacity. Turner Interview II, *supra* note 98.

133. MICH. COMP. LAWS ANN. § 800.78(2); *see supra* note 79 and accompanying text. An estimated 813 prisoners are presently being held in temporary housing. Frye Interview II, *supra* note 108.

134. A prison facility in Lansing with a capacity of 240 prisoners is expected to be completed in 1984-85. The Detroit House of Corrections Men's Regional Facility is also scheduled to be completed in 1984-85 and will hold 550 prisoners.

In addition, the Michigan Reformatory in Ionia, presently containing 1,217 prisoners, will be demolished before 1990. MICH. COMP. LAWS ANN. § 791.220d (Supp. 1981).

135. MICH. COMP. LAWS § 10.31-.33 (1979).

136. Strictly construed, the governor's broad emergency powers do not extend to rescission of states of emergency which have been ordered by the Corrections Committee at the legislature's direction. *See id.* However, the statutory grant of emergency powers to the governor is intended by the legislature to be construed broadly. MICH. COMP. LAWS § 10.32 (1979). Moreover, even if rescission of a Commission-ordered emergency is held to be outside the governor's authority, he may assert that the declaration was made upon his own volition — as permitted by the authorizing provision — and accordingly rescind it. The governor can also disregard the pending state of emergency and declare a new state of emergency in reliance upon his broad statutory authority.

These suggested remedies, however, grant far greater discretion to the governor than intended by the statute's drafters. *See supra* note 124. The legislature can reduce the governor's discretion by amending the statute to provide limitless reduction stages during a state of emergency.

137. MICH. COMP. LAWS ANN. § 800.75 (Supp. 1981) (emphasis added).

of drafting errors. The drafters of the Act intended eligibility under the second stage to parallel that of the first stage.¹³⁸ As written, however, the provision excludes from eligibility incarcerated prisoners who hold minimum sentences during the second ninety day period but are not in prison on the date the second stage begins.¹³⁹ While this flaw does not undermine the effectiveness of the critical first sentence reduction stage, its consequences are serious. In community corrections programs, for example, sentence reductions are denied to the group of prisoners who are closest to their parole date and best suited to re-enter society.¹⁴⁰ This section, therefore, should be amended to parallel the first stage of sentence reduction.

CONCLUSION

The Prison Overcrowding Emergency Powers Act does not eradicate the sources of prison overcrowding. Yet, unlike past informal and discretionary uses of accelerated parole, the Act

138. Telephone Interview with James Boyd, Aide to the House Corrections Committee and Member of the Task Force on Prison Overcrowding (Mar. 22, 1982) [hereinafter cited as Boyd Telephone Interview]. The drafters intended the second stage to function in a manner similar to the first stage of sentence reductions and the limiting language was thought only to apply to prisoners outside the state prison system, i.e., prisoners in county jails, federal prisons, and escapees. *Id.*; see Light Letter, *supra* note 93.

This section of the Act was the product of a House Corrections Committee amendment designed to replace a more controversial draft of the second stage. 117 House J. 3008-09 (1980). Difficulties arising with the second stage of sentence reductions may have resulted from hurried redrafting. Boyd Telephone Interview, *supra*.

139. The Department of Corrections intends to construe this limitation strictly, reducing only the sentences of state prisoners who are listed as held in Bureau of Correctional Facilities on that date. Johnson Interview, *supra* note 63.

140. Of the groups of prisoners that will be excluded from eligibility for second stage sentence reductions, the most important will be prisoners in community corrections programs. Approximately 12% of the state corrections population, over 2,000 individuals, reside in community residential programs, and they represent the segment of the population closest to release. Light Letter, *supra* note 93. If there are no openings in community corrections, the Act will have little remedial effect on state prisons. Boyd Interview II, *supra* note 63.

Furthermore, Department of Corrections studies indicate that prisoners placed in community residential programs prior to release on parole commit four times fewer crimes than those paroled directly from prison, Department of Corrections, Press Release (Sept. 24, 1980) (variation attributed to the Department's successful classification and screening of community program residents) (on file with the *Journal of Law Reform*), and that they are significantly better risks on parole, Department of Corrections, Press Release (Sept. 21, 1981) (variation attributed to the Department's effective risk prediction techniques) (on file with the *Journal of Law Reform*). See generally Department of Corrections, Policy Directive - DWA - 30.02 (Dec. 1, 1978); Department of Corrections, Policy Directive - DWA - 43.01 (Aug. 1, 1978) (guidelines for residential security classification and community residential program placement).

balances effectively the needs of prisoners and prison officials against public safety during periods of prison overcrowding. The Act provides immediate relief for prisons which violate constitutional standards, facilitates efficient and cost-effective correctional management, and forestalls court intervention to allow the legislature time to develop long-term reforms that will eliminate overcrowding. As an intermediate step toward systemic reform, the Michigan Act offers new hope to states confronting acute prison overcrowding.

—*Frank T. Judge III*