
NOTES

PRISON OVERCROWDING IN ALASKA: A LEGISLATIVE RESPONSE TO THE *CLEARY* SETTLEMENT

I. INTRODUCTION

In September 1990, the Superior Court for the Third Judicial District of Alaska approved a final settlement agreement in *Cleary v. Smith*,¹ a prisoner class action suit filed nine years earlier challenging the conditions in Alaska's prisons. The settlement provides for sweeping changes in the operation of Alaska's prison system, and will fundamentally alter Alaska's treatment of its prisoners.² Although officially a final disposition of the suit, the settlement leaves open the possibility of further court involvement in Alaska's prison system for some time to come.

This Note analyzes the *Cleary* settlement and the legislative response it requires. Section II briefly identifies the nature and sources of Alaska's prison overcrowding problem. Section III describes the specific provisions of the *Cleary* settlement and analyzes the impact of these provisions on Alaska's prison system. Section IV discusses the need for both short-term and long-term legislative responses to the settlement, and will argue that the legislature should not respond by enacting emergency release legislation. The Note concludes with suggestions for an alternative response by the Alaska legislature.

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1. No. 3AN-81-5274 (Alaska Super. Ct. Sept. 21, 1990).

2. In January 1983, the superior court approved a partial settlement agreement which, for the most part, was incorporated into the final settlement. *Id.* at 1. Thus, the implementation of many of the changes provided for in the final settlement actually began several years ago.

II. THE PRISON OVERCROWDING PROBLEM IN ALASKA

Like most states, Alaska is faced with the overcrowding³ of its correctional facilities. While this problem is not new,⁴ a recent dramatic growth in the prison population has seriously strained the prison system. From 1980 to 1988, Alaska had the largest percentage increase of any state prison population in the country.⁵ In 1987 and 1988, Alaska ranked fourth among states with regard to the percentage of population incarcerated.⁶ Furthermore, studies and forecasts of Alaska's projected prison population indicate that the problem is likely to worsen before it improves.⁷

While it is difficult to attribute these increases to specific causes, several factors appear significant: (1) Alaska's adoption of presumptive sentencing;⁸ (2) increased law enforcement and prosecution; (3)

3. The term "overcrowding" is used because it is the term most often found in the literature. The term connotes conditions that, because they are "too crowded," are or may be violative of the eighth amendment's prohibition against cruel and unusual punishment. For criticism of this terminology, however, see *Bleich*, *The Politics of Prison Crowding*, 77 CALIF. L. REV. 1125, 1129-44 (1989) (quoted *infra* note 111).

4. Overcrowding has been a problem in Alaska's correctional facilities since territorial days. ALASKA DEP'T OF CORRECTIONS, ANNUAL REPORT FISCAL YEAR 1988, 33 (1988) [hereinafter 1988 DEP'T OF CORRECTIONS REPORT].

5. ALASKA SENTENCING COMM'N, 1990 ANNUAL REPORT TO THE GOVERNOR AND THE ALASKA LEGISLATURE 22 (1990) [hereinafter 1990 SENTENCING COMM'N REPORT]. Percentages were measured as the number of persons incarcerated under sentences of one year or more per 100,000 residents. The actual number of prisoners (including prisoners in Alaska institutions, residential centers, and those temporarily housed in the Federal Bureau of Prisons and Minnesota institutions) increased from 771 in December 1979 to 2540 in December 1987. 1988 DEP'T OF CORRECTIONS REPORT, *supra* note 4, at 33. This represents a 229.4% increase in the prison population.

6. ALASKA JUDICIAL COUNCIL, DRAFT REPORT ON PLEA BARGAINING AND PRESUMPTIVE SENTENCING ch. IV at 6 (1990) [hereinafter 1990 JUDICIAL COUNCIL REPORT] (citing J. Austin & M. Brown, *Ranking the Nation's Most Punitive and Costly States*, FOCUS, NAT'L COUNCIL ON CRIME & DELINQUENCY 2 (July 1989)). To place Alaska's incarceration rate in context, note that a recent study concluded that the United States as a whole has the highest incarceration rate in the world. Pollock & Geyelin, *U.S. Incarceration Rate Highest in World*, Wall St. J., Jan. 7 1991, at B5, col. 1.

7. A study by the University of Alaska in 1986 predicted that, without changes in the status quo, Alaska's probable prison population, both sentenced and unsentenced, will total 4080 in 1990 and 8914 by the year 2000. SCHOOL OF JUSTICE, UNIV. OF ALASKA, ANCHORAGE, ALASKA CORRECTIONAL REQUIREMENTS: A FORECAST OF PRISON POPULATION THROUGH THE YEAR 2000 ii (1986). The predictions of Alaska's Department of Corrections were more conservative, predicting 3000 inmates by 1990 and close to 4000 by 1995. ALASKA DEP'T OF CORRECTIONS, FISCAL YEAR 1989 REPORT 27 (1989).

8. To eliminate unjustified disparity and uncertainty in sentencing, the Alaska legislature enacted a Revised Criminal Code in 1978 which created a presumptive sentencing system in Alaska. Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws

the Attorney General's ban on plea bargaining;⁹ and (4) changes in the public's attitude toward tougher sentences.¹⁰ Alaska attempted to use its oil wealth during the 1980s to accommodate prison population increases, but this approach ultimately proved unsuccessful.¹¹ The result, as in many other states, is that Alaska now has overcrowded prisons.

Prison overcrowding is not a new phenomenon in Alaska or any other state. In fact, there has hardly been a time in the history of the United States that the nation's prisons have not been criticized as being too crowded.¹² What is new, however, is the willingness of the courts to take an aggressive role in hearing prisoners' cases and declaring prison conditions unconstitutional based on overcrowding.¹³ According to a report by the National Prison Project, the entire prison systems of ten states are operating under court orders or consent decrees, and thirty other states have at least one institution under order or decree due to overcrowding.¹⁴ *Cleary* demonstrates that Alaska has not escaped the judiciary's increased willingness to review the conditions inside state prisons.

(effective Jan. 1 1980). For an excellent discussion of the historical development and main features of Alaska's presumptive sentencing system, see Stern, *Presumptive Sentencing in Alaska*, 2 ALASKA L. REV. 227 (1985).

9. Plea bargaining was officially banned in 1975 by then Attorney General Avrum Gross. This policy, although altered in practice, remains in place today. For a bibliography and concise history of the evolution of the plea bargaining ban in Alaska see DiPietro, *The Development of Appellate Sentencing Law in Alaska*, 7 ALASKA L. REV. 265, 274 n.69 (1990). For a more complete discussion of the history of Alaska's plea bargaining, see Carns, *A Reevaluation of Alaska's Plea Bargaining Ban*, 8 ALASKA L. REV. — (June 1991).

10. 1990 JUDICIAL REPORT, *supra* note 6, at Chapter IV at 6. Other factors contributing to the growth in prison population include increases in the general population and state resources, and increases in funding for the police, prosecutors and courts. *Id.* See 1990 SENTENCING COMM'N REPORT, *supra* note 5, at 22-28. See also ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCES: 1984 (1987) (concluding in part that increased funding for law enforcement and prosecution, and the plea bargaining ban, rather than presumptive sentencing, were the principle causes of prison overcrowding); Torgerson, HOUSE RESEARCH AGENCY REPORT, THE IMPACT OF PRESUMPTIVE SENTENCING ON ALASKA'S PRISON POPULATION 13-27 (1986) (analyzing the effect of changes in the sentencing laws on prison populations).

11. 1990 SENTENCING COMM'N REPORT, *supra* note 5, at 4. Alaska spent \$127.4 million for prison construction, renovation and repair during the 1980s. *Id.* In 1986, a sharp drop in world oil prices drastically reduced Alaska's revenues and created economic difficulties for the state and the criminal justice system. 1990 JUDICIAL COUNCIL REPORT, *supra* note 6, at 4.

12. Bleich, *supra* note 3, at 1144 (noting criticism of crowded prison conditions since the late eighteenth century).

13. *Id.* at 1149.

14. NATIONAL PRISON PROJECT, STATUS REPORT: THE COURTS AND PRISONS i (1988).

III. THE *Cleary* Settlement

In 1981, a prisoner class action suit was filed against the state of Alaska alleging, inter alia, that the crowded conditions of the state's prison facilities violated the United States Constitution's eighth amendment prohibition against cruel and unusual punishment.¹⁵ In 1985, the trial court concluded¹⁶ that the plaintiffs had failed to demonstrate by a preponderance of the evidence that any pretrial detainee or inmate of the Alaska system had been punished in violation of the eighth amendment,¹⁷ the due process clause of the fourteenth amendment,¹⁸ or the cruel and unusual punishment clause of the Alaska Constitution.¹⁹ The court further stated that, with a few noted exceptions,²⁰ Alaska's prisons were not unconstitutionally overcrowded.²¹ However, the court concluded that because of the near-capacity populations at all of the institutions, presumptive population caps were necessary in order to prevent unconstitutional overcrowding from occurring in the future.

The court set tentative population caps, subject to revision pursuant to further comment by both parties and further consideration by the court.²² The state obtained a stay from the Alaska Supreme Court, pending appeal of these population caps and other remedies, and both the state and the prisoners filed cross-appeals raising twenty-five issues. Partly because of the lengthy and complicated record on appeal, the parties entered into settlement negotiations in 1988 in an

15. Fourth Amended Complaint at 5, 7, *Cleary v. Smith*, No. 3AN-81-5274 (Alaska Super. Ct. Mar. 1, 1985).

16. Findings of Fact and Conclusions of Law at 27, *Cleary v. Smith*, No. 3AN-81-5274 (Alaska Super. Ct. Mar. 1, 1985) [hereinafter *Cleary* Findings and Conclusions].

17. U.S. CONST. amend. VIII.

18. *Id.* amend. XIV, § 2.

19. ALASKA CONST. art. I, § 12.

20. The court found specific problems in five different institutions. First, numerous inmates at Hiland Mountain Correctional Center were housed on cots in a hallway with access to only one bathroom facility. These conditions were found unconstitutional. Second, at Meadow Creek Correctional Center, the housing of women prisoners in bunk-beds in day-rooms was found to constitute unconstitutional overcrowding. Third, at Cook Inlet Pretrial Facility's Administrative Module, two or more inmates were commonly housed in single moderate-sized punitive or administrative cells (where prisoners are kept 22 hours a day). The court determined that only one inmate could constitutionally be housed in such cells. Fourth, the court noted that further deterioration of conditions at both the Third Avenue and Ridgeview facilities could lead to unconstitutional overcrowding, and thus to the possible closing of the facilities. Finally, the court noted that, in general, the housing of inmates in non-residential areas, such as day-rooms, gymnasiums and hallways, constitutes unconstitutional overcrowding. *Cleary* Findings and Conclusions, *supra* note 16, at 27-28.

21. *Id.* at 27.

22. *Id.*

attempt to resolve the issues on appeal and all other outstanding issues in the case.²³

In September 1990, the court approved a final settlement between the parties which represented a full and final disposition of the lawsuit.²⁴ The settlement was the culmination of over eighteen months and 350 hours of face-to-face negotiations between opposing counsel, and contained provisions addressing nearly every aspect of the prison system.²⁵ The comprehensive agreement established specific mandates for Alaska correctional institutions regarding facility requirements;²⁶ operational requirements;²⁷ rights and opportunities of inmates;²⁸ classification, administrative segregation, discipline and grievances; and overcrowding. The settlement also provides for future monitoring, modification and enforcement of its terms. While many of the settlement provisions are important from a policy perspective, this note focuses on perhaps its most significant aspects: prison overcrowding, population caps and the call for emergency release legislation.

A. Aspects of the Settlement

1. *Overcrowding Provisions and Population Caps.* As noted, in 1985 the trial court did not find Alaska's prisons, taken as a whole, to be unconstitutionally overcrowded. The court did, however, set presumptive caps on the prison population for each facility.²⁹ The final settlement agreement and order altered the tentative caps set by the court in 1985, and adopted a different approach to determining maximum capacity. The agreement requires the Department of Corrections ("the Department") to promulgate regulations by which the

23. Telephone interview with Michael J. Stark, Assistant Attorney General of the State of Alaska (Jan. 2, 1991) [hereinafter "Stark Interview"]. Stark has served as counsel for the state in *Cleary* since the case was filed in 1981.

24. Final Settlement Agreement and Order, *Cleary v. Smith*, No. 3AN-81-5274 (Alaska Super. Ct. Sept. 21, 1990) [hereinafter "*Cleary* Settlement"]. The Alaska Rules of Civil Procedure require judicial approval of the settlement of a class action. ALASKA R. CIV. P. 23(e).

25. Stark Interview, *supra* note 23.

26. The specific mandates include specifications for heat, lighting and ventilation, non-smoking areas, plumbing, gymnasium and recreation areas, a law library, cell size, day room space, program support space, visitation rooms, attorney-client rooms, staff space and new facilities for women. *Cleary* Settlement, *supra* note 24, at 4-8.

27. These specific mandates include provisions for staffing, staff training, fire and life safety, sanitation, inmate personal hygiene, inmate clothing, bedding, housing, food services, medical and dental care, and mental health services. *Id.* at 9-20.

28. These include specifications for exercise and recreation, visitation, telephone communication, mail communication, inmate information, access to courts and legal services, access to the law library and legal materials, religious freedom, inmate businesses, commissary privileges and inmate councils. *Id.* at 24-43.

29. See *supra* notes 20-21 and accompanying text.

maximum capacity of each facility shall be determined.³⁰ The parties acknowledged in the settlement agreement that the application of the enumerated criteria would essentially establish prison population caps at each institution.³¹ However, by providing a formula for determining maximum capacity, rather than concrete numbers, the settlement potentially allows for adjustments based on any increases in staff, space or facilities.³² Additionally, the settlement prospectively establishes the dimensions of prison cells in all future facilities in Alaska.³³

30. *Cleary Settlement*, *supra* note 24, at 70.

31. *Id.* at 74. Given present staffing, programming resources, and cell, dormitory and day-room size, the parties acknowledged that the application of the criteria would result in the following maximum capacities:

FACILITY	MAXIMUM CAPACITY	SPECIAL BEDS	EMERGENCY CAPACITY
Cook Inlet Pretrial Facility	397	12	403
Sixth Avenue - Anchorage	104	7	108
Hiland Mountain Correctional Center	225	10	230
Meadow Creek Correctional Center	62	7	66
Palmer Medium Correctional Center	165	10	170
Palmer Minimum Correctional Center	130	0	130
Mat-Su Pretrial Facility	76	6	79
Wildwood Correctional Center	204	12	210
Wildwood Pretrial Facility	112	2	113
Fairbanks Correctional Center	183	21	194
Lemon Creek Correctional Center	164	12	170
Spring Creek Correctional Center	412	32	428
Anvil Mountain Correctional Center	102	4	104
Yukon Kuskokwim Correctional Center	88	8	92
Ketchikan Correctional Center	53	11	59

Id. at 74. Totalling these columns reveals that Alaska's prison system has a maximum inmate capacity of 2477, a maximum special bed capacity of 154, and a maximum emergency capacity of 2556. The "Emergency Capacity" figures were calculated by adding one-half of the special beds at a facility to the maximum capacity of that facility. *Id.* at 75. The parties also agreed that three institutions could conditionally operate for one year at slightly higher capacities: Fairbanks Correctional Center (202); Lemon Creek Correctional Center (175); and Yukon Kuskokwim Correctional Center (100). *Id.* at 74-75.

32. *Id.* at 70-75.

33. The required specifications are a minimum of 60 square feet for one inmate, 80 square feet for two inmates, and 140 square feet for three inmates. *Id.* at 73. In cells used for inmates that are locked down more than ten hours per day, these figures increase to 80, 90 and 150 respectively. *Id.* at 74. The standard of 60 square feet per prisoner is consistent with that recommended by the American Correctional Association and has been adopted by at least two federal courts in remedying constitutional violations by state prisons. Bleich, *supra* note 3, at 1138-39.

While the prisoners originally demanded binding³⁴ population caps, the actual figures employed were mostly suggested by the Department itself.³⁵ Comparing the capacity limits from *Cleary* with the capacity limits given by the Department in its 1989 year-end report, only five facilities will have their capacities reduced by the settlement, and the total reduction in maximum capacity will be only thirty-nine inmates.³⁶ The important difference, however, is that the *Cleary* limits, unlike the Department's limits, are binding on the state. As a result, failure to comply with the agreement may result in contempt proceedings and other forms of judicial intervention.³⁷

2. *Emergency Overcrowding Legislation.* While prison overcrowding in Alaska is not as pervasive as it is in many other states, future increases in prison population may overwhelm Alaska's system.³⁸ To avoid such a contingency, the *Cleary* settlement requires the Department to seek legislative approval of a prison overcrowding emergency act that will prevent future overcrowding.³⁹ The legislature is not obliged to pass such an act, and given the controversial

34. See *infra* notes 50-51 and accompanying text for a discussion of the legal force of the *Cleary* Settlement.

35. Stark Interview, *supra* note 23.

36. These facilities are Fairbanks Correctional Center (reduced by 17); Sixth Avenue Anchorage (reduced by 12); Hiland Mountain Correctional Center (reduced by 4); Lemon Creek Correctional Center (reduced by 10); and Ketchikan Correctional Center (reduced by 10). See DEPARTMENT OF CORRECTIONS, FACT SHEET FOR 1989 (1990). The maximum capacity figures of three facilities were actually increased by the *Cleary* settlement: Meadow Creek (increased by 6); Mat-Su (increased by 2); and Wildwood (increased by 6). *Id.*

37. See *infra* notes 53-54 and accompanying text for discussion of the *Cleary* Settlement's legal force.

38. See *supra* note 7 and accompanying text.

39. According to the provisions of the settlement, this legislation shall include:

1. Provision for the declaration of an overcrowding emergency once the statewide population exceeds maximum capacity for a period of 30 consecutive days.
2. Provision for special discretionary parole consideration of inmates who have served at least one-half of their sentences and who have been presumptively sentenced for a crime other than an unclassified or an A felony; a Class B felony against a person under [Alaska Statute § 11.41], arson under [Alaska Statute § 11.46.010], criminal mischief under [Alaska Statute § 11.46.480], or attempt or solicitation to commit an A felony under [Alaska Statute § 11.31.100] or [Alaska Statute § 11.31.110].
3. Provision for early release of eligible inmates into supervised probation or parole who have served at least half of their sentence and have no more than 120 days remaining to serve on their sentence, if special discretionary parole consideration and release does not eliminate the overcrowding emergency.
4. Provision for a repeat of special discretionary parole and early release consideration as may be necessary to relieve overcrowding.

nature of the subject matter, the legislature may choose not to do so. The settlement provides, however, that if such legislation is not enacted by the end of the 1991 legislative session, plaintiffs may file an action to determine the appropriate capacities for each facility and the remedies available when such capacities are exceeded.⁴⁰

The agreement also contains provisions that bind the Department during the interim period until emergency overcrowding legislation is passed. If legislation is not enacted, the agreement provides for the continued operation of these interim provisions and for further judicial involvement.⁴¹ These provisions work as follows. The Department first agrees in principle to prevent prison populations from exceeding emergency capacity. The Department also agrees to take all reasonable steps to ensure that facilities operate at or below maximum capacity and do not reach emergency capacity.⁴² Further, no individual facility may exceed its emergency capacity for ten consecutive days, or for a total of thirty days in any ninety-day period.⁴³ The total inmate population may not exceed emergency capacity for thirty consecutive days, or for a total of forty-five days in any ninety-day period.⁴⁴

The settlement then provides for specific departmental responses when populations exceed emergency capacity for periods longer than those stated above. If the population at an individual facility exceeds emergency capacity for ten consecutive days, the Department must immediately take action to reduce the inmate population to below maximum capacity within twenty days.⁴⁵ If the Department is unable or unwilling to do this, or if the population in a single facility exceeds emergency capacity for thirty days in any ninety-day period, the Department must immediately report to the court and present a plan for reducing population below maximum capacity within twenty days.⁴⁶ At such a time, plaintiffs are entitled to present objections or requests for other relief.⁴⁷

Cleary Settlement, supra note 24, at 69-70.

40. As a defense to such a claim, the Department reserves the right to assert that the court lacks the authority to impose such capacities since unconstitutional overcrowding is a threshold requirement for the court to impose remedies. *Cleary Settlement, supra note 24, at 77.*

41. *Id.* at 77.

42. *Id.*

43. *Id.* "Emergency capacity" is defined as "maximum capacity . . . plus inmates occupying one-half of the number of special beds." *Id.* Special beds are those allotted for temporary detention, segregation and medical care. Maximum capacity is defined according to the criteria set forth in the settlement. *See supra* notes 31-33 and accompanying text.

44. *Cleary Settlement, supra note 24, at 75.*

45. *Id.* at 75-76.

46. *Id.* at 76.

47. *Id.*

If the total inmate population exceeds emergency capacity in violation of the above provisions, the Department "must immediately report to the court and present for approval a plan which provides for the reduction of the inmate population to below maximum capacity in each of the Department's facilities within 30 days, and a plan which will maintain the population level at or below maximum capacity."⁴⁸

These interim provisions will be superseded if and when the Alaska legislature passes emergency overcrowding legislation consistent with *Cleary*. If the legislature chooses not to enact such legislation, the provisions will continue to operate. Regardless of the legislature's choice, the population caps and the extensive operating provisions of *Cleary* are here to stay.

B. Analysis of the Settlement

The *Cleary* settlement is detailed and comprehensive in its provisions for specific changes to Alaska's prison system.⁴⁹ The overcrowding provisions are especially important because they bind the Department in a way that it was not previously bound, and because they provide for the possibility of continued court involvement in Alaska's prison system. The settlement thus represents a significant victory for those incarcerated in Alaska's prisons. The state, on the other hand, faces costly compliance with the provisions of *Cleary*, as well as some loss of control over the maintenance of the prison system.

From a legal standpoint, these settlement provisions are binding on the state and are enforceable in a court of law. Settlements are treated as contracts in Alaska and are governed by state contract law.⁵⁰ A breach of the settlement agreement by the state would entitle prisoners to sue for contempt in order to ensure compliance.⁵¹ Thus, the *Cleary* settlement operates like a private contract, and the promises made by the state in the settlement are legally binding on the state, the Department and the citizens of Alaska.

Given this binding quality, the Department appears to have lost much of its previous discretion. Prior to *Cleary*, the Alaska prison system was subject only to the general eighth amendment prohibition against overcrowding. The enforcement of this prohibition, however,

48. *Id.*

49. *See supra* notes 25-28 and accompanying text.

50. 15A C.J.S. *Compromise and Settlement* § 22 (1967 & Supp. 1990). A policy in Alaska favors the termination of litigation and encourages settlements. *Mitchell v. Mitchell*, 655 P.2d 748, 751 (Alaska 1982).

51. *Cleary* Settlement, *supra* note 24, at 80. However, an inmate must exhaust the administrative grievance procedure set out in Section VII.E of the settlement prior to filing an action for contempt. *Id.* at 65-69. Section VIII.F contemplates a new action regarding overcrowding if emergency overcrowding legislation is not enacted. *Id.* at 77.

required a lawsuit, which in turn required resources and time. Without a specific court order, the Department enjoyed significant flexibility in resolving temporary increases or fluctuations in the prison population. A legal challenge to departmental action based on overcapacity of the prisons would take years and would not immediately affect current practices. The ability to exceed capacity temporarily in response to increasing prison populations was a powerful tool for the Department of Corrections.

The *Cleary* settlement significantly reduced this flexibility. In addition to facility and operational requirements, the settlement essentially sets specific population caps at individual institutions. If these caps are exceeded for specified periods of time, the settlement requires the Department to reduce the prison population and to report to the court with a plan for these reductions. If the Alaska legislature enacts emergency overcrowding legislation, increases in population that exceed the caps will result in the early release of certain prisoners.⁵² Either way, the Department will remain bound by the population caps set forth in *Cleary* and will have less flexibility to allow populations temporarily to exceed capacity.

Another legacy of *Cleary* is the prospect of continued court involvement in Alaska's prison system. As noted, the settlement functions like a contract. If the state fails to comply with the essential elements of the settlement, the prisoners may bring an action for breach of the agreement. Specific settlement provisions also ensure continued judicial supervision at various points in the compliance process.⁵³ While the prisoners' dismissal of the suit was an important consideration in the state's decision to settle, the *Cleary* settlement does not guarantee that the plaintiffs will never be heard from again. Compliance with *Cleary* will be complex and ongoing, and the courts will remain involved in Alaska's prison system for some time to come.⁵⁴

52. If emergency overcrowding legislation is enacted, the settlement bars prisoners from bringing an action for overcrowding even if emergency capacities are exceeded. This guarantee was an important element of consideration received by the state in the settlement. *Id.* at 83.

53. *See id.* at 82-83.

54. *See, e.g.,* Hirschhorn, *Where the Money Is: Remedies to Finance Compliance with Strict Structural Injunctions*, 82 MICH. L. REV. 1815 (1984) (examining the systemic enforcement of the eighth amendment in prison condition cases); Starr, *Accommodation and Accountability: A Strategy for Judicial Enforcement of Institutional Reform Decrees*, 32 ALA. L. REV. 399 (1981) (proposing general strategy for courts to facilitate, rather than engineer, institutional changes); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978) (surveying the difficulties courts face in devising effective remedies to social problems and discussing the various interests affected by the remedial activities of the courts); Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981)

IV. THE LEGISLATIVE RESPONSE

The *Cleary* settlement calls for both a short-term and a long-term response from the Alaska legislature. In the short term, the settlement requires the Department to seek legislative approval of an emergency overcrowding act but does not obligate the legislature to pass such an act.⁵⁵ The problem of overcrowding in Alaska's prisons is not likely to disappear, however, even if emergency overcrowding legislation is passed. Population increases and the continued application of Alaska's tough sentencing laws will add prisoners to an already burdened system. At some point, the legislature will have to make difficult, long-term decisions about the overall structure of Alaska's criminal justice system, or else face the possibility of federal court intervention should the situation deteriorate further.⁵⁶

This section examines the different forms that a legislative response to *Cleary* may take, briefly outlining the long-term options available and then focusing on the short-term response of emergency overcrowding legislation.

A. The Long-Term Response to *Cleary*

Most commentators agree that the ideal response to prison overcrowding would involve a long-term, comprehensive reworking of the criminal justice system rather than a short-term adjustment.⁵⁷ Recognizing the importance of formulating a coherent long-term solution to the overcrowding problem, the Alaska legislature established the

(examining the power available to federal courts to enforce decrees in prison crowding cases); Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367 (1977) (suggesting framework courts can use to prod other branches of government to initiate prison reform independently).

55. See *supra* note 39 and accompanying text.

56. Possible remedies include the following: closing of unconstitutional facilities, *Miller v. Carson*, 563 F.2d 741, 747-48 (5th Cir. 1977); ordering the release of inmates to relieve overcrowding, *Ruiz v. Estelle*, 679 F.2d 1115, 1148 (5th Cir. 1982), *modified on rehearing*, 688 F.2d 266 (5th Cir. 1982) (*per curiam*), *cert. denied*, 460 U.S. 1042 (1983); proceeding by way of contempt, *Mobile County Jail Inmates v. Purvis*, 551 F. Supp. 92 (S.D. Ala. 1982), *aff'd*, 703 F.2d 580 (11th Cir. 1983); and ordering the construction of new facilities. *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974), *cert. denied sub nom. Hall v. Inmates of Suffolk County Jail*, 419 U.S. 977 (1974); see *Crain v. Bordenkircher*, 342 S.E.2d 422, 448 n.17 (W. Va. 1986) (citing federal court cases imposing these remedies); Note, *Releasing Inmates from State and County Correctional Institutions: The Propriety of Federal Court Release Orders*, 64 TEX. L. REV. 1165 (1986) (discussing remedies employed by federal courts in overcrowding cases).

57. See, e.g., N. MORRIS & M. TONRY, *BETWEEN PRISON AND PROBATION* (1990); Austin, *Using Early Release to Relieve Prison Crowding: A Dilemma in Public Policy*, 32 CRIME & DELINQ. 404, 443 (1986); THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, *Our Crowded Prisons*, 478 ANNALS 1 (1985); *Symposium:*

Alaska Sentencing Commission in 1990. The Commission's task is to evaluate the effect of sentencing laws and practices on the criminal justice system, and to make recommendations for improving sentencing practices.⁵⁸ While a comprehensive analysis of such long-term solutions to Alaska's overcrowding problem is beyond the scope of this Note, it is useful at this point to at least outline the basic approaches that may be available in formulating a long-term solution.

There are two basic approaches to solving a crisis in prison population: accommodate population increases by building more prisons, or halt the increases by either reducing the number of prisoners incarcerated or by reducing the length of their sentences.⁵⁹ The first approach is perhaps the most immediately intuitive response to an overcrowding problem, and has been adopted in many states including to some extent Alaska.⁶⁰ Some commentators have rejected this approach, however, noting that prison populations tend to increase as fast as, or faster than, space does.⁶¹ These commentators thus deny that "building yourself out of the problem" is a viable option.⁶² The second basic approach alleviates overcrowding by reducing the prison population, so that existing facilities can accommodate the prisoners to be incarcerated. The legislative devices used to reduce the prison population fall into two categories: "front-end" and "rear-end" mechanisms. A front-end mechanism seeks to reduce the number of people entering prison, while a rear-end mechanism seeks to increase the number of people leaving prison.⁶³ Front-end mechanisms include alternatives to incarceration, decriminalization of certain offenses, removal of penal sanctions for certain offenses or presumptions against

Prison Crowding, 1984 U. ILL. L. REV. 203; *Colloquium: The Prison Overcrowding Crisis*, 12 N.Y.U. REV. L. & SOC. CHANGE 1 (1984).

58. ALASKA STAT. § 44.19.569 (Supp. 1990). For information about the Commission's membership and work plans, see 1990 SENTENCING COMM'N REPORT, *supra* note 5.

59. See Torgerson, *supra* note 10, at vi.

60. During the 1980s, Alaska spent \$127.4 million for prison construction, renovation and repair. 1990 SENTENCING COMM'N REPORT, *supra* note 5, at 3.

61. See, e.g., J. MULLEN, K. CARLSON & B. SMITH, 1 AMERICAN PRISONS AND JAILS 38, 120 (1980) (arguing that prison capacity drives prison population, rather than the reverse). For a criticism of this thesis, see Blumstein, Cohen, & Gooding, *The Influence of Capacity on Prison Population: A Critical Review of Some Recent Evidence*, 29 CRIME & DELINQ. 1 (1983).

62. See, e.g., EDNA MCCONNELL CLARK FOUNDATION, OVERCROWDED TIME: WHY PRISONS ARE SO CROWDED AND WHAT CAN BE DONE 25 (1982) ("prison overcrowding is not something we can build our way out of"). California, for example, projects that its prisons will be more crowded after spending six billion dollars on prison construction, than they were before. 1990 SENTENCING COMM'N REPORT, *supra* note 5, at 3.

63. Weatherburn, *Reducing the New South Wales Prison Population: Sentencing Reform and Early Release*, 10 CRIM. L.J. 119, 128 (1986); see also Weatherburn,

imprisonment.⁶⁴ By contrast, decreases in the length of sentences, introduction of parole or work release and emergency overcrowding release provisions all constitute rear-end solutions since they effectively shorten incarceration periods.⁶⁵

The basic approaches of increasing capacity or reducing prison populations vary both in their application and in their efficacy, depending on the system to which they are applied. The legislature has taken an important first step toward an effective long-term response by establishing the Alaska Sentencing Commission. This commission, with the continued support of the legislature, will have the time and resources to document the underlying causes of Alaska's overcrowding problem and to analyze the most effective responses available. With this documentation and research in place, the legislature will then be prepared to engage in a meaningful public debate on the best solution to Alaska's problem.

B. The Short-Term Response to *Cleary*

The *Cleary* settlement demands a response from the state of Alaska. While most people would agree that a comprehensive, long-term solution would be preferable to a stop-gap, short-term solution,⁶⁶ this theoretical preference does not eliminate the need for an immediate response to overcrowding. Such a response may take the form of non-action, or it may involve substantial changes in the system. Either way, the legislature will have "responded," and will be sending a clear message to parties concerned with the problem, including the courts. The most immediate concern for the legislature is the settlement's call for emergency overcrowding legislation. If the legislature fails to enact such legislation consistent with the terms of the settlement, the state is likely to find itself back in court.⁶⁷ The crucial questions, therefore, are whether Alaska should enact such legislation and, if so, what form the legislation should take.

1. *The Example of Other States.* At least thirteen states currently have emergency overcrowding legislation that provides for the early release of prisoners when prison populations exceed specified levels.⁶⁸

Note: Front-End versus Rear-End Solutions to Prison Overcrowding; A Reply to Professor Harding. 21 AUSTL. & N.Z. J. CRIMINOLOGY 117 (1988).

64. Weatherburn, *Note: Front-end Versus Rear-End Solutions to Prison Overcrowding; A Reply to Professor Harding*, *supra* note 63, at 117.

65. Professor Weatherburn did not favor one of these methods over the other as a solution to prison overcrowding in New South Wales or any other state. *Id.* at 119.

66. See *supra* notes 61-62 and accompanying text.

67. *Cleary* Settlement, *supra* note 24, at 77.

68. ARK. STAT. ANN. §§ 12-28-601 to -606 (Supp. 1989); CONN. GEN. STAT. §§ 18-87e, -87f, -87k (1988 & Supp. 1990); D.C. CODE ANN. §§ 24-901 to -905 (1981

All of these states have experienced judicial intervention in their systems as a result of overcrowding or improper operation of prison facilities. As might be expected, early release legislation is extremely unpopular, and is a highly controversial approach to alleviating prison overcrowding.⁶⁹ Legislators in these states, however, faced with the possibility of court-ordered closing of institutions and the wide-scale release of prisoners, reluctantly enacted early release legislation. While certainly not ideal, such a response allows the legislature to control which prisoners are released and thus helps protect citizens from violent early release crime.

Early release programs, which have arisen both with and without early release legislation,⁷⁰ vary primarily in terms of their sentencing structure: whether a state utilizes determinate or indeterminate sentencing.⁷¹ In general, states with determinate sentencing schemes employ existing good-time provisions to move up predetermined inmate release dates. Indeterminate sentencing states, on the other hand, tend to use an accelerated parole-board hearing method that brings inmates before the parole board sooner.⁷²

& Supp. 1990); FLA. STAT. ANN. § 944.598 (West Supp. 1990); GA. CODE ANN. §§ 42-2-14, -9-60 (1989 & Supp. 1990); LA. REV. STAT. ANN. § 15:764 (West Supp. 1990); MISS. CODE ANN. §§ 47-5-701 to -731 (Supp. 1990); OHIO REV. CODE ANN. § 2967.18 (Anderson Supp. 1990); OKLA. STAT. tit. 57, §§ 570 to 576 (Supp. 1991); S.C. CODE ANN. §§ 24-3-1110 to -2060 (Law. Co-op. 1976); TENN. CODE ANN. §§ 41-1-501 to -510 (1990); TEX. GOV'T CODE ANN. § 498.025 (Vernon 1990); WASH. REV. CODE § 9.94A.160 (1988 & Supp. 1990); see also Reed, *Prison Overcrowding: The Connecticut Response*, 7 W. NEW ENG. L. REV. 389 (1984) (analyzing Connecticut's Emergency Overcrowding Powers Act); *Keeping the Lid on Prisons*, 5 Nat'l L.J. 1 (Dec. 13, 1982) (discussing early release statutes); Note, *1989 Georgia Legislation: Penal Institutions*, 6 GA. ST. U. L. REV. 287 (1989) (summarizing the statute and its legislative history).

Perhaps the most well-known emergency overcrowding law was Michigan's, which was repealed in 1987 MICH. COMP. LAWS § 800.71 (1982), repealed by P.A. 1987, No. 101, § 1 (eff. Jan. 1, 1988).

69. Austin, *supra* note 57, at 405, 409.

70. To alleviate prison overcrowding, some state governors, including Alaska's, have utilized their pardon authority to release prisoners without the benefit of emergency overcrowding legislation. Illinois' governor implemented a massive early release program between 1980 and 1983 without the backing of the state legislature, releasing over 21,000 prisoners. The Illinois Supreme Court significantly restricted this program in 1983. Austin, *supra* note 57, at 443. In Alaska, Governor Sheffield implemented an emergency release system in 1983 entitled the *Emergency Conditional Commutation Release Plan*. Between 1983 and 1986, approximately 194 prisoners were granted early release under this plan. TORGERSON, HOUSE RESEARCH AGENCY REPORT, THE IMPACT OF PRESUMPTIVE SENTENCING ON ALASKA'S PRISON POPULATION 86-D (1986).

71. Austin, *supra* note 57, at 405.

72. *Id.* at 405.

One fundamental characteristic of all emergency release legislation is a provision barring the release of prisoners who would pose a safety hazard to the public. Again, the exact mechanism tends to differ according to a state's sentencing structure. In indeterminate sentencing states, a board or committee usually reviews the prisoners that may be released.⁷³ If the board concludes that a particular prisoner may pose a hazard to the public, then that prisoner will be denied early release. Determinate sentencing states usually establish categories of offenders who will be excluded from the early release mechanisms.⁷⁴ This approach ensures that prisoners incarcerated for violent crimes and severe crimes will not be considered for early release.

The success of other states' early release programs is difficult to gauge because of the many competing policy considerations involved. For instance, one can debate whether success should be defined by effective decreases in prison population, by public support for such programs or by cost-benefit analyses of early release versus other possible solutions. Furthermore, early release programs are often indicative of the dramatic failures of the criminal justice system. It seems improper to attribute "success" to a program that is little more than a last-ditch effort to salvage the remains of a rapidly deteriorating system.

Despite these many differences, there are several aspects of early release programs that seem to be consistent from state to state. First, early release measures are almost always viewed as short-term and emergency-only options, not as coherent, long-term solutions to overcrowding.⁷⁵ Second, such measures are universally unpopular among the citizens of states adopting the programs.⁷⁶ Finally, early release programs are practical, immediate alternatives to significant court intervention in prison systems, and are effective in reducing prison populations.⁷⁷

2. *The Argument For Emergency Overcrowding Legislation in Alaska.* As discussed, few supporters of emergency release legislation view it as a realistic long-term solution to prison overcrowding.⁷⁸

73. See, e.g., TENN. CODE ANN. § 41-1-505 (1990).

74. See, e.g., OKLA. STAT. tit. 57, § 573 (1991); see also *Cleary Settlement*, *supra* note 24, at 70 (suggesting categories of offenders to be excluded from Alaska's emergency release program).

75. Austin, *supra* note 57, at 413.

76. Early release schemes frequently come under public scrutiny when an early release prisoner commits another crime against a citizen. This exact scenario led to the recent repeal of Michigan's early release plan, which had been the prototype of early release programs. See *supra* note 68; see also Austin, *supra* note 57, at 447.

77. Austin, *supra* note 57, at 405.

78. See *supra* note 57 and accompanying text.

Nevertheless, as a short-term, stop-gap measure, such legislation may appeal to the Alaska legislature for several reasons. First, emergency release legislation provides a practical solution to an immediate problem and prevents federal courts from intruding into the state prison system. Second, emergency release legislation is a safety valve to be used only in emergency situations, and if wide-scale releases result, the public might respond with an increased commitment of resources. Finally, emergency release programs are cost-effective, and public safety can be adequately protected by screening prisoners eligible for release. This section will discuss these arguments in favor of emergency overcrowding legislation in Alaska.

Emergency release plans provide a practical, workable solution to a problem in need of immediate resolution.⁷⁹ The plans work as they are supposed to, and effectively control prison populations on an ongoing basis.⁸⁰ In Alaska's case, such legislation would ensure that the prison system remains in compliance with the population capacity figures established by the *Cleary* settlement. Thus, the Alaska Legislature may view the enactment of emergency overcrowding legislation as an effective means of temporarily restraining the prison population until a more permanent, long-term solution can be found.⁸¹

Relatedly, the enactment of emergency release legislation will extricate the courts from the prison system.⁸² Many states whose prison systems are under federal court order view such legislation as a means of preventing the federal courts' intrusion into a distinctly local problem.⁸³ While the federal courts are not yet involved in Alaska's prison system, legislators and members of Alaska's executive branch may view the superior court's intervention in *Cleary* as intrusive. If the

79. Stark Interview, *supra* note 23.

80. See Austin, *supra* note 57, at 407 (concluding that Illinois' three-pronged strategy of regulating prison admissions, using early release and expanding prison capacity resulted in Illinois' avoidance of an overcrowding problem and its costly consequences).

81. One practical option available to Alaska might be to enact a temporary, three to five year early release scheme. During this time the legislature could work to eradicate the sources of the problem and, having done this, could allow the early release legislation to expire.

82. *Cleary* Settlement, *supra* note 24, at 77-80. As long as the state complies with the settlement's provisions, the settlement shall be considered final. *Id.* at 80. If emergency overcrowding legislation is not enacted, however, the prisoners reserve the right to file another action against the state. *Id.* at 77.

83. The Governor of Illinois, James R. Thompson, repeatedly stated that the worst approach would be to allow prisons to become overcrowded, thereby inviting the intrusion of federal courts. This belief led him to accept a large-scale early release program. Austin, *supra* note 57, at 440. See *supra* note 70. See also Reed, *supra* note 68, at 391 n.25 (legislative history of Connecticut's Emergency Overcrowding Act indicates that the General Assembly acted primarily to avoid federal court intervention).

court's involvement becomes protracted, the legislature's resentment of the court's involvement is likely to rise. The enactment of emergency overcrowding legislation complying with the *Cleary* settlement would provide a legislative mechanism for controlling prison populations, and thus would reduce the possibility of continued court involvement in Alaska's prison system.⁸⁴

A third rationale supporting emergency release legislation is that it can function as a "safety valve," and need not be used to release prisoners. To avoid the release of prisoners, the state could make long-term adjustments in its criminal justice system to prevent such a contingency from ever occurring.⁸⁵ If, on the other hand, the state did not change the system to reduce the number of incoming prisoners, the legislation would make room for these prisoners by releasing others prior to the expiration of their sentences. Early release legislation, under this rationale, is an important back-up device that works only when necessary, and even then only to the extent required to ensure compliance with the population caps set in *Cleary*.

The wide-scale or repeated release of prisoners could also have the positive long-term effect of educating the public about Alaska's prison overcrowding problem. Commentators have suggested that federal court orders releasing prisoners may be an effective long-term remedy for prison overcrowding if the orders sway public opinion towards increased spending for correctional facilities.⁸⁶ If such legislation worked in Alaska to release significant numbers of prisoners, sufficient public sentiment might be generated to prompt legislative action. The enactment of early release legislation in Alaska could be the drastic measure needed to raise concern and get both public officials and citizens involved in discussing a long-term solution to the overcrowding problem.⁸⁷

As further support for the enactment of early release legislation, public safety could better be protected if the legislation is carefully designed, as it has been in other states, to help minimize crimes by early release prisoners. The "incapacitation theory" posits that the incarceration of criminals protects society from at least those crimes that convicted criminals would have committed had they been on the

84. See *supra* note 52 and accompanying text.

85. Stark Interview, *supra* note 23 (responding to the author's question of whether he thought such legislation was an extreme response given the relatively minor problems in Alaska's system).

86. Note, *supra* note 56, at 1183 (1986). See also Smolla, *Prison Overcrowding and The Courts: A Roadmap For The 1980s*, 1984 U. ILL. L. REV. 389, 421 (concluding that courts play a crucial role in informing public opinion about extreme prison overcrowding).

87. See Comment, *supra* note 54, at 392 (suggesting that cases involving prison conditions have sensitized the public to the need for prison reform).

streets.⁸⁸ By carefully limiting the classes of prisoners eligible for early release,⁸⁹ Alaska could reduce the risk of violent crimes being committed by those released during their "risk window" (the time period between their early release date and their original scheduled release).⁹⁰

Even if some early release prisoners did commit crimes within their "risk window," Alaska is likely to be financially better off than if additional funds had been spent on new prison construction. One in-depth state study showed that the costs to society of these additional crimes were significantly less than the costs the state would have otherwise incurred building and maintaining new prisons.⁹¹ The enactment of early release legislation in Alaska would produce significant savings to the state, by eliminating considerable prison building and maintenance costs, and litigation costs. Effective screening provisions would minimize the economic loss to victims of early release crimes. Aside from the obvious political considerations that would militate against the use of such an economic argument, the cost-effectiveness of early release presents a viable rationale for the enactment of emergency release legislation.⁹²

3. *The Arguments Against Emergency Overcrowding Legislation in Alaska.* Despite the aforementioned benefits, the problems associated with early release programs are more convincing, and confirm that the Alaska Legislature should not enact such legislation. An early release program would directly increase the amount of crime suffered by the public, would compromise general deterrence and would produce a strong negative reaction by the public. Furthermore, emergency release would be inconsistent with the objectives of the Alaska Criminal Code, would promote "dishonesty" in sentencing, and would perpetuate the appearance of overcrowding in Alaska's prisons.

88. W. LAFAVE & A. SCOTT, JR., *CRIMINAL LAW* 23 (West 2d ed. 1986).

89. This type of categorical screening is suggested by the settlement, which excludes the most serious offenders from participation in an early release program. *Cleary Settlement*, *supra* note 24, at 70.

90. Austin, *supra* note 57, at 467-77.

91. A study of Illinois' early release program between 1980 and 1983 concluded that the plan was cost-effective. During this period, \$49 million in prison operating costs were averted. This savings was partially offset by the costs associated with crimes committed by those released early. The costs for processing the 4,500 early release arrests were estimated to be \$3.3 million. More significant were the economic losses suffered by victims of the early release crimes: these costs totaled at least \$13.6 million, a figure that includes the unrecovered value of property and medical services, but does not include other costs such as lowered wages, changes in lifestyle, and psychological pain and suffering. The study concluded that, as a result of the plan, the net savings to the state was \$1,480 per early release prisoner. *Id.* at 408-09.

92. *Id.* at 409.

Emergency release schemes potentially subject the general public to crimes that would not have occurred had the offending prisoner remained in prison. Even a careful screening program cannot fully eliminate the possibility of early release prisoners committing violent or otherwise serious crimes.⁹³ The early release study conducted in Illinois found that, while prisoners selected for early release had a lower one-year rearrest rate (forty-two percent) than prisoners serving their full terms (forty-nine percent), the plan substantially accelerated the incidents of crime suffered by the public.⁹⁴

The threat to public safety is an integral part of incapacitation theory.⁹⁵ Prisoners who remain in jail cannot harm members of the general public, while those released early may commit crimes that they otherwise would have been unable to commit. No screening process can fully eliminate the significant public risk that is directly attributable to an early release scheme.⁹⁶ The fact that early release programs are economically efficient⁹⁷ is of little consolation to the victim of an early release crime.

Furthermore, a well-publicized early release plan might increase the incidents of minor crime by compromising general deterrence. If the public were aware that the system was reducing prison sentences, marginal offenders might be more likely to engage in criminal activity.⁹⁸

93. Reed, *supra* note 68, at 393 n.38 (1984) (noting that, while the Connecticut legislature intended to release as few dangerous and violent individuals as possible, the legislature acknowledged that it was *inevitable* that such prisoners would be released).

94. The study estimated that roughly one percent (4,500 arrests) of the recorded arrests were attributed to early release from 1980 to 1983, and that the actual amount of crime committed by early releases during their risk window was nearly two percent of the total number of reported crimes during that period. Austin, *supra* note 57, at 408.

95. See *supra* note 88 and accompanying text.

96. This incapacitation argument does not reflect a belief that substantial numbers of crimes can be avoided by rejecting the early release option. The argument acknowledges that keeping an inmate incarcerated for an additional 90 days (the hypothetical amount of time cut from his sentence for early release) would at best delay rather than prevent crimes. Austin, *supra* note 57, at 455.

Still, the causal link between an early release and a crime suffered by a citizen during the risk window is virtually impossible for a state to justify. Consider, for example, the Willie Horton debate from the 1988 Presidential election. It came to the attention of the American public that Michael Dukakis' weekend prison furlough program in Massachusetts had resulted in the release of convicted murderer Willie Horton who, while on furlough, raped a Maryland woman and stabbed her husband. The public was outraged, and the story had disastrous effects on Dukakis' campaign. A NEXIS search of newspapers, journals and magazines from 1988 to February 23, 1991 revealed 1186 articles on the Willie Horton incident. Clearly, the public is extremely concerned with the release of potentially violent prisoners.

97. See *supra* note 91 and accompanying text.

98. Austin, *supra* note 57, at 405.

In addition to these practical considerations, theoretical problems also militate against an early release program in Alaska. For example, selective incapacitation — the careful extension or reduction of prison terms according to criteria that establish high-risk and low-risk prisoners⁹⁹ — is one of the most effective forms of screening in terms of public safety, yet it is also the most objectionable in terms of uniformity, certainty and integrity of sentencing. Incapacitating the highest-risk offenders *beyond* current sentences would likely produce a decline in crime rates, but would also have the unsettling effect of punishing persons for crimes they did not commit.¹⁰⁰ By contrast, a method of selective discretionary screening of prisoners for early release, in the form of case-by-case reviews by prisoner parole boards, would avoid this pitfall, but would also inject an element of arbitrariness and disparity into the sentencing process.

Similarly, even if the Alaska Legislature were to follow the *Cleary* settlement and establish specific categories of offenses eligible for release, such an approach would conflict with the Revised Criminal Code's objectives of certainty and uniformity in sentencing.¹⁰¹ Those prisoners who were convicted of crimes that made them ineligible for early release would be treated uniformly. All other prisoners, however, would be subject to uncertain, nonuniform treatment. Sentence lengths for prisoners convicted of the same crime would vary based purely on timing and the chance declaration of an overcrowding emergency.

The enactment of an early release plan in Alaska would also have a negative effect on the public's perception of the criminal justice system. As noted, a well-publicized early release program could compromise effective general deterrence.¹⁰² An early release plan could also

99. Greenwood and Abrahamse argue that selective incapacitation can achieve reductions in both crime rates and prison population growth. Von Hirsch & Gottfredson, *Selective Incapacitation: Some Queries About Research Design and Equity*, 12 N.Y.U. REV. L. & SOC. CHANGE 11, 42-45 (1984) (citing P. GREENWOOD & A. ABRAHAMSE, *SELECTIVE INCAPACITATION* (1982)).

100. *Id.*

101. Alaska enacted a presumptive sentencing system in 1978 with the express purpose of "eliminat[ing] unjustified disparity in sentences imposed on defendants convicted of similar offenses — disparity which is not related to legally relevant sentencing criteria." Stern, *supra* note 8, at 228 (quoting ALASKA SENATE COMM'N ON THE JUDICIARY, COMMENTARY ON THE ALASKA REVISED CRIMINAL CODE, ALASKA SENATE J. SUPP. NO. 47, at 148 (June 12, 1978)). Hanrahan and Greer suggest that "the idea that offenders convicted of similar crimes should receive roughly the same punishment" is universally appealing since "even philosophically or politically diverse groups can agree that deviations from some sentencing norm are undesirable." DiPietro, *supra* note 9, at 269 n.29 (quoting Hanrahan & Greer, *Criminal Code Revision and the Issue of Disparity*, in SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY 35, 36 (M. Forst ed. 1982)).

102. See *supra* note 98 and accompanying text.

cause the public to become further disenchanted with what it already perceives as an ineffective and overly lenient criminal justice system.¹⁰³ The enactment of early release legislation in Alaska would serve notice to the citizens of Alaska that the state had lost effective control of the system.

This "loss of control" would be important to the state of Alaska both practically and theoretically. Early release would seriously compromise the "integrity" of the criminal justice system by eliminating the state's control over the incarceration of its prisoners. Once capacity was reached, the system would be controlled by an automatic release mechanism which the state would be unable to counteract. While the release of prisoners would probably not be extensive immediately, large increases in prison population could eventually result in wide-scale releases, which the state would be powerless to prevent.¹⁰⁴

Theoretically, it is troublesome to modify an aspect of the criminal justice system based on a negative reason such as overcrowding.¹⁰⁵ Ideally, the system should be designed, and changes implemented, based on positive reasons such as goals, values and expectations. If Alaska's goal is to create a rational, uniform and comprehensive sentencing structure,¹⁰⁶ then the enactment of early release legislation would seriously compromise this goal and the integrity of Alaska's criminal justice system.

The enactment of early release legislation, moreover, would promote political manipulation of the overcrowding problem. Early release legislation could allow legislators to avoid the real issues and difficult choices involved with long-term solutions to prison overcrowding. While early release legislation would almost certainly be unpopular, it is conceivable that legislators might seek to pass the blame to the court that approved the *Cleary* settlement, thereby deferring responsibility for the overcrowding problem. The legislature could protest publicly that the courts were "letting out" the very prisoners that the state had worked so hard to put in jail, all the while denying the causal nexus between tougher sentencing laws and strains on prison populations.

With such a release valve in place, other political players could advance their own agendas and their own manipulations of the system. District attorneys could prosecute heavily during election years to

103. Austin, *supra* note 57, at 405.

104. See *supra* note 7, discussing forecasts of Alaska's prison population. *But see* Note, *supra* note 56, at 1183-85 (suggesting that wide-scale releases would have the positive effects of sensitizing the public to the need for prison reform and prompting government officials to authorize additional funding for corrections).

105. N. MORRIS & M. TONRY, *supra* note 57, at 37.

106. See *supra* note 8 and accompanying text.

“put criminals behind bars,” and legislators could campaign on typical “get tough on crime” platforms, confident that the early release mechanism would relieve the problems they were creating.¹⁰⁷ The enactment of early release legislation in Alaska would thus foster “dishonesty” within the criminal justice system. Legislators, prosecutors and the Governor could promote their “get tough on crime” stance and stress the need for “stiffer” sentences while simultaneously providing an escape valve for the release of prisoners they knew could not fit into the system.¹⁰⁸

Legislators should not enact tough sentencing laws unless they are willing to fund the expansion of prison space that such laws will require.¹⁰⁹ The enactment of an early release scheme, however, could shield legislators from having to make hard decisions about sentencing and enforcement policies. What Alaska needs is a well-informed public debate about the goals and functioning of the entire criminal justice system. Early release legislation would be an embarrassing example of the legislature passing the buck by refusing to deal squarely with problems demanding a long-term response.

Professor Bleich describes another potential “political” effect of early release legislation in Alaska.¹¹⁰ Bleich asserts that “crowding” of prisons is not objectively identifiable, but is rather a label used by all participants involved in the overcrowding¹¹¹ debate to pursue their

107. It is common knowledge that each branch of government contributes to the overcrowding problem: legislatures by passing tougher and longer sentences, prosecutors by operating with increased resources and public support, judges by responding to the public's cry for tough sentences and parole boards by hesitating to release prisoners.

108. See *Keeping the Lid on Prisons*, *supra* note 68, at 10, col. 4 (predicting that legislators will increasingly use “relief valves” like early release without addressing the underlying causes of overcrowding).

109. A principle cause of prison overcrowding is faulty legislative planning, which results in major changes in sentencing without accompanying allocations of additional prison resources. Austin, *supra* note 57, at 431. Some commentators have suggested requiring that prison impact statements accompany each new piece of mandatory minimum sentencing legislation, thus forcing legislators to debate openly the costs associated with tough sentencing laws. See, e.g., Blumstein, *Panel: The Question of Appropriate Sentences: Responding to Prison Overcrowding Through Sentencing Policy*, 12 N.Y.U. REV. L. & SOC. CHANGE 85, 134 (1984). The Alaska Sentencing Commission has recognized the need to gather information to aid legislators in making resource allocation decisions. 1990 SENTENCING COMM'N REPORT, *supra* note 5, at 40.

110. Bleich, *supra* note 3.

111. A critic of this terminology, Professor Bleich, states in his article that [t]he term ‘overcrowding’ is redundant at best, since crowding already refers to a higher level of social density than is desired. At worst, the term begs one of the central questions posed by this Comment — namely, at what point does a prison's population become so great that the risks to prisoners' health and safety outweigh society's demand that the prisoners be punished, or that the prisons simply become administratively unmanageable.

own agendas.¹¹² Prisoners are interested in reducing their stay in prison, prison officials in obtaining increased funding, and legislators in garnering public support for additional prison construction.¹¹³ While prison policy decisionmakers have an interest in relieving overcrowded conditions, they also have an interest in perpetuating the appearance of an overcrowding crisis. For example, California prison officials have in the past manipulated administrative mechanisms, such as prisoner transfers, in order to keep their prison populations above rated capacity and thereby assure future appropriations and the retention of key personnel.¹¹⁴

If Bleich's theory is correct, it is doubtful that emergency overcrowding legislation would solve Alaska's overcrowding problem even in the short run, since the problem is not solely attributable to increased prison populations. Such legislation would decrease the numbers of prisoners in Alaska's system, but would not lessen the perception of overcrowding which is vital to the political interests of all parties involved in the debate.

A final argument against emergency overcrowding legislation is that it would be an extreme response to a relatively minor problem. While problem areas certainly exist in Alaska's prisons, Alaska's system compares favorably to other states' systems. Expert testimony in *Cleary* concluded that, in terms of safety and humane treatment of prisoners, Alaska's prisons rank in the top ten of state correctional facilities.¹¹⁵ Serious violent behavior has been absent from Alaska's prisons. At the time of trial in 1984, there was no evidence of a single murder, assault with a weapon or successful suicide.¹¹⁶ As one expert noted, "stabblings, beatings and violent attacks that occur regularly in large state systems, and even small state systems, just aren't present in the State of Alaska correctional system."¹¹⁷

This testimony suggests that some of the principle reasons for enacting emergency overcrowding legislation — to ensure the safety of

Id. at 1125 n.2.

112. *Id.* at 1154.

113. *Id.* at 1154-74; see also Jacobs, *The Politics of Prison Expansion*, 12 N.Y.U. REV. L. & SOC. CHANGE 209 (1984) (discussing the political and legal processes of prison expansion).

114. Bleich, *supra* note 3, at 1176-77; see also Holbert & Call, *The Perspective of State Correctional Officials on Prison Overcrowding: Causes, Court Orders, and Solutions*, 53 FED. PROBATION, Mar. 1989, at 25, 28 (1989) (study analyzing the perspective of state correctional officials found, inter alia, that their favored solution to prison overcrowding is increased hiring of correctional and security staff).

115. *Cleary Findings and Conclusions*, *supra* note 16, at 1-6 (testimony of Anthony Travisono, Executive Director of the American Correctional Association).

116. *Id.* at 3.

117. *Id.* at 4 (testimony of Stan Brodsky, Professor of Psychiatry at the University of Alabama).

prisoners and guards, and avoid prison violence¹¹⁸ — are simply not a factor in Alaska. Conditions in Alaska's prisons are among the best in the nation. It would be senseless to compromise the integrity of a relatively successful system by resorting to the last-gasp tactics of states burdened with much greater problems. Emergency overcrowding legislation may be appropriate in states whose prison systems are on the verge of collapsing, but is inappropriate for Alaska. For all the aforementioned reasons, the Alaska Legislature should reject emergency overcrowding legislation as a response to *Cleary*.

V. CONCLUSION: ALASKA'S LEGISLATIVE RESPONSE

While good news for Alaska's prisoners, the *Cleary* settlement is less satisfactory to the government and citizens of Alaska. The settlement imposes capacity limits on Alaska's institutions and, more importantly, provides for continuing judicial involvement in the prison system should these limits be exceeded. To enforce the prescribed limits, the settlement calls for the enactment of emergency overcrowding legislation that will require the early release of prisoners once the prisons become too crowded. It appears that, with the *Cleary* settlement, Alaska has relinquished control over crucial aspects of the criminal justice system. It is time to regain this control. The legislature should not take the easy way out of this crisis, and should not enact emergency overcrowding legislation.¹¹⁹

For both theoretical and practical reasons, the time is ripe for the legislature and the citizens of Alaska to reestablish control over the criminal justice system. Because of the significant risks of political manipulation, early release legislation should be scrapped, and the legislature should instead begin working on both short-term and long-term responses to *Cleary*. Each party to the debate has a stake in perpetuating the appearance of an overcrowding crisis.¹²⁰ Instead of avoiding the problem, the legislature should confront it directly.

The first goal for the legislature is to limit judicial interference with the prison system by conforming with the mandates of the *Cleary* settlement. The legislature should "ratify" the *Cleary* population caps in the form of legislation. This would send a message to the court that

118. Austin, *supra* note 57, at 410.

119. Just before this Note went to press, SB 215 and HB 224 (both entitled "An Act Relating to Population Management in the State Correctional System") were introduced into the Alaska Senate and House of Representatives. These identical bills, as introduced, follow the guidelines of the *Cleary* settlement. The bills are unlikely to pass unamended and therefore, a substantive discussion of their provisions has not been included.

120. Bleich, *supra* note 3, at 1154.

the state will abide by the settlement's figures. The next step, potentially more difficult from a political standpoint but necessary to satisfy the courts, is to reduce the populations of prisons that are over capacity by placing select prisoners into intensive supervision.¹²¹ This plan of action is not equivalent to enacting early release legislation. The legislature will have regained control of the system by actively deciding to reduce the prison population rather than passively waiting by while the early release mechanism automatically engages.

With the short-term compliance response to *Cleary* in place, the legislature will be ready to begin crafting a long-term response that will guarantee that the overcrowding problem does not recur. Building on the Sentencing Commission's work, the legislature should try to foster public debate on the goals of the criminal justice system and the possible means of maintaining an acceptable prison population. Legislators may decide to limit the number of persons imprisoned by increasing the alternatives to incarceration. These alternatives might comprise a variety of less costly intermediate sanctions, such as intensive supervision. Alternatively, legislators may decide to change the sentencing laws to reduce the incarceration period for certain categories of offenders. A third option is for the legislators to "build themselves out of the crisis," by authorizing the construction of new facilities to keep pace with population increases. The exact form the legislative response should take is beyond the scope of this note. What is important to this author is that the legislature take responsibility for its actions and actively debate and plan for the future.

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121. Intensive supervision programs provide a relatively inexpensive, effective alternative to incarceration, and are suitable for offenders who are considered too serious a risk for routine probation. The programs subject the offender to strict and frequent reporting requirements to a probation officer with a substantially reduced caseload. Furthermore, participants in these programs often pay victim restitution, perform community service, hold a job, submit to random drug and alcohol testing, and pay a probation supervision fee. 1990 SENTENCING COMM'N REPORT, *supra* note 5, at 35. See also N. MORRIS & M. TONRY, *supra* note 57, at 180-86 (discussing intensive supervision and other "intermediate sanctions").

