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PRISON OVERCROWDING—THE TIME FOR POLICY CHANGE HAS COME!

CHARLES M. HARRIS, JR.

The "[lack of bed space to house felons being sentenced in this State in unprecedented numbers has resulted in an undermining of Florida's corrections policy to the extent that punishment and rehabilitation appear to be incidental to other considerations."

In the early 1990's, Florida must come to terms with one of its most pressing problems—prison overcrowding. Overcrowding in Florida prisons has already reached critical levels, and the Florida Legislature no longer has the luxury of sidestepping the issue because it is politically unpalatable. Florida has spent hundreds of millions of dollars to alleviate overcrowding, and yet neither the crisis nor the crime rate have subsided. The Florida correctional system threatens to become a black hole swallowing millions of taxpayer dollars without protecting Florida citizens or their property. Moreover, money wasted on ineffective correctional policies is money that could help alleviate the state's education, transportation, and social welfare needs. Undeniably, correctional policy decisions made in the early 1990's will impact the quality of life in Florida for years to come.

This Comment examines the dimensions of the prison overcrowding crisis in Florida. Specifically, the Comment addresses the use and effect of two attempts by the state to alleviate prison overcrowding: early release credits and prison construction. The Comment then reviews two proposals for restructuring the Florida correctional system to maximize objectives of punishment, deterrence, incapacitation, and rehabilitation. Finally, the Comment assesses the strengths and weaknesses of the two proposals and makes recommendations for future legislation.

I. DIMENSIONS OF THE CRISIS

The dimensions of the prison overcrowding crisis in Florida are alarming. In fiscal year 1988-89, 40,582 persons were admitted to
Florida prisons.² That figure represents nearly a thirty percent increase over total admissions in fiscal year 1987-88.³ By fiscal year 1994-95, the Criminal Justice Estimating Conference (CJEC)⁴ projects that admissions will be over 100,000 annually.⁵ If all those admitted stayed in prison for only one year, the state would need 40,000 new prison beds by 1993; a two-year stay would require 80,000 more beds.⁶

Since Governor Bob Martinez took office in 1987, the legislature has approved only 18,000 additional prison beds.⁷ This increase will expand the state prison capacity by September 1991 to only 50,021 beds.⁸ The CJEC projects that without resorting to early release measures, the prison population will reach 86,479 by June 1991 and 156,000 by 1995.⁹ Based on these estimates, it would cost more than $7 billion to construct and operate enough prison beds to keep up with the exploding prison population.¹⁰ This equals approximately $600 for every Florida citizen.¹¹

An additional pressure to the already overburdened correctional system is Florida's incarceration rate—one of the highest rates in the nation.¹² Between 1978 and 1987, Florida led all states in prison admissions with a 210% increase.¹³ This growth is primarily the result of two factors: a precipitous increase in drug related offenses¹⁴ and the institution of sentencing guidelines.¹⁵ From 1980 to 1988, prison admissions for drug offenses increased 942%.¹⁶ Drug offenders now account for over 35% of all prison admissions, as compared to less than 8% in 1984.¹⁷ Remarkably, law enforcement officials believe that up

³. Id.
⁴. The Criminal Justice Estimating Conference is a group of individuals knowledgeable in the criminal justice system who were appointed to estimate future needs concerning the prison population in Florida. J. ECKERD, ENOUGH IS ENOUGH: SOLVING FLORIDA'S PRISON CRISIS 12, 28 (1990).
⁵. FLA. DEP'T OF CORRECT., supra note 2, at 2.
⁸. FLA. DEP'T OF CORRECT., supra note 2, at 4.
⁹. Id.
¹⁰. J. ECKERD, supra note 4, at 12.
¹¹. Id.
¹². Bird, supra note 6, at 1.
¹³. Id.
¹⁴. Bird, supra note 6, at 1.
¹⁶. Staff Analysis, supra note 1, at 1.
¹⁷. Bird, supra note 6, at 7.
to 90% of crimes are provoked by some degree of drug or substance abuse.\textsuperscript{18}

The adoption of sentencing guidelines in 1972 has also caused a significant increase in prison admissions.\textsuperscript{19} Although these guidelines have been attacked as too lenient, they have actually increased incarceration, particularly for crimes of violence.\textsuperscript{20} Critics maintain that this result is created because many of the laws contain a strong presumption in favor of incarceration for even first-time and petty offenders.\textsuperscript{21} Furthermore, a conviction leaves a judge with little flexibility other than sentencing within guidelines limitations. Often, alternative forms of punishment are not an available option to incarceration because the guidelines favor incarceration and provide minimum and maximum ranges for sentencing.

This crisis in prison overcrowding will continue to escalate until decisive action is taken. Florida, however, is obligated to alleviate prison overcrowding whenever critical levels are reached.\textsuperscript{22} That obligation stems from a 1980 settlement agreement reached in the case of \textit{Costello v. Wainwright},\textsuperscript{23} a class action suit that addressed confinement conditions in the Florida prison system.\textsuperscript{24} As a result, various measures have been implemented to keep prison population levels within acceptable limits. Two measures that have been employed with varying degrees of success are early release credits and accelerated prison construction. Even though these two measures are inherently problematic, each of them serves a necessary and indispensable role in controlling prison overcrowding. Sole reliance on these two measures, however, will not solve the prison dilemma in Florida. The Florida Legislature must adopt a more comprehensive approach supplemented by early release credits and continued prison construction if Florida is to respond adequately to this crisis. A review of the role that early release credits and prison construction have played in controlling prison overcrowding in Florida is helpful in determining their proper use in the future.

\textbf{A. Early Release Credits}

Early release credits have become a central and indispensable tool in prison management. Because prison admissions have increased uncon-
trollably and because prison construction simply has not kept pace, prison officials are left with little choice but to release prisoners early. The result is a system of awarding inmates early release credits that is highly ineffectual and dangerous and that is not as much a tool for control as it is a reaction out of necessity.

When the prison system reaches 97.5 percent capacity, a system of credits is employed leading to early release of eligible inmates. Effective November 1990, Florida prisons may have to release nearly 900 inmates a week in order to comply. Other than a few exceptions such as those convicted of first-degree murder, sex offenses, drug trafficking, or use of a firearm in the commission of a felony, almost every prisoner is eligible for early release credits. This accounts for the fact that nearly ninety percent of Florida's prisoners are "walking out early." According to the CJEC, average inmates in the Florida correctional system actually serve only thirty-five percent of the time to which they are sentenced.

Early release credits are one of the most controversial of all prison policies because almost two-thirds of all offenders released are rearrested within three years. The numerous failures of the early release system regarding convicts who have been released prematurely and who have subsequently victimized citizens have received extensive media coverage. Charles Street typifies this failure. In 1988, Street was released from prison despite having served only one-half of his sentence for attempted murder and despite being far from a model prisoner. He subsequently killed two Miami police officers. On the day he was released to alleviate overcrowding, ten more people were admitted to Florida prisons for writing worthless checks. "Charles

25. Id. at 11. "Gaintime" is a tool by which the Department of Corrections seeks to encourage satisfactory behavior. There are four types: (1) "Basic Gaintime" is awarded at a fixed rate based on the term of the sentence and the date of the offense. Inmates receive ten days of basic gaintime for each month of the sentence imposed upon them. It is not applied to inmates serving life or certain minimum mandatory portions of sentences. Basic gaintime usually reduces the time to be served by about one-third. (2) "Incentive Gaintime" is awarded to inmates for above satisfactory work and adjustment. The awards are made on a monthly basis as earned. The maximum allowance for a month is twenty days. (3) "Meritorious Gaintime" may be awarded to an inmate for an outstanding deed performed. This allows for a maximum award of sixty days. (4) "Provisional Release Credits" (previously "administrative gaintime") are used specifically as an early release mechanism to keep prison populations below the capacity defined by federal court order. Id. at 10, 11.
27. Fla. Dep't of Correct., supra note 2, at 11.
28. Id.
29. Id. at 2.
30. J. Eckerd, supra note 4, at 18.
Street is not an aberration—he is an example of a system gone awry."

Yet undeniably, early release credits are necessary in the management of prisoners. Prisoners are rewarded for good behavior and for making industrious use of their time while incarcerated. This in turn has an obvious deterrent effect on prison violence and thus protects prison guards and other prisoners as well as ensuring efficient and smooth prison management. Elimination of all early release credits would create a volatile prison environment because prisoners would have little incentive to abstain from violence or to cooperate. Clearly, early release credits serve a useful purpose and should not be abolished. The system, however, of awarding credits far in excess of the amount necessary to nearly all prisoners must be changed.

B. Prison Construction

Another strategy used to control prison overcrowding is the construction of additional prison beds. This strategy represents a "get tough" approach to the increases in Florida crime. Proponents of accelerated prison construction claim that removing criminals from society is the best way to ensure public safety because it incapacitates known criminals and serves a deterrent effect. Increases in the rate of incarceration, however, have not and will not solve the crime problem.

A prison construction strategy that attempts to "out-build" prison admissions is both expensive and ineffective. Estimates reflect that the cost of construction is approximately $25,000 per inmate. Further, it costs $15,000 a year to guard and support that inmate. Additionally, by juxtaposing fifteen states that have attempted to "out-build" prison admissions with fifteen other states that have placed greater reliance on alternative forms of punishment, an interesting statistic is realized: over a twenty-year period, crime actually grew faster in fifteen states where prison capacity grew by fifty-six percent than it did in fifteen other states where prison capacity increased by only four percent. Moreover, recent research indicates that persons sentenced to prison return to crime more often after release than similar offenders placed directly in alternative forms of punishment such as com-

33. Glassman, supra note 31, at 77.
34. FLA. DEP'T OF CORRECT., supra note 2, at 10.
35. No Con Job on Doing Time, supra note 7.
36. Id.
37. J. ECKERD, supra note 4, at 11.
Community based programs. This demonstrates that prisons may neither adequately deter criminal activity nor rehabilitate offenders as effectively as alternative options.

Much can be learned from the attempts of other states that have tried to "out-build" the crowding problem. In California, for example, the corrections budget has grown by 400% since 1982, with annual expenditures increasing from $300 million to $1.3 billion in 1988. This huge commitment of money has added 19,000 new prison beds, and yet the California correctional system is still operating at 157% of capacity. Similarly, in 1984 Michigan prisons held 300 prisoners above capacity, and the state's Department of Corrections began a highly ambitious construction program in which the state nearly doubled its capacity. Yet in 1989 Michigan prisons were still overcrowded—this time by more than 3000 prisoners! Consequently, Michigan has now abandoned its "out-build" strategy. Likewise, Texas spent $500 million in 1988 on prison construction but refused to accept new inmates six times in 1989 due to overcrowding. Significantly, despite these monolithic monetary commitments by California, Texas, and Michigan, the crime rate decreased in none of these states.

Florida is currently the fourth largest state in the nation. Nearly 900 people each day move into Florida, and the population of the state is projected to grow to 17.5 million by the year 2010. With this increase in growth, continued construction of prisons will be necessary. Nevertheless, Florida cannot solve its overcrowding problems by attempting to "out-build" prison admissions.

Furthermore, Florida has a limited tax base, and massive infusions of money into corrections undoubtedly will hurt the state's ability to meet its obligations to essential programs such as education, child protection, transportation, and health and human services. As one study suggested, "the construction of tens of thousands of new prison beds . . . [may actually] . . . increase crime rates because funds will be diverted from preventive programs targeted toward children and adolescents preparing for the demanding labor markets of the future."
In light of the experience of other states attempting "out-build" strategies and of the enormous costs involved, an "out-build" strategy is simply not a viable option. In sum, indiscriminate get-tough approaches fill prisons but fail to reduce crime.

II. SEARCHING FOR THE SOLUTION

Early release credits and prison construction are an integral part of prison management and policy in controlling overcrowding. These two measures, however, cannot remain the primary remedies to the overcrowding problem. From 1982 to 1988, the National Jail and Prison Overcrowding Project participated in the efforts of seven states to control prison overcrowding. The project participants concluded that uncoordinated, isolated efforts—such as early release credits and "out-build" prison construction strategies—regardless of resources, will never solve the overcrowding problem. These strategies will inexorably fail because they only treat one aspect of the crowding equation and fail to establish a functional link between population and capacity.' The Florida Legislature must adopt innovative measures, supplemented by early release credits and continued prison construction, to deal effectively with the crisis. Two proposals that present novel approaches toward providing a solution are a demand-side proposal and a proposal that calls for the creation of special correctional districts.

A. A Demand-Side Approach

Under a proposal promulgated by the James Madison Institute for Public Policy, authors Bruce L. Benson and Laurin A. Wollan, Jr., advocate shifting from efforts to solve prison overcrowding by supply-side initiatives (increasing the amount of space for inmates) to a demand-side approach (reducing the number of convicts reaching prison). The authors utilize the "tragedy of the commons" concept to illuminate the nature of the current prison overcrowding problem

47. Id.
48. A nearly identical proposal has been promulgated by Peggy McGarry and Linda Adams in their article Balancing Supply with Demand: A New Approach to Corrections Crowding. See McGarry & Adams, supra note 46, at 84. Their proposal advocates adoption of a concept that would link demand with capacity in the form of policy, sentencing practices, and sanctions. The proposal, however, is a more conceptual argument and lacks the specificity of the demand-side approach herein described. Id.
and to advocate considerably greater discretion for judges in managing and controlling prison overcrowding.\textsuperscript{50}

The tragedy of the commons occurs "[w]hen several individuals are free to graze cattle on the same land, [and thus] each individual has an incentive to use up as much grass as possible before other owners do the same."\textsuperscript{51} Each herder will raise as many head of cattle as possible and overuse the land.\textsuperscript{52} Thus, the commons becomes crowded and the quality of life deteriorates for everyone.\textsuperscript{53} This tragedy is only rectified by the assignment of access rights—only then is each user provided the incentive to graze at a level that allows the land to maintain its productive value.\textsuperscript{54}

So too, the tragedy of the commons exists in the correctional system because judges have common access to the prison system and have virtually no incentive to limit the number of prisoners they incarcerate or to consider alternatives to imprisonment. Moreover, just as overgrazing the commons deteriorates the quality of the herd and is an inefficient use of the land, overcrowding undermines the objectives of the correctional system and results in ineffective use of Florida’s prisons.\textsuperscript{55} The purposes of incarceration are punishment of convicted criminals, deterrence, incapacitation of dangerous felons, and rehabilitation of criminals who can be reformed.\textsuperscript{56} Overcrowding of the prison system, however, necessitates early release programs. In turn, prisoners released early are not punished to the degree that judges, victims, and the public feel is necessary. Further, the early release of violent felons places them back on the streets where they can further victimize the community. Overcrowding also necessitates accelerated prison construction that diverts funds from programs to educate and rehabilitate prisoners.

A demand-side proposal that would rectify this problem and provide the necessary incentive to judges calls for the assignment of a certain number of cells to each individual judge.\textsuperscript{57} As Benson and Wollan suggest:

Each judge would have to determine who should be in his (sic) prison unit and for how long. If a judge crowded his (sic) unit, he (sic)
would be responsible for deciding which prisoners to release. This clearly would create incentives for judges to consider alternative forms of punishment where appropriate and to take care in imposing prison sentences for relatively minor crimes, in order to assure that space is available for criminals who commit more serious crimes.⁵⁸

Nevertheless, this proposal presents problems with allocation. Clearly, simply providing each judge in each jurisdiction with an equal number of prison cells will not be satisfactory. A potentially workable allocation rule, however, is one based on crime rates or arrest rates across jurisdictions. To be effective, this system will have to be flexible—an allocation rule under this system will have to accommodate changing conditions such as those in a growing community.⁵⁹ Furthermore, in the event of an unexpected crime wave, the system should have the flexibility to allow a jurisdiction experiencing the crime wave to acquire prison access from a neighboring jurisdiction experiencing less than anticipated prison admissions. In this way, prison access becomes a transferrable “property right” with the purchase price being “a direct monetary payment from one community’s treasury to another’s.”⁶⁰

Under this proposal, judges are forced to utilize alternatives to incarceration. Essentially, many prisoners will not receive incarceration as their punishment.⁶¹ This potentially could make the proposal politically unacceptable. The effect of overcrowding, however, is already a diminution of the system’s ability to effect its purposes—retribution, deterrence, incapacitation, and rehabilitation.⁶² Currently, as admissions increase, prison officials are forced to release inmates to accommodate new admissions with little respect to the crime committed.

Undesirable early release of prisoners will be less likely to occur under the demand-side proposal because judges will be responsible for their actions or inactions.⁶³ The result will be a concerted effort on the part of judges to keep prison space for violent offenders and to use alternatives to incarceration for nonviolent offenders. Thus, the demand-side proposal creates an early release program that is less mechanical in its application and that is designed to release those prisoners least likely to commit violent crimes in the future.

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⁵⁸. Id.
⁵⁹. Id. at 6-7.
⁶⁰. Id. at 7.
⁶¹. Id. at 8.
⁶². Id.
⁶³. Id.
This proposal creates the incentive now lacking for judges to develop variations on the theme of alternative constraints and forms of punishments. As judges turn their attention to these variations out of necessity created by limited prison space rather than penological desirability, much greater variety in sentencing will emerge, eventually yielding a catalogue of options. The authors advocate as alternatives to incarceration "split sentences," "shock sentences," and "suspended sentences," as well as the alternatives to incarceration enunciated in Section 921.187, Florida Statutes.

Specifically, the authors of this proposal advocate considerably greater reliance on fines and restitution. American courts, they argue, should follow the lead of European courts and impose fines based on ability to pay. This punitive measure is more viable as collection systems such as EFT ("electronic funds transfer") are now commonplace. Compensatory rather than punitive restitution also has not been utilized to the fullest extent possible. Restitution options could be developed to provide the courts with a variety of mechanisms by which offenders' wealth and incomes, present and future, could be connected directly or indirectly with the harms and losses of their victims. Furthermore, restitution can be linked with a powerful incentive measure: as the offender progresses toward fulfillment of the restitutionary obligation, he or she will be rewarded with a gradual reduction of constraints, incarceration, or otherwise.

The demand side proposal of Benson and Wollan represents an innovative attempt to address directly the source of prison overcrowding. By using a tragedy of the commons analysis, the authors have portrayed a Florida correctional system in which judges have little in-

64. Id. at 9.
65. Id. A "split sentence" is a period of incarceration followed by a period of probation. Id. at 10.
66. Id. at 9. A "shock sentence" is a "boot camp" experience plus probation. Id. at 10.
67. Id. at 9. With a "suspended sentence," if an offender's behavior is acceptable for a stated period, he or she will not receive a criminal conviction. Id. at 10.
68. Id. at 9. Pursuant to Fla. Stat. § 921.187 (1989), alternatives include probation, fines, community control, treatment, work release, education/vocational training, public service, substance abuse programs, restitution, and any other disposition that is authorized by law. Id.
69. Id. at 11.
70. Id.
72. B. BENSON & L. WOLLAN, supra note 32, at 12.
73. Id.
centive to utilize alternative forms of incarceration. Their proposal allows judges considerably greater discretion and holds judges responsible for the allocation of a set number of prison cells. This concept has several significant strengths as well as some serious weaknesses.

Forcing judges not only to consider, but also to utilize, to enhance, and to create alternative forms of incarceration is probably the proposal's single greatest strength. Whether these alternative forms materialize as increased use of house arrest, probation, work release, or electronic monitoring, the result will be a reduction in admissions to prisons. A significant feature of this proposal is that the judge who sentences the convict and who is the most informed, objective observer of the case, will also be the one to determine which convicts pose the greatest threat to the community and should be incarcerated. This should personalize the application of the early release program and should decrease the likelihood that violent felons will be released onto the streets prematurely.

Another promising aspect of the proposal is its advocacy of the increased use of fines and restitution. Although victims suffer most from crime, their interests are represented least. This fact has spawned numerous victims' rights groups, many of which have promoted "restitution and other alternatives to incarceration—not to make life easier for offenders, but to benefit victims." As the authors of the proposal suggest, punishment need not take the form of incarceration. Often, the most effective punishment is to require the convicts to pay for the costs of their prosecution and to pay restitution to the victims of their crimes. Moreover, felons that are not

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74. Offenders under house arrest are confined to their residence except for regular employment or public service work. J. Eckerd, supra note 4, at 29.
75. The Department of Probation and Parole monitors felony offenders placed on probation according to a list of requirements to be followed: counseling, restitution to victims, community service work, and treatment for alcohol or drug addiction. Fla. Dep't of Correct., supra note 2, at 16.
76. Work release enables inmates to work at paid employment in the local community. When not involved in work or other authorized activity, inmates live at a work release center. These offenders are carefully screened, classified minimum security, and normally considered for work release only in the last 24 months prior to their release. Id. at 12.
77. Electronic anklets and wristlets are used in selected cases to help monitor adherence to house arrest. Electronic anklets are linked through telephone lines with a computer in a nearby probation office and indicate when offenders are in their homes. In Jails Without Walls, Fred Scaglione argues that electronic monitoring has moved beyond the realm of science fiction and is now a viable alternative to incarceration. Scaglione, Jails Without Walls, 104 Am. City & County 32 (January 1989).
78. Colson & Van Ness, supra note 41, at 60.
79. Id.
80. B. Benson & L. Wollan, supra note 32, at 11.
placed in prison but rather are required to pay restitution and fines will not cause the state additional expenses in prison housing costs and welfare payments to their dependents. Lastly, it will allow the victim to see justice done.

Some major limitations to the proposal, however, do exist. The greatest weakness is undoubtedly a more political judiciary. No matter how much time a judge devotes to determining which convicts should be released early or which ones should participate in alternative forms of imprisonment, eventually one of these inmates will commit a violent crime. This fact will place enormous pressure on judges because releasing an individual who later commits a crime could have a detrimental effect on a judge’s chances of reelection. Additionally, victims and victims’ rights groups, realizing the discretion that judges would possess, will lobby the judges to impose the most severe sentences possible. These problems must be directly confronted before this proposal could be instituted because judges must be free to decide cases on the law rather than on pressure from the public.

Another problem with the proposal is the time factor involved. Judges, already taxed for time, may be unable to balance a significant new responsibility with their other duties. Judges will have to devote a significant proportion of their time to reviewing prison allocation and to determining which persons should participate in alternative programs. The time factor should not pose an insurmountable problem, however, if additional judges and judicial assistants are allocated to each of the twenty judicial circuits to accommodate the proposal.

Other factors involved in this proposal could also pose serious difficulties. For example, the financing of the project may be problematic. In making judges responsible for a set number of cells, the decision-making process regarding the use of alternatives to incarceration would be decentralized. Despite this decentralization, however, funding would have to be kept central. Thus, the need would arise for a mechanism to communicate to the legislature the needs of the judges.

The allocation rule could pose some problems as well. Although crime is increasing statewide, this increase is not the same for every jurisdiction. Though transferrable property rights in theory seem promising, their application in practice may be difficult. Most likely, jurisdictions experiencing less crime will simply use the extra space to incarcerate felons who otherwise would qualify for some alternative program.

Furthermore, proposed alternatives to incarceration often create their own problems. For instance, alternative forms of punishment

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such as requiring convicts to pay for the costs of their prosecution and
to pay restitution to their victims may ensure that the rich go free
while the poor are incarcerated. Although repayment in these in-
stances likely will assist in lowering the economic burden placed on
the state, the resulting inequities in many cases may prohibit the insti-
tution of these alternatives.

The demand-side proposal is a resourceful approach to alleviating
prison overcrowding in Florida. Although the proposal will cause po-
liticization of the judiciary, impose additional time burdens on judges,
and present problems of financing and of allocation rules, it repre-
sents a workable framework for serious consideration.

B. Special Correctional Districts

In a promising proposal, Judge Charles E. Miner, Jr., and
Laurin A. Wollan, Jr., advocate the creation of twenty special correc-
tional districts throughout the state patterned after the twenty judicial
circuits. These special district facilities would be constructed solely
for the incarceration and rehabilitation of third-degree felons and cer-
tain nonviolent second-degree felons who would otherwise be housed
in already crowded state prisons. These districts would be overseen
by boards appointed from a representative array of officials and citi-
zens, managed by specialists in corrections, constrained by state-wide
standards adopted and monitored by the Department of Corrections,
and financed by a one-cent increase in the sales tax.

This proposal creates twenty correctional districts organized consist-
tent with Florida's twenty judicial circuits, and this organization
would be accomplished by statute. All correctional activities would
be under the jurisdiction of the district and the governance of its

82. This proposal was first advanced in the 1988 session of the legislature as House Bill
1793. The bill never made it to a vote in either the House or the Senate primarily because of its
financing aspects. Initially, this proposal called for an ad valorem tax to be levied in each dis-
ctrict. Miner & Wollan, supra note 44, at 16. This levy would not be permitted to exceed one mill
on the combined taxable property in the counties within the district. This caused an uproar from
several county commissions who rely solely on property taxes for their funding and who felt that
 correctional funding should be accomplished at the state and not the district level. See Trans-
script: Interview of Charles E. Miner, Jr., at 1 (1990)(on file with Fla. Dep't of State, Div. of
Archives, Tallahassee, Fla.). The Special Correctional District proposal that follows has had its
financing mechanisms completely amended and will be advanced again in the 1991 session of the
Florida Legislature. Id.

83. Charles E. Miner, Jr., is currently a judge on the Florida First District Court of Appeal
in Tallahassee.

84. Miner & Wollan, supra note 44, at 15.

85. Id.

86. Id.

87. Id.
board with the exception of the operation of county jails and those correctional activities associated with misdemeanor offenders.\textsuperscript{88}

The governance of special districts has been quite successful and efficient with such entities as community colleges and water management districts.\textsuperscript{89} Corrections districts would be governed in a similar manner. Each district would have its own governing board that would operate according to rules adopted by the Department of Corrections.\textsuperscript{90} The Department also would be responsible for ensuring each district's compliance with quality specifications.\textsuperscript{91}

The district governing boards would have considerable latitude and discretion in a variety of areas such as the construction, acquisition, and use of detention facilities, and the levy of millage above the uniform levy that would be required by the law of all districts.\textsuperscript{92} Additionally, the district governing boards would be responsible for the types of rehabilitation programs offered to their inmates and for personnel selection and management.\textsuperscript{93} The bulk of operational procedures, however, would be determined by legislation and rules promulgated by the Department of Corrections.\textsuperscript{94}

Financing under any proposal is controversial and often is responsible for the death of new proposals—even promising ones. To finance the special correctional districts, Miner and Wollan urge a one-cent increase to the sales tax.\textsuperscript{95} To guarantee that this money would be devoted solely to the special correctional district program, an amendment to the Florida Constitution guaranteeing the strict use of these funds is recommended.\textsuperscript{96}

\begin{itemize}
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Id.
\item \textsuperscript{90} Id.
\item \textsuperscript{91} Id.
\item \textsuperscript{92} Id.
\item \textsuperscript{93} Id.
\item \textsuperscript{94} Id.
\item \textsuperscript{95} Id.
\item \textsuperscript{96} Proposed Amendment is as follows:
\begin{quote}
A Joint Resolution Proposing an Amendment to Article VII of State Constitution
Sec. 17. Revenues dedicated to substance abuse education, corrections facilities and programs, loss reimbursement of crime victims and Article V implementation.
(a) In addition to the sales and use taxes which have heretofore been or which may hereafter be levied or authorized by general law, there is hereby levied a one per cent sales and use tax, the proceeds of which levy shall be appropriated by the legislature only for the purposes set forth in this section. The terms and conditions of the tax required to be levied hereunder shall be determined by general law.
(b) Revenue generated by the tax required to be levied under this section shall be deposited into the Criminal Justice and Substance Abuse Education Trust Fund and shall be expended for the following priority purposes:
(1) a comprehensive, systematic substance abuse education and counselling program in
\end{quote}
\end{itemize}
The money generated from the increase in sales tax would be used primarily for the construction of a mix of dormitory and work-camp beds. These beds would cost approximately $11,600 each,\(^9\) considerably less than the $38,500 average per bed price in the construction of state prisons.\(^8\)

Nearly forty percent of the prison population are third-degree and nonviolent second-degree felons who would qualify for transfer to detention in the special correctional districts.\(^9\) In fiscal year 1988-89, 40,582 inmates were committed to state prison.\(^10\) Thus, if forty percent of these inmates, or 16,233, were transferred, a substantial amount of space in state prisons for the incarceration of violent offenders would become available. Significantly, the reliance on early release credits for violent offenders would also be diminished and a far greater proportion of those offenders' sentences would be served. In sum, this proposal allows the state to deal more effectively with hardened violent offenders, many of whom, according to Miner and Wollan, "escape just punishment because there is no room for them in the 'inn.'"\(^101\)

Even though each district board would have considerable discretion in managing its district, the financing aspects of the special districts would be a joint effort, centrally organized and managed. This joint effort is justifiable because residents of one county can be victimized just as easily by a miscreant from another jurisdiction as they can by one from their own jurisdiction.\(^102\) Thus, cooperation among the correctional districts in all aspects of financing is important. Miner and Wollan propose a mutual assistance financing program that essentially would be a partnership between the citizens of the districts and the state.\(^103\) All construction money generated by the sales tax would be

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\(^9\) Miner & Wollan, supra note 44, at 16.
\(^8\) FLA. DEPT. OF CORRECT., supra note 2, at 7.
\(^9\) Miner & Wollan, supra note 44, at 16.
\(^10\) Miner & Wollan, supra note 44, at 16.
\(^100\) FLA. DEPT. OF CORRECT., supra note 2, at 2.
\(^101\) Miner & Wollan, supra note 44, at 16.
\(^102\) Id. at 17.
\(^103\) Id. at 16.
deposited in a central trust fund and parceled out to each district based upon the projected number of target inmates from that district. Similarly, a central operational fund also would be created from the tax dollars.

After construction of district facilities, third-degree felons and nonviolent second-degree felons would no longer be housed in state prisons. Upon admission into the special correctional district facilities, all new inmates would be classified under a medium security status and would be eligible to gain minimum custody status. After earning minimum custody, the inmate would be assigned to a work-camp bed and would be able to participate in work-release programs. Further, part of the inmate's pay would be used to defray the cost of his or her maintenance as well as used to pay any alimony or child care obligations.

As for the various early release programs, this proposal would negate the need for both basic and administrative gain time. Apparently, early release could be earned by an inmate only through conscientious efforts to participate in work-release and to repay the system and victims or to participate in other rehabilitative programs.

Placing offenders in special districts closer to home, family, friends, former and potential employers, local education and vocational opportunities, and within more familiar surroundings is another appealing aspect of this program. As the system currently operates, a person convicted of writing bad checks in Dade County easily could serve a sentence in a correctional facility in Leon County. By separating third-degree felons and nonviolent second-degree felons and detaining them in the special correctional districts, two distinct advantages exist: (1) the victims in the community can witness the punishment meted out to offenders for their transgressions in the community where the offense occurred; and (2) the inmate population will be more manageable and amenable to rehabilitative opportunities in institutions not so overwhelmed by sheer numbers that these "luxuries" must be sacrificed.

The Special Correctional District proposal is the most promising proposal to restructure the correctional system in Florida. Moreover,

104. Id.
105. Id. at 17.
106. See supra note 25.
107. Id. at 17.
109. Id. at 18.
110. Id.
111. Id.
it represents a long term, comprehensive approach to solving Florida's prison overcrowding problems. Adoption of this proposal would remove numerous inmates from the overcrowded state prisons. Additionally, housing prisoners in a dormitory/work-camp setting at an average of $11,600 per bed\textsuperscript{112} would be a significant savings. More importantly, space in state prisons would be reserved for hardened violent and career criminals who should not be released prematurely. In fact, this proposal would render reliance upon basic and administrative gaintime for this class of offender unnecessary.

The proposal also would reduce reliance upon basic and administrative gaintime for those inmates detained in the special correctional districts. The incentive originally provided by early release credits would now be contained in the system itself. Inmates would recognize that greater liberty is awarded only by participation in rehabilitative programs, by good conduct, and by obtaining and maintaining a job.

Another strength of the program is that local governing boards would have the discretion, within the parameters defined by the Department of Corrections, to develop programs that would most benefit their particular inmate population. The result might be that special districts in metropolitan areas would offer different educational and vocational training than, for example, a district in a more rural area. Inmates would then be more marketable upon release. By removing these more marketable inmates from state prison, the result would be an inmate population more amenable to those rehabilitative programs that state prison can barely afford to offer under the present circumstances.

Another benefit is that inmates would be detained in their own community, and this would be less disruptive on inmates' families. Further, once inmates qualify for work release, they would be required to make any necessary alimony and child support payments as well as to partially reimburse the system supporting them. Another advantage of community control is that instead of sending offenders to state prisons, the communities detaining them could reap the benefits of their labor for charitable or governmental agencies.\textsuperscript{113} The state of New York, for example, has perfected this practice; since 1981, offenders in community control programs in New York have performed over 97,000 hours of community service for 118 community agencies with a total value of $389,000.\textsuperscript{114}

\textsuperscript{112} See Miner & Wollan, supra note 44, at 16.
\textsuperscript{113} Colson & Van Ness, supra note 41, at 61.
\textsuperscript{114} Id.
Nevertheless, some potential shortcomings of the proposal exist. Financing for any proposal is oftentimes its achilles heel. Because this program would be expensive and would require an increase in the sales tax, its passage in the legislature poses problems. Two factors, however, regarding the tax implications of this proposal would make the proposal more palatable. First, a constitutional amendment assuring that all money collected by the increase in the sales tax will be used only for the special correctional districts would increase the proposal’s chances for acceptance by the public. Second, the savings in tax dollars from implementation of the proposal would alleviate much of the burden of meeting the current need for costly prison space. Certainly, financing for such an ambitious proposal will not be cheap—but this program represents the most cost effective, politically acceptable proposal available.

III. PROPOSALS FOR FUTURE LEGISLATION

Florida has reached a crossroad in the future of its correctional system. Until decisive action is taken, the correctional system in Florida will continue to consume an increasing share of state resources, will remain overcrowded, and will not adequately protect the citizens of the state. The special correctional district proposal is an approach that should be given serious consideration by the 1991 Florida Legislature. In addition to this proposal, several other measures should be examined.

A. Drug Rehabilitation

At least one commentator attributes the unprecedented growth in prison admissions solely to drugs and the emergence of a “crack economy.” In addition to the ninety percent of all crimes that are drug related or that are provoked by some degree of drug or substance abuse, the Department of Corrections reports that seventy percent of all new inmates admit to having a serious chemical dependency. Yet remarkably, because of overcrowding and limited resources, only an estimated four percent ever receive treatment.

Florida can no longer neglect the impact of drugs on future generations of prisoners. Employing a “get-tough” policy of simply incarcerating drug offenders will not work. Studies have shown that imprisoning drug offenders does not impede the drug trade because

115. Bird, supra note 6, at 8.
116. J. ECKERD, supra note 4, at 15.
117. Bird, supra note 6, at 9.
new sellers are waiting to take the place of the incarcerated drug dealers. Furthermore, the age of first use of drugs is alarmingly young and most drug-dealing youths are still in school.

Florida must adopt a three-prong approach towards drug abuse. First, Florida must help inmates kick the habit before they leave prison. Second, for the nonviolent drug abusers that do not need prison, Florida must expand and support existing community based drug-abuse treatment programs such as Parental Awareness Responsibility (PAR) and the Drug Abuse Comprehensive Coordinative Office (DACCO). Third, Florida must install school-based prevention and referral services. Schools must play an increasingly active role in the education of Florida’s children regarding the dangers of drugs.

In sum, the use of incarceration as the primary measure to wage a “war on drugs” is not as cost-effective as vocational and educational counseling and the treatment of drug dependence.

**B. Nonviolent Offenders Should Pay Not Stay**

The second recommendation represents the crux of both the demand-side and special correctional districts proposals. Nonviolent offenders should receive punishment, not necessarily in the form of incarceration, but possibly in some type of alternative program. Clearly, the use of expensive prison space for nonviolent offenders who serve short sentences does little to protect the public. In fact, the incarceration of large numbers of nonviolent, nonchronic offenders reduces the safety of the public by requiring the early release of many violent and chronic offenders in order to avoid the court-ordered limits on prison populations. Significantly, it costs more than thirty dollars a day to incarcerate an inmate in Florida’s overcrowded prisons—the cost, however, is only five dollars per day per inmate when the state utilizes an alternative form of punishment such as house arrest.

Moreover, heavy reliance upon incarceration as punishment for nonviolent offenders can be highly counterproductive. Prison is little more than college for criminals—a place where petty thieves refine their skills and nonviolent offenders become hardened ones. “Prisons and jails are run in ways almost calculated to produce low levels of order, amenity, and service, and to reinforce inmates’ uncivil, cri-

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121. *Id.* at 8.
minalistic behavior.”122 Meaningful educational, vocational, and counseling programs are rare. A 1986 study by the Rand Corporation indicated that probationers committed fewer new crimes than ex-prisoners.123 The researchers conducting that study concluded that “imprisonment was associated with a higher probability of recidivism.”124 Those offenders not yet classified as hardened criminals but who commit third-degree and nonviolent second-degree felonies, are those who seem to have the greatest chance for reform. For them, incarceration appears to be the least effective form of discipline.

Florida must put greater reliance on alternative forms of punishment. Significantly, in 1987 seventy-five percent of all nonviolent offenders were sentenced to three years or less of incarceration.125 For many of these offenders, utilization of alternative forms of punishment would be more effective. Some offenders even chose prison sentences over the Florida Community Control Program, clearly indicating that short stays in prison are viewed as less intrusive and more appealing than intensive community supervision.126 Florida’s Community Control Program127 has been highly successful—only nine percent of the offenders who participated in the program have committed new crimes.128 Furthermore, research in Florida and in other states indicates that intensive community supervision programs are effective in reducing recidivism while controlling costs to the taxpayer.129

Florida must expand its use and reliance upon alternative forms of incarceration such as the Community Control Program, house arrest, work release, supervised community release programs, probation and parole, and electronic monitoring. The Florida Legislature must also allocate greater funds for these programs.

C. Early Release Credits

The early release program requires significant restructuring. It can remain an effective tool of management but should not be a measure

122. Id.
124. Id.
125. Bird, supra note 6, at 5.
126. J. Eckerd, supra note 4, at 9.
127. See id. “Community control” is a form of supervised “house arrest” that was created in 1983 with the passage of the Correctional Reform Act. Community control allows selected offenders to serve their sentences under supervision in their homes. “The cost to the state is $2,650 per year per offender, which is 80 percent less than the $13,140 cost for imprisonment.” Id.
129. Id.
that must be employed out of sheer necessity. This program is so out of hand that inmates typically serve less than thirty-five percent of their sentences.\textsuperscript{130}

Three substantive changes should be incorporated into the early release program. First, the early release program should not be primarily a tool for controlling overcrowding but rather should be a supplemental tool only employed in its present manner in times of absolute necessity. Second, all first-degree felons, particularly those who have committed crimes of violence, should be denied, or have severely limited, the gaintime for which they are eligible. Third, basic gaintime should be completely abolished, and the use of administrative gaintime should be drastically curtailed.

Early release credits serve an indispensable role in prison management, but that role is only realized when credits are given based on merit. Awarding for merit establishes the necessary incentive to make the program work. Basic and administrative gain simply do not provide this incentive and only serve to place the felon back on the streets earlier.

\textbf{D. Sentencing Guidelines}

Currently, Florida's sentencing guidelines favor incarceration as the primary form of punishment. Additionally, they provide little flexibility for the judges who must apply them. In contrast, the only two states in the country that have controlled prison populations, Minnesota and Washington, both use sentencing guidelines that favor, in many instances, incarceration alternatives or "prescriptive" sentencing guidelines.\textsuperscript{131} Prescriptive guidelines are defined as guidelines that provide the flexibility necessary to assure incarceration for violent and repeat offenders but encourage judges to use prison alternatives for nonviolent offenders.\textsuperscript{132} Prescriptive sentencing guidelines in Washington have been so successful that the state is actually able to now rent over 1,200 of its prison cells to other jurisdictions.\textsuperscript{133} The renting of these prison cells has produced over twenty million dollars for the state.\textsuperscript{134}

According to the National Council on Crime and Delinquency, adopting prescriptive sentencing guidelines such as those used in Washington and Minnesota would create the following incarceration

\begin{footnotesize}
\item 130. \textit{Fla. Dep't of Correct.}, \textit{supra} note 2, at 11.
\item 131. \textit{Bird}, \textit{supra} note 6, at 6.
\item 132. \textit{Id.}
\item 133. \textit{Id.}
\item 134. \textit{Id.}
\end{footnotesize}
patterns: first, incarceration rates for murder, manslaughter, vehicular homicide, sex offenses, aggravated assaults, battery, and crimes involving weapons would be substantially higher; and second, use of prison space for crimes such as auto theft, fraud, forgery, worthless checks, and grand larceny would be substantially lower.\textsuperscript{135}

Thus, the Florida Legislature should introduce modifications in its sentencing guidelines and provide the flexibility necessary to allow judges to place more nonviolent offenders into structured community settings.

\section*{E. Prison Construction}

Because the population of Florida will reach 17.5 million by the year 2010,\textsuperscript{136} Florida must continue to build prisons. It is essential, however, that Florida not attempt merely to “out-build” the overcrowding problem. The experiences of California, Michigan, and Texas demonstrate that doubling prison construction does not solve the overcrowding problem but does severely deplete resources needed for other state responsibilities. Prison construction in Florida should increase proportionally to the estimated increase in state population but should not increase in an attempt to keep up with escalating prison admissions.

Furthermore, the argument that a “get tough” policy of incarcerating all felons will deter crime is simply specious. Charles Colson and Daniel W. Van Ness poignantly address this issue:

\begin{quote}
Consider the odds. The federal government reports that out of 100 crimes, 33 will be reported to the police and seven will result in an arrest. Four will end with a conviction, with one offender going to jail, one to prison and two to probation. In other words, for every 100 crimes committed in the United States, one person goes to prison.\textsuperscript{137}
\end{quote}

With these short odds on getting caught and convicted, it can hardly be argued that increasing prison capacity by two or even three times will have much of a deterrent effect.\textsuperscript{138}

Prison overcrowding is the result of many factors. The two principle factors are the increase in drug related offenses and the adoption of strict sentencing guidelines. Prison construction should proceed

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{135} \textit{Id.} at 7.
\item\textsuperscript{136} Miner & Wollan, \textit{supra} note 44, at 17.
\item\textsuperscript{137} Colson & Van Ness, \textit{supra} note 41, at 61.
\item\textsuperscript{138} \textit{Id.}
\end{enumerate}
\end{footnotesize}
based on a careful balancing of the estimated increases in the state's population, revisions of the state's sentencing guidelines, and increased use by Florida judges of alternative forms of incarceration. This will be a difficult determination, but one thing remains clear: an "out-build" prison construction strategy should not be adopted.

IV. Conclusion

Florida must come to terms with the overcrowding crisis in its prisons. As stated by Colson and Van Ness: "[t]he time has come for real solutions rather than overheated rhetoric that fuels public passions, reinforces stereotypes about prisons and prisoners and, in the end, results in taxpayers being punished far more than offenders." With the increases in Florida's population and the drug trade and with the adoption of strict sentencing guidelines, admissions will continue to increase to unprecedented levels. Florida cannot afford to depend solely on early release policies and continued prison construction to manage this influx in admissions.

Early release credits are a necessary evil. They provide an incentive to prisoners that is needed for the safe and efficient management of prisons. At the same time, however, the current reliance on early release measures to the extent that offenders are now serving approximately one-third of their sentences, severely undermines the correctional philosophy of the state.

Like early release credits, continued prison construction is essential. However, prison construction should not evolve into the sole strategy to solve the crisis. Other states that have attempted to "out-build" admissions have not succeeded in either solving their overcrowding problems or in diminishing their crime rates. "The indiscriminate 'get tough' approach is a grand success in filling prisons, but it fails miserably at reducing crime." Furthermore, there is a poignant irony to this approach: by indiscriminately sending more people to prison, communities become less safe because greater reliance is placed on early release measures and, therefore, more hardened, violent criminals are released prematurely.

Indeed, the overcrowding crisis requires more than a piecemeal effort. Florida must adopt an innovative, comprehensive policy to address the problem and supplement it by early release and prison construction. The demand-side approach is promising because it cre-
ates the incentive for judges to use alternatives to incarceration. Though this proposal has some serious weaknesses, it provides a useful framework that can serve as a working model.

The special correctional district proposal represents the type of comprehensive long-term solution to the overcrowding crisis that the Florida Legislature should be prepared to adopt. This proposal will be expensive and will require the legislature to utilize vast resources of time and effort. Nevertheless, this proposal is exactly the type of solution that the citizens of Florida deserve and for which they should be willing to pay.

Additionally, Florida should consider several further recommendations. To alleviate drug abuse and its pernicious effects, Florida must treat dependent prisoners and must also expand its treatment and preventive programs in the community and schools. The state should not systematically incarcerate nonviolent offenders but rather should place greater reliance on various alternatives to imprisonment. This will require greater funding for these programs. The early release program should be changed so that basic gain time is abolished and the use of administrative gain time is curtailed. Florida should also adopt prescriptive sentencing guidelines to give judges greater flexibility. Lastly, and most importantly, an “out-build” prison construction strategy should not be adopted.

The Florida Legislature must meet the challenge. Jack Eckerd recently wrote that, “[w]e must restore sanity to the system, slamming the door and keeping it shut on violent and career criminals like Charlie Street, while expanding alternate punishments for non-violent offenders.”142 A change in course must be made. The time has come for the legislature to adopt an effective policy to control prison overcrowding.

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