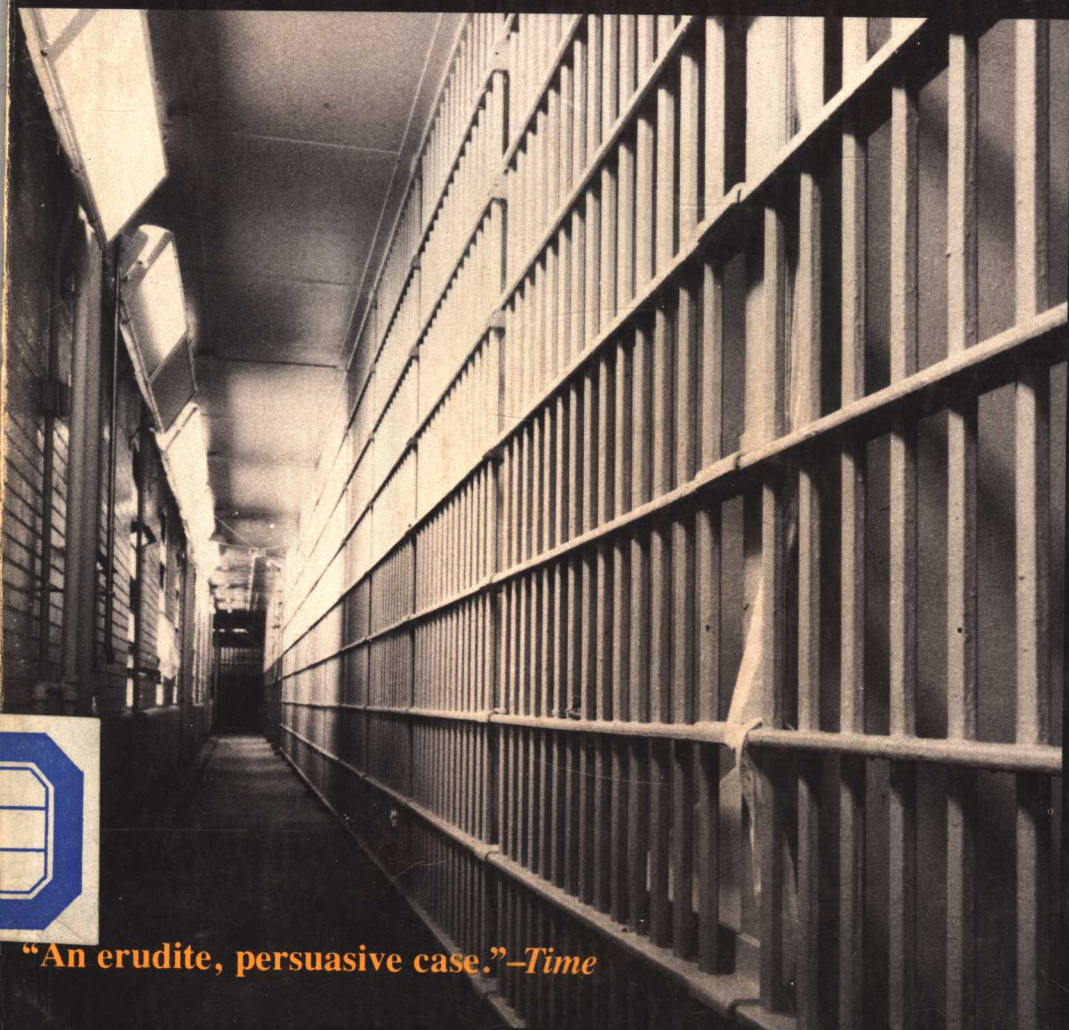


IMPRISONMENT IN AMERICA

Choosing the Future

Michael Sherman and Gordon Hawkins

Studies in Crime and Justice



"An erudite, persuasive case."—*Time*

**Michael Sherman and
Gordon Hawkins**

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America**
Choosing the Future

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STUDIES IN CRIME AND JUSTICE

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Preface

“Don’t look back,” Satchel Paige advised, “something might be gaining on you.” Yet, of necessity, this book regards the future by looking over its shoulder at the past. In any consideration of the social institution of imprisonment—especially in any attempt to change it—the weight of history must be placed in the balance. The recent excellent works of David Rothman, Michel Foucault, and Michael Ignatieff have confirmed the importance of a historical perspective on any era’s policy prescriptions.

This is, however, explicitly a policy book. In Chapter 5, the analysis of the past is allowed to inform some recommendations which mesh liberal and conservative views. Although in some cases we have been driven back to original sources, this is not a work of primary social history in which lessons are inferred from a mass of detail. Ours is an idiosyncratic view of the constraints imposed by traditions on future choices, and its policy lessons are not shared by many of the historians on whose work we have tried to build.

The genesis of the book may help to explain another of its features. In 1977–80, the first author participated in a major study (commissioned by the U.S. Department of Justice) of the American correctional system. The central task was to advise the Congress, through the agency, of the present and future needs of the country’s prisons and jails. The legislators, it seems, believed initially that the long-term future of the system was something that could be forecasted or projected with confidence. On the surface, this may seem a sensible goal. Yet as some of the researchers argued at the time and as this book maintains, this is not the way to approach the problem. To convert a policy analysis into a mechanical forecasting exercise is not only impossible in any respectable professional way, it is potentially dangerous.

Some of the dangers are addressed below, and others are examined by Kenneth Carlson in the project’s report, *American Prisons and Jails*. Here we simply note that a great deal of correctional policy is currently made by this misguided reliance on forecasting the demand of an inexorable prison population and meeting it with a supply of

cells. In many jurisdictions, such efforts produce only the familiar cycle of building, renewed crowding, and more building. Our book is aimed at these policymakers. They do not have to let the future sweep over them; rather than predicting it, they must choose it.

Legislators are necessarily generalists, but implicitly they use images of the past and the future to guide their decisions. Without a more explicit and critical view of these images, they will almost certainly prescribe for the American prison in its third century the same problems that have plagued it in the previous two.

Acknowledgments

Our central debt, to Franklin Zimring, is reflected in the dedication. His personal energy and critical intelligence sustained us many times during a lull in the proceedings. Other blameless individuals include Norval Morris and James Jacobs, who commented on the whole manuscript; Lloyd Ohlin, who impressed upon us the proper scarcity of the resource of imprisonment; Andrew von Hirsch, who emphasized the dangers of the supply-demand analogy in the making of prison policy; and Kenneth Carlson, who tried to ensure that we did not violate his high standards for the use of numbers in policy-making.

Our institutional debts are also extended. The University of Chicago Law School's Center for Studies in Criminal Justice, the Hudson Institute, and the Center for Advanced Study in the Behavioral Sciences at Stanford provided varied but essential help. Abt Associates expertly collected and analyzed the data in Chapter 2. The National Institute of Justice supported earlier work by Michael Sherman, and Gordon Hawkins received a fellowship from the Chicago Bar Association Foundation to begin the work that led to this book.

Itinerant projects are especially dependent on administrative support. Helen Flint, Elizabeth Scheuerman, Ann Bushmiller, Susan Bogdanffy, Sylvia Karjala, Barrik Van Winkle, Sally Mendoza, and Susan Olsen, at the University of Chicago; Robert Lindee and Barbara Witt at Stanford University; and Roberta McPheeters, Yvonne Swinton, Dorothy Worfolk, and Maureen Pritchard at Hudson Institute all know too well what we mean.

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1 A Crossroad in American Social Policy

Introduction

When Alexis de Tocqueville came to the United States in 1831, his hidden agenda may have been to write *Democracy in America*, but his formal mission was to study the penitentiary system. On both subjects he was struck by the country's confidence in what he called "seizing the future." Today, 150 years later, many Americans lack such confidence about shaping events, yet they cannot avoid important choices which have been forced upon them. This is particularly true of the institution of imprisonment, which stands in 1981 at a crossroad. Conventional wisdom holds that the prison is practically impossible to change; yet today, along with some massive problems, there are opportunities for progress and reform greater than at any other time in this century. We do not predict a revolution in this critical area of social policy. We do contend that an unusual chance for change exists and that the real question is whether the nation will recognize that chance and take it.

We contend also that the subject deserves, and perhaps demands, attention from many Americans who try to look the other way. There are more than half a million adults in prisons and jails today. Six million jail admissions for various periods are recorded during a single year. One million offenders are under the supervision of the probation and parole systems; they can be locked up at any time for violating the conditions of their release. Still another 75,000 youths are held in special juvenile facilities, and the annual total of juveniles detained for short periods may exceed one million.¹ These correctional populations, as they are politely called, are large for any society. They appear even larger in a society which places liberty at the center of its political values. They represent a fraction of the citizenry larger than that of any other Western nation. The policies which have created them deserve serious thought.

The difficulty of balancing liberty and order would arise even if the American practice of incarceration were generally acknowledged to be effective. But the suspicion is spreading that many of the millions

of man-years spent in confinement are not serving any useful function. The problem is even more serious if, as the critics charge, society is taking away a great deal of liberty without getting increased order in return.

Even if political sensibilities do not stimulate a concern, economic sensibilities should do so. In most jurisdictions, one new maximum security cell costs \$30,000–\$60,000; another \$7,000–\$10,000 per year is spent to maintain each inmate. In the past ten years, the United States has spent more than \$40 billion on correctional services.² To provide facilities that meet the standards set recently by the United States Department of Justice, governments at all levels would have to spend an additional \$10–\$20 billion; for reasons detailed below, they may soon be forced to do so. Moreover, these figures represent only out-of-pocket costs; a major accounting firm has estimated the real cost of incarceration (including such factors as the lost labor of the inmate) at \$50,000 per year over a ten-year sentence, and \$80,000 per year over a twenty-year sentence.³ At these prices, it would make sense for the citizen, if only in his capacity as taxpayer, to look closely at the policies he is supporting in such style.

Yet despite these costs, imprisonment traditionally receives less scrutiny than do other important areas of public policy. Usually it gets no public attention at all: the institution of incarceration simply grinds away, and the people who run it are left to their own lights. When it does get attention, the scrutiny usually takes one of two unsatisfactory forms. The first kind occurs when a legislative subcommittee, a special commission, or a reform group discovers the problem of corrections. Concern is usually prompted by a prison disturbance, or by someone noticing, as if for the first time, that conditions in many American prisons and jails are terrible. Whether formed by the Wickersham Commission of 1931,⁴ or the Attica Commission of 1971,⁵ the pattern is pretty much the same: a flurry of intense interest, followed by a long lag, followed by an official report, and, with minor exceptions, a return to business as usual.

The second type of interest is more general, although it is often stimulated by an election campaign or by the report of a sensational crime. Public scrutiny of the prison system takes the form of an ideological shouting match between liberals and conservatives. Both wings are strong on accusations and weak on solutions. Too many liberals talk about preventing crime with tomorrow's long-term social programs, without attending to the communities suffering from today's offenses. Too many conservatives talk about throwing the key away, without considering the costs in dollars or in civil rights. Although the balance between these forces shifts over time, the broad-brush ideological debate is seldom fruitful. In recent years it

has resulted in, at most, legislation allowing for longer prison sentences. Many legislative sponsors seem either unaware of or cynically indifferent to the fact that, in practice, the criminal justice system usually nullifies such legislation. Despite a rash of ostensibly tough laws regarding sentencing, the actual time served in prison has not lengthened substantially even in those jurisdictions where politicians have made capital on their hard-nosed approaches.⁶

The evasions which pose as scrutiny are time-honored, and both forms are very much with us today. The ideological battle continues, although it is becoming one-sided as conservatives are outbid in their calls for severity by politicians who call themselves liberals. The fitful attention to prison problems is going through a manic phase, during which every event is regarded as a major crisis, and making it virtually impossible even for thoughtful officials to plan beyond their morning newspaper.

The Crisis Mentality

In August 1978, Strom Thurmond announced to the U.S. Senate that "overcrowded conditions in our prisons have become a national crisis."⁷ In support of this claim, he cited among others a warning in *U.S. News and World Report* headlined "Crisis Builds in America's Crowded Prisons."⁸ A month earlier, Senator Joseph Biden had introduced legislation providing historically unprecedented federal funds for state and local construction. He contended that "the legislation fills an urgent need that becomes more critical as each day passes."⁹ In 1979 the U.S. Justice Department published a warning from the American Correctional Association that current prison conditions around the nation held "the seeds of future Atticas."¹⁰ The same mood has pervaded state governments. When a recent corrections commissioner assumed office in New York, he declared that his state was "rapidly approaching a crisis,"¹¹ and in 1980 the *New York Times* reported that in New York prisons "a major disturbance could erupt at any time."¹² Even at the local level, the crisis became a fixture on administrators' calendars: 1978 witnessed the convening of the Second Annual National Assembly on the Jail Crisis. By 1981, the dominant view seemed summarized in a bill submitted to the Senate by Robert Dole of Kansas which proposed revenue bonds and a direct federal appropriation of \$6.5 billion to meet "the critical shortfall in funding for criminal justice construction, a shortfall that grows worse with each passing day."¹³

As Frank Kermode has said, "To be in the midst of . . . a crisis is what we all want, for it makes us more interesting."¹⁴ But the issue is larger than that. The words used in public discourse, and the ways

they are used, do more than express what people think. Language can influence *how* people think. The words are signals, and it is important to see their messages. In several ways, the crisis signals have distorted the policy problem facing the nation.

The first drawback of the crisis mentality is that it has forced the policy debate out of balance. People have become hypnotized by the quantitative, physical aspects of the current situation: the numbers of prisoners, of cells, of square feet. While no discussion can ignore these matters, it must be remembered that correctional populations result from decisions based on qualitative, normative assumptions. The prison population rises not by some mysterious levitation but because society, through its agents, decides that certain people ought to be locked up. To see the prison crisis exclusively as a problem of crowding and conditions is positively dangerous. It addresses effects while ignoring causes. It forces the debate into an excessive concentration on meeting a demand for prison space, without examining the policies and assumptions that underlie that demand. Worse, it may aggravate the very problem it purports to solve, because (as we shall show) new supply may not only meet the old demand but may also create new demand.

The rhetoric of national crisis may also lead to some panicky decisions. Consider the theme that the situation "grows worse with each passing day." To an official who accepts this view, not only must something be done but it must be done now, before matters get out of control. But the issues here are complex; they require careful thought. Most politicians are unfamiliar with them, and "Don't just sit there" can be a risky prescription. We doubt that the haste made by the crisis mentality will offset the poorly conceived policies that are likely to follow.

Our next quarrel is with the "national" part of the national crisis label. Traditionally, responsibility for providing adequate correctional space has rested with the state and local governments, whose courts incarcerate over 94 percent of all inmates, and whose facilities house them. Only 6 percent of all prison and jail inmates are federal, and the role of the federal government has therefore been small. However, a national crisis deserves a national-level response. It is this feeling that has injected the prison issue into the U.S. Congress and led one U.S. attorney general to appoint a Task Force to seek a "comprehensive national policy."¹⁵ But it is not obvious that such a policy is possible or desirable. We do not deny the need for sufficient capacity to house those offenders who belong in custody in safe, humane conditions. But the real problems that exist are bad enough, without injecting a note of false drama by generalizing them to the whole country. There is a real danger that the Congress may be

caught up in its own rhetoric, and not only provide national solutions to problems which are not national but possibly spread certain problems to areas of the nation where they do not now exist. Proposals to base federal funds for state prison construction on general formulas might have just this effect.

A final, serious drawback of the crisis mentality is its undue emphasis on the short-term. A crisis is something that comes, is resolved one way or another (by medicine in the recovery or death of the patient), and is gone. Its use here has policy implications which go beyond semantics. It neglects the long-term consequences of decisions that are intended to solve a short-term crisis. It implies that, when today's pressure is relieved, we can all go back to business as usual because the crisis is over. Unfortunately, matters are not so simple.

The crisis mentality encourages officials to regard prison policy as a "one-shot" problem, divorced from the past and even from the future. They believe, or want to believe, that it can be solved with a decision today and then forgotten. In our view, policymakers must see contemporary decisions as part of a long-range pattern, carrying well back into the past and well ahead into the future. This view may make these decisions seem less dramatic, but in fact they become more crucial. The entire matter is placed in a different light; regarded not as a transitory crisis but as a deeply rooted problem, its true importance can be appreciated.

With one qualification, T. D. Allman has nicely summarized our view:

We should stop bounding every few years from one inadequate metaphor for the situation we face to another . . . the energy crisis; the population crisis; the crisis of crime in the streets and the crisis created by the revolution of rising expectations. The crisis of the falling dominoes, and the missile gap crisis. The whole history of policy discourse over the past twenty years often has been no more than a pantomime in which vast amounts of money and officials, technology and newsprint have been marshalled to fight crises that, it eventually was discovered, weren't really crises at all. We have tended to confuse unstoppable evolutions with sudden breaks in the dike.¹⁶

Allman's critique of the crisis metaphor is apt, but to replace it with "unstoppable evolution" would be equally misleading. We have substituted "crossroad": a place where the country can decide to change direction, where some barriers to free choice are down. Three current trends have merged to knock down these barriers.

First, the most recent rediscovery that many prisons and jails are overcrowded and that conditions are often terrible has been made

during a period of expansive activity by the federal courts. While the courts had been informed of these conditions at various times in the past, their response to suits against correctional systems had always been that "courts are without power to intervene in the administration of correctional institutions."¹⁷ This came to be known as the hands-off doctrine. But riding the momentum of the civil rights litigation of the 1960s, the federal courts of the 1970s turned to the prisons and jails in force. The U.S. district courts found many federal, state, and local systems in violation of the due process, equal protection, cruel and unusual punishment, and other provisions of the U.S. Constitution. They ordered new housing arrangements, classification procedures, facility closings, population ceilings, and hundreds of other constraints on correctional administration. Some of these orders have been partially reversed by higher courts, and some have been affirmed but ignored by administrators. But others have not been ignored, and as a result the institution of American imprisonment will never be the same.¹⁸ Although much remains uncertain about the future of this development, the director of the Federal Bureau of Prisons is surely correct that in its pure version "the hands-off doctrine is dead and buried."¹⁹ The rediscovery of the realities of American corrections will not go away as easily as in the past. Judicial intervention is forcing a profoundly different set of relations among the branches and levels of American government. It forms the core of a new correctional federalism and acts as a lever on the system, a powerful instrument for change.

The second crucial development is that the familiar but sterile ideological battle about crime and punishment has been refocused into a searching debate over the fundamental purposes of incarceration. Does America, and should it, put people in prison in order to rehabilitate them and then reintegrate them into society? Or should incarceration be solely a punishment for misdeeds, as declared by California's new sentencing statute?²⁰ Or is prison merely a device to protect society by incapacitating the offender? Indeed, is incarceration intended for the offender at all, or is its principal purpose to deter others from committing similar crimes? To what extent should the jail serve a different set of purposes? Is it good public policy to use the jail as a catchall to punish minor criminals, to shelter or contain the homeless and the nuisances, as well as for its traditional purpose of detaining those awaiting trial or sentencing? In any particular case, what is incarceration for?

These questions, of course, are hardly new; they are part of a continuing tradition of jurisprudence and penal philosophy. But as Chapter 4 shows in detail, the contemporary debate has severely weakened the moral and intellectual underpinnings of American

imprisonment. Fundamental doubts have been raised, especially about the effectiveness and legitimacy of rehabilitation as a justifying purpose of incarceration. The effect has been to deepen the discussion of construction policy and to give the familiar philosophical thorns a new practical sting. Before answering whether to build more prisons, more people want to ask, "Why?"

Either of these developments—in judicial intervention or the purposes debate—would have been important by itself. But their intersection in the mid-1970s with a third development completed the present opportunity to choose a better future. Throughout the 1960s, the size of the prison population of the United States was either stable or declining. Then, in 1972–73, that population began to rise sharply. In five years it increased by almost 50 percent,²¹ and this gave much greater urgency to the other two issues. In many jurisdictions, corrections resembled a rush-hour highway: the system runs normally at or above its capacity, so any abnormal load creates unmanageable difficulties.

We stress that by itself the population increase of the mid-1970s could not have created the current chance for change. Prisons have been overcrowded at many, perhaps most, times and places in American history. But in addition to feeding the United States' fascination with record numbers, the large jumps in inmate totals reinforced and aggravated the trends described above. In some states population levels pressed against judicially imposed ceilings. In others, crowding caused further deterioration in prison conditions and made it even harder for federal judges to look away. In turn, this intensified the debate over the purposes of imprisonment: how, it was asked, could the purpose of rehabilitation be served in those worsening conditions?²²

The legacy of the 1970s, then, is not a national crisis but a setting in which major change is at least possible. Discussion of "alternative futures" is no longer academic; real options exist; familiar patterns and expectations are not shattered but unsettled. Federal judges dictating to state administrators, state legislatures reconsidering the basic justifications for prison, federal authorities pressing standards of conditions on state and local officials, the Congress considering for the first time whether to pay the bill for state correctional construction—all these combined in an unprecedented way during the middle and later 1970s. With established routines disrupted, a struggle was inevitable for the direction of any ensuing change.

At this writing (early 1981), there remains a chance for the serious deliberation that is one explicit goal of Mr. Dole's bill. "It is not the Senator from Kansas' belief," he said in introducing the legislation, "that funds will be made available in the budget for the immediate,

full-scale implementation of this proposal. However, S. 186 is designed to serve as a catalyst for discussing between Members of Congress and representatives from criminal justice agencies and interested groups. It is imperative that this dialog begin as soon as possible." The pressure for change remains high, because many prisons remain badly overcrowded and the purposes debate is by no means resolved. But, since 1978, the annual rate of increase in the national inmate total has not matched earlier levels, and whatever we may think of this indicator it inevitably affects the national legislature. Many things are bad, but in most places they are not getting dramatically worse while solutions are being considered. Sensible legislators should be able to abandon the crisis mentality and choose, without panic, the future they really want. In that mood, we may pause here and review the contemporary debate about what to do next.

The Contemporary Construction Debate

The specialized debate over prison construction suffers from a familiar distortion: the reappearance of ideology in plain clothes. Experts are supposed to provide the public with reasoned analysis rather than personal opinion; but many penologists' discussions are more ideological and simplistic than the statements made in the general liberal-conservative debate. Two one-idea positions battle it out. The first group of specialists argues that the answer is simple: build more prisons. Otherwise an increasing number of dangerous criminals will go free, either because there literally is no room for them in prison or because federal judges will not allow local judges to send them there. The policy problem, in this view, is the underuse of incarceration. The prison and jail populations are too small; more offenders should be sent to prison, and more capacity must be built to house all those who should be locked up.

A second group of specialists also finds the answer simple, but exactly opposite: refuse to build any more prisons, and reduce prison populations by finding other penalties for most of those now locked up. Here the problem is seen as the overuse of incarceration. The prison and jail populations are much too large; the country has too much prison space already and certainly does not need any more.

There is a parallel here with an earlier era in American history. The germinal years of American penology were dominated by the great nineteenth-century conflict between the proponents of the rival Pennsylvania and Auburn systems of prison administration, architecture, and discipline. From a twentieth-century perspective, this bitter controversy—between the Quaker case for reflection in solitude and

the New England/Puritan arguments in favor of congregate work—may seem trivial. David Rothman is correct in saying that “as both schemes placed maximum emphasis on preventing the prisoners from communicating with anyone else, the point of dispute was whether convicts should work silently in large groups or individually within solitary cells.”²³ But those who participated in the debate, not only in America but also in England, France, and Prussia, did not see themselves as concerned with a matter of little significance. Supporters of the Pennsylvania system believed that their form of organization was not only more effective in achieving reformation but also recognized the prisoner as a human being rather than a wage slave. Auburn supporters argued that their system was more natural, more humane, and more healthy as well as economically superior. Moreover, these competing theories had important practical consequences; as Rothman recognizes, the controversy exerted “a critical influence on legislators’ resolves to erect penitentiaries and officials’ decisions on how to administer them.”²⁴ Nor was this influence merely transient. As W. David Lewis notes, the lasting power of these ideas was such that “methods that were increasingly outmoded continued to be imposed upon most adult convicts for the rest of the nineteenth century.”²⁵

Today’s construction debate shares some superficial features with that early controversy. It is certainly bitter, and there is plenty of rhetoric. Consider William Nagel, director of the American Foundation’s Institute of Corrections and a leader of the antibuilding school. Attacking the Federal Bureau of Prisons’ “Long Range Master Plan” for the construction of new institutions, Nagel published a pamphlet entitled *An American Archipelago: The United States Bureau of Prisons*. The clear allusion was to *The Gulag Archipelago*, Solzhenitsyn’s study of Soviet tyranny. Nagel accused the Bureau of Prisons of being “construction crazy” and “isolated and secretive.” The bureau’s plans, he said, “are deeper and darker secrets than ever were the Pentagon papers.”²⁶

The probuilding school is capable of its own extravagant language. John Conrad of the Academy for Contemporary Problems has said that to oppose prison construction “means entailing increased misery, violence, and murder.” He writes of “the stomach-turning future” of the nation’s prisons where “men and boys will be jammed together like rubbish in a compost pile.”²⁷ But whatever one’s view of these literary styles, behind the rhetoric there are real issues at stake: differences both about matters of fact and their interpretation, and also about expediency and morality and prudence in the use of scarce resources. A debate which seems to be about a straightforward practical matter, namely, the construction of prisons, ap-