

Federal Overincarceration and Its Impact on Correctional Practices

A Warden's Perspective

By Percy Pitzer

Note: This article is based on the author's own experience and observations as well as discussions held with a number of retired Bureau of Prisons wardens and executives; it represents their collective thoughts on these issues.

As a retired warden with nearly 30 years of experience working in prisons, I am greatly concerned about the future of corrections, especially federal corrections. The 1980s “get tough on crime” and war on drugs agendas resulted in substantial changes to sentencing and correctional structures. From the abolition of parole to mandatory/minimum sentences, these initiatives resulted in prison populations larger than anyone could have anticipated. I entered the Bureau of Prisons (BOP) in 1973. By 1980, the federal prison system had 24,000 prisoners; today it totals 218,000.

Each year we lock up more individuals than we release. How long can this continue? How long can the American taxpayer foot the bill for increased incarceration? And more importantly, is it necessary?

Some states are rethinking the notion that a steady increase in incarceration is a societal benefit and have recognized that being “smart” on crime is as important as being “tough” on crime. The federal government, however, continues to increase law enforcement without addressing the end result of overcrowding, tightening prison budgets, increased safety concerns, and lack of programs. Our world is changing, but our system remains the same. We have removed common sense from the federal judge's arsenal and determined that one prescription—more and longer terms of incarceration—fits all. We spend more money as a country incarcerating an individual than educating our kids. I

am not saying that some people don't need to go to prison. I am saying that long prison sentences without the benefit of common sense and real investment in reentry programs create a bigger problem than we had to start with. The federal prison system needs a new look, and what is required is more than simply changing a few policies, adding a few programs, or increasing resources by a few percentage points.

I retired from the BOP 14 years ago and still believe that the BOP is one of the best agencies in government. What the BOP seems to have lost in recent years is the ability to be innovative and creative, largely because it continues to gain more responsibility with fewer resources. Additional money is not the best solution to every problem; common sense is. We give the public the perception that once we send a person to prison the problem is solved. What we don't explain to the public is that over 97 percent of prisoners will eventually return to the community. Will those individuals be better people upon release than when they entered the system? I think not. I believe with the growth of the BOP population, the agency has been forced to concentrate more on containment than on rehabilitation. As a result, it is a confinement rather than a correctional system.

The solutions to these issues will require a strong political will to overcome the fear of looking weak on crime and a cooperative effort among Congress, the administration, and the people with expertise in corrections, such as those at the BOP. In this article I'll address the issue of overincarceration from a correctional administrator's perspective and suggest a way ahead. I have spoken to a number of other retired federal prison wardens and they share many of these same perspectives.

Where We Are

The costs of using incarceration as the primary correctional tool in America in terms of human and fiscal capital are well documented elsewhere. What others do not discuss as frequently is the impact of overincarceration and the resultant crowding on correctional management. A recent Government Accounting Office (GAO) study of the BOP details the current levels of crowding in the BOP. (U.S. GOV'T ACCOUNTABILITY OFFICE, BUREAU OF PRISONS: GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE (2012) [hereinafter BOP: GROWING INMATE CROWDING], available at <http://tinyurl.com/bf7g99g>.) Today the BOP is 39 percent over capacity. Though there are frequent disagreements about how the actual capacity of prison systems is calculated and what crowding rates really mean, a more tangible way to view the BOP's crowding is simply this: on any given day, 73,000 prisoners are *triple* bunked or housed in gymnasiums, classrooms, or other spaces not designed to house inmates, including 35,000 in medium-security prisons. Only 3 percent of the total federal prison population, including high-security prisoners, is single bunked.

Unfortunately, the BOP's experience has been an increase in prison population without a commensurate growth in staff. The result has been a worsening inmate-to-staff ratio and a reduction in inmate supervision and support. In 1997, the inmate-to-staff ratio in the system was 1 to 3.57. Now that ratio is 1 to 5.1 while the five largest state systems have a ratio of 1 to 3.1. This becomes important, as a 2005 study by the BOP showed that population pressures on both staffing levels and living space have a direct relationship on the amount of serious prison violence. (BUREAU OF PRISONS: THE EFFECTS OF CHANGING CROWDING AND STAFFING LEVELS IN FEDERAL PRISONS ON INMATE VIOLENCE RATES (2005).)

The reaction of correctional administrators, who are responsible for the day-to-day running of these overcrowded facilities, is understandably to increase the physical and management control of the inmate population to reduce the number of assaults and incidents. This means more restricted movement around the facility, increased use of segregation to manage difficult prisoners, and increased use of institutional lockdowns where inmates are locked into their cells in order to head off a potential disturbance or manage an existing one. From 2006 to 2011, the BOP had over 4,000 lockdowns systemwide. Though temporary, lockdowns can

last for weeks. These security measures have a direct effect on inmate programs. During lockdowns, most programs cease because inmates cannot move to classrooms or treatment areas. Frequent lockdowns also create an environment that in no way resembles the outside world, so inmates are affected further by not learning the coping and management skills needed when one is placed into the real world without such controls and regimentation.

The pressures of crowding force security and control to dominate management priorities and actions, not reentry, programming, or other priorities. The California Department of Corrections and Rehabilitation (CDCR) experienced many of these same pressures over the past 20 years. In testimony cited by a three-judge panel in the CDCR litigation, *Coleman v. Schwarzenegger*, former Texas Department of Criminal Justice Executive Director Doyle Wayne Scott noted: [O]vercrowding engenders a state of perpetual crisis that causes management failures. Administrators spend their time doing damage control, rather than making sure the prison is operating properly and prisoners are getting the services that they need. (No. CIV S-90-0520 LKK JFM P, slip op. at 58 (E.D. Cal. Aug. 4, 2009), available at <http://tinyurl.com/c89zteh>.)

Crowding was the major contributing factors in lack of medical care and other services that prompted the courts to intervene and to require a reduction in CDCR's population levels. Crowding also means more lines and more waiting—waiting for visits, food, access to libraries, and, most importantly, access to programs. Despite the fact that 48 percent of federal inmates are serving time for drug offenses and well over 70 percent have substance abuse issues, more than 10,000 inmates are on waiting lists for residential drug treatment and over 35,000 are on waiting lists for drug education programs. While 13 percent of the federal prison population is enrolled in literacy programs, another 11–12 percent is backlogged for such programs. So crowding impacts programming and, ultimately, recidivism.

Crowding also results in massive inmate idleness. While federal prison policy requires all able inmates to work, the net result of massive crowding is that much of the inmate population works only a few hours a day, and much of this is make-work. The fact that the majority of federal prisons were built in the last 15 years means that maintenance work is less plentiful. Federal Prisoner Industries (FPI), the BOP's major work program, has suffered from significant congressional intervention in cutting back its market space. Whereas FPI employed over 22 percent of federal prisoners prior to the 1990s, it now employs less than 9 percent. From 2007 to 2011 alone, prisoner industries went from 23,000 jobs to 14,000 jobs, while the federal prison population continued to rise. The environment of idleness creates misconduct opportunities and management difficulties while failing to reinforce the work ethic and accountability values inmates will need when they reenter the job market after release.

One solution would be to reduce crowding through an aggressive building and hiring program. But given the reality that the BOP already has an operating budget just shy of \$7

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billion and we face a rapidly growing federal deficit, no one has the political or fiscal stomach to build the tens of thousands of beds or hire thousands more federal employees to resolve the overcrowding issue by throwing more resources at corrections. Another solution would be to do more with less—cut costs in food, programs, medical care, maintenance, etc., each of which has long-term effects. Realistically, though, 70 percent of a prison budget is labor costs, so the savings margins in food, medical, and other nonlabor areas are small. To date, the federal fix has been to keep labor costs stagnant while at the same time pushing more prisoners into existing space—the recipe for understaffing, institutional problems, and a resultant emphasis on control. Currently, the BOP is funded at less than 90 percent of its already slim authorized staff levels due to budget constraints. To ensure that custody posts are continually manned to maintain safety and security, the BOP “augments” its custody forces by assigning program, professional, and support staff to cover custody posts—further eroding the emphasis on reentry.

The Sentencing Reform Act, which took effect in 1987, eliminated federal parole and solidified determinate sentencing. It also limited the amount of “good time” an inmate could earn to no more than 15 percent of a prisoner’s sentence, which impacts not only the size of the prison population but also a prisoner’s motivation to behave appropriately. Prisoners saddled with lengthy sentences and provided with an incentive of only 47 days a year in good time are largely unwilling to comply with the rules of a facility or engage in productive programs. Instead they take part in violent, gang-related behavior that has become increasingly difficult for the BOP to manage. Standard correctional sanctions such as loss of telephone or visiting privileges mean little to gang members or violent criminals serving 20-plus years. As a result, the only meaningful sanction left—disciplinary segregation—has dominated the correctional toolbox. The result is thousands of long-term segregation cases—so many, that the BOP had to take a number of open-population prison beds off line to create “special management units” to handle long-term segregation cases. While the use of long-term segregation makes complete sense from a security and safety perspective, when it becomes the only effective tool at the system’s disposal, reentry programs, meaningful work, and meaningful personal interactions for those prisoners are significantly diminished.

The result of all of this is the unending revolving door of corrections, whereby 40-plus percent of prisoners released into their communities are rearrested within three years. This creates additional costs and burdens as this recidivating population is now a major driver of the number of prisoners coming in the front door. Additionally, their recent return from the community where they have continued their criminality reinforces the links between prison gangs and criminal activity in the street, adversely impacting both prison and community safety.

For the first 60 years of its existence, the BOP was never close to being the largest correctional system in the United States and was significantly dwarfed by state systems, including those in Texas, California, and New York. Now

the situation is reversed; the BOP dwarfs any state system and the magnitude of the difference is increasing. The BOP has grown from a federal system built to house offenders of specific federal offenses to a system that is slowly beginning to resemble the national prison systems of Canada and Great Britain, filled with violent gang offenders, robbers, murderers, and drug dealers, most of whom were traditionally prisoners of state systems in this country. But one cannot be a state system and a federal system at the same time. The BOP is not local; it houses prisoners hundreds, if not thousands, of miles away from their homes, removed from family and community links. Unlike a state correctional system, the BOP has no ties to a system of county jails that manage prisoners for the state in the near term and form an integrated system of admission and release. The BOP also has no presence in local communities outside of its prisons and 8,800 residential reentry center (RRC) beds for which the BOP contracts out. Because it is a federal entity, the BOP has little connection to state or county housing, treatment, Medicaid, job search, or other service agencies. These services are provided by state and local—not federal—agencies, so when the BOP releases an offender, it can do little to engage the offender at the ground level—the release community. For this community transitioning, the BOP relies on the limited RRC beds, which service only a portion of the releasing population and in only 185 communities, or on its hand-off to federal probation. The transition for an offender from a nationwide prison system to city and county release support systems will never be practical or effective without massive resources given to the BOP to establish a presence in the more than 3,000 counties nationwide, which is an unworkable solution.

The overincarceration of offenders at the federal level has resulted in huge costs, crowding, and recidivism, and negatively impacted families and communities. Much of this impact was unintended and based on rational policy making at that time. But times change and so must solutions and policies.

The Way Ahead

The solutions to these issues are not “prison” fixes—better prison management, more security, more success at driving efficiencies in food, medical, or staffing, etc. The major problem with the status quo of the past 20 years has been that policy and structural changes at the front end of the federal criminal justice system—shifting law enforcement and prosecutorial priorities, adding resources at the law enforcement officer level, changes in sentencing and good-time credits, and others—are made without substantial regard for the downstream effects of these changes on the detention facilities, prisons, community corrections, and postrelease supervision at the back of the system. This disconnect squeezes resources for agencies responsible for the back end of the system, as their populations balloon—as if the back-end agencies caused or could fix the problem on their own. Still, there is hope. The common-sense suggestions outlined below provide a road map for improving the federal correctional system moving forward.

1. The only way to fix the current state of affairs is to

engage all—law enforcement, the Department of Justice, the courts, probation, the BOP, defense counsel, and Congress—in an objective discussion of a national federal public safety policy. Rather than relying on each individual stovepipe in the system to change laws and policies and to reallocate resources and priorities, stakeholders need to develop and implement a coherent overall strategy. If the result of this discussion is a federal prison system of eventually 300,000 prisoners, so be it. As long as all stakeholders buy into the rationale, drivers, and costs associated with that policy, it may be acceptable. If the result is to shrink the federal prison population, reduce the length of sentences, and increase good time and other incentives offered to prisoners, that, too, may be acceptable. What is not acceptable is a disjointed approach to federal criminal justice. Such a conversation must also address immigration issues. Currently, 27 percent of the federal prison population is composed of non-US citizens at a cost of \$1.8 billion a year. Policies need to be retooled to more rapidly deport criminal aliens rather than spend \$27,000 a year per noncitizen to provide housing, medical care, and food.

2. Rational cost-benefit analysis needs to be tied to federal policies. No business would make costly decisions without understanding the costs associated with those decisions and examining whether those costs are likely to produce the desired payoff. But that's what happens in the federal justice system. For example, in sentencing, what are the diminishing benefits compared to costs for different sentencing laws? If a 15-year sentence for conspiracy to distribute has the desired effect on incapacitation, deterrence, punishment, and rehabilitation (the four basic goals of corrections), then why impose a 20-year sentence? Those extra five years mean that we add nearly \$130,000 to the cost of incarceration without significant benefit, not to mention the human costs. Even though law enforcement is a public safety decision, it is also a fiscal one. We must bring that fiscal analysis and cost-benefit mindset to bear and reexamine mandatory minimum sentencing, sentencing enhancements, and all of the other drivers that have resulted in this tremendous increase in incarceration since the mid-1980s.

3. With recent and significant enhancements in technology, programming, incentives, and community corrections, there has not been a better time to look at alternatives to incarceration—both at the front end, in lieu of incarceration, and at the back end, during the last one to two years of incarceration. This is not a suggestion for passive community supervision but for a full menu of intensive supervision using everything from GPS tracking, alcohol and drug monitoring, use of opiate depressing drugs to reduce relapse and improve treatment compliance, day reporting, and intensive residential drug treatment. Furthermore, this supervision would feature punitive consequences for failure to comply. Much of the research literature indicates that treatment programs are not only much less costly in the community but also more effective. In order to preserve public safety, inmates placed in alternative programs must be selected according to sophisticated statistical models of risk assessment that identify the best candidates.

The states have created a number of alternatives, such as the Justice Reinvestment Initiative, which is funded by the Department of Justice Bureau of Justice Assistance. These changes at the state level are beginning to show promise. A recent Bureau of Justice Statistics report showed that 25 states have recorded decreases in their prisoner populations. (PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010 (revised Feb. 9, 2012), *available at* <http://tinyurl.com/bpvvjtm>.) Some states provide possible actions for the federal government to model, but the structural, regulatory, and funding limitations discussed above have hampered any meaningful innovation at the federal level.

4. Restructure the federal justice system or at least the appropriations to improve cross-agency solutions. The BOP's statutory and funding limits mean that it cannot significantly invest in alternatives to incarceration at the front end or in meaningful community-based supervision at the back end. These are the turf and appropriation of the US Probation and Pretrial Services System, which is an agency governed by the US district courts and not the BOP or Justice Department. We must find a way to resolve stovepiping so that alternatives can be funded across agencies. If the BOP could invest 1 percent of its funds in federal probation for postsentence alternatives to incarceration, and such investment would save the BOP 3 percent of its budget in incarceration costs, how can we change the structural boundaries to allow and encourage that investment?

5. In addition to these systemic and front-end issues, the back end of the federal correctional system also needs significant work. The BOP's Residential Reentry Center program of 8,800 contract beds in the community is effective. It needs to be expanded to include more secure residential community correctional facilities. The GAO study concluded that for the BOP to place all eligible inmates into RRCs for the full 12 months allowed under current regulations would require an additional 29,000 RRC beds. Currently, 22,000 BOP prisoners are in minimum-security camps with no fence surrounding the facility; most are drug offenders. Some portion of this group would be better placed, at least during the last one to two years of their sentences, in highly programmatic, secure reentry centers with a strong emphasis on assessment, treatment, and community connections from which they would then transition to the BOP's RRCs. If a significant number of minimum-security prisoners could be relocated into community correctional facilities, that minimum-security camp capacity could then be reworked and fenced to create secure reentry programming facilities for medium- and low-security prisoners near the end of their sentences. The BOP could concentrate treatment, assessment, and program resources in such centers to truly make a significant investment in reentry programs for those inmates moving toward the end of their sentences. These solutions, though, require funding and commitment across all three branches of the federal government.

6. Correctional administrators need strong incentives to motivate prisoners to be engaged in positive behavior and programming. Even if prisoners enter programs due to external incentives, such as increased good time, eventually

many internalize the motivation for programs and positive change. It makes sense to significantly improve the good-time formulas for the BOP and increase the good time awarded for participation in programs—similar to what currently exists for residential drug treatment—to enhance incentives and encourage programs. (The BOP has proposed legislation in this area, but Congress has failed to enact it.) These good-time enhancements would not only result in encouraging positive behavior but they also result in significant cost reductions, as thousands of prisoner are released a little earlier based on their behavior.

7. Prison industries need to be reshaped. It is clear that Congress is not open to expanded domestic markets for FPI. The current unemployment rates of law-abiding citizens will understandably force legislators' hands. But the current prison industries model is driving prison industries toward bankruptcy, increasing inmate idleness, and harming a program that has demonstrated a positive impact on recidivism. A new paradigm for prisoner industries needs to be implemented that will require congressional action to change FPI's charter. FPI should be privatized to permit private sector companies to find products and services not produced by law-abiding citizens in the US and bring them to federal inmates. FPI is not "inherently governmental" and would be better served by a for-profit mentality that will actively seek markets that do not impact US workers, will create a more realistic work environment for prisoners, and will be driven to be productive and employ as many inmates as practicable. To enhance the realism of the work experience, we should consider paying prisoners community minimum wage rates to work, but require that they pay for their lodging in addition to child support and court-ordered fines and restitution. At the end of the day, the costs will cancel each other out, but the work lessons will translate more directly upon release back to the community. There are legitimate concerns that such a model could result in a return to the nineteenth century prison slave labor issues, but with proper regulations and oversight, abuses can be avoided.

8. Investment in reentry needs to be improved. Forget the altruistic and public safety issues of former inmates returning to their communities unprepared for reentry. Recidivating prisoners are also a fiscal issue. For every prisoner who does not recidivate, a \$90,000 prison bed does not need to be constructed and \$27,000 a year in operating costs are not spent. The Pew Center on the States projected, for example, that if state correctional systems could reduce recidivism rates by just 10 percent it would save \$635 million annually. (PEW CTR. ON THE STATES, *STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS* (2011), available at <http://tinyurl.com/5t9v7bm>.) Additionally, there needs to be more accountability for recidivism at the policy-making and operating levels. Corrections officials get scrutinized constantly over safety and security measures—numbers of homicides, escapes, disturbances, suicides, or violations of constitutional

conditions of confinement; this makes sense. But there is little accountability for the "product" of corrections—a released prisoner who is better off and less likely to recidivate than when he or she entered the system. Prison managers will argue that they have no control over the behavior of highly criminogenic people. I disagree. The recidivism rate of prisoners should be a major performance measure not only for the correctional system and probation as a whole, but also for wardens and other managers. This would require sophisticated statistical models, but accountability drives results and the investment in these performance metrics will pay off.

9. Either we get away from the BOP being a national prison system with few local community ties or invest in the community; we cannot have it both ways. If the policy decision is that the BOP will be the largest and most prominent correctional system in the United States, then it needs to be provided the resources to establish a presence in hundreds of cities and communities nationwide to establish reentry connections, one-stop shops, and all of the other case management and community ties needed to transition a federal prisoner back into meaningful work, housing, and treatment. Failing to do this is unfair not only to the released prisoners leaving custody but to the cities and states where they are released.

10. Finally, and perhaps most importantly, at some point we need to start taking a long-term approach to reducing incarceration—and one avenue is to invest in the children of incarcerated parents. There are currently 1.7 million children who have one or more parent who is incarcerated. Some research indicates that these children are five times more likely to end up in prison than their peers. (Charlene Wear Simmons, *Children of Incarcerated Parents*, CRB NOTE, Mar. 2000, available at <http://tinyurl.com/bj9ld55>.) There is a great concern that we are raising the next generation of felons that we will then incarcerate. It is time to make a small investment in these children that will pay human and financial dividends for decades. This is why I founded the Creative Corrections Education Foundation (www.creativecorrectionseducationfoundation.org) that provides scholarship money directly to vocational schools, community colleges, and universities where children of incarcerated parents attend. The foundation works with parents, counselors, high school teachers, and coaches to identify these children and provide educational opportunities. But much investment is needed here.

None of the solutions proposed above are easy, and some may be expensive, at least in the short term. But the long-term costs of brick and mortar incarceration, a federal prison population approaching 250,000, and the human, family, and community costs will far exceed any of them. The current federal fiscal crisis provides an opportunity to find new paths ahead for the federal prison system and solutions to its difficulties. Now it just takes the courage to explore and implement them. ■