

**NEBRASKA'S
PRISON CAPACITY CRISIS**

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**Nebraska's
Prison Capacity Crisis**

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Nebraska's Prison Capacity Crisis

Litigation

Prisons which operate in excess of their rated capacity need not violate the rights of prisoners. In *Bell v. Wolfish*, 441 U.S. 520 (1979), Justice Rehnquist declared that there was no "'one man, one cell' principle lurking in the Due Process Clause." In *Rhodes v. Chapman*, 452 U.S. 337 (1982), the Court rejected the argument that prisoners have a right to 50 to 55 square feet of living space. Speaking for the majority, Justice Powell wrote that "the Constitution does not mandate comfortable prisons."

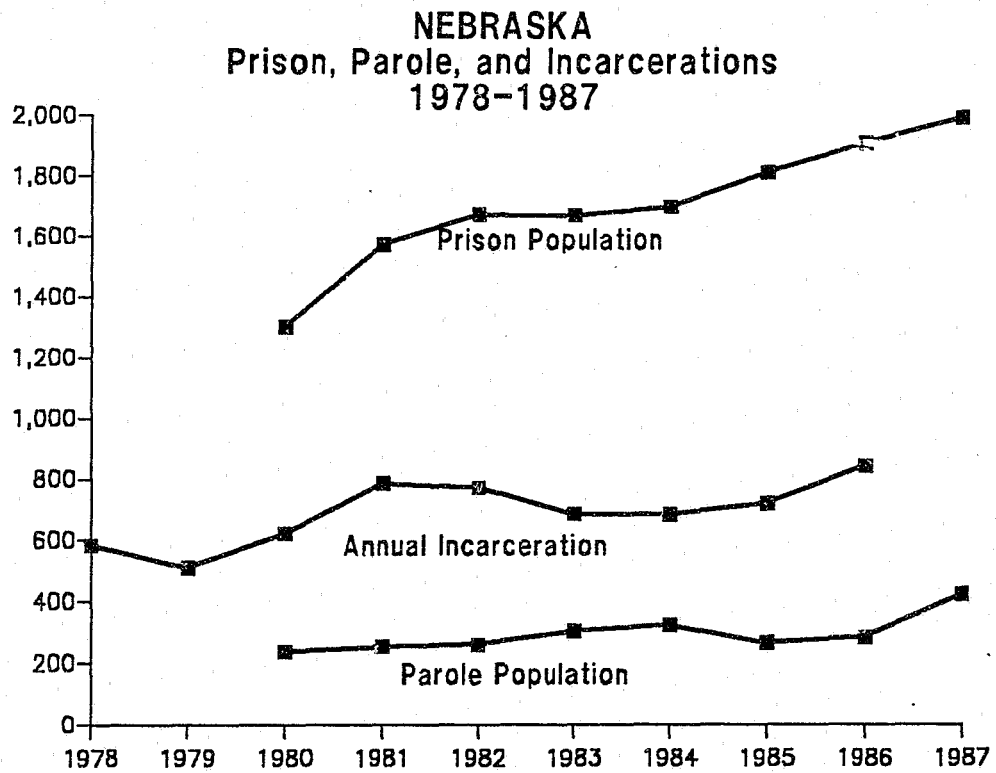
The Eighth Amendment protects individuals from "cruel and unusual punishments". The courts have not defined a threshold which would establish a *prima facie* invalidation of a prison system. In determining Eighth Amendment infringements, a court must consider the effect of the conditions of the system. These include fire safety, violence, physical plant, and sanitation. Primary among these conditions are those that affect physical safety of the inmate and the officer.

Prison litigation has been developed primarily by the nation's trial and appellate courts. Beginning with prison systems in Arkansas and Alabama, the courts have held that the **totality of conditions** in prison -- including crowding -- must not combine to amount to cruel and unusual punishment. Though the Eighth Amendment exists to protect individuals, the courts have extended this protection to hold that an entire prison system could violate the Eighth Amendment rights of each prisoner. In *Rhodes* and *Wolfish*, the Supreme Court established the constitutional boundaries of overcrowding.

While the courts were expanding their jurisdiction over a state's prison system, they were also expanding the scope of relief. Until recently, the accepted approach in condition cases was for the district court to issue a sweeping injunction, affecting any aspect of the institution that the court felt contributed to the constitutional violations,

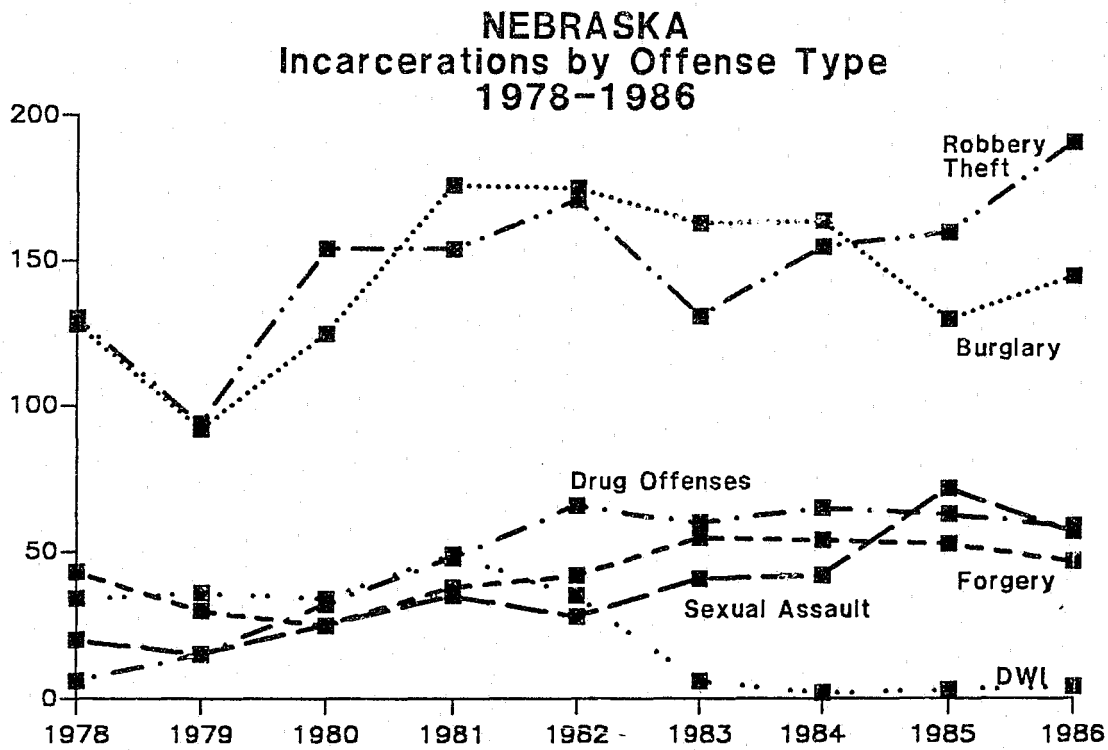
even if a particular aspect of the order was not constitutionally protected. In Texas, for example, the district court in *Ruiz v. Estelle*, 503 F. Supp. 1265 (1980), felt that it was entitled to issue an injunction that was related to facility size, design, and organizational structure, as well as to the location of new penal facilities. At least two more recent decisions suggest that the all-encompassing and never-ending order may be passing. These cases involve the corrections systems of Texas and Washington. See *Ruiz v. Estelle*, 679 F.2d 1115 (1982), *modified*, 688 F.2d 266, and *Hoptowit v. Ray*, 682 F.2d 1237 (1982).

Nebraska's correctional system is not under court order. There is, however, something to be feared from federal supervision, and hence something to be avoided. While there is no overcrowding threshold which might cause a court to act, Nebraska's system is operating at 134 per cent of capacity, and shows no sign of relaxation. Certainly the court would look askance at a prison which operates at 150 per cent of its capacity, but might not determine a violation of the Eighth Amendment exists. Still, the practical effect of such an overburdened system should raise concerns of possible constitutional violations and unsafe conditions for inmates and officers.

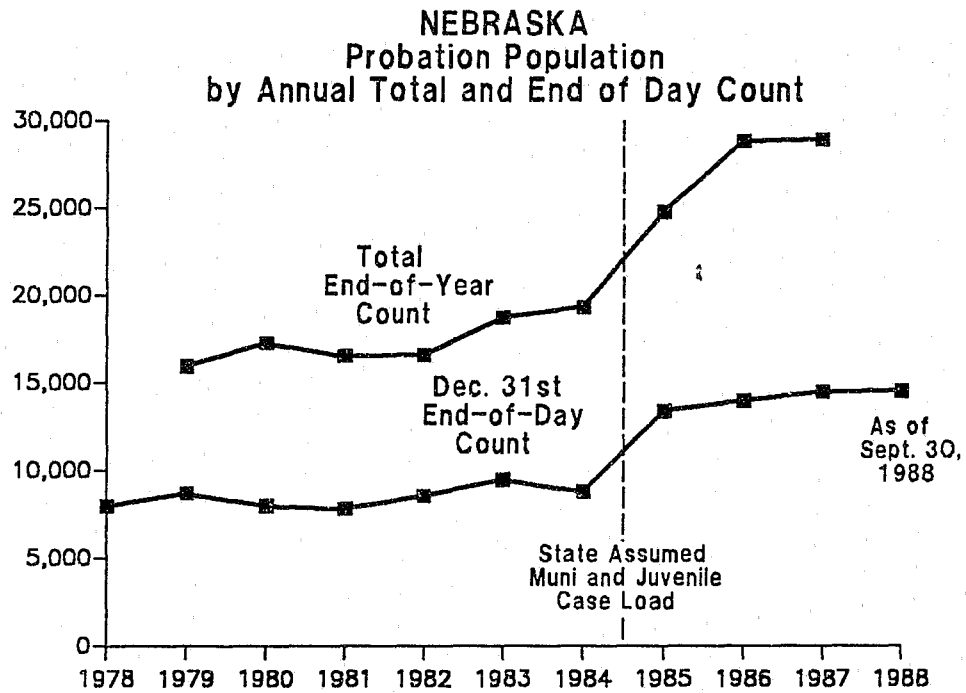


Nebraska's current situation is unprecedented. The prison population has doubled in the past seven years. For the first time in its history, the population at the women's facility has exceeded its capacity. The state's rate of admission is at the highest level in ten years. The average length of stay is increasing, and the average age of an incarcerated individual has increased by two years.

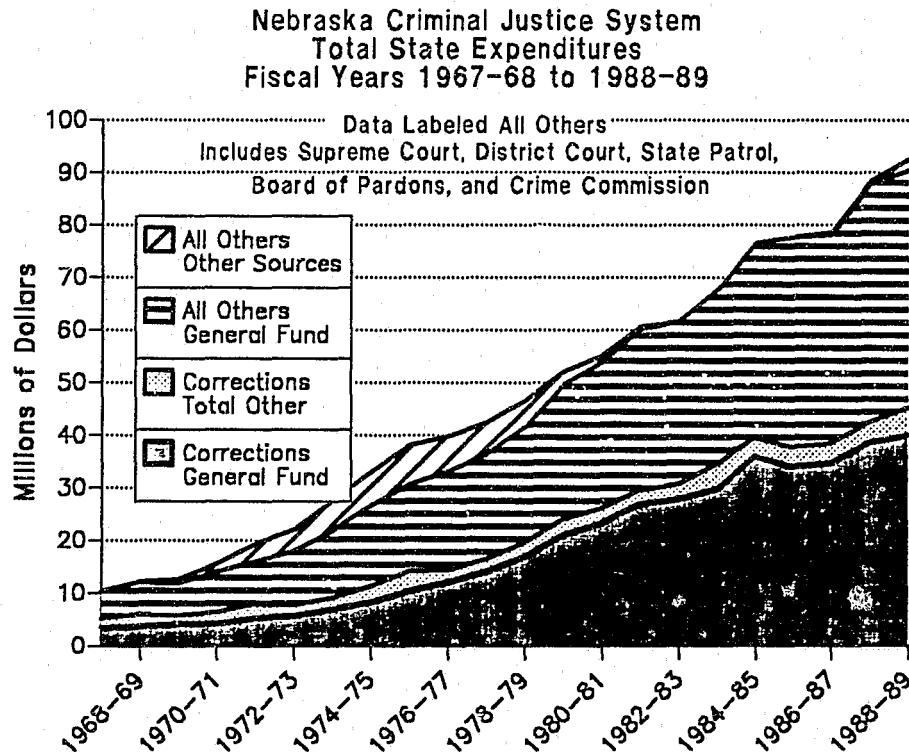
Persons convicted for burglary, robbery, and theft represent the most frequent admissions. Commitments for delivering a dangerous substance, 2nd degree forgery, and 1st degree sexual assault are increasing while commitments for DWI, 1st degree forgery, and dealing a controlled substance are declining.



Nebraska's capacity crisis is not measured solely by incarcerated inmates. Probation populations have also reached record numbers. By any measure, Nebraska's criminal justice system is overburdened.



State officials have discovered that tough crime laws and rigid sentencing requirements exact a price. Criminal justice systems have become budget busters. Funding for Nebraska's penal institutions equals 4.2 per cent of the state General Fund budget.



In Fiscal Year 1968-69, the State Department of Corrections received \$3.75 million. Ten years later, in FY 1978-79, General Fund support had increased by 451.9 per cent, to a total of \$16.9 million. In FY 1988-89, General Fund support to the

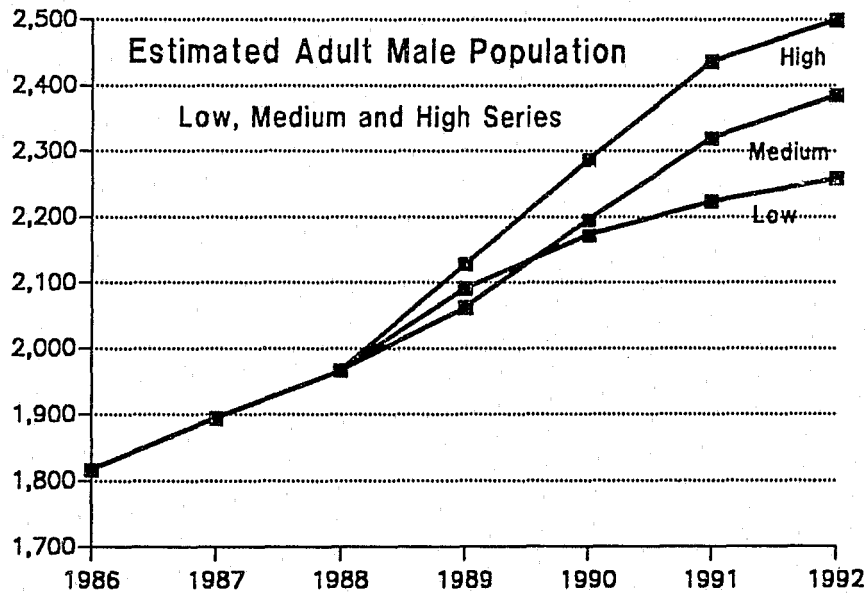
Department totaled \$40.1 million, an increase of 236.8 per cent over the FY 1978-79. Over the past twenty years, General Fund support for the Department of Corrections has increased at an average annual rate of 53.5 per cent.

Arguing against the notion that "prison populations are a natural phenomenon that are an inevitable consequence of factors outside the criminal justice arena," Ms. Kay Knapp, former project director for the Minnesota Sentencing Guidelines Commission asserts that "policy drives prison populations." From this perspective, "prison populations are viewed as a consequence of explicit policy and practices of criminal justice decision makers."

It follows that legislators are a major influence on the factors that affect prison populations. It is a legislative function to define crime and punishments and to set conditions of confinement.

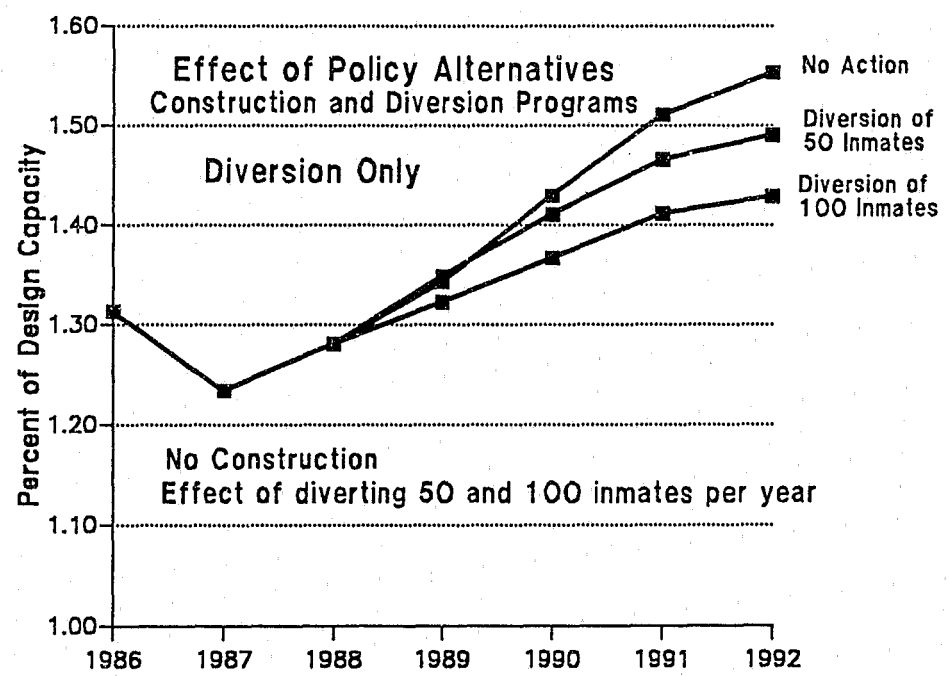
Population Projections

Unless the legislature reacts to the problem of prison overcrowding, there can be no doubt that the capacity of the state prison system will reach the point where it will operate in an unsafe manner. The state's design capacity for adult male offenders totals 1,535. Based on figures supplied by the Department of Corrections, the state is expected to achieve 150 per cent of adult male capacity in 1991.



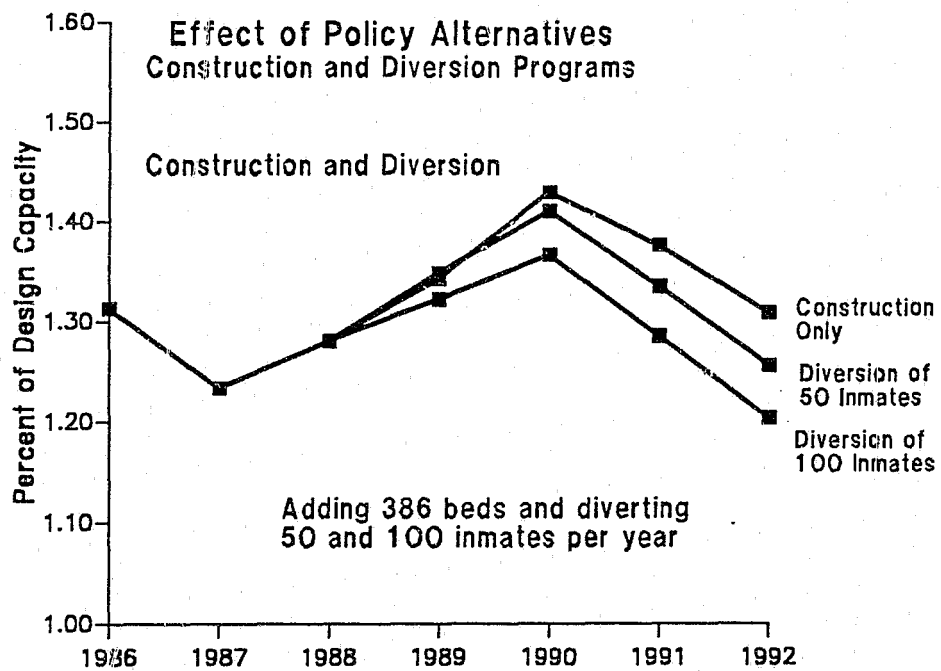
In response to the anticipated need, the Department of Corrections requested, and the Appropriations Committee recommended the construction of 386 additional adult male beds at existing institutions. If this is the only course of action adopted by the legislature, **at the time these beds are available, they will be full.**

In an article titled *Prison Overcrowding in Nebraska: The Feasibility of Intensive Supervision Probation*, Professors Hoffman and Webb of the Department of Criminal Justice at the University of Nebraska-Omaha, suggest the state should attempt to divert 50 or 100 inmates annually from the state prison system. The following graphs depict the impact of those decision alternatives.



The previous graph depicts the impact of diversion without capitol construction. If the state does nothing, the adult male population will exceed 150 per cent of design capacity in 1991. If the state were to divert 50 individuals per year, or 5 per cent of new admissions, the impact would only defer the problem by one year. Diversion of 100 new admissions, a 10 per cent annual reduction, would not reverse the trend but would allow some degree of freedom to address the problem.

The following graph depicts the impact of construction and diversion. Adding 386 new beds, at the time they are scheduled for completion, would reduce the overcrowding problem following a peak expected in 1990. At completion, construction would allow the prison to operate at 131 per cent of capacity into the early 1990s. When diversion is linked to construction, the trend is significantly reversed, allowing the prison to operate at 122 per cent of capacity in the 1990s.



The significance of these projections is that, taken by themselves, neither policy significantly improves Nebraska's current situation. Moreover, when these policy options are combined, they have little lasting impact on adult male population. Taken together, they only defer the state's predicament. In the mid 1990s, the legislature will once again be facing the same situation. At that time the solutions will be more expensive. Existing facilities were designed to allow for additional growth. Once used, the 1995 legislature will be debating the construction of an entirely new facility with all its ancillary support systems.

The Cost of Incarceration

The State Department of Correctional Services is doing a commendable job managing the state's prison population given available options. One such option is capacity expansion. The Department has requested additional capacity. Their request includes funding for the following projects:

<u>Project</u>	<u>Beds</u>	<u>Cost</u>	<u>Operation</u>
Center for Women. A 40 bed addition and closure of 10 beds. Completion date Aug. 1990.	30	\$ 446,700	\$ 10,600
State Penitentiary. An 80 bed replacement for the Departmental Control Unit. Would replace 36 bed facility. Completion date Aug. 1991.	44	4,541,200	518,248
Omaha Correctional Center. A 150 bed minimum security facility. Completion date Aug. 1990.	150	1,640,900	786,838
Lincoln Correctional Center. A 200 bed minimum security facility. Construction dependent on alternative sentencing and facility renovation study. Completion date July 1991.	200	3,333,000	1,329,726

Criminal justice practitioners have long argued about the definition of the cost of incarceration. These discussions center on the amortization of the cost of construction and the cost of incarceration. Of the sentencing options available to policymakers, incarceration at a state institution is the most expensive policy option.

According to the **Rand Corporation**, the annual cost of sentencing options per individual, exclusive of construction costs, are as follows:

<u>Option</u>	<u>Annual Cost</u>
Routine Probation	\$ 300 - 2,000
Intensive Probation	2,500 - 7,000
House Arrest	
Without Electronics	1,350 - 7,000
With Electronics	2,500 - 8,500
Local Jail	8,000 - 12,000
State Prison	9,000 - 20,000

Factors Affecting Policy Options

As previously discussed, additional capacity will not, by itself, relieve the state of overcrowding. If the state does nothing else, the best that can be achieved from construction alone is the maintenance of the current system for only six years.

These estimates are based on computer projections provided by the Department of Corrections. The predictions were produced from a software package called *IMPACT* distributed by the **Center for Decision Support**, located in Washington, D.C. Predictions were made to the year 1992.

IMPACT produces a low, medium, and high predictive series, the results of which are presented earlier. Construction requests were based on the results obtained from the medium series. The major input variables which may be altered for analysis are anticipated new admissions and average length of stay.

An analysis of the assumptions used by the Department to produce their estimates suggests that the *IMPACT* model might actually **underestimate** inmate population, especially in the later years of the estimate. Three factors led to this conclusion. First, the rate of new admissions assumed in the model. For new admissions, Nebraska's prison population is being driven by three factors.

(1) The state experienced a 40 per cent increase in the number of persons given prison sentences of one or more years during the period 1980 through 1986, a period when crime rates were declining.

(2) The ratio of prison commitments to reported crimes in Nebraska increased from 35 state prison admissions per 1,000 serious offenses in 1980 to 39 admissions per 1,000 serious offenses in 1985.

(3) Commitments for drug offenses, first degree sexual assault, and second degree forgery have increased significantly since 1978. For the

period 1978 to 1987, commitments for drug offenses increased from 5.8 per cent to 9.3 per cent; commitments for first degree sexual assaults increased from 3.0 per cent to 14.6 per cent; and, commitments for second degree forgery increased from 0.8 per cent to 5.5 per cent.

These three factors -- increasing admissions, increased probability of imprisonment, and increased use of prison for certain offenses -- combine to produce an estimate that future admissions will be higher than predicted by the *IMPACT* model. This is especially true in the fifth year of the analysis, when new admissions are not forecasted to change.

The second variable which tends to underestimate the effect of sentencing policy is average length of stay. In the *IMPACT* model both current average length of stay and future average length of stay are assumed to be constant and the same. An analysis of the average length of stay shows that, not only are there more inmates, they are staying longer. From 1982 to 1985, the median length of stay in Nebraska's prisons increased from 13 months to 20 months. Varying the future average length of stay in the *IMPACT* model would result in a higher prison population.

Finally, the state is evidencing declining parole rates. Between 1969 and 1983, the parole rate (the percentage of hearings that result in a parole), was never lower than 70 per cent. For the three year period 1983 through 1986, the parole rate declined to an average of just over 61 per cent.

In Nebraska, more offenders are being sentenced to prison (sometimes for offenses that would not have resulted in a prison sentence in previous years), they are staying longer, and they are being paroled at a lower rate than in the past.

In general, the causes of prison overcrowding in Nebraska are no different from other states. Much of the increase in prison population can be traced to criminal justice policy. Factors which are under the control of decision makers rather than

those outside their sphere of influence. They reflect the public pressure for imprisonment.

The current corrections policy debate is centered on the issue "to construct or not to construct." As demonstrated, the capacity problem goes beyond construction to include policy options. They include the realization that Nebraska's system is based on "back door" intervention, that is, releasing inmates who are nearing the completion of their sentence. The Department of Corrections has used restoration of good time to advance release dates to reduce prison population. Parole is a second "back door" strategy.

Opportunity needs to be built into the system. Several "front end" strategies, which are being tested in the state, need to be expanded. Such programs include those which are designed to keep inmates out of the prison system, or those which reduce the length of sentence. The state could provide for increased use and coordination of community corrections programs to keep offenders in the community or ease them back into society.

Judicial sentencing discretion limits the control that a state may exercise over the number of persons that may be sentenced to prison. Many states have imposed sentencing guidelines to control prison admissions. The State of Delaware has introduced sentencing accountability. Other states have advanced the use of alternative sentencing options.

Once sentenced to prison, state laws limit the ability of corrections officials to manage the population. Once incarcerated, the state's "good time" law has the greatest impact on length of stay of any other single factor.

Whatever strategies are developed by the state, they should not be adopted with the intent of controlling prison populations. They should be examined as the state decides what type of individual it wants to incarcerate. They should allow a judge

additional sentencing latitude for each individual case. Finally, state policy should provide corrections officials with sufficient discretion to adequately and effectively manage inmate population.