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Future of Corrections

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Hard Labor Can Save Prison Time

*Kenneth F. Schoen**

Perhaps I judged my criminal justice graduate students too harshly when I graded their term papers recently. I had asked them to create a sentence for a young, Hispanic armed robber of a 7-Eleven convenience store, who had a prior felony, that would satisfy the purposes of sentencing ranging from retribution to rehabilitation. But the sentence was not to include incarceration in prison or jail. Some students declared that the task was impossible, others slipped incarceration in by using "shock probation," and still others warned the offender that any violation of the non-incarcerative sentence would bring certain imprisonment. Clearly the students' perception of real punishment had to include imprisonment; to them, alternatives represented various degrees of "getting off."

I probably should have accepted their responses as indicative of how crime and punishment is widely seen, and as an example of even the informed seeing no alternative but to advocate imprisonment for serious crime. With the perception of such a response from the public, policymakers will clearly remain reluctant to relax tough, criminal justice policies. This attitude is certainly seen in the product of the U.S. Sentencing Guidelines Commission. When Congress directed the Commission to formulate Sentencing Guidelines "to minimize the likelihood that the Federal prison population will exceed the capacity of Federal prisons," they ignored the mandate. Moreover, they largely eliminated probation, offered no intermediate sanctions in exchange for incarceration, and submitted a product that will increase the prison population by at least 10 percent. The attitude of my students and the Commission has produced laws across the country that have not only increased penalties for crime but have also defined more behavior as criminal, especially sex offenses and drug use. These laws, plus the generally high levels of crime in the United States compared to other Western countries, have funneled an enormous number of offenders into the criminal justice process. As a result, prison populations have grown to unprecedented heights and prison overcrowding is pervasive.

Overcrowding, however, is not a new problem. Rarely since their inception some 200 years ago have prisons been at less than capacity. What is different today is that the courts have declared that some prison conditions that result from overcrowding are illegal. Certainly the intervention of the courts in the management of prisons during the past 25 years has been the most significant single force to change the face of corrections. Today, virtually no prison or jail in the United States operates as it did before the onset of prisoners' rights litigation.

As a major supporter of prison litigation during the past decade, the Clark Foundation has a high stake in litigation and in what its future will bring. While we may be no more accurate than a stockbroker in forecasting the future, we must consider the future of this investment in litigation.

It is likely that further change at the hands of the court during the next 25 years will probably be markedly less for two reasons. First, much of what courts can do has been done. The ripple effect of litigation on all prisons and jails has become extensive, although not as definitive of administrative policy as the Foundation had initially hoped.

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Second, the Supreme Court is likely to continue to become less responsive to prisoners' rights litigation. The perception of the Supreme Court's more conservative approach to prisoners' rights will encourage some jurisdictions to test issues that, in the past, were deemed unconstitutional. States can be expected to attempt to crowd more inmates into less space. Some may even try to dissolve consent decrees they had early agreed to. To the extent that the court's reach into the prisons diminishes, we will begin to see how entrenched and accepted are the changes that the courts have brought, and how much the American Correctional Association's standards will help tame the powerful forces pushing to compress more inmates into smaller spaces.

But by no means will the presence of the court disappear. Since court orders virtually never die, they will continue to play an important role in jurisdictions where they now exist. The courts will continue to be called upon to intervene in systems where overcrowding has caused the conditions of facilities to deteriorate to a point of being illegal. The specter of potential court intervention will continue to be an important deterrent to every jurisdiction that contemplates overcrowding its prisons and jails. While litigators may find wins harder to achieve, prisons will never be free to operate unmindful of the presence of the courts.

With the pressures created by the courts on overcrowded prisons and the effects of harsher laws, we have what is no less than a crisis in our penal system. The Foundation intends to use this situation to advance another goal—that of reducing the use of unnecessary incarceration. In addition to supporting litigation as a remedy for unconstitutional conditions of confinement, the Foundation has sought to create policies and programs that result in the development of a broader spectrum of sanctions, a reduced reliance on incarceration, and, to some extent, programs that may be used to supplement probation.

We are aware that there is another group that is also taking advantage of the crisis. The private profit-making sector is hard at work offering its services as the solution to overcrowding. To the extent that private operators can be more efficient, they could be helpful. Unfortunately, the greatest opportunities for the private sector to ply its cost-cutting talents are in jurisdictions with strong labor unions where it has little chance of acceptance. For example, as New York City annually spends \$30,000 on each of its adult inmates and well over \$100,000 on each youth in custody in its juvenile justice agency, a private operator could both reap big profits and reward the taxpayer with significant savings. But there is little chance for the private sector to get even a nose in the door, given the strong union.

The private sector, however, brings no additional resource to the table. If it is engaged to reduce prison overcrowding by adding beds, it drives up a jurisdiction's prison budget just as would the expansion of state-operated facilities. In the short run, it may be easier to include private prisons in a budget than it is to get voters to approve building bonds. But either way, ultimately, it is the taxpayer who foots the bill. During the next 25 years, the private sector will grow, but primarily in the operation of jails, which are chronic irritants to the county officials who have to support them. The private sector might have arrived too late; it should have been on the scene in the early 1970's when states had both the will and the resources to expand their systems.

The pressure that will relax the public's unrelenting grip on the belief that imprisonment is the way to control criminals, whether they are held in private or public facilities, will increasingly come from budget offices. When the state of California projects the cost of prisons to grow to over 5 percent of the overall state outlay within the next three years totalling 28 billion dollars a year and to threaten other state services, a host of new constituencies will join the traditional advocates of non-incarcerative sen-

tences to create strange bedfellows. The Foundation intends to approach a few of the states that are in the toughest straits. States that are besieged by overcrowding crises and prisoners' rights lawsuits and are unable to buy their way out of their problems will be high on the list of candidates. In the states we finally settle on, we will, in conjunction with local officials, initiate a variety of programs that will help the states bring their penal policies within their resources and legal mandates. Programs might include the development of model alternative sanctions, policy analysis, citizen advocacy, and public education. The overall goal of the effort is to eventually end up with several states that have model penal systems in place, offer sentencing judges a range of options, have prisons that are neither overcrowded nor unconstitutional, and have an array of sanctions that are credible and affordable.

This will not come easily. Even in the best of situations, policymakers will be as reluctant to modify sentencing statutes and to substitute noncustodial sanctions for incarceration as were my graduate students. Initially, the easiest measures will most likely be taken. These might include, for example, the development of better systems of classification to allow the redeployment of less threatening inmates to cheaper correctional settings—camps, work release centers, and so on. Technical parole violators, who occupy a surprising number of prison slots (about 15,000 in California), can be diverted elsewhere or handled differently by administrative decision. Release mechanisms of a less public nature (emergency release laws, increased good time, early and extended furloughs) will be high on the list of choices.

Looking ahead, we think we are going to receive help in our efforts to reduce overreliance on imprisonment from the public, that same public that politicians and criminal justice officials point to as the reason for their tough stance toward offenders. Opinion polls taken in the past few years indicate that the public is not as lock-em-up-minded about offenders as it is thought to be. A recent study commissioned by the Foundation found the public to be fearful of crime and to be disenchanted with the quality of the justice system, but not believing that wall-to-wall prisons would solve either concern. While the study showed that the public wants tough measures toward some offenders, such as drug sellers, they believe that prison is a debilitating institution. Taking this rather reasonable and non-knee-jerk-conservative outlook on criminals by the public a step further, it is not hard to imagine that it will take little for a consensus to develop that imprisonment should be reserved for the truly dangerous offender, that we can no longer afford to use this necessary but costly institution as a symbolic gesture. Making the point that certain criminal behavior is unacceptable can be done by means other than caging. It can be done, for example, through a variety of types of mandatory community service that includes tight and controlling supervision of the offender.

Yet it is hard to imagine politicians seriously advocating rehabilitation as the primary means of crime control, even though the "get tough" approach of the past decade has delivered little in reducing the fear of crime. But there is reason to believe that the more human dimension of crime and the criminal will again be acceptable as a topic to consider. First, it is going to be hard to hold on much longer to the "get tough" approach as the solution to crime. It is becoming clear even to the casual onlooker that the experiment of massive imprisonment as the antidote to crime has failed. When 1.0% of the population is under some kind of correctional control, when 2.5% of blacks are in prison, when one cent of the total tax dollar is spent on incarcerating offenders, we are approaching the outer limits of tolerable public policy. Furthermore, the influence of the current administration, which has relentlessly pushed increased imprisonment as the desirable disposition of offenders, is waning and will soon be defunct.

Observers have described the mood of the American public during the past decade as being self-centered and unforgiving of the unfortunates among us. This may be

an accurate appraisal, but it is also correct to recall that this country has a strong commitment to fairness and justice. While the polls show that most Americans favor the death penalty, we can predict that one day, probably within this century, capital punishment will be abandoned because it has been proven to be impossible to administer in a racially unbiased manner. In this vein, it is going to strain the American conscience to continue to dump the embarrassingly disproportionate numbers of poor minorities into our prisons and jails. Sooner or later the fact will be faced that intolerable conditions in our poor urban communities permit a great many young people, especially minorities, to neglect the values of the larger community. As the Hispanic community grows and becomes a political force to the point that there is a high likelihood that an Hispanic will emerge as a serious presidential candidate during this century, it may hasten the willingness of government to direct responses to conditions of poverty, unemployment, and undereducation. After the disappointing experiences of earlier poverty programs, perhaps we will now be better at such an effort. Even the least compassionate among us will come to realize that if our streets are to be safe, we are going to have to take the necessary steps to lure the street mugger and burglar into willingness to embrace the values of the mainstream society. This may sound like pie in the sky, but in the light of the failure and cost of current policies, the theme can already be an interesting topic to sound at Rotary Club luncheons.

The corrections system itself, of course, is not the major arena for solving the underlying causes of crime. But the fact is that it provides the environment in which large and growing numbers of young people, drawn from poor communities in the metropolitan areas, are spending large chunks of their formative years. What outlook the corrections system produces in these people as they return to the community will have a significant impact on the safety of these communities. The irony of today's policies may be that not only do they not deter crime, but in the long run they significantly add to the problem. We think our optimism is not misplaced when we believe that the American public, even its victims of crime, are ready to replace the retributive policies of today with policies and programs that, while being tough in structure, are supportive of the offender and not merely punitive. We will learn how wise we are as we now proceed. And how imaginative at sentencing my next class of graduate students are.