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## Expanding Sentencing Options: A Governor's Perspective

by Pierre S. du Pont IV

Pierre S. du Pont was born on January 22, 1935, in Wilmington, Delaware. He is a graduate of Princeton University (1956, B.S.E.) and Harvard University (1963, J.D.), and served as a lieutenant in the U.S. Navy from 1957 to 1960. Now completing his second term as Governor of Delaware, Pierre S. du Pont IV has been a businessman, State representative, and Congressman.

When I became governor in 1977, Delaware was committing about 3 percent of its State budget to corrections. Like

all new officeholders, I had a list of things I wanted to improve during my administration. And corrections seemed to me to be one thing that certainly needed improvement. I wanted to cut its demands on tax revenues, which I felt were more urgently needed in other areas. We were, I concluded, pouring too much money into our prisons and jails.

I like to think I accomplished much during my term as governor. But like most officeholders getting ready to step aside, I have to admit that I did not do everything I wished.

This year corrections will account for more than 7 percent of the total State budget, which means that there is still

### From the Director

The criminal sentencing process is at once the most routine and yet most dramatic and controversial expression of society's effort to ensure public order. Over the past decade, pressure has come from many quarters to make sentencing more responsive to a number of complex and sometimes contradictory factors. We expect sentences to be appropriate to the seriousness of the criminal act and to incapacitate the violent predator and prevent other innocent people from becoming victims of crime. At the same time, sentences are imposed within the realities of ever-present fiscal constraints and crowded conditions in many correctional facilities.

Research may be able to help administrators balance these competing concerns. To share with Federal, State, and local officials a decade of research findings on such reforms as sentencing guidelines, determinate sentencing, and alternative forms of punishment, the National Institute of Justice last year held a National Conference on Sentencing.

In sponsoring the conference, the National Institute recognized that the key issue in sentencing reform is who should be sanctioned and for what penalty. In many cases, the options are limited: either lock offenders up in maximum security institutions or release them on probation.

An alternative approach, under consideration in Delaware, is described in this Brief, by Governor Pierre S. du Pont. The Brief offers a top policymaker's assessment of the dilemma facing corrections systems, and it reviews Delaware's proposals to create a more flexible and accountable system for sentencing and corrections.

The issues touched on in Governor du Pont's article are among the most serious concerns of the criminal justice system. We need sentencing options that are fair and just and are not arbitrarily displaced because of pressures of crowding or fiscal constraints. If sanctioning is to deter, it must fulfill the expectation that those who commit crimes will be accountable for a specific time in prison or are adequately controlled in other settings. Early

release procedures or other forms of disincarceration may erode this deterrent. Such policies must be weighed against their consequences. Not the least of these is the number of new victims that may be created through release of dangerous offenders.

A number of research efforts are underway to help criminal justice officials make the right choices within their resources. Prediction and classification studies seek to develop more reliable methods to assess the risk that different defendants pose. Modular construction is being examined as a means for reducing the time and perhaps the expense of building new facilities.

Other efforts are: evaluating various release plans tried by certain States to alleviate crowding, devising improved techniques for managing the long-term offender, exploring private-sector involvement in operating prisons, and evaluating alternative punishments for certain classes of offenders.

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more pressure on the other vital services the State must provide. Indeed, in real dollar terms, our State's corrections budget has grown over 300 percent in just 7 years. This makes it by far the most inflated budget in State government since I took office.

I believe there are answers to the corrections dilemma, and I plan to explore some of them in this article. The proposals that are under active consideration in Delaware are no mere "quick fixes" or exercises in political legerdemain.

Instead, what I propose will require a major overhaul of the corrections system and the establishment of a more flexible and effective sentencing structure. This will require public understanding and acceptance at a time when the criminal justice system is under considerable pressure for not being rigid enough in dealing with criminals.

Balanced against these considerations are the problems of doing nothing at all. The costs in terms of money, of public dismay at growing criminality, and of the waste of human effort are too appalling to permit this to be a viable option.

The failure of the status quo can be shown in what I once considered to be a bright part of the criminal justice system in Delaware. In the 1970's Delaware had built one of the most up-to-date prison facilities in the Nation. It was designed to handle the State's needs until 1990. At least, I was assured as the new governor, there would be no need to worry about building more prisons for some time.

The prison that was to last until the end of this decade was filled to capacity before this decade began. We have since had to construct two major additions to the facility, and a third is in progress today. We have built a multi-purpose correctional facility in Wilmington, and a minimum security institution is now in the planning stages. We are being told to begin thinking about building still more space.

Part of the reason for this alarming growth in spending and in prison population is that only two States incarcerate more people, per capita, than Delaware. We have 274 prison inmates

for every 100,000 people. And we are putting them in prison for longer terms under our relatively inflexible criminal justice system. Seven years ago, for each inmate serving a term of 10 years or more, there was roughly one serving a term of less than a year. Today there are four long-termers for every prisoner serving less than a year. And the price to the State for housing, feeding, and guarding these inmates has risen dramatically. It now costs \$17,000 per year for us to incarcerate one prisoner.

Despite its great cost, and the promise of more increases to come, the present system might be largely acceptable if it were working properly. But it isn't. We traditionally rely on incarceration as the primary method of punishing criminals, but—as numerous studies have demonstrated—there is no evidence that higher incarceration rates have any impact on the crime rate. For one thing, prison overcrowding limits whatever chances exist for success in rehabilitative programs.

Despite the evidence that change is imperative, we seem unable to break out of our present pattern of dealing with criminals. It is as if our corrections system is a prisoner, too.

In my judgment, a fundamental reshaping of our approach to corrections is not only in order, it is feasible and imperative. As a start, we must begin to view punishment in terms of certainty rather than severity. The criminal justice system is seriously undermined

when men and women are sentenced to probation when they should go to jail, or are released from jail on probation when they ought to remain behind bars. The answer that overcrowding forces these compromises is not acceptable when other answers are available. We must provide sentencing options between the extremes of probation and prison.

Clearly, nothing less than major reform can accomplish these goals. In Delaware, we are beginning to consider an alternative program developed by the Delaware Sentencing Reform Commission. That alternative program stresses accountability—accountability of the offender to the victim and the State, and accountability of the corrections system to the public and other criminal justice agencies. The accountability concept could create an ordered yet flexible system of sentencing and corrections. This system would be based on the belief that an offender should be sentenced to the least restrictive (and least costly) sanction available, consistent with public safety. That is a standard, by the way, endorsed by the American Bar Association some years ago.

A system built on accountability would structure the movement of offenders into and out of the corrections system, making it fairer and more cost-efficient. It would provide incentives for offenders to work at rehabilitation, since this would permit them to move into less restrictive (and less expensive) forms of control. At the

same time accountability would strengthen the safeguards against violent offenders, who could be held in prison as long as necessary, or at least as long as their sentences ran.

Today the sentencing judge in Delaware and many other States is often faced with rigid choices. The offender before him or her is either sent to prison or put on probation. And as we know, conventional probation is not an adequate answer for every offender whose crime was not serious enough to merit a jail sentence. The options between the two extremes are rarely in place.

And if an offender fails to comply with the conditions of a less restrictive sanction, such as probation, what then? Assuming the probation officer even notifies the court of the violation, the judge's options are limited to sending the violator to prison, or continuing him or her on probation. There is no real flexibility, no real choice of options that will carefully address the needs of society and the individuals involved. Neither is there certainty of punishment in such a system.

There is no one answer to our problems in the criminal justice system. But I believe sentencing reform is the sort of radical surgery that the system must have and have soon. How would this work?

It is not overstatement to say that the proposals of the Delaware Sentencing Reform Commission would completely

overhaul our sentencing and corrections laws. They would establish a range of sanctions available to a judge over 10 "levels of accountability." The table displays these 10 levels.

Level I is unsupervised probation; Level X is maximum-security imprisonment. Moving from probation, there is a full range of alternatives, each more restrictive than the last, until the judge—and the criminal—reach a sentence of maximum-security incarceration.

Within each level there are degrees of control and accountability. These involve the offender's freedom of action within the community, the amount of supervision he or she is subject to, and what privileges are to be withheld or what other special conditions are to be attached to the sentence. In addition, the system provides for a range of possible financial sanctions to be imposed, including victims' compensation. Through such flexible controls, we would be able to control the offender's choice of job, choice of residence, ability to drive, ability to drink, ability to travel, and even ability to make telephone calls.

And to all of this we would add the probation fee concept. Successfully used in Georgia and Florida, the \$10- to \$50- per-month fee is charged to probationers to offset the cost of their supervision. Like the sanctions, the fee could be increased depending on the level of supervision required.

What is so attractive about this idea of accountability is that it applies not

only to sentencing offenders, but also to controlling them following sentencing. And the same level of flexibility available to judges would be available to corrections officials responsible for probation.

Let's look at two hypothetical cases to see how the flexible sentencing and control system might work in practice.

First, let's take a drug offender with a minimal prior record but unstable employment record. He might be sentenced in Level II to supervised probation for 2 years, with restrictions on his place of residence, his association with certain individuals, and/or his right to visit high-drug/crime locations. And we might charge him a \$10-per-month fee to offset some of the costs of keeping him straight.

If he observes these conditions for the first year of his probation, he could move down the sanctions scale into Level I. This level involves unsupervised probation and levies no fees, but holds out the possibility of certain restrictions on mobility and personal associations to minimize the chance of the offender slipping back into the drug scene and its associated crime. If our hypothetical drug offender violates the terms of his probation, he could be moved on to Level III, with heightened supervision, a curfew, and an increased monthly fee. Thus, the offender has a clear incentive to comply with his sentence. And, equally important, the sentencing judge has available options other than prison when probation is violated. Having and using these options will increase the certainty of appropriate punishment.

Restrictions	Level I	Level II	Level III	Level IV
Mobility in the community <sup>1</sup>	100 percent (unrestricted)	100 percent (unrestricted)	90 percent (restricted 0-10 hours/week)	80 percent (restricted 10-30 hours/week)
Amount of supervision	None	Monthly written report	1-2 face-to-face/month; 1-2 weekly phone contact	3-6 face-to-face/month; weekly phone contact
Privileges withheld or special conditions <sup>2</sup>	100 percent (same as prior conviction)	100 percent (same as prior conviction)	1-2 privileges withheld	1-4 privileges withheld
Financial obligations <sup>3</sup>	Fine, court costs may be applied (0- to 2-day fine)	Fine, court costs, restitution; probation (supervisory fee may be applied; 1- to 3-day fine)	Same (increase probation fee by \$5-10/month; 2- to 4-day fine)	Same (increase probation fee by \$5-10/month; 3- to 5-day fine)
Examples (Note: many other scenarios could be constructed meeting the requirements at each level)	\$50 fine, court costs; 6 months' unsupervised probation	\$50 fine, court costs, restitution; 6 months' supervised probation; \$10 monthly fee; written report	Fine, court costs, restitution; 1 year probation; weekend community service; no drinking	Weekend community service or mandatory treatment 5 hours/day; \$30/month probation fee; no drinking; no out-of-State trips

Level V	Level VI	Level VII	Level VIII	Level IX	Level X
60 percent (restricted 30-40 hours/week)	30 percent (restricted 50-100 hours/week)	20 percent (restricted 100-140 hours/week)	10 percent (90 percent of time incarcerated)	Incarcerated	Incarcerated
2-6 face-to-face/week; daily phone contact; weekly written reports	Daily phone contact; daily face-to-face; weekly written reports	Daily onsite supervision 8-16 hours/day	Daily onsite supervision 24 hours/day	Daily onsite supervision 24 hours/day	Daily onsite supervision 24 hours/day
1-7 privileges withheld	1-10 privileges withheld	1-12 privileges withheld	5-15 privileges withheld	15-19 privileges withheld	20 or more privileges withheld
Same (pay partial cost of food/lodging/supervision fee; 4- to 7-day fine)	Same as Level V (8- to 10-day fine)	Same as Level V (11- to 12-day fine)	Fine, court costs, restitution payable upon release to Level VII or lower (12- to 15-day fine)	Same as Level VIII	Same as Level VIII
Mandatory rehabilitation skills program 8 hours/day; restitution; \$40/month probation fee; no drinking; curfew	Work release; pay portion of food/lodging; restitution; no kitchen privileges outside mealtimes; no drinking; no sex; weekends home	Residential treatment program; pay portion of program costs; limited privileges	Minimum-security prison	Medium-security prison	Maximum-security prison

<sup>1</sup>Restrictions on freedom structure an offender's time, controlling his or her schedule, whereabouts, and activities for a designated period. To the extent that monitoring is not standard or consistent or to the extent that no sanctions accrue for failure on the part of the offender, the time is *not* structured. It could consist of residential, part-time residential, community service, or other specific methods for meeting the designated hours. The judge could order that the hours be met daily (e.g., 2 hours/day) or in one period (e.g., weekend in jail).

<sup>2</sup>Privileges/conditions; choice of job, choice of residence, mobility within setting, driving, drinking (possible use of Antabuse), out-of-State trips, phone calls, curfew, mail, analysis, associates, areas off limits.

<sup>3</sup>As a more equitable guide to appropriate fines, the amount would be measured in units of equivalent daily income, such as 1 day's salary = "1-day fine."

The second example is near the other end of the offense spectrum. This time our hypothetical offender is a twice-convicted armed robber. He was sentenced to 20 years, with the sentence to begin at Level X, or a maximum-security prison. After serving 2 years, and adhering to all the rules, the man might be moved to Level IX, a medium-security facility, where he might be able to take advantage of expanded rehabilitative programs.

Two years later, with continued good behavior, the offender again could move down the scale, this time to a minimum-security facility with still greater opportunities for rehabilitation. By the same token, if the prisoner's action at Level IX was disruptive and uncooperative, he could be returned to Level X.

Later, at a parole hearing, some appropriate program at Level VI might be selected instead of releasing the offender to a fuller freedom in the streets or leaving him in prison.

When the Sentencing Reform Commission applied the concept of accountability levels to the present offender population in Delaware, it found that only 21 percent of that population fell within Levels IX and X. But that medium- and maximum-security population accounted for 87 percent of the total corrections budget in Delaware. The Commission also found that roughly 70 percent of the corrections

population fell between Levels I and III. Less than 10 percent filled the middle ground, and most of these were in some sort of alcohol or drug abuse program. Analysis showed that many in prison could be safely released if the programs were available to restrict their activities properly and closely supervise their rehabilitation. That analysis also showed that many in probation were undersupervised. Many of these men and women clearly needed to be moved into a middle level where they would be subject to stronger, more restrictive programs.

Let me sum up by shifting the focus from corrections mechanics to corrections philosophy. In this regard, I think it reasonable to consider two important goals of sentencing reform. The first is to reverse the long-established trend of growing prison populations and skyrocketing corrections budgets. The second is to redirect the system so that it guides offenders toward a useful life within the law.

Don't expect miracles from the reform proposals I am suggesting. Even with a sophisticated accountability system, we may not be able to reverse quickly the growth of corrections populations and spending. But we reasonably can expect to slow growth in spending and, ultimately, to stabilize costs. A hallmark of the accountability concept is cost avoidance—that is, developing

and using less costly alternatives in our corrections programs. And, optimally, the effect of the accountability concept, as the offender moves through the system, will be to help reduce recidivism.

There will be expenses, of course. We must have new programs for those who need to be placed in something less than prison but in more than lightly supervised probation. But again, we can expect cost avoidance. The cost of new programs will be far less than the cost of constructing new prisons, a prospect which currently looms before Delaware and many other States. In fact, we in Delaware expect to rely on the private sector to run many of these programs.

Frankly, I do not see money as the major issue. Nor do I see great reluctance to change within the system itself, although there is strong and healthy debate on the direction that change should take.

I believe the major obstacle to sentencing reform is the attitude of the public, an attitude which naturally and properly is reflected in the votes of its elected representatives. I do not consider this a daunting challenge. I believe the winds of change are already blowing in Delaware. Ours was the first State to ratify the U.S. Constitution, and we may again lead the Nation, this time in pragmatic and thorough sentencing reform.

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