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# Current Developments in Corrections and the Lawyer's Role at Sentencing

Walter Dickey\*

## INTRODUCTION

Lawyers who work in the criminal justice system, whether they are judges, prosecutors, or defense attorneys, should know corrections. To use a medical analogy, if the correctional process is the medicine that is prescribed for convicted offenders, lawyers should know as much about it and its effect on the patient as possible.

The knowledge about corrections which lawyers need to be effective at sentencing can be divided into four categories.<sup>1</sup> First, lawyers should know the human and legal consequences of conviction and sentencing. Incarceration can have profound and unintended consequences on the offender and his family. It can, for example, create and exacerbate economic and family problems due to the offender's absence from home. Ideally, these consequences would be foreseen and explored before the sentencing decision is made. Knowledge of parole eligibility, good time law, and parole criteria is equally crucial, because such knowledge can affect the sentence argued for and ultimately imposed.

Second, lawyers must know how the correctional system operates. For instance, in correctional and parole decision making great reliance is placed on the information in the presentence report. Not only can this information affect an offender's parole date, but it is usually the basis for security and program decisions which profoundly affect the quality of life for the offender during confinement. Lawyers at sentencing, therefore, should pay great attention to the report.<sup>2</sup> The defense lawyer may rightfully conclude

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1. For a detailed description of these categories, see Dickey, *The Lawyer and the Quality of Service to the Poor and Disadvantaged Client: Legal Services to the Institutionalized*, 27 DE PAUL L. REV. 407, 408-09 (1978).

2. The implementation of rule 32(c)(3) of the Federal Rules of Criminal Procedure, requiring disclosure of the presentence report upon the defendant's request, is described in Fennel & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1615 (1980). For a discus-

that his responsibility is to see to it that the offender is presented in as sympathetic light as possible. At the same time, the defense lawyer, together with the judge and the prosecutor, will want to ensure accuracy in the report.

Third, both defense lawyers and prosecutors need to know their proper role at sentencing. For years lawyers have neglected this stage in the criminal justice process. Yet, the profound impact of sentencing on the client dictates that lawyers be more vigorous at this stage. Effectiveness, however, requires that lawyers know their role, and this is not always easy. Who decides what sentence to seek? Is this for the client whose life is being so deeply affected? Or is it for the lawyer who may know more about what can be achieved at sentencing?<sup>3</sup> If probation is sought, is it the lawyer's job to help the client find employment, to settle his family problems, and to do whatever else is feasible to increase his chances for a successful probation? Surely, probation is more apt to be imposed if successful completion is likely.

Finally, lawyers must know how to utilize their knowledge at the sentencing hearing. While knowledge of the consequences of conviction, of how the system operates, and of the role of the lawyer are important, effectiveness requires that it be brought to bear in specific cases. This requires a host of qualities not directly related to corrections, such as the ability to care, the ability to work hard, resourcefulness, and judgment.<sup>4</sup>

In this short article I will briefly describe the more significant current developments in corrections. Some developments, such as the lack of comprehensive correctional policies, while important to clients and the criminal justice system in general, are matters over which lawyers will have little, if any, influence at sentencing.<sup>5</sup> These matters are more significant for lawyers who work on correctional and post-conviction matters. Other developments, such as changes in sentencing systems and new possibilities in probation,

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sion of the lawyer's role in ensuring the accuracy of the report, see Dickey, *The Lawyer and the Accuracy of the Presentence Report*, FED. PROBATION, Feb. 1979, at 28.

3. Most issues that have such a profound impact on the client are normally for the client to decide with the advice of the lawyer as to the alternatives, their consequences, and the likelihood that a particular sentence will be imposed.

4. ABA Section of Legal Education and Admissions to the Bar, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979).

5. This fact reflects, among other things, the fragmented nature of the criminal justice system.

will directly affect what lawyers do because of the effect on offenders. After describing developments in correctional policy making, institutions, community supervision, sentencing, and parole decision making, I will analyze briefly their significance for lawyers, given my view of the qualities lawyers need to be effective.

#### STATE OF CORRECTIONS

In the recent past, there have been several developments that have influenced the state of our nation's correctional systems. First, the lack of comprehensive policy has emerged as a factor that has seriously inhibited the functioning of correctional systems as greater demands have been placed upon them. Second, overcrowding in institutions has greatly influenced the implementation of what correctional policy exists and the quality of life for inmates and staff in institutions. Third, resources in corrections are eroding at a time when they are most needed. Fourth, all of the above, as well as changes in the make-up of the inmate population, have contributed to instability in institutions. Fifth, emphasis upon procedural due process has resulted in a lack of attention to substantive issues with the result that significant problems have not received the attention they deserve.

#### *Absence of Comprehensive Policy*

Correctional agencies today lack both clear policy objectives and comprehensive, specific policies. While some agencies have formulated policy statements on a range of issues, such statements are for the most part crisis oriented, insufficiently related to other policies, and not reflective of current practice. As a result, there is a lack of thoughtfulness about issues, haphazard policy decisions, unwarranted inconsistency, and a failure to address the behavioral problems of inmates and probationers. Not surprisingly, correctional staff are demoralized and confused.

There are five principal reasons for this confusion. First, legislatures have provided little direction on correctional policy issues. This, coupled with the historical lack of judicial involvement in correctional matters, has provided little incentive for correctional agencies to engage in comprehensive, detailed policy making. Third, the erosion of this hands-off approach and the recent willingness of courts to review correctional issues has resulted in piecemeal policy making by courts and reactive policy making by cor-

rectional agencies.<sup>6</sup> In addition, the corrections pendulum has swung from rehabilitation to punishment, and back to rehabilitation, thereby inhibiting the development of consistent objectives. Finally, increasing political pressure on correctional agencies has hindered their capacity to develop comprehensive correctional policy.

Historically, legislatures have provided inadequate direction to correctional agencies. Delegations of authority have been broad, leaving the major responsibility for policy making to administrators. In Wisconsin, for example, the legislature has delegated responsibility to prison wardens for the treatment and discipline of inmates: "The wardens and the superintendents and all prison officials shall uniformly treat the inmates with kindness. There shall be no corporal or other painful and unusual punishment inflicted upon inmates."<sup>7</sup> Such legislation does not provide clear direction to the agency about the role of discipline in institutions and its relation to broader correctional objectives. If correctional agencies would have devised and carefully implemented their own policy, the lack of legislative involvement might not have critically retarded correctional policy making. But the lack of legislative and public interest in corrections has resulted in the agencies' reluctance to formulate detailed policy.

Indeed, most states<sup>8</sup> have exempted corrections from their administrative procedure acts. Whatever detailed correctional policy does exist, therefore, has developed in response to court involvement in policy making. The recent erosion of the courts' hands-off approach to corrections has affected correctional policy making profoundly. Courts are now more willing to intervene in correctional matters and to make correctional policy. Unfortunately, courts have offered at best a piecemeal approach to correctional issues. Their policies are frequently fragmented, based on incomplete information and reactive to specific problems,<sup>9</sup> rather than to

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6. The change in prisoner access to federal courts resulting from erosion of the hands-off doctrine is documented in the FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 29 (1980). Parallels in the police field are described in H. GOLDSTEIN, POLICING A FREE SOCIETY 1, 307 (1976) [hereinafter cited as H. GOLDSTEIN].

7. WIS. STAT. ANN. § 53.08 (West 1981-1982).

8. WIS. STAT. ANN. § 227.22(4) (West 1981-1982); see S. KRANTZ, THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS IN A NUTSHELL 293 (1976) (describing the Massachusetts exemption).

9. Duran v. Apodaca, No. 77-721-C (N.M. 1980) (consent decree). Takeovers by federal courts of prison systems in Alabama and Texas are discussed in *Status Report: The Courts*

all dimensions of correctional issues.<sup>10</sup>

Periodic changes in the emphasis given to various correctional objectives and to the difficulty of achieving them has also contributed to the policy void in corrections. To the extent that rehabilitation is an agreed upon objective in corrections, for example, it is nonetheless exceedingly difficult to achieve even under the best of circumstances.<sup>11</sup> In fact, the current emphasis upon punishment as the primary objective of corrections is explained in part by frustrated expectations about the rehabilitative ideal. Yet, like the untested assumptions underlying rehabilitation, it is unclear what will be achieved by this emphasis on punishment. Perhaps most significant about this swinging pendulum of correctional theory is that it hinders the development of a consistent correctional philosophy and the means by which to implement it.<sup>12</sup>

Finally, political factors have undercut the development and implementation of correctional policy. Two examples are illustrative. While there has been an increasing number of offenders sentenced to prison and a concomitant need for more prisons, local communities have strongly resisted hosting these institutions.<sup>13</sup> This is true despite the virtual consensus that it is highly desirable to place offenders in institutions near their homes. There have been similar problems in locating small community facilities, sometimes called community correctional centers.

The second example of the politicalization of corrections is the growth of guard unions.<sup>14</sup> Union contracts influence correctional

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*and Prisons*, CORRECTIONS DIGEST, Feb. 13, 1981, at 7; and in K. Krajick, *A Federal Judge Comes Down Hard on Texas . . .*, CORRECTIONS MAGAZINE, June 1981, at 43.

10. One result of court involvement was that it spurred administrative attention to issues which should have been addressed years ago. This attention, however, was reactive to lawsuits and not the careful, comprehensive attention to correctional issues that is needed. See *Maryland to Ask Court to Extend Deadline on Prison Overcrowding*, CORRECTIONS DIGEST, Feb. 1, 1980, at 5.

11. The extent to which this is true in the probation area is discussed in K. Krajick, *Probation: The Original Community Program*, CORRECTIONS MAGAZINE, Dec. 1980, at 7.

12. See Remington, Book Review, 29 VAND. L. REV. 1309 (1976) (reviewing E. VAN DEN HAAG, *PUNISHING CRIMINALS* (1975) and J. WILSON, *THINKING ABOUT CRIME* (1975) [hereinafter cited as Remington]).

13. *Residents Fight to Ban a Parole Office*, N.Y. Times, Feb. 7, 1982, at 22, col. 3; *Community Groups Protest New Facilities in Arizona and Maryland*, CORRECTIONS MAGAZINE, June 1980, at 4; and K. Krajick, *Not on My Block: Local Opposition Impedes the Search for Alternatives*, CORRECTIONS MAGAZINE, Oct. 1980, at 15.

14. B. CROUCH, *THE KEEPERS: PRISON GUARDS AND CONTEMPORARY CORRECTIONS* (1980); J. JACOBS, *GUARD UNIONS AND THE FUTURE OF THE PRISONS* (1978); J. MORGAN, *IMPACT OF COLLECTIVE BARGAINING ON LAW ENFORCEMENT AND CORRECTIONS* (1977). In the police field, see H. GOLDSTEIN, *supra* note 6, at 311-16.

policy, sometimes in profound ways. For example, many union contracts now call for the assignment of correctional officers or guards to posts based on seniority. This can force wardens to place guards in positions that they are ill-suited for, which in turn can contribute to the difficulty of managing the institutions. One reason for the increase in union influence in corrections is that elected public officials are responsive to large blocks of votes. Guard unions, particularly in small communities, represent a sizeable proportion of the voters. The fact that they are well-organized and part of larger public employee unions frequently results in their having substantial influence on elected officials.

A very recent positive development that may finally address the lack of direction in corrections policy is administrative rulemaking. Increasing numbers of states are requiring correctional agencies to develop detailed administrative rules.<sup>15</sup> Such rulemaking has several virtues.<sup>16</sup> Above all, rulemaking provides an opportunity for correctional staff to think about what they are doing, what they should be doing, and why. In addition, however, it holds the promise of motivating staff by involving them in policy making and its implementation. It also provides an opportunity to inform the legislature and the public about correctional policy, in order to get legislative direction and approval. Finally, it offers a stable base upon which to develop and implement positive correctional policy at a time when the field is marked most clearly by confusion and instability. Still, it is too soon to tell whether the opportunities offered by rulemaking will be used by correctional agencies so that the initiative and responsibility for policy making may be regained.

### *Overcrowding*

Virtually every American correctional institution is desperately overcrowded. The significance of this fact is frequently lost on casual observers. Overcrowding means far more than simply having two inmates reside in a cell built for one. Overcrowding stretches every resource in the institution and can substantially diminish the quality of life inside the prison, as well as an inmate's chances for parole release.

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15. IOWA CODE § 17A.3 (1977); MASS. ANN. LAWS ch. 124, § 1(q) (Michie/Law. Co-op. 1981); OR. REV. STAT. § 423.060 (1979); WIS. STAT. ANN. § 227.011 (West 1981-1982).

16. K. DAVIS, POLICE DISCRETION (1975); see Davis, *Police Rulemaking on Selective Enforcement: A Reply*, 125 U. PA. L. REV. 1167 (1977); McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972).

Overcrowding also results in inmate idleness because programs are not available to keep all the inmates occupied.<sup>17</sup> An inmate who wants a job or an education may have to wait a long time before being placed in a program. Moreover, parole release decisions are sometimes influenced by evidence of positive involvement in institution programs. Ironically, because of overcrowding, an inmate may be deprived of the opportunity to demonstrate such an involvement despite his desire to be so involved.

In addition, the quality of available programs and jobs in institutions is frequently diminished. For example, before overcrowding became a major problem in Wisconsin, an inmate in a full-time school program was required to spend eight hours per day in school. But in order to accommodate the large prison population, the full-time school program was reduced to four hours per day. As a further example, the job of cleaning pots and pans in the kitchen of one institution took twenty inmates per day. The desire to relieve some of the idleness of inmates not assigned to work led the warden to assign forty inmates to do the work of twenty. When overcrowding in this institution became even more desperate, the warden assigned forty more inmates to clean pots and pans and had them alternate with the first forty. Although getting eighty inmates out of their cells and actively working at something every other day has value, this is an unhappy solution to a grave problem.

The staff of correctional institutions is also adversely affected by overcrowding. The prison school teacher has too many students and the supervisor of the kitchen has more workers than can be adequately supervised. The effect on the staff member's morale is in turn felt by everyone with whom they work.<sup>18</sup>

#### *Lack of Resources*

The country's present difficult economic situation, resulting budget cutting, and the trend toward fair and certain punishment, which deemphasizes programs in institutions, have all led to fewer resources for institutions when they need them most. This decrease in resources is felt most severely in program areas. The first people who are laid off due to budget reductions are teachers and social workers, because the first priority in institutions is security,

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17. Krajick, *In Illinois, It's a Long Way from Pontiac to Vienna*, CORRECTIONS MAGAZINE, June 1980, at 16.

18. *Id.* at 17.

not diversity in program availability. Overcrowding usually translates into more correctional officers if a choice must be made between programs and security. Some argue, however, that an institution is more secure if adequate resources are available for outlets such as jobs and school for inmates. Although this may be true, many wardens, when faced with the need to initiate staff layoffs, feel that correctional officers provide more safety than program staff and should therefore be the last to be released from employment.<sup>19</sup>

### *Instability in Institutions*

In the past several years, disturbances, some relatively minor and others involving the loss of life and substantial amounts of property, have become almost monthly occurrences in American correctional institutions.<sup>20</sup> But tensions are also high in institutions other than those experiencing disturbances. Overcrowding, forced idleness, diminished resources, and the demoralization of staff have contributed to the frustration and unrest. Other factors also contribute to the deterioration of life in the institutions. For example, inmates are serving longer sentences for more serious crimes than ever before.<sup>21</sup> In addition, correctional administrators speak of a "different brand" of inmate<sup>22</sup> than twenty years ago, when institutions were similarly overcrowded. Wardens characterize today's inmates as more violent and more likely to prey on other inmates. Some wardens claim that more inmates have records of violence than ever before, as fewer defendants are imprisoned for property crimes like bad check writing.<sup>23</sup>

Another factor which contributes to instability in institutions is the presence of mentally ill inmates who are easily preyed upon by

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19. These reductions, of course, are consistent with the notion that imprisonment is for punishment and that educational and work programs are incidental to the mission of correctional agencies. This view is used to justify the reduction in programs in institutions when resources are reduced.

20. Hart, *In Michigan, Officers Rebel, Then Inmates Riot*, CORRECTIONS MAGAZINE, Aug. 1981, at 52; Serrill & Katel, *New Mexico: The Anatomy of a Riot*, CORRECTIONS MAGAZINE, Apr. 1980, at 6.

21. Krajick, *Annual Prison Population Survey: The Boom Resumes*, CORRECTIONS MAGAZINE, Apr. 1981, at 16.

22. These inmates pose serious dangers to fellow inmates. See Anderson, *The Price of Safety: "I Can't Go Back Out There,"* CORRECTIONS MAGAZINE, Aug. 1980, at 6, 8.

23. Some of the perceived recklessness of today's inmates may be attributed to their serving longer sentences. In a sense, they have less to lose for misbehavior because it is difficult to know if it will have any effect on their release from the institution.

fellow inmates. There appear to be two reasons for the increasing numbers of mentally ill offenders in institutions. First, the difficult conditions under which inmates live, including constant tension and the lack of privacy, can adversely affect mental health. Moreover, fewer of these disturbed inmates have been transferred to mental institutions.<sup>24</sup> Second, many mentally ill defendants are being sentenced to prison, who formerly would have been civilly committed.<sup>25</sup> This is due to the difficulty in obtaining civil commitment and to the unfavorable community responses to deinstitutionalization policies.

### *Due Process in Institutions*

Litigation over correctional practices, particularly as they affect due process, has had a substantial impact on life in institutions. One unfortunate result of due process advances, however, is that some prison programs have been discontinued because the due process burden has proved too great. For example, the Mutual Agreement Program was developed to motivate inmates to earn early parole. Under this program, inmates contracted with the parole board for release dates in exchange for the inmate's promise to complete various programs and to behave reasonably. The program was viewed as an effective motivator of inmates and introduced a desirable degree of certainty into the parole process.

Unfortunately, the four states that developed the program later abolished it.<sup>26</sup> The abolition was triggered to a substantial degree by litigation, which apparently led to unrealistic requirements for determining who got into the program, who stayed in the program, and who successfully completed the program. Administration of the program became so expensive that the costs outweighed the benefits and the program was dropped.<sup>27</sup>

Another result of the emphasis on due process in corrections liti-

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24. See Dickey, *Incompetency and the Nondangerous Mentally Ill Client*, 16 CRIM. L. BULL. 22 (1980); Wilson, *Who Will Care for the "Mad and Bad,"* CORRECTIONS MAGAZINE, Feb. 1980, at 5, 8.

25. *Mentally Ill, Dumped and Isolated*, N.Y. Times, Mar. 11, 1978, at 23; Koenig, *The Problem That Can't Be Tranquilized*, N.Y. Times, May 21, 1978, § 6 (Magazine), at 14.

26. F. REMINGTON, E. KIMBALL, D. NEWMAN, H. GOLDSTEIN, & W. DICKEY, CRIMINAL JUSTICE ADMINISTRATION 656 (rev. ed. 1982) [hereinafter cited as F. REMINGTON]; H. LOSCHNIGG-FOX, *THE MUTUAL AGREEMENT PROGRAM: A STUDY OF SYSTEM INTERVENTION IN THE WISCONSIN DIVISION OF CORRECTIONS* (1979).

27. Although fairness in such programs is of great importance, one is left wondering whether anyone benefits when efforts to achieve "due process" in the program result in its abolition.

gation is the deflection of concern away from other significant areas of correctional policy. The decision in *Wolff v. McDonnell*,<sup>28</sup> for example, resulted in great attention to the process required before an inmate could either be placed in segregation or lose "good time." Although this is important, minor disciplinary decisions, such as summary punishment and decisions not to punish for minor rule violations, probably have a far wider impact on inmates and institutional life.<sup>29</sup> Nevertheless, relatively little attention has focused on securing fairness and efficiency in regard to these matters.

### COMMUNITY SUPERVISION

Although increasingly large numbers of offenders are being sentenced to prison, the dominant disposition of criminal cases today is probation.<sup>30</sup> Probation is a period of supervised freedom in the community, usually subject to conditions. Parole is a period of conditional supervised freedom after release from a correctional institution. After successful completion of probation or parole, the offender is discharged from supervision. If a significant condition is violated, probation or parole may be revoked and the offender imprisoned.

Community supervision in general has two purposes: it assists the offender in adjusting to the community and insures that he will avoid future criminal behavior.<sup>31</sup> Such assistance may take a variety of forms, depending on the needs of the offender and the resources of the agency. These forms include drug, alcohol, and other types of counseling, assistance in securing a job and a place to live, and the loan or gift of money for the offender to go to school or to buy tools necessary for a job. Likewise, the method and amount of supervision may vary greatly. Some offenders have contact with their probation agents only when they report for monthly meetings. Others are subject to relatively constant surveillance and

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28. 418 U.S. 539 (1974).

29. Cf. WIS. ADMIN. CODE § HSS 303.65 (1981) (enumerative criteria for administration of summary punishment).

30. Even in determinate sentencing jurisdictions, the judge has the option to place the defendant on probation for most offenses. In fact, the clear choice between imprisonment and conditional release in the community has become blurred by increasing use of the split sentence. With a split sentence, the offender must spend a portion of the probationary period in a county jail, a halfway house, or occasionally a prison. This disposition is closely related to a normal probation term in that it includes an extended period of community supervision.

31. For a helpful discussion, see *Morrissey v. Brewer*, 408 U.S. 471 (1972).

searches of their persons and homes. Drug offenders are frequently subject to urine and blood tests to determine if they are abusing drugs.

In recent years, the role of probation agents has changed. When few community resources were available to offenders, the agent was the person primarily responsible for the delivery of services. If the offender needed counseling, the agent counseled. If the offender needed a job, the agent helped find openings, transported the offender to the interview, and interceded on his behalf with the prospective employer. The development of community services for the poor, however, resulted in a reduction of the amount of direct services provided offenders by probation agents. Now, the agent more often refers the alcohol abuser to alcohol treatment programs and the jobless offender to job service programs.<sup>32</sup>

Community supervision is again undergoing changes. The current emphasis on security in institutions is reflected in the increased attention to community safety and to the supervision of offenders on probation and parole.<sup>33</sup> However, budget cuts<sup>34</sup> have forced a reduction in the number of probation agents on the job.<sup>35</sup> This means fewer agents to supervise probationers and parolees at a time when the agents are required to provide more services due to the diminution of independent community programs.

In addition, this decrease in community programs available to the offender has produced a greater emphasis on restitution and community service orders as a condition of probation.<sup>36</sup> Although

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32. Krajick, *Probation: The Original Community Program*, CORRECTIONS MAGAZINE, Dec. 1980, at 7, 10.

33. The role conflict of the probation agent is discussed in L. ORLAND, *JUSTICE, PUNISHMENT AND TREATMENT* 494 (1973) and in Gettinger, *Separating the Cop from the Counselor*, CORRECTIONS MAGAZINE, Apr. 1981, at 34.

Probation and Parole are afflicted with many of the same problems as correctional institutions. The lack of direction and the failure to develop coherent policies has resulted in a drift in community corrections similar to that in the institutions. There is a similar need to spell out in detail what the agency is doing, how it is doing it and why.

34. Bernstein, *Probation Feels the Squeeze in California*, CORRECTIONS MAGAZINE, Mar. 1979, at 47.

35. Blackmore, *Big-City Probation: Treatment? There's No Treatment Going on Here*, CORRECTIONS MAGAZINE, Dec. 1980, at 13.

36. 1981 Wis. Laws 88 (relating to community service work by defendants and probationers); Wisconsin Legislative Council Report No. 11 to the 1981 Legislature—Legislation Relating to Community Correctional Programs; Wisconsin Legislative Council Report No. 21 to the 1981 Legislature—Legislation Relating to Community Correctional Programs (describing Senate Bill 621, dated Oct. 28, 1981); *Governors Against Crime*, N.Y. Times, Feb. 6, 1982, at 18, col. 1; Haberman, *Rikers Island Inmates Deployed to Help Clean City's Parks*, N.Y. Times, Feb. 21, 1982, at 15, col. 5 [hereinafter cited as Haberman].

restitution, the payment to the victim of the crime of an amount equal to the damage done, has been a fairly common condition of probation, it has not always been strictly enforced. In some states, however, restitution is now required as a condition of probation in every case. Additionally, part of the funding for probation services in some states comes from money collected in restitution. Thus, increased pressure has been placed on agents to collect restitution, as the financial stability of the agency may depend heavily on it.

A related development in community supervision is the increased use of community service orders as a condition of probation. A community service order requires an offender to work a certain number of hours at a specified job. In the past, the legal authority for such orders, as well as the liability for injuries incurred while the offender worked, was uncertain. The result was that these orders were not systematically issued, but were used mainly for professionals on probation. A physician convicted of a crime, for instance, would be required to work in a community hospital without pay. Some states, however, have enacted laws authorizing community service orders and have addressed the issues that have made courts reluctant to enforce them previously.<sup>37</sup> The result is that the orders are now used in a greater variety of cases. Recently, community service orders have included such tasks as cleaning parkways and maintaining, gardening, and planting shrubbery in public parks. Moreover, although these conditions have been and still are set primarily for juveniles, the current trend is to allow similar conditions for adults.

Another development in community supervision is the increased emphasis on supervision of offenders. This is in partial response to the widespread community resistance to probation and parole, and a desire for close supervision as a means of avoiding future crimes. Resistance to community supervision usually crystallizes if a probationer or parolee commits a serious crime. Consequently, pressure will mount for probation services to act. The agency's response is usually to "get tough" to satisfy the community concern. An offender under community supervision in Wisconsin, for example, was arrested for what appeared to be a minor property crime. His agent did not order that he be retained in custody or that his community release be revoked, and the offender subsequently committed a very serious assault on a young woman. The probation

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37. Haberman, *supra* note 36, at 15, col. 5.

service was severely criticized for not keeping the man in custody after the property crime, which turned out to be more serious than first imagined. This incident led to a substantial rule change for the Madison probation agency that required it to retain in custody all people under supervision who were charged with a new crime, regardless of its type.<sup>38</sup>

This response was criticized as an overreaction that would diminish the quality of probation services. It was argued, for instance, that the new rule required custody even for driving offenses; and although the jailing of such offenders might seriously affect their lives in the community, by causing loss of their jobs and by straining family relations, the community pressure for supervision required the agency to adopt the rules.

That custody is an important part of community supervision programs is also reflected in classification systems,<sup>39</sup> recently developed to determine the "needs and risks" of offenders. In the past, the level of supervision of an offender had been determined informally within the agency. Great emphasis is now placed on classifying the risks posed by offenders under supervision, with the result that offenders who are identified as posing greater risks to the community will be more closely supervised.

#### PAROLE AND SENTENCE DETERMINATION

In the past ten years, there have been significant developments related to the offenders' release from institutions. Since other articles in this symposium and in correctional literature discuss this topic, it will be only briefly outlined here.

##### *Indeterminate System*

Recently, the prevalent system for determining release dates has been the indeterminate sentence. This system is based on the premise that proper treatment will cure criminal behavior. The indeterminate sentencing system has favored high maximum and short minimum terms or early parole.<sup>40</sup> The court's responsibility is to fix the maximum term, within the legislatively prescribed limits, that an offender may serve. As a result, the parole authority has great flexibility in determining the actual parole release date. Pa-

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38. See WIS. ADMIN. CODE § HSS 328.22(1) (1981).

39. Gettinger, *Separating the Cop from the Counselor*, CORRECTIONS MAGAZINE, Apr. 1981, at 34.

40. WIS. STAT. § 973.01 (1981).

role release is appropriate when the offender is "cured" or is least likely to commit further crimes.

Normally, an inmate may be released in two ways. First, the parole board may parole him. Historically, this decision was based on the judgment of when the inmate was most likely to "make it on the outside," based on his progress in the institution and the employment, family, and living arrangements made for him upon release. Under such a system, the inmate can determine his own release by his progress in the institution.

The second method for release typically is through a reduction in the amount of time the inmate must serve by earning "good time." Good time is earned normally in two ways: by good behavior and by working while in the institution. There is, in effect, a "mandatory release date" when the inmate must be released because he has served his whole sentence less good time earned in diminution of it.

### *Definite Sentencing System*

In contrast to the indeterminate system with its emphasis on parole, the determinate or definite system has no parole. Typically, the inmate must serve the whole sentence set by the court or legislature for the offense, though frequently the actual term is diminished by the earning of good time.<sup>41</sup> Under this system, the inmate's behavior in the institution does not affect when he is released, nor do changes in the situation in his community or his plans upon release.

Determinate sentences, as well as those in between determinate and indeterminate, are becoming more common.<sup>42</sup> This change reflects two different views. One is that the emphasis in sentencing ought to be on fair and certain punishment, as reflected in definite sentences without parole. Proponents of this view usually argue that rehabilitation has failed and that punishment as the principal objective in sentencing should be stressed, with a view toward deterring further criminal behavior. Others argue that it is highly desirable to have definite sentences because systems heavily laced

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41. The various types of sentencing systems are compared in F. REMINGTON, *supra* note 26, at 573.

42. See TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979); Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29 (1978); Remington, *supra* note 12, at 1311-15.

with discretion in sentencing and parole decision making are administered in arbitrary and unfair ways. Under this view, fairness can best be achieved through definite sentences.

### *The Middle Position*

While the federal system retains the indeterminate theory, it contains some elements of the determinate system.<sup>43</sup> In the federal system, the judge retains the authority to set the maximum and the minimum sentence in most cases. These limits may not be of great significance, however, because the actual release date is determined through the application of parole guidelines. These guidelines set a narrow range during which an offender will be released.

Although this system resembles an indeterminate system, it does not contain the key element of indeterminate systems; that is, what the inmate does in the institution and what he plans to do when he gets out have little or no bearing on the parole release date.<sup>44</sup> The federal parole guidelines contain criteria which relate solely to the behavior of the offender before sentencing. Nevertheless, the minimum and maximum sentencing limits are of some significance in that they set the outer limits for release. In this sense, they affect the actual release date in two fundamental ways. If the date a person would be released in the federal system under the guidelines is before his parole eligibility date set by the judge, the offender cannot be released until the parole eligibility date is reached. Conversely, if the maximum term set by the judge is less than the amount of time the guidelines require the offender to serve, the offender will be released when he has served the term set by the judge less any good time.

### *Suggestions for Lawyers*

The developments in sentencing systems are illustrative of changes that are of direct and obvious significance to lawyers. In the introduction, I suggested that knowledge of several aspects of corrections including the legal consequences of conviction are important. In the indeterminate system, the lawyer requires sufficient knowledge about parole practices to know when an inmate may be

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43. 28 C.F.R. § 2.20 (1981).

44. Hoffman & Adelberg, *The Salient Factor Score: A Nontechnical Overview*, *FED. PROBATION*, Mar. 1980, at 44.

released within the range set by the judge. Moreover, the inmate's behavior in the institution may be a significant factor in the release decision, and this must be communicated to the offender. The offender's background, usually reflected in the presentence report, is also important in parole decisions. Lawyers should therefore try to ensure that the report is accurate.

In the determinate system, the crime for which the offender is convicted will determine when the offender is released. In such a system, the charging decision takes on great significance since it will often dictate the prison term served by the offender. This suggests that, given the prevalence of the guilty plea, the sentencing decision may in fact be made when the charging decision is made. Lawyers will want to be mindful of this at charging. Except for reduction in sentence for good behavior, there is nothing the offender can do to affect his release in a definite sentencing system.

In the federal system, which is duplicated in many states, lawyers will want to pay attention to the parole guidelines score of the offender. It is the most significant factor in determining the actual term of imprisonment and *it is ascertainable before conviction*. Lawyers must pay careful attention to the background of the offender so as to ensure that it is accurately reflected in the offender's salient factor score. Because the release date *can* be affected by varying parole eligibility and the maximum term set by the judge, the significance of the minimum and maximum should be known by all lawyers and, of course, by the offender.

#### CONCLUSION

Corrections in the United States is undergoing change. This is important to anyone concerned about the direction and adequacy of the correctional process as well as to lawyers who are involved in sentencing. Some of the current developments will require adjustments in the practices of lawyers. There can be little doubt that the move toward definite sentencing and the restructuring of parole decision making will have an impact on what lawyers do at sentencing.

Other developments, such as overcrowding in prisons and the decrease in resources made available to correctional institutions and programs, while of great significance, do not necessarily portend change in what lawyers do. While overcrowding may make a judge hesitant to send an offender to prison, it is not clear that this fact alone will substantially affect sentencing practices.

Among the most disturbing developments in corrections is the

absence of clearly reasoned, comprehensive policies that are effectively implemented. There is promise for correctional policy making, however, in the movement toward administrative rulemaking because it offers stability as well as an opportunity to evaluate the correctional process. Perhaps the lack of comprehensive attention to all phases of corrections best explains why we have not seen the advancement in the field of corrections that is needed.

