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The Jail Crisis in America Today: What Value Do Jails Have? Who Should Be Sent to Them and for How Long?

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After forty years of involvement in the field of criminal justice, including more than thirty years as a lawyer and seven years as a judge, I have come to the conclusion that America is in the midst of a jail crisis.

We do not have to read too many news reports to realize that crime is increasing. When I began practicing law in Montgomery County in 1950, the county's population was approximately 200,000. We had one part-time trial magistrate and two full-time circuit court judges. Today, with the population approaching 600,000, Montgomery County has ten full-time district court judges, four full-time domestic relations masters and fourteen full-time circuit court judges — over twelve times the judicial complement for a population that has increased only three-fold. In 1950, the local jail population on any given day was between thirty and forty prisoners. Today, that figure has increased to approximately 600.

Over the years, theories of criminal justice have also changed. In the 1920's and 1930's, it was widely believed that training in penal institutions would deter offenders from a life of crime. Half a century later, we recognize that jails and penal institutions have little value as a means of rehabilitation.

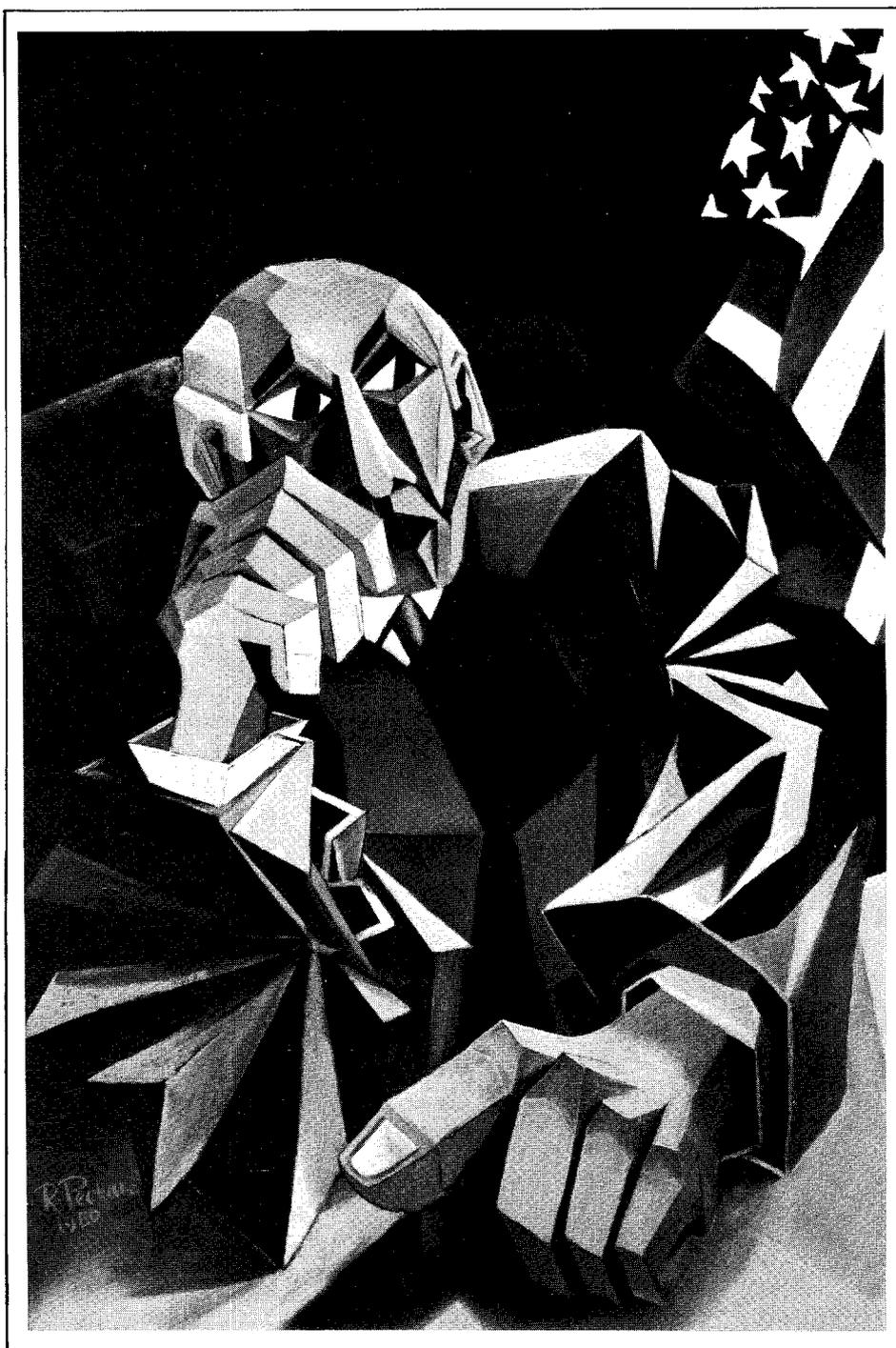
Those of us who have the duty of sending people to prison or keeping them there should remember that, until the beginning of the nineteenth century, corporal punishment and not incarceration was the usual sanction for criminal conduct. Until approximately 150 years ago, jails were inhabited primarily by defendants awaiting trial. Those convicted of minor offenses were sentenced to some form of corporal punishment, which may have included whipping, the "stocks" (or pillory) or even a heavy fine. More serious offenses were punishable by hanging. In Great Britain, serious offenders might be banished to one of the colonies. In the United States, we ran the "desperadoes" out of town into the western territories and unknown frontiers.

Judge Frosh is an Associate Judge of the Sixth Judicial Circuit in Rockville, Maryland. This article has been adapted from an address given by Judge Frosh to the Third National Assembly of Counties on November 11, 1982.

THE JAIL CRISIS IN AMERICA TODAY:

What Value Do Jails Have? Who Should Be Sent To Them and For How Long?

by The Honorable Stanley B. Frosh



It is interesting to note from an historical perspective that when London's Holloway Prison was built in 1849 it bore a cornerstone inscription which read: "May God preserve the City of London and make this place a terror to evil doers." Then the object of prisons was "deterrence through suffering." A penal system based on terror lasted until the early twentieth century, when public opinion rose against it as people realized that prisons reduced crime very little and deterred few persistent offenders. The same is true today. Let us examine a few statistics:

- It costs between \$35,000 and \$85,000 to build a single prison cell in a conventional jail in America. The average cost is \$50,000.
- In 1978 it cost between \$6,000 and \$30,000 each year to house, feed, clothe and manage a single prisoner in an American jail. (In Maryland the cost is almost \$34.00 per day.) Yet, less than 5% of this amount is spent on rehabilitation, vocational training or guidance.
- Nearly 40% of all prisoners incarcerated in our country's jails are between the ages of 18 and 25. Sixty-one percent of all local detainees are prisoners awaiting trial.
- The recidivism rate for all state and federal offenders is as high as 63.9%.
- In 1976 the cost of crime was \$125 billion. This sum exceeds the \$104.3 billion authorized by Congress for defense spending in fiscal year 1977 and exceeds the amount spent by the federal government on education, welfare, transportation and scientific development combined! Moreover, this figure does not include the losses suffered by victims of crime or the cost of supporting the criminal's family during the criminal's incarceration and afterwards. Despite the enormous cost of crime, crime spending benefits no one. At least military spending results in some civilian technological gains. Other government spending also results in some public benefit. But crime spending benefits no one; it is pure loss and pure drain. It is a hole in the fabric of society through which our public weal is lost.

- Offenders convicted of driving erratically are jailed together with those who murder for hire, and drug offenders are jailed together with child molesters and rapists. While I do not suggest that we build separate jails for separate offenses, we should at least realize that dangerous felons and offenders of victimless crimes can and should be separated at the earliest possible time, if not before conviction, then at least afterwards.

- In 1981, the state and federal jail population approached 600,000, almost the size of our sixth largest city. Today, more than one out of every 600 Americans is in prison. Among industrialized countries, only the Soviet Union and the Republic of South Africa have higher ratios of prisoners to the general population.

Experts suggest that the only solution to the rising crime rate is to adopt mandatory sentencing policies. However, the results of mandatory sentencing in New York and Massachusetts have been discouraging. Still, the crime-fearing public in the District of Columbia recently voted to adopt mandatory sentencing for themselves.

Experts also suggest that the way to solve the prison problem is to build more prisons. Perhaps we do need new and more modern prisons. But is prison life as we know it today really the answer? I don't think so. Let us consider some alternatives.

Guideline Sentencing Instead of Mandatory Sentencing

Guideline sentencing simply means that we feed into computers sentencing data on various types of felons, various types of crimes and various punishments handed out in the past. Then averages are computed which are treated as sentencing guidelines and provided to judges to give them some idea of what sentences other judges have given similar offenders convicted of similar crimes. When judges deviate from the guidelines, they must explain their reasons in writing.

Guideline sentencing is a way of preventing the violent swings of justice that can result in sentences that are too harsh or too lenient. Whereas mandatory sentencing eliminates all discretion,

guideline sentencing is discretionary, but advised.

Rehabilitation Facilities Instead of Jail for Non-Violent and First-Time Offenders

In recent years, the decline in the baby boom has resulted in a surplus of public schools. Why not convert these schools into neighborhood rehabilitation centers for drunk drivers and first-time, non-violent drug and alcohol offenders? After all, schools have cafeterias, gymnasias, offices and classrooms that can easily be converted into dormitories. Renovating schools for use as alcohol and drug rehabilitation centers would cost less than building and operating new prisons.

Certainly incarceration in rehabilitation centers would be safer for non-violent inmates. In addition, alcohol and drug offenders could get treatment for their dependencies, treatment that is now unavailable to them in conventional prisons. To those who would argue that the public will not accept the idea of turning neighborhood schools into rehabilitation centers, I reply that the offenders who would be served by such centers would be our own brothers, sisters, fathers, mothers, sons, daughters and neighbors.

The success of rehabilitation centers depends upon their proximity to home and support facilities and public transportation. First-time offenders convicted of driving while under the influence or while intoxicated can be confined in neighborhood rehabilitation centers for thirty to sixty days and still go to work during the day and attend alcohol or drug dependency counseling sessions every evening. Although their drivers' licenses would be suspended for the duration, public transportation, family, co-workers or friends would be available to provide necessary transportation. Second-time offenders could be sentenced to six months at a rehabilitation center with six-month suspensions of their driving privileges. Third-time offenders could be sentenced to a full year's term and lose their drivers' licenses permanently.

Would such a center work? It is hard to say. But it would be safer and cheaper to convert schools into rehabilitation centers, than to pursue our present policy of just dumping all alcoholics and drug users into prisons where they receive no treatment for

their dependencies and often celebrate their release at the closest bar or with a fix.

A Program For Young People and First-Time Offenders of Non-Violent Crimes

What kinds of offenders ought to be imprisoned? I suggest that the way of enlightened punishment is to incarcerate only those convicts who have shown themselves to be a danger to the public or to themselves and whose acts have been so reprehensible that the judicial system must demonstrate in the only way it can — by imposing a sentence involving the loss of liberty — that society will not tolerate such conduct. Murderers, rapists, arsonists, child molesters and armed robbers deserve prison sentences. As for the rest, I suggest that no judge or magistrate should sentence an offender to jail unless there is no reasonable alternative.

First-time, non-violent offenders or those who commit victimless crimes ought to expiate their sins in better ways than serving prison sentences.

First-time, non-violent offenders or those who commit victimless crimes ought to expiate their sins in better ways than serving prison sentences. We can, as I mentioned earlier, sentence those who commit non-violent alcohol and drug-related offenses to neighborhood rehabilitation facilities. We can compel other non-violent offenders to:

- Make restitution to the victim.
- Complete a reasonable educational program of public school equivalence, so that they can at least read and write.
- Undergo psychiatric or other appropriate counseling.
- Receive vocational testing and counseling.
- Maintain full-time employment and support their dependents.
- Remain trouble-free for a prolonged period of time.
- Perform community service for a specific length of time.

Community Service As an Alternative to Imprisonment

Community service is an effective way for offenders to repay their debts to society. Most responsible probation officers provide judges with pre-sentence reports that outline the offender's life and habits. These reports indicate, among other things, the offender's hobbies, interests and talents.

An appropriate alternative sentence might be to assign the offender to work with retarded or disabled children for seven to eight hours every weekend for a year or longer. Performing community service is one way the offender can utilize his abilities to do some good for society.

If the offender is a competent reader, he can be required to record texts or read to the blind every Saturday or Sunday for a few years. If he is handy with tools, he can be assigned to work at homes for the aged and infirmed that sorely need carpenters, brick masons and handymen. If he is a church-goer or interested in religion, then perhaps he could drive disabled congregants to their Sabbath worship or to meetings or deliver their meals in the evenings. There are untold community needs that can be fulfilled by first-time, non-violent offenders. It is only a matter of matching the resources to the needs.

Conclusion

Good sentencing calls for an accurate perception of both the offender's place in the criminal spectrum as well as society's need to protect itself against violence. There is no easy way to reduce the cost of crime by means that will be both punitive and rehabilitative. Jailing costs more than any other form of social control. Even if we do need more jails, jails alone are not enough.

In his address to the American Bar Association in 1981, Chief Justice Warren Burger emphasized that "[w]e must accept the reality that to confine offenders behind walls without trying to change them is an expensive folly with short-term benefits." When you cut your finger you do not necessarily have to go to the hospital to be bandaged. Maybe jails, like hospitals, should confine only those for whom there is no reasonable alternative. ⚖️

Model Rules Notes

continued from page 13

¹⁴ See MODEL RULES 1.7, 1.8 and 1.9. The related MODEL CPR provisions are DR 5-

101(A), DR 5-104, DR 5-105, DR 5-106 and DR 5-107. See also EC 5-5, EC 5-6, EC 5-7 and EC 5-8.

¹⁵ This term is used in this commentary to mean "information relating to representation of a client." See MODEL RULE 1.6(a), a broader concept than that used in the MODEL CPR. Cf. DR 4-101(A).

¹⁶ MODEL RULE 8.4(b).

¹⁷ MODEL RULE 8.4(c).

¹⁸ MODEL RULE 8.4(d).

¹⁹ MODEL RULE 1.6(b)(1).

²⁰ Cf. DR 7-102(B)(1) of the MODEL CPR, which provides:

A lawyer who receives information clearly establishing that:

- (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, [except when the information is protected as a privileged communication] [brackets added].

The bracketed language, added by an A.B.A. amendment in 1974, has never been adopted in Maryland. See Attorney Grievance Commission of Maryland v. Sperling, 296 Md. 558, 463 A.2d 868 (1983). See also Kramer, *Clients' Frauds and Their Lawyers' Obligations: A Study in Irresponsibility*, 67 GEO. L.J. 991 (1979).

²¹ Added as a last-minute compromise, this comment is intended to protect lawyers from complicity in criminal or civil fraud. See S. Taylor, Jr., *The Law: A Case History*, N.Y. Times, January 9, 1983, §6 (Magazine), at 31 (recounting the involvement of law firms in the notorious O.P.M. equipment leasing frauds and the civil suits that followed).

²² See also MODEL RULE 4.1(b). But cf. PROPOSED MODEL RULES 1.2(d).

²³ See e.g., Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978).

²⁴ Cf. 1 A.B.A. STANDARDS FOR CRIMINAL JUSTICE Proposed Standard 7.7 (2d ed. 1980) (Testimony by the defendant, approval of which was withheld pending consideration of the MODEL RULES by the A.B.A. House of Delegates. Former Standard 7.7 has been implicitly followed in at least one case, Thornton v. U.S., 357 A.2d 429 (D.C.C.A. 1976), cert. denied, 429 U.S. 1024 (1976). For an analysis of this problem, see Comment, *Proposed Client Perjury: A Criminal Defense Attorney's Alternatives*, 12 U. BALT. L. REV. 248 (1983).

²⁵ See 3 BUSINESS LAW MEMO (A.B.A. Section of Corporations, Banking and Business Law, No. 4, March/April 1983) at 1.

²⁶ Opinion 81-21 and the guidelines followed the approach of an earlier Kutak Commission Model Rules draft that allowed targeted mail solicitations. See also MSBA Ethics Opinions 84-37 (October 17, 1983), 83-36 (April 20, 1983), and 82-49 (April 22, 1982) generally to the same effect.

²⁷ 455 U.S. 191 (1982).

²⁸ The Kutak Commission's Proposed Model Rule 7.2(b) was adopted by the A.B.A. House of Delegates with one modification: written communications must be retained for two years, not one year as proposed.

²⁹ 285 Md. 132, 138, n.4, 400 A.2d 1111, 1115 n.4 (1979).

³⁰ 440 U.S. 1 (1979).

³¹ This approach was adopted by the Pennsylvania Disciplinary Board following the decision in *In re R.M.J.*, 455 U.S. 191 (1982). The guidelines are available through that agency or the Attorney Grievance Commission of Maryland.

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