RESPONSES

THE HONORABLE BERNARD J. FRIED*

I think it's important that I describe the context in which I work. I sit in a court of limited jurisdiction, the Criminal Court of the City of New York, in New York County (Manhattan). Under the law of this state, the criminal court has jurisdiction over all misdemeanors, and also limited jurisdiction over felonies. Consequently, my perspective in sentencing is primarily a misdemeanor perspective; I deal with felonies only if they have not yet gone or will not go to the Grand Jury. In New York County last year we had approximately 92,000 filings.[1] The year before, I believe, there were approximately 74,000,[2] and this year we're running almost one-third over last year.[3] The percentage of those misdemeanor cases that are disposed of at the first appearance in court exceeds 60%,[4] and an additional 11% are disposed of at the second appearance in court.[5] That means that the substantial majority of cases in this county are disposed of by the second court date; they are disposed of primarily through plea bargaining. It can be done at the bench, it can be done on or off the record but, nonetheless, it occurs. I think the most difficult problems that I face as a judge, and the issues that cause the most conversation, discussion and anguish among myself and my colleagues, are not questions of law, but questions of sentencing. I feel as if I'm a target here today, and rightly so. We do sentencing in an instant in our busy municipal court, which handles upwards of 100 arraignments in the course of an eight-hour session. In arraignments, about 54% of those defendants are sentenced[6]—be it a fine, a conditional discharge, a term of imprisonment, or a referral to a particular program. It happens as quickly as a flash, and without as much reflection as we should be entitled to take. I believe—and I have to live with myself—that I spend as much time as I can, and I'm not dissatisfied because I feel I bring a lot of thought to it. Nevertheless, I want help, and I think my colleagues also want help. The help that I want is other available alternatives, and if you talk to my colleagues in the New York City Criminal Court I believe they will agree. Sitting in a busy court, it's very easy to reflexively impose a jail sentence when the individual before you who has six, ten, eighteen, or thirty-five

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1. Office of Court Administration, State of New York, Comparative Statistics Profile, Criminal Court Arrest Cases (1982) (unpublished report).

2. *Id.*

3. *Id.*

4. Based on an unpublished analysis of 1981 data by the New York City Criminal Justice Agency. This figure does not include the percentage of prostitution cases disposed of at arraignment.

5. See the analysis of 1981 data, *supra* note 4.

6. *See id.*

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prior arrests. It's also very easy, to impose a fine while sitting in one of those courts—and again I'm talking about Manhattan—where we have prostitutes or prostitution-related cases, three-card monte or similar kinds of cases, and low-level drug cases (the nickel-bag, the one tuinol or the two joints of marijuana arrest), which constitute a substantial percentage of our cases. A variety of things in those cases are done very quickly, and it's astonishing to me that there is no real alternative. The fine imposed on a prostitute, a three-card monte defendant, or a minor drug defendant is, in effect, a statutory licensing fee. That's really what it is.

These courts are overwhelmed. Last night, sitting in an arraignment part, I witnessed some cases which had taken as long as seven days from arrest to arraignment for petty, petty offenses. For example, last night, I arraigned a prostitute who had been in jail, a police department lockup, for six days awaiting arraignment. I have also arraigned youths of sixteen years of age who have been arrested for failure to pay the subway fare—I don't believe it occured last night, but it has happened often enough to be a problem of enormous proportions which is not currently being addressed by any segment of our community. These youths are not issued desk appearance tickets because they have no identification, or they may have resisted arrest, or perhaps because there was an outstanding warrant for a similar prior transit offense. Some of these youths have spent as many as six or seven days in jail on a charge on which normally a conditional discharge, or a ten or fifteen dollar fine is imposed and the record is sealed, at least for most first-time offenders.

There are enormous problems—I've been listening to these papers, and I think that they're interesting. I personally do not believe, at least from my own limited perspective, that restitution is an answer in this city. In New York County approximately 68% of the defendants cannot make $500 bail.[7] I believe if I fixed bail in the amount of $100, it would probably hold 30, 40, or 50% of the people in jail.[8] Given such a situation, how can we meaningfully talk about restitution? Restitution, in an environment such as New York City, with the kind of cases that come before me, is simply a Pollyanna solution. It sounds nice, but it's of no real value. You fine a person who's charged with shoplifting, what is he going to do? He's going to go back and shoplift to earn the money to pay the fine. Yet that's what we do—we encourage shoplifting by imposing fines on shoplifters who are not otherwise employed.

We have a couple of choices, at least I have a couple of choices, and I'm speaking very personally. One of my alternatives is probation, but I have no great faith, at least at the misdemeanor level, in probation supervi-

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7. This figure is based on a briefing that I received at my orientation as a judge in May, 1980.

8. *Id.*

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sion. There are some extraordinary, dedicated probation officers, many of whom will do whatever they can to try and make the probationary sentence meaningful and effective. The problem in New York County is that there is generally no follow-up by the sentencing judge. We don't have individual calendars and unless a judge specifies on the papers that if there's a violation of probation, it is to be brought before him, that judge will never again see the individual that he has placed on probation. And when there's a violation, another judge in the press of business will usually dispose of it at the arraignment with whatever he thinks appropriate. To prevent this, I took to endorsing my papers with a red magic marker, "Before Me," and I became like a piece of flypaper. I go from courtroom to courtroom and cases catch up with me. However, it causes administrative problems. Probation supervision is sometimes helpful, sometimes it's not, but it's really the only nonjail alternative.

The next alternative is jail. I think, however, that there should be an incline towards prison, something similar to the Chinese system of nonjudicial sanctions which deals with certain levels of community aberrational behavior administratively before a jail sentence is imposed. In American jurisprudence, it seems to me that we have a cliff. A person chugs along, and then all of a sudden falls down, and there's no choice except to incarcerate. In certain other societies, including China, there is somewhat of a sliding pond to jail. Alternatives are actually utilized as stops en route to the bottom. In my court there are a limited number of such stops, one of which is Michael Smith's program, the Manhattan Community Service Sentencing Project.[9] He may not view it as a stop, but I do. And I think it's a good stop; I think we need more of those alternatives. Frankly, I think it's an outrage that the community does not provide judges with the kind of flexibility that a range of sentencing options would provide; we just do not have the options.

It may come as a shock to you, because it comes as one to everybody that I tell it to, but I am never told what prison populations are. I receive no memorandum in the morning from the Department of Corrections saying to me that there are ten spaces—"fill them up," or that there are no spaces—"send them home." We have no idea. I know from newspapers what's going on; I'm probably a little bit more educated than that, but not much. Judges are not officially advised what the prison populations are, we're left to our own devices. And I think that's good—I don't think that judges should be imposing or calculating sentences depending on the available number of beds. That's where I think the hotel model doesn't apply. I think it's a very seductively attractive model. But jail is not a hotel where guests can be turned away and left to take a nap in their car or pitch a tent in the

9. Another such program is sponsored by the Citizen Advocates For Justice, Inc., and is limited to female offenders.

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woods. We really have no other alternative when there is a defendant for whom we do not have a realistic sentence other than a term of incarceration. He's been placed on probation; he's violated probation. What do you do with him? We're just not given the tools. I think a goal of colloquia such as this should be to make a shrill outcry to the community to give the judges the tools with which to work.

Judges in New York City, as you may or may not know, are required by statute to regularly visit the jails to which they send prisoners. Dostoyevsky said that the degree of civilization in a society can be measured by entering its prisons. If you go to Riker's Island, you will realize that we are not a very civilized society. Nonetheless, when I'm sitting in court, I often have no alternative but to send a defendant to Riker's Island. I think that's wrong. While it may be a laudable goal, I don't believe that in my life time I will see, in this country, a society in which jail is no longer required for the incapacitation of certain persons. Although incarceration may be required only ultimately for the most serious cases, I'd like to see alternatives developed at the misdemeanor and petty-crime level. The legislature has increasingly restricted judges' sentencing options. On a day-to-day basis we are being told that the sole option is jail, and the legislature is defining the length of the jail term. There may be, for classes of cases, no other workable alternative. However, I believe that we should search for practical alternatives to incarceration which have credibility. I want to know that when I sentence to an alternative program somebody who would otherwise be sentenced to jail, the alternative has "teeth," and that if it is not complied with, the defendant will be brought before me for resentencing.

If we are at least provided with minimum alternatives, there will be hopefully some improvement, however modest, in the problem of prison overcrowding, and sentencing generally.

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KENNETH SCHOEN*

I

THE STRATEGY FOR CHANGE

Prisons in the United States are overcrowded because there is not enough money to support what amounts to our principal crime control policy—to stop crime by locking up increasing numbers of criminals. Alternative sanctions designed to reduce imprisonment are fundamentally out of sync with this policy. For this reason, attempts to implement alternative sanctions are frustrated by resistance. Most of the "successful programs," upon closer examination, serve primarily offenders who would have otherwise received lesser sanctions. The programs which truly divert offenders from prisons are exceptions and are dismissed as being soft on crime and disinterested in the victim.

Politicians, sensitive to the public's call for tougher measures, are quick to capitalize on the fear of crime and spout get-tough rhetoric. Even the professionals, who presumably are informed and unswayed by emotion, have altered their vocabulary to include words like punishment, public safety, and just deserts. Few promote rehabilitation. Particularly distressing are those researchers who instead of dealing in facts, issue provocative self-serving "findings" and hope to appear on national television with their revelations. With their help, reactionary thinking is encouraged. The result of the lack of money and desire for retribution is a "nothing works" attitude towards corrections programs. To combat this, we must create an environment receptive to change and concentrate our efforts where they will be most effective.

II

CREATING AN ENVIRONMENT FOR CHANGE

Information alone, no matter how powerful and well-founded, will not make a difference because prisons and prison conditions are not attractive issues. Policies about crime are principally driven by myth, custom and habit and are galvanized by fear. The voice of the humanitarian concerned with the evils of excessive imprisonment for human beings is weak and ineffective.

The only compelling force which might promote alternative punishments is cost-benefit interests. Even though politicians and the public shout "cost be damned," they are sobered by the enormity of the price tag of incarceration. Leveraging this factor to force consideration of alternative policies requires both leadership and a constituency. Unfortunately, both

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are usually absent. The Edna McConnell Clark Foundation has launched two efforts to create a constituency and develop leadership.

The Foundation and the National Institute of Corrections selected four states and created state policy groups composed of members who were necessary to affect policy change, and who would not otherwise come together. The groups include prosecutors, legislators, executive staff, and criminal justice members. The effort is basically aimed at illuminating the realities of sentencing policy and helping the groups understand that it is within the power of policy-makers to change events—something that comes as a surprise to most of the groups' members. While major change is not yet expected since the project is just over a year old, a product of this effort is a "good time" law just instituted in Michigan. The point is that a constituency capable of effecting prison reform is in place.

The foundation is also involved in selecting and training corrections directors. The state corrections director has considerable authority to influence the factors which contribute to prison overcrowding. Unfortunately, the director's performance is usually more like that of an innkeeper rather than an interventionist in the policies that effect growing inmate populations. Seizing the opportunity presented by the newly elected governors' biennial purge of corrections directors, a Boston executive-search firm has been engaged by the Foundation to assist these governors in locating men and women able and willing to confront this problem. This is coupled with a training program at the University of Pennsylvania's Wharton School to assist the newly appointed commissioners in tackling managerial problems and later with improving policies of imprisonment. Thus we hope to have future corrections directors who use their offices effectively.

III

THE BEST BET FOR CHANGING IMPRISONMENT PATTERNS

A. Reform at the Time of Sentencing

While programs which can affect prison populations are fairly numerous, the pressure point with the greatest potential for reducing overcrowding is the "traffic circle" where offenders are directed to the various dispositions, i.e., sentencing. In spite of the increasing rigidity of sentencing laws, judges remain crucial in controlling prison overcrowding. Reformers should realize that lobbying for new sentencing structures can backfire and produce laws which are harsher and less rational than those they replaced.

Like corrections directors, judges lack the will to lead. Many consider themselves not responsible for the control of excessive use of prisons and jails and, indeed, many add that they should not be fettered by these considerations as they mete out justice. Those who lead must be wary of the intimidation of court watchers and mayors like the mayor of New York City, who equate creative sentencing with leniency. The Clark Foundation

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currently has no strategy to catalyze judicial leadership. However, others are beginning to tackle these problems.

The Client Specific Planning Project of Washington, D.C. forcefully demonstrates that given options, judges frustrated by their limited sentencing choices will use them. The program presents, at sentencing, a plan recommended for the offender. The plan may include several elements including time in jail, community service, restitution to the victim, or drug and alcohol rehabilitation. The challenge is creating a sanction which appears tough and yet avoids excessive incarceration.

Minnesota created sentencing guidelines which are able to control prison overcrowding and the disparity and unpredictability in sentencing (unfortunately, such legislation is a rarity). The legislature instructed the Sentencing Guidelines Commission to tie the lengths of sentences to prison capacity, thus permitting the state to maintain a comparatively low prison population. But Minnesota's success in drawing a line between offenders to be "set free" and a much smaller number to be imprisoned must be understood in the context of its Community Corrections Act.[1] Earlier the Act established the policy that lesser offenders should be treated in the community and provided the funding for communities to offer creative alternatives.

The Chief Justice of the New Mexico Supreme Court established a commission similar to that of the Minnesota program, but sentencing guidelines would be developed by the court rather than the legislature. In the long run, this could be a stronger arrangement than Minnesota's because the judges are involved in the development of the policy which they must utilize rather than having the scheme imposed on them.

Even when good policy is in place, it is important to have a strategy to protect it from resurging cries for revenge. Some policies by their nature are vulnerable because only a minor alteration in language can neutralize their value or they depend upon a charismatic leader. For example, despite the apparent success of Minnesota's policies, the public perception that the low use of imprisonment is an impediment to effective crime control threatens the stability of the Sentencing Guidelines[2] which, with the Community Corrections Acts, have created an effective system of sanctions. Unfortunately, the kind of leadership which brought the legislation into being is now being diverted to stave off political adversaries. For example, while the state's crime rate is declining, the prison population is poised for a large increase. Prosecutors now realize that the greater the number of prior convictions, the greater the possibility the guidelines will call for imprisonment. So where several crimes are alleged, they no longer settle for only going after the most serious one. Unless this loophole is closed, Minnesotans

1. MINN. STAT. ANN. §§ 401.01- 401.16 (Supp. 1983).
2. *Id.* at §§ 244.01-244.11.

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will pay heavily for what only appears to be an increase in criminal activity. Minnesota's Community Corrections Act was attacked by the "nothing works" crowd a couple of years ago. The announcement of its "failure" went unnoticed by policy-makers in Minnesota because of its solid political base. Again, this shows the importance of developing a strong constituency and effective leadership.

B. Comprehensive Community Corrections

When you look beyond the negative headlines to the substantive research on Minnesota's Act, it is apparent that the Act improved local planning and administration of corrections, increased the number of community-based programs, increased the retention of offenders in the community, and did not threaten public safety. It failed, the researchers said, to reduce costs and the number of inmates in prison. But during its history from 1974 to 1981, while the surrounding states' prison populations went up by 98.37%, Minnesota's went up only 47%.[3] In an evaluation of the Oregon Act, when savings from otherwise needed prison construction were included, the Community Corrections Act was justified using a cost-benefit analysis. Thus, cost-benefit analysis ultimately supports community-based programs.

The comprehensive Community Corrections Acts of Minnesota, Kansas[4] and Oregon[5] contain several features which are effective in combating prison overcrowding. Basic to the Acts is their ability to build a constituency for good corrections policy, which will not develop spontaneously. Criminal justice officials and the general citizenry serve on advisory boards and in planning efforts, and develop a sense of ownership which protects the statute from the advocates of quick-fix, get-tough imprisoning measures. As indicated earlier, the Acts facilitate the creation of other policies that may not be a part of the Acts but aid in controlling prison population. An assumption of the Acts, which has proven successful in Minnesota, is that offenders can be shifted from custodial control within large fortress-type institutions to community-based organizations offering creditable crime sanctions without a loss of public protection. Just as important, funds are also shifted away from the costly prison to the community where they can go further.

Another assumption is that crime and delinquency should be seen as symptoms of failure and disorganization on the community level and that the development of a healthy connection between the offender and the community institutions—family, schools, work, etc.—is primarily responsi-

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3. *See* P. McMANUS & L. BARCLAY, COMMUNITY CORRECTIONS ACT TECHNICAL ASSISTANCE MANUAL (undated) (published by the American Correctional Association).

4. KAN. STAT. ANN. §§ 75-5290-75-52,108 (Supp. 1982).

5. OR. REV. STAT. §§ 423.500-423,560 (1981).

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ble for the development of law-abiding behavior. This fundamental assumption is an important feature in the communities of the poor, the black and the Hispanic populations which are virtually the exclusive source of prison inmates. In this perspective, the task of community corrections becomes a definition of the needs at the local level and the development of solid ties between the offender and the community. A comprehensive approach at the community level can put criminal justice planners in a position to view the dynamics of these extraordinary criminogenic environments. Taming these virulent forces would be the best solution to a lasting reduction in prison-bound populations.

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