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This Issue in Brief

Restitution As Innovation or Unfilled Promise?—Author Burt Galaway discusses what we have learned about restitution since the establishment of the Minnesota Restitution Center in 1972 and in light of the early theory and work of Stephen Schafer. Noting that restitution meets both retributive and utilitarian goals for punishment, the author finds considerable public and victim support for restitution, including using restitution in place of more restrictive penalties. He cautions, however, that we must clarify the difference between restitution and community service sentencing and discusses challenges which exist for future restitution programming.

Parole and the Public: A Look at Attitudes in California.—Describing recent events in California, Author Walter L. Barkdull stresses the need for parole authorities to develop community support for the concept of parole. Public attitudes hostile to parole have been crystalized by the release of several notorious offenders at the end of determinate sentences. Community groups have discovered the power of organized action to thwart the state's ability to locate facilities and place parolees. Resulting court decisions have provided both the public and parole authorities with new rights, while legislation has imposed severe operating limitations.

Long-Term Inmates: Special Needs and Management Considerations.—Society's response to crime has contributed to a number of trends which have resulted in longer terms of incarceration for convicted felons. Determinant sentencing, modifications in parole eligibility criteria, enhanced sentences for repeat offenders, and longer terms for violent offenders have resulted in an increase in time served and a subsequent increase in the proportion of long-term inmates in state facilities. The incarceration of greater numbers of long-term inmates brings a number of programmatic and management concerns to correctional administrators which must be addressed. Using data on Kentucky inmates incarcerated as "persistent felony offenders," authors Deborah G. Wilson and Gennaro F. Vito identify the programmatic and management needs of long-term inmates and delineate some possible strategies to address this "special needs" group.

The Use of Counsel Substitutes: Prison Discipline in Texas.—Although prison discipline has changed significantly through internally and externally initiated reforms, it remains a critical aspect

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The Use of Counsel Substitutes: Prison Discipline in Texas

BY MARILYN D. MCSHANE AND H. MICHAEL GENTRY*

Introduction

DISCIPLINE HAS long been considered the essence of control in operating penal institutions. In its 1931 report the Wickersham Commission claimed, "discipline . . . determines the influence of the institution upon inmates. It determines the relationship between the prisoners and prison officials. It sets the mood and temper of all other activities within the prison."[1]

In recent years, there has been a considerable amount of research on discipline within the prison; the characteristics of disciplinary offenders,[2] the relationship of rule infractions to overall prison adjustment,[3] and the effects of disciplinary infractions on parole and other release performances[4] have all been explored. Ironically, however, the decision processes of prison discipline have operated apart from public scrutiny and have been neglected in criminal justice literature.[5] Examining changes in the structure and process of the disciplinary system gives us insight into evolving management strategies in correctional administration.

Background

Discipline in the early 19th century was a penal philosophy aimed at individual reform through silence, solitude, and repentence. Work, separation from amoral influences, and strict rules were aids to instill character in the inmates' "lost souls."[6] As the prisons grew in size and administrative complexity, humanitarian reformists were replaced by state bureaucrats, and individual rehabilitation was replaced by economic efficiency as an institutional goal.

Insisting that most reformers had abandoned the notion of rehabilitation, many officials in the 1830's defended the use of corporal punishment as a way of forcing inmates to behave. One assistant warden at Sing Sing proclaimed that convicts "must be made to know that here they must submit to every regulation and obey every command of their keepers."[7]

In 1883, the Texas Legislature had the Penitentiary Board draw up specific rules and regulations for employees and inmates outlining the only punishments allowed. These included:

1. confinement in dark cell (not exceeding 7 days at a time)
2. confinement in dark cell or other cell in irons
3. ball & chain, shackles or spike on ankle
4. deprivation of privileges in whole or in part
5. forfeiture of communication in whole or in part
6. whipping (only a special order in writing of superintendent, asssistant superintendent or inspector)[8]

Although corporal punishment has virtually been eliminated by major reforms that have taken place in the last century, the philosphy of controlling behavior through strict discipline remained critical to the management of penal institutions. In 1967, the President's Commission on Law Enforcement and Administration of Justice stated, " . . . no institution can be operated safely and efficiently unless its occupants conform to some minimal standards of or-

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[1]National Commission on Law Observance and Enforcement (Wickersham Commission). *Report on Penal Institutions, Probation and Parole* (reprinted). Montclair, NY: Patterson Smith, 1968.

[2]T. J. Flanagan, "Correlates of Institutional Misconduct among State Prisoners," *Criminology*, 21(1), 1983, pp. 29-39; H. M. Gentry, *A Comparison of the Chronic Rule Violator, the Occasional Rule Violator and Non-Violator in the Texas Department of Corrections* (thesis), Sam Houston State University, Huntsville, TX, 1987; A. Goetting & R. M. Howsen, "Correlates of Prisoner Misconduct," *Journal of Quantitative Criminology*, 2(1), 1986, pp. 49-67; G. Jensen, "Age and Rule-Breaking in Prison: A test of Socio-cultural Interpretations, *Criminology*, 14, 1977, pp. 555-568; E. Johnson, "Pilot Study: Age, Race, and Recidivism as Factors in Prisoner Infractions, *Canadian Journal of Corrections*, 8, 1966, pp. 268-283; H. Toch, K. Adams, and R. Greene, "Ethnicity, Disruptiveness, and Emotional Disorder among Prison Inmates, *"Criminal Justice and Behavior*, 14(1), 1987, pp. 93-109.

[3]R. Coe, "Characteristics of Well Adjusted and Poorly Adjusted Inmates," *J. Crim. Law, Criminol., & Pol. Sci.* 52, 1961, pp. 178-184; D. MacKenzie, L. Goodstein, and D. Blouin, "Personal Control and Prisoner Adjustment: An Empirical Test of a Proposed Model," *J. of Research in Crime & Delin.* 24(1), 1987, pp. 49-68; S. Wolf, W. Freinek, and J. Schaffer, "Frequency and Severity of Rule Infractions as Criteria for Prison Maladjustment," *Journal of Clinical Psychology*, 22, 1966, pp. 244-47; M. Wolfgang, "Quantitative Analysis of Adjustment to the Prison Community," *J. Crim. Law, Criminol., & Pol. Sci.* 51, 1961, pp. 608-618.

[4]E. Dolan, R. Lunden, and R. Barberet, "Prison Behavior and Parole Outcome in Massachusetts," paper presented at the American Society of Criminology, Montreal, Nov. 1987; M. Gottfredson and K. Adams, "Prisoner Behavior and Release Performance," *Law & Policy Quarterly*, 4(3), 1982, pp. 373-391; G. Hill, "Predicting Recidivism Using Institutional Measures," in Farrington & Tarling (eds.), *Prediction in Criminology*, Albany: SUNY Press, 1985.

[5]D. Glaser, "Testing Correctional Decisions," *J. of Crim. Law, Criminol., & Pol. Sci.* (45), 1955, p. 679; J. Ramierez, "Race and the Apprehension of Inmate Misconduct," *J. of Crim. Justice*, 11(5), 1983, pp. 413-428.

[6]H. E. Barnes and N. K. Teeters, *New Horizons in Criminology*. New York: Prentice Hall, 1943.

[7]D. Rothman, *The Discovery of the Asylum*. Boston: Little Brown, 1971.

[8]R. C. Copeland, *The Evolution of the Texas Department of Corrections* (thesis), Sam Houston State University, Huntsville, TX, 1980.

derly behavior."[9] At this same time the courts began requiring officials to follow constitutionally implied standards in most areas of prison operations.

State and Federal courts, departing from a tradition of noninterference in matters once considered the discretion of administration, began instituting procedural safeguards to protect the rights of the incarcerated. Noting this judicial trend, many states initiated their own "due process" formulas for disciplinary actions.

In 1974, the American Bar Association characterized 21 elements of due process for imposing punishment on inmates and surveyed the states about the availability of each. At that time every state had written rules specifying the offenses for which one could be charged. All of those questioned used impartial tribunals to conduct hearings and allowed the inmate to appear at the hearing. In addition, all respondents allowed the inmate to be present during the taking of evidence and to make his own statement. Only 14, or 37 percent of the states responding, allowed the inmate to be represented by counsel (most often at the inmate's own expense), while 39 or 89 percent allowed representation by a counsel-substitute.[10] Many states followed the 1973 recommendation of the National Advisory Commission on Criminal Justice Standards and Goals that offenders be allowed to select someone, including legal counsel, to assist them at hearing.[11] These counsel-substitutes range from other inmates to law students to a list of staff members to assist with the inmate's defense. A closer look at one state system, that of Texas, illustrates how the refinement of the disciplinary process including the use of counsel substitutes has accommodated both court and mangement concerns.

Court Intervention in the Texas Prisons

It is not surprising that disciplinary practices were a key issue in the landmark case, *Ruiz* v. *Estelle*,[12] which questioned the constitutionality of many policies in the Texas Department of Corrections. Just a few years earlier widespread abuses, particularly in the area of discipline, had triggered litigation and Federal intervention in the juvenile justice system.[13] Filed in 1972 and consolidated from a number of individual petitions in 1974, the *Ruiz* case was finally heard in 1978. The results were sweeping reforms in every area from sanitation to access to courts.

System–wide changes initiated by the court included a formal administrative disciplinary process replacing the arbitrary and cruel practices of threats and brutality. In developing guidelines for this disciplinary system the parties used standards outlined in the 1974 Supreme Court decision, *Wolff* v. *McDonnell*.[14]

Wolff v. *McDonnell*

In *Wolff*, the Court decided that certain procedural steps are required before an inmate can be deprived of statutorily granted "good time" credit. Most courts have subsequently extended *Wolff* to hearings that could result in solitary confinement and cell restriction since these too are considered deprivations of liberty. The safeguards outlined by *Wolff* include:

a. written notification of the charges at least 24 hours before the hearing, describing specific conduct upon which charges are based
b. the right to call witnesses and present documentary evidence
c. an impartial tribunal for hearing
d. a finding of guilt must contain a summary of the evidence relied upon a specific statement on the reason for the finding of guilt.

Though *Wolff* did not require that assistance be afforded to inmates in the disciplinary process, it recognized a limited need in cases where an inmate was illiterate or the issues were complex. Ironically, it was Justice Marshall's dissent that has most influenced the development of counsel substitute programs:

> I would hold that any prisoner is constitutionally entitled to the assistance of a competent fellow inmate or correctional staff member or if the institution chooses, such other alternatives as the assistance of law students to aid in the preparation of his defense.

Discipline under Ruiz

As a result of the court's finding that the Texas prisons were in violation of the 8th and 14th amendments the parties entered into an agreement resolving the primary disputes of prisoner treatment. As ordered, the Texas Department of Corrections (hereinafter referred to as TDC) adopted an expanded version of *Wolff* protections for disciplinary hearings. Uniformed officers became substitute counsels, assisting in designated cases where the inmate was "mentally impaired, illiterate, or did not understand English, or because of the complexity of the issue,

[9] The President's Commission on Law Enforcement and the Administration of Justice, *Challenge of Crime in a Free Society*. Washington, DC: Government Printing Office, 1967.

[10] Resource Center on Correctional Law and Legal Services, *Survey of Prison Disciplinary Practices and Procedures*. Washington, DC: American Bar Association, 1974.

[11] *National Advisory Commission on Criminal Justice Standards and Goals: Corrections*. U.S. Dept. of Justice, Washington, DC, 1973.

[12] *Ruiz* v. *Estelle* 503 F.Supp 1265 (S.D. Tex 1980), *aff'd in part rev'd in part, Ruiz* v. *Estelle*, 679 F.2d 1115 (5th Cir. 1982).

[13] *Morales* v. *Turman* 364 F.Supp. 166 (E.D. Tex. 1973).

[14] *Wolff* v. *McDonnell* 418 U.S. 539 (1974).

the inmate would not be able to collect and present evidence necessary to an adequate comprehension of the case; or if an inmate is confined to any form of segregation pending the hearing."[15] Substitute counsel[16] was also afforded when the inmate requested or when a witness requested by the accused was unable to attend and statements had to be obtained and presented at the hearing.

Critique of the Substitute Counsel

The switch in role from rule enforcer to inmate advocate was a difficult burden for the average correctional officer. The emphasis on treatment and rehabilitation, according to Cressey,[17] gives contradictory directives to those accustomed to enforcing the rules of security. On some units, officers rotated the task of substitute counsel while on others it was a permanent assignment for the slow and ineffective employee.

Though the guidelines for the appointment of substitute counsel on each case were fairly clear-cut, their performance was scrutinized by the Special Master's Office overseeing the implementation of federally mandated reforms. The work of the substitute counsel suffered from no training and no incentive to perform this task well. In addition, the officer often had other security responsibilities to accomplish at the same time. As was characteristic of much of the disciplinary process, documentation was extremely poor. It was often difficult to determine whether the inmates were properly notified of the charges pending against them (served), interviewed, or assisted in gathering evidence and witnesses.

By surveys and periodic observation the Special Master's Office concluded that in many cases, the officer substitute counsel had not read or explained the charges, had not obtained statements or assisted the inmate in preparing a defense. They wrote:

> Unfortunately, the performance of the majority of counsel substitutes observed in person or monitored on tape was inadequate. To suggest that most are not acting as effective advocates for their clients fails to reflect the magnitude of the problem. Observation of proceedings at various units left the impression that the function of most counsel substitutes was to escort the accused to and from the hearing, for during every stage of the proceeding, the counsel substitute stood inexplicably mute. In the course of monitoring this area, the monitor observed counsel substitutes who obviously had not discussed the case with their client, who failed to assist the prisoner when he was having difficulty phrasing a question or making a statement, or who declined to question witnesses who had made incriminating statements against the accused. Moreover, such lapses were not isolated instances, but common occurrences at most of the units.[18]

As a result of deficiencies in the substitute counsel's performance, it was obvious that the plaintiffs could press for the abolition of the officer substitute counsels. They could also insist on a program where inmates assisted each other. To avoid this, the defendants, TDC, proposed creating a program of non-correctional counsel substitutes. In exchange, the plaintiffs would permanently eliminate the idea of inmates assisting each other in disciplinary matters. This agreement was the basis for the establishment of a new counsel substitute program using non-uniformed, non-correctional TDC employees as inmate advocates.

The New Counsel Substitute Program

The new counsel substitute is under the direct supervision of a separate office, Staff Counsel for Inmates. These employees are no longer evaluted or controlled by the disciplinary captain. Though the function of the counsel substitute is regulated independently from the unit, he or she is still required to follow TDC guidelines and any specific unit rules and regulations mandated by the unit wardens. This sytem, known as "dual supervision," applies to a number of technical positions within the prison system. Counsel substitutes, like medical and psychiatric specialists, are monitored by unit administrative staff as well as their own independent technical supervisors.

The disciplinary process under the old substitute counsel program varied from unit to unit with much discretion over necessary documentation. In contrast, the new counsel substitute program has developed a centralized system of uniform documents, records, and reporting techniques.

Once a case is assigned to a counsel substitute, that case remains in his or her control until completed. Unlike the old system where the officer substitute counsel only represented the inmate (entering at a later point in the case), the counsel substitute begins working on a case by serving notice of the charges to the inmate and continues through the possible appeals following the disciplinary hearing.

The counsel substitute, or CS, begins by screening

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[15] Texas Department of Corrections, *Disciplinary Rules and Procedures for Inmates*, 1986.

[16] Inside TDC, the term "substitute counsel" was used to describe the original program where correctional officers assisted the inmate at disciplinary hearings. The new program, made up of non-correctional employees, uses the title "counsel substitute." The Special Master's Office and the courts have, however, used the terms interchangeably and it was the authors' intent to keep their quotes exact despite the confusing use of the two terms.

[17] D. Cressey, "Contradictory Directives in Complex Organizations: Cases of Prisons," *Admin. Sc. Q.* (4) June 1959, pp. 1-19.

[18] Office of the Special Master. Thirty-eighth Monitor's Report, filed in the U.S. District Court of Texas, Houston Division, Civil Action No. H-78-987-CA, *Ruiz* v. *McCotter*.

each case for proper format and charge. The TDC Rulebook outlines the basic information that must be included in the disciplinary report. The CS ensures that the factual information is complete and that the elements of each charge are clearly established in the report. If the offence description is deficient, it is his or her responsibility to notify the disciplinary captain and attempt to have the case rewritten or dismissed. If the offense description indicates that the incident was not serious, the CS will attempt to have the case reduced from a major to a minor offense. The intent here is to have those cases reduced at the earliest point in time, prior to costly investments in investigations, preparation, and hearing time. One goal of the CS program is to have more cases reduced before hearing and less cases reduced at hearing as was the previous tendency.

The CS serves the case (notifies the inmate that charges are pending), making sure the prisoner understands the charges and informs the inmate of his or her rights in the proceeding. These rights, derived directly from *Wolff*, are listed on a form which is checked off and initialed by the CS. This form serves as verification of due process notification should the case be audited later. After serving the case, the CS documents the inmate's version of the incident (including any excuses or facts that might contradict the officer's report).

The next step of the investigation is to follow up on any relevant facts the inmate has provided. This might be medical information, appointment slips, valid craft-making cards, or shaving passes. Where the inmate pleads not quilty and provides specific information on his behalf, it is the responsibility of the CS to interview the charging officer and inform him or her of the inmate's contradictory evidence. The counsel substitute will then document any statements the officer provides to clarify the cirumstances surrounding the alleged incident. In addition, the CS may gather unit records such as use-of-force reports, incident videotapes, property issue receipts, work rosters, and inspection logs to corroborate an officer's allegation. The CS also interviews witnesses and may obtain their written statements. By conducting a thorough fact-finding investigation, the CS has all the necessary information to accurately advise the inmate. The consolidation of the functions of notifier, investigator, and advocate at the hearing also reduces the manpower from three separate officers to one counsel substitute.

The completed report, a balanced coverage of all pertinent facts, is submitted to the captain of the disciplinary committee prior to the hearing. The CS may also use this time and all of the facts uncovered in the investigation to confer with the inmate over defense strategy, plea, and questions or testimony needed at the hearing.

Another critical aspect of the CS's job occurs before the actual hearing. While conducting the investigation it is possible that the CS will uncover information that will mitigate the circumstances surrounding the incident. For example, a CS might find that the inmate charged with not going to work had a valid appointment that was not noted in his medical records, or that the contact between the inmate and an officer originally written as "striking an officer" was accidental. In such cases this evidence is presented to the disciplinary captain. The CS attempts to negotiate a reduction or dismissal of the charge. In many instances the investigation will show that a less serious charge (e.g., creating unnecessary noise, rather than inciting a riot) may be more appropriate, and the CS will request this change.

Without direct control over the number of cases written, the CS can still affect the caseload. By timely reductions and dismissals of cases, the disciplinary process becomes more effecient and effective. By having poorly written or unsubstantiated charges eliminated from the process early, management can focus on bringing other cases to a timely resolution. Also, administrators believe that this is the type of involvement the court monitors were expecting from the CS. Though these types of resolutions may have existed under the old program, they were not conducted in a structured, consistent manner, nor were they documented. Since there were no accounts of the dispositions other than findings of guilt, it was difficult to prove their existence. Under the current program, all reductions, dismissals, and not guilty findings are part of the regular monthly reporting system. These reports also function as a mangement tool for comparison, efficiency analysis, and identification of trends.

In defense of prison administrators, they were as statistically naive as the court monitors who did no investigation of prehearing resolution. The Special Master's Office only monitored cases that resulted in major hearings. When they investigated a unit, they analyzed the hearing paperwork or tapes of cases tried from a designated period of time or sat in on major hearings. There was no recognition of cases that had dropped out of the system. Neither the reporting nor the monitoring procedure reflected any outcome other than the formal resolution of cases.

The final stage of the case is the hearing. The CS stands with the accused and acts on his behalf by presenting evidence or mitigating circumstances concerning the inmate or the incident. It is also the

responsibility of the CS to represent inmates who are unable or refuse to attend the disciplinary hearing.

As an advocate for the inmate, the CS has two concerns: the determination of guilt or innoncence and, if guilty, the possible punishment.

Depending on the plea, the CS is responsible during the hearing for either presenting evidence that will support the inmate's innocence, or providing mitigating circumstances that will cause the committee to show leniency in punishment. As much as possible, the CS acts as a spokesman for the inmate by questioning witnesses, presenting the documentary evidence, and explaining the inmate's version of the incident.

Finally, the CS assists inmates in filing appeals on issues related to the case. This assistance may be as simple as explaining the issues or grounds for appeal to actually writing out appeals for the illiterate or intellecutally handicapped inmate. When there are no grounds for appeal or the inmate's intended appeal is frivolous, this is also explained. The independent status of the CSs offers them credibility in their assessments that the officers did not previously have.

The new counsel substitute program was implemented gradually over a 2-year period on all of the 28 units within the TDC. This gave the program director the opportunity to ensure that each group of counsel substitutes was properly trained and supervised before a new unit was undertaken. Each unit had its own unique population and needs that had to be accommodated despite the centralized and uniform nature of the operation. In an early report on the success of the counsel substitutes, the Special Master's Office cited great improvement in the disciplinary process, due in great part to the concern and hard work of the counsel substitutes.[19]

Summary

According to Jacobs[20] a prison cannot meet the demands of the prisoners, various interest groups, and the courts and still maintain control without a unique form of administration—rational-legal bureaucracy. The standards set by court intervention in Texas have been met by the creation of an administration guided by staff attorneys and a highly sophisticated disciplinary process.[21] The Texas Counsel Substitute Program is typical of the programs created out of the resolution of interests, compromise, and change. Derived from concepts in the U.S. Supreme Court decision, *Wolff* v. *McDonnell*, and liberally expanded in *Ruiz*, the program offers assistance to all inmates requesting representation in the disciplinary process. Originally staffed by correctional officers, the monitors found sufficient weaknesses in the service to cause the creation of an alternative program. Thus, civilian (non-correctional) staff members, independent of direct unit control, assumed the inmate advocate role.

The current counsel substitute program functions under guidelines that are state-of-the-art in prison discipline and in prisoner protection. With safeguards that exceed the mandates of *Wolff*, this program, under the watchful eye of the Special Master, is pioneering the standards for inmate advocacy within the prison setting. Through efforts like these, the TDC looks forward to release from monitoring and the end of 15 years of continuous judicial intervention.

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[19] Office of the Special Master. Forty-fifth Monitor's Report, filed in the U.S. District Court of Texas, Houston Division, Civil Action No. H-78-987-CA, *Ruiz* v. *Lynaugh*.

[20] J. B. Jacobs, *Stateville*. Chicago: U. of Chicago Press, 1977.

[21] D. Parr, *An Analysis of the Critical Phases of Administrative Discipline Development at the Texas Department of Corrections* (thesis), Sam Houston State University, Huntsville, TX, 1987.