THE RIGHTS OF OFFENDERS IN COMMUNITY RESIDENTIAL CENTERS

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ABSTRACT

"The Rights of Offenders in Community Residential Settings" takes a preliminary look at how evolving judicial regard for offenders' rights will be applied to community residential settings. Judicial decisions affecting jails and prisons have proliferated in recent years. Reaction to the resulting court orders has varied, but for the most part it appears that correctional personnel have reacted with fear, anger, and resistance. A study being conducted on the impact of judicial decrees in this area, however, indicates that the most negative results of judicial intervention may be psychological ones on the part of correctional personnel, who are not happy with having their judgment second-guessed. The author suggests that personnel in community residential centers might be able to avoid a large measure of judicial intervention, and thus side-step such unwanted consequences, by assuming an anticipatory stance and taking action now to affirm and protect the rights of persons under their supervision. As an aid in this effort, administrators might undertake an analysis of the applicability to community residential programs of the standards set forth for the rights of offenders by the National Advisory Commission of Criminal Justice Standards and Goals, giving particular attention to the issues of due process and voluntarism.

I'm sure that all of you are familiar, in varying degree, with the increasing judicial attention that has been focused on corrections in the last few years. As early as 1944, a U.S. District Court declared that "[a] prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication taken from him by law".[1] It was not until the late sixties and early seventies, however, that the courts began to get intimately involved in making determinations as to what that principle means in operation. It is evident, as one examines the history of judicial intervention in corrections, that the courts took on the role of arbiters of offender rights reluctantly. They are still reluctant, but it is now clear that the courts will indeed make these determinations if they feel that other responsible parties are not making them satisfactorily.

Decision after decision has been issued finding the action of correctional administrators and the conditions in penal institutions constitutionally deficient or otherwise unlawful. Holdings have reached into virtually every aspect of prison and jail operation -- discipline, sanitation, food, prisoner safety, transfers, censorship, recreation, overcrowding, health and medical care, classification, legal services, administration of "good time" provisions, rights of speech and religion, probation and parole revocation, and even treatment programs, or lack of them.

Reaction to Expanding Offender Rights

Reaction to the new judicial activism seems to have varied depending on relationship to the correctional apparatus. Correctional administrators and the line staff of their agencies generally viewed the new judicial attention to jail and prison questions as unwarranted and unwanted. They objected to having their expert judgments questioned by people not conversant with the exigencies of operating a correctional facility or program. They resented being named in lawsuits and they complained that the time spent in preparation of their defense or in court hearings reduced the time they could spend working to improve programs and conditions. Further, a number of such administrators reacted with genuine fear of the consequences of the judicial interference. They feared that court decisions were undermining the authority of correctional staff and jeopardizing the safety of staff and inmates alike. Some saw the activities of inmates and their attorneys as part of a real effort to bring the system down entirely.

Prisoners and their lawyers tended to view the situation more positively. In the main, the lawyers' positivism reflected an expectation that courts, familiar with the concepts of due process and similar doctrines, would be in a better position to assay their application to cor-

rections than correctional personnel. The alternative forum -- the legislature -- was not thought to offer the bright prospects of the courts because prisoners have so little political power. Undoubtedly, there were some among these attorneys who were indeed envisioning far more sweeping and dramatic effects than those they sought publicly. Similarly, many prisoners doubtless welcomed the interest of courts fully expecting they would be able to make their keepers uncomfortable, quite legally. The greater number, however, saw judicial intervention as the change needed to bring about improvement of their condition.

Recently, questions have begun to arise from all sides pondering exactly what effects all of the judicial activity of recent years has had. Has the lot of prisoners changed for the better? Have specific requirements of court orders been implemented? Have the dire effects on staff control and morale predicted by some occured? In fact, there has been remarkably little follow-up of the after-math of judicial intervention.

For the last nine minths, I have been part of a team that has been working to begin to close this knowledge gap by exploring what actually has happened after judicial decrees ordering changes in correctional facilities and programs were handed down. We have been using a case study approach, taking an intensive look at a small number of judicial decisions around the country. In each of these cases, we have been interviewing persons involved in or affected by the court order under study. We have interviewed judges, attorneys, correctional administrators, line staff, and offenders. We have also been examining court records and other official documents. We have been exploring the extent to which there has been compliance with the judicial decrees; how changes were brought about or why they were not made; and the overall impact -- good, bad, or indifferent -- of the judicial orders.

Our analysis of our research findings is not yet complete and will at any rate, be too lengthy for much description in a session of this type. I would like to share with you, however, some preliminary findings about the impact of judicial intervention from the point of view of correctional personnel. We have found that in general, correctional personnel have indeed reacted to comprehensive suits challenging their facilities with fear, hatred, resistance, and even defiance. The personnel we interviewed reported that they did not understand or trust the attorneys who sued them. Some reported that the changes ordered were undesirable or unnecessary. Still others reported that while some or all of the changes might be necessary or desirable, the conditions challenged were not their fault and the attacks on them were unfair. It was the legislature or the city council or the local judges or the budget office who had been unwilling to provide needed funds or authority. Yet it was the correctional personnel, who were doing the job as best they could, who were under attack. Thus, when the courts issued sweeping orders finding them at fault or ordering dramatic changes made, many personnel reacted by avoidance, evasion or delay. A reaction of "perhaps if we ignore it, it will go away" seems to have been more prevalent than outright defiance, but some of that has been found as well.

I was particularly interested in learning the response of correctional

personnel when we reached the point of asking them more specifically about the negative effects they viewed as having stemmed from the court orders with which they had been involved. While there were some other negative effects reported by some persons in some cases, by far the most common and strongly-stated reaction was that the worst effects of the judicial intervention were psychological ones -- that it is psychologically very difficult to accept someone telling you that what you have been doing is wrong when you were trying to do a decent job; that it is psychologically very difficult to accept that a few lawyers and a judge who have never operated, or perhaps even visited, a correctional facility can tell you what to do; that it is psychologically very difficult to accept that you might be personally liable for money damages for doing your job as you saw it.

This finding holds considerable interest. Few more direct negative effects of the court orders and the changes that were made were reported. Most of those interviewed informed us that they came to see that most of the changes were indeed beneficial, or at worst, simply not that much of a problem. Some did report a change in attitudes among inmates; that they became more demanding and less respectful. But,above all, we heard sadness and hurt about having to endure the whole process.

After having gone through such an experience, however, it seems that the correctional stance in regard to judicial intervention tends to change. Discovering that the operational changes required by judicial intervention were generally not all that bad, there is a movement from resistance to anticipation. The reaction seems to be--

> Well, a lot of these changes are not really so awful. It's the process you have to go through when the court starts intervening that is bad. Thus, we will try to keep abreast of what other courts and standard-setting bodies and experts are saying and try to make the necessary change on our own, without anyone telling us directly what we have to do, and thus avoid any more intervention by the courts.

A definite change in stance toward an anticipatory one is observable.

Applicability of Expanding Rights to Community Settings

So what does all this discussion about increasing judicial action to affirm and protect the rights of offenders have to do with you as administrators and personnel of community residential treatment centers? That's a good question. In preparation for my participation in this program, I skimmed through several volumes of advance sheets and summaries that are put out to keep interested persons apprised of new developments in case law, such as the Prison Law Reporter, the Clearinghouse Review, and the Criminal Law Reporter. I also went back through a number of publications that synopsize recent decisions affecting corrections such as The Emerging Rights of the Confined and its update, Recent Developments in Correctional Case Law, put out by the South Carolina Department of Corrections. I also reviewed the list of several hundred corrections cases that we developed for our study of the impact of judicial decrees on corrections. In all of these sources, I was looking for judicial

decisions that spoke to the rights of persons under correctional supervision in the community. I of course did find cases dealing with the due process requirements attendant to probation and parole revocation, but I did not find a single case that concerned persons in halfway houses, group homes, or other residential or day care programs. I also communicated with Maureen Carter who has been conducting research for this program to learn whether her research on litigation directly affecting CRTCs had been fruitful. She responded that cases had been found involving zoning, nuisance actions against halfway houses, and policy concerning escapes from houses. But like me, she had found no reported cases that dealt with the legal rights of halfway house residents. I do not claim that the searching I did was fully comprehensive but if there have been any decisions affecting persons in programs like those we're discussing, I feel it is safe to say that there have not been many.

Finding no case law dealing with rights of persons in CRTC's except that dealing with possible commitment to penal facilities, I looked at the work of standard-setting bodies. Here I did find that some attention has been paid to the rights of persons in community status.

The report on corrections of the National Advisory Commission on Criminal Justice Standards and Goals, for example, contains a chapter dealing with the rights of offenders.[2] The narrative of that chapter states that the standards "are meant to cover adults, juveniles, males, females, probation, parole, institutions, pretrial and posttrial detention, and all community programs. Unless specifically qualified, general statements of rights cover all offenders in these categories."[3] Some of the standards are so qualified. For example, Standard 2.3, "Access to Legal Materials," states that "[t]he correctional authority should make arrangements to insure that persons under its supervision but not confined also have access to legal materials."[4] Standard 2.7, "Searches," states that, "[u]nless specifically authorized by the court as a condition of release, persons supervised by correctional authorities in the community should be subject to the same rules governing searches and seizures that are applicable to the general public."[5] Thus, the National Advisory Commission's standards for corrections do speak to the rights of persons in community residential programs. Some of the standards specify how they apply to such persons; others are meant to apply to all persons under correctional supervision regardless of placement.

Another set of standards, the United Nations Standard Minimum Rules for the Treatment of Prisoners, has recently been examined for extent of applicability to community based supervision and residential care. While it was found that many of the Rules were applicable, it was felt that some did not apply and that some areas of concern to community programs were not covered. Thus, the Working Group of Experts on the Standard Minimum Rules recommended to the Fifth United Nations Congress on Crime Prevention and Control that new rules for the treatment and supervision of offenders in the community be developed.[6]

Looking Into the Future

Thus, while there has been little judicial activity to date regarding the rights of persons in community residential programs, these examples illustrate that various standard-setting bodies have begun to address this population and are likely to do so with greater comprehensiveness and more specificity in the relatively near future. Speaking of the future, I would now like to indulge in some crystal ball-gazing and speculate a little about what the future portends in relation to the rights of persons in CRTC's. I hope that we might learn from the experience of institutions and move now to an anticipatory stance, because I fear that administrators of CRTC's are going to be caught off guard as the offender rights movement flows into the community from prisons and jails unless someone wakes up now.

As community-based programs proliferate and as their novelty wears off, I predict two general trends. First, we will see more concern with the development of regulations, standards, and rules for the operation of community programs. Second, we will hear an increasing volume of complaints from persons under community supervision as to how their lives are regulated. These two trends should nourish each other. That is, as standards are set, offenders will increasingly complain that their programs don't meet the standards or that the standards are inadequate. Likewise, as complaints are heard, more standards and controls will be developed.

It appears that many staff and administrators of community programs are operating with blinders on, seemingly believing that court decisions and legal challenges have little to do with them because they are treatment-oriented and benevolent and, therefore, free to exercise almost limitless discretion in their day-to-day operations. Generalizing dangerously, it seems that the emphasis on individualized treatment in community programs has led to operations and procedures that are arbitrary, capricious, and rather stunningly paternalistic. Privileges, not rights, are discussed. A peculiar twist of thinking is evident. That is -- because community based residential programs are viewed as being less drastic than major institutions, it is thought that fewer legal protections for the residents are required. On the contrary, however, courts may find that because community-based residential programs are less drastic, fewer restrictions on the residents' rights can be justified. Particularly in view of the fact that many of the restrictions on rights of offenders that have been accepted by the courts have been tied to the security needs of major institutions, examination of the same issues in a community context may yield different results. Even more significantly, for those of you whose facilities deal with unconvicted persons, the courts have applied even more rigorous tests to assertions that rights of pre-trial detainees need to be limited. Since unconvicted persons are innocent in the eyes of the law, limitations imposed on them should be only those that are inherent in the fact of pre-trial custody and they should be reasonably related to assuring the presence of the accused at trial.

As an aside, I feel that I should mention that the Advisory

Committee for this program asked me to discuss not only the rights of residential center residents, but also their responsibilities. I'm afraid that this request left me a little befuddled because I am really not sure what can be said on that subject. As a matter of law, residents of community programs have the same responsibilities as other citizens and no more, except to the extent that other duties may be imposed by order of a court of law, as a condition of sentence for example. The only other special case I know of relates to juveniles, where the parens patriae concept may allow the state to impose special standards on children. I have seen lists of responsibilities drawn-up by correctional administrators, often to accompany a statement of rights for offenders. For example, I have seen things like: "You have the right to adequate, nutritious food. You have the responsibility not to waste food." But I'm afraid that any such lists of responsibilities must be regarded simply as horatory, or educative, or as guidance materials. They have no legal force. If we assume that some of the persons under your care have been inadequately socialized and need guidance as to customary and valued behavior in group-living situations, then some such guidance may be appropriate. But I repeat that in general, the responsibilities of CRTC residents, in a legal sense, are no different from yours and mine.

As a useful exercise, I would suggest that you review the standards dealing with the rights of offenders proposed by the National Advisory Commission with a view toward how such standards would affect your operations if they were to be implemented. In general, the standards follow the position taken by the courts that convicted offenders should retain all rights that citizens in general have, except those that must be limited in order to carry out the criminal sanction or to administer a correctional facility or agency. Where necessity for limiting a right is claimed, the burden of justifying that limitation should be borne by the correctional agency. That is, the question must be asked, "Can the agency show that its interest in imposing a restriction is compelling enough to justify the invasion of the offender's rights?" Even if that test is met, another question must be asked, "Is there any other way in which the agency could protect its interest and yet minimize or avoid the violation of the offender's rights?" That is, is the proposed restriction the "least drastic means" of achieving the state's compelling interest? It is these questions which courts are adopting not only as tests for correctional practices, but for all governmental activities that have adverse effects on individuals.

If you were to go through the corrections standards, I think you would find it difficult to show a compelling interest for restricting rights of CRTC residents in such areas as access to courts, legal services, and legal materials; provision of healthful surroundings and adequate medical care; nondiscriminatory treatment; exercise of religious beliefs and practices; and free expression and access to the public. Nor do I imagine that any of the rights just mentioned give any of you major cause for concern. However, I think there are some rights among those discussed in the corrections report that will give some of you trouble. In particular, I imagine that issues relating to due process and equal protection will be difficult for CRTC

administrators to accept, interpret, and implement. It is not at all clear that the most basic steps have been taken to protect CRTC residents from arbitrary and capricious treatment. The view seems to be that procedural due process is adversarial and, therefore, inimical to treatment. Significant decisions affecting the lives of residents are made without clear standards or criteria, an opportunity for review or appeal, or other keystones of procedural due process.

At one residential corrections center I visited, I inquired about disciplinary procedures. I was told that if a person violates a rule, the staff confronts the violator. Then a casework counselor, the Director of the facility, and possibly one other staff member decide what the punishment should be, if any. I was told that possible sanctions included restriction to one's room, denial of furloughs, and other fairly substantial penalties as well as the big one -- a recommendation for incarceration. I was told that numerous violations or particular violations could lead to a recommendation that the person be removed from the program. When I asked for more specifics in regard to procedures followed, I was told that the staff tries to individualize as much as possible. In other words, residents of that facility are not given advance notion of the sanctions that may follow a particular rule-violation. Nor was it evident that any kind of more or less formal fact-finding or adjudicatory process existed. It was up to the staff how alleged violations were to be handled. The staff then, was deciding matters that could have very significant effects on a person's life and liberty. I dare say that no prison in the country can get away with such loose procedures. Due process will become an increasingly bigger issue in community residential programs, not just in regard to discipline, but also in relation to classification, access to records and case files, work and program assignments, furloughs, and other areas where discretion now reigns.

But perhaps the most difficult challenge to be faced in the future relates to more subtle issues. A number of writers and speakers have begun to question the rehabilitative ideal. Some question the rehabilitative ideal on the grounds of effectiveness. You've heard the evidence presented by Martinson and others[7] that treatment programs cannot be shown to have an appreciable effect on later criminality and you've heard the debate that has ensued. On reflection, it seems rather peculiar that participation in work, education, training, counseling, or other programs is part of the punishment in CRTC's. Such participation is either required explicitly or the fact of declining participation results in removal from the facility into a more severe setting. In either event, these links in essence make program participation part of the punishment. What kind of association does that create with the kinds of activities that are being promoted and encouraged? It is like current practices in many educational systems around the country today where misbehavior is punished by requiring the student to do "extra" homework or assignments. This is in contrast to some African countries where misbehaving students are punished by not being able to take any books home after school. Our practices seem designed to create negative and distasteful associations with things we are trying to promote.

Additionally, it seems odd that while voluntarism and self-determination are two of the basic tenets of social work practice, the sine qua non of an effective change process, social workers in the correctional world often seem to operate as if these two tenets can be disregarded and the method will work anyway. They are surprised and angered when the people they are trying so hard to change resist all of the benevolent efforts being made to change them.

But in my mind the really hot issue is not at all related to effectiveness. It concerns the moral and philosophical "rightness" of allowing rehabilitative objectives to influence the nature or duration of criminal sanctions. It is well to remember that persons who are committed to a community facility by authority of a court have been convicted and sentenced for violations of the criminal law. The sentence they have received is a criminal sanction and no matter how well-intentioned and helpful the program is designed to be, commitment to a community center (either directly or subsequent to another assignment) is a coercive penalty. In the words of C.S. Lewis:

> To be taken without consent from my home and friends, to lose my liberty, to undergo all those assaults on my personality which modern psychotherapy knows how to deliver, to be remade after some pattern of "normality" hatched in a Viennese laboratory to which I never professed allegiance, to know that this process will never end until either my captors have succeeded or I have grown wise enough to cheat them with apparent success -- who cares whether this is called punishment or not?[8]

Debate about the proper purposes of criminal sanctions is growing loud and heated. An increasing number of voices are asserting that sentences should be based on the degree of punishment that is deserved for a particular offense, that sentences should be definite, that social services and assistance should not be tied to criminal sanctions.[9] A big question for the future will center around what the necessary elements of a criminal sentence involving assignment to a community center are and what other conditions, constraints, or requirements may legitimately be imposed. Can a resident be coerced (directly or indirectly) into participating in a particular program? In any program? Does a resident have a right to refuse treatment? A particular treatment? All treatment?

If the critics of the rehabilitative ideal who assert that rehabilitative purposes should play no part in determining the nature or duration of a sanction gain favor, what role will community residential facilities play? Could you accept a role as inflicters-of-state-ordered-punishment, offering assistance as an extra function to those who voluntarily opt to receive it? If you're convinced of the value of what you're offering, should full voluntarism in regard to program participation frighten you? Are your programs attractive enough that residents would freely choose to participate in them if successful release from the program or other such inducements were not tied to them? These are difficult questions. The notion of a right to refuse treatment that really meant that such a refusal would carry no negative

consequences strikes me as presenting a real challenge to administrators of community-treatment centers, a challenge that all-too-soon may be heavy upon you.

In closing, I'm thinking of a response from a resident of a community corrections center when I asked her what she thought of the program. She said, "It beats sitting in jail." That response raised in my mind a question I ask when exploring how good any program is. That question is -- "Compared to what?" I think that for too long we have compared community programs to total institutions and, as a result, almost anything looks good. Too seldom do we have a clear vision of the positive program we're trying to achieve. Too seldom do we compare our programs to that dream. I hope that as you work to recognize and protect the rights of persons committed to your facilities, that you will compare what you're doing not only to prisons and jails, but to some better way.

M. Kay Harris

10/6/75

FOOTNOTES

1
Coffin v. Reichard 143 F. 2d 443 (6th Cir. 1944).

2
National Advisory Commission on Criminal Justice Standards and Goals, Corrections (Wash., D.C.:Government Printing Office, 1973), 17-72.

3
Id. at 21.

4
Id. at 29.

5
Id. at 38.

6
See, ABA Commission on Correctional Facilities and Services, "Analysis of Extent of Applicability of the UN Standard Minimum Rules for the Treatment of Prisoners to Community - Based Supervision and Residential Care for Convicted Offenders" (May 1975).

7
See, e.g., Robert Martinson, "What works? - questions and answers about prison reform," The Public Interest 35 (Spring 1974), 22-54.

8
C.S. Lewis, "The Humanitarian Theory of Punishment," reprinted in Crime and Justice 2 (L. Radzinowicz and M. Wolfgang eds., New York: Basic Books, Inc.,1971), 45.

9
See, e.g., Norval Morris, The Future of Imprisonment (Chicago: The University o Chicago Press, 1974); ; Lawrence Pierce, "Rehabilitation in Corrections: A Reassessment," Federal Probation 38 (June, 1974), 14-19; Working Party of the American Friends Service Committee, Struggle for Justice(New York: Hilland, Wang, 1971); M. Kay Harris, "Disquisition on the Need for a New Model for Criminal Sanctioning Systems," West Virginia Law Review 77 (May 1975), 263 - 326.

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END

7 illustrations