

# Community Corrections Institute



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## COMMUNITY CORRECTION MANAGEMENT AND THE LAW

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Upon conviction of a felony a person loses his presumption of innocence; his life pattern is forced to change in many ways. The change can be as real as prison or as ephemeral as a psychic click.

In Montana the judge has sole and exclusive authority to sentence the convicted felon. The judicial discretion is enormous and ultimately determinative of the kind of physical and legal changes. Essentially the judge does one of two things; locks the person behind walls or releases him from physical custody. If he is released from physical custody it will be on one of two theories; one, on a deferred imposition of sentence, i.e. a decision by the judge that the defendant is free to go and sometime later he will be sentenced or perhaps if all goes well for a stated period of time the charge may be dismissed and the record cleared; two, a suspended execution of sentence, i.e. an actual sentence is imposed but its execution is suspended. If either of these sentencing techniques is used (deferred imposition or suspended execution) it is assumed the defendant will be placed on probation for either the period of the deferred imposition or the suspended execution. Finally, if the defendant is locked up it is likely that within a few months, or at the most a few years, he will be released. Upon release it is expected that the defendant will be placed with an officer for the period of his parole.

A new direction of some significance in this whole process is community corrections, often equated with half-way houses but in fact encompassing a much broader concept than half-way houses. Any local operation or facility that attempts to deal with criminal offenders should be a part of an integrated correctional scheme referred to as community corrections. However, this discussion will center on so called half-way houses or community correction facilities

which strive to re-integrate offenders on their way back to the community from centralized prison facilities. Unfortunately, such facilities are so limited in availability they should probably be used primarily for offenders before they enter centralized prison facilities in an effort to socialize and re-integrate without institutionalizing.

There are generally three alternative approaches by which clients enter community correctional facilities. They include pre-trial diversion, direct court commitment after a plea of guilty or after convicted, and after a term in prison but before outright release.

Pre-trial diversion is a quasi-voluntary commitment and as close to a voluntary commitment as you are likely to encounter. Although the arrangement may be extra legal it would nonetheless be advisable to formulate a written contract signed by the client-suspect, the county attorney and perhaps a representative of the community correction facility. Any agreement made is probably not enforceable. The real outer limit is the applicable statute of limitation.

A direct court commitment after a plea of guilty or after conviction might be made as a condition of probation associated with either deferred imposition of sentence or suspended execution of sentence or a direct commitment might be made as if the community correction facility were a prison of sorts. Since there are no cases directly in point these approaches might be contested but not likely, because success for the unhappy client would mean new sentencing by the judge which would be to a formal correctional institution and not as a condition of probation. The "correctional institution" would most likely be the prison.

A return to a community correction facility after a court commitment to the prison would rely on some scheme of parole or work furlough.

The discretion to assign is within the department of institutions and is limited according to legislative authorization and guidelines prepared by the department. The conditions of any release to a community correction facility should be clear, concise and specific and should be communicated to both the client and the director of the community correction facility.

Insofar as possible, the conditions should be the same whether the commitment is made at pre-trial diversion, after plea or conviction by the court, or after a return from prison. This should not be a large problem in a community correction facility since the client population is carefully selected and the total client population is very small relative to the administrative staff and the case workers. However, to protect against biases and unfettered discretion, parameters of approach and presentation should be established.

It is easy to treat people according to what we think is good for them. It is difficult not to be influenced by sex, color, age, general appearance and general attitude, and respond accordingly. Hence there is a need for definitive guidelines. Statutes and case decisions attempt to establish minimums but can only do a rough and somewhat uneven job.

The lawyer's advice is based on what is the "legal minimum" in a correctional setting. The community correction facility should decide what will satisfy the needs of the center . . . and then ask the question, is it legal? I doubt there will be any legal question if you proceed on the basis of what is good for the community correction facility. Some things to remember as you formulate guidelines:

1. The facility must be safe to be legal.
2. The facility needs some security to meet community protection requirements and to avoid tort liability.

3. The clientele needs to be carefully selected to meet the limited security the facility provides, to avoid tort liability and to be accepted in the community.

4. The consent or the commitment which is the basis of the client's presence should be known, but the operation should be such that any "ordinary consent" or "typical commitment order" will provide all the authority any community correction facility would ever need.

5. Regulations should be clearly defined and made known to the clients before the fact to avoid charges of capriciousness and arbitrariness.

6. Finally, regulations should be directed toward the needs of clientele first; the protection of the community first; and the convenience of the administration last!

The courts are unlikely to interfere with community correction efforts insofar as the techniques are less restrictive than a prison environment.

The principal difficulty in assessing the legal position of the client of a community correction facility is the variety of terms of confinement coupled with the dearth of court decisions directly in point. In general, the law urges a balancing of the legitimate interests of the state against the personal liberties of the individual.

In application this standard for measuring the activity of a community correction facility will be different than that for prisons since community correction facility residents are by definition less dangerous than inmates of prisons. In judging on scale, a community correction facility being a "half way" measure of control between prisons and on the street supervision should be permitted somewhat less restrictive control devices based on the original classification of the client or the advancement made by the client

or the client's nearness to institutional release or ultimate freedom from any state supervision.

The need to confine is less, therefore the legitimacy of confining regulations is less.

Prisoners retain all rights except those taken from them by law. In some jurisdictions the legislative pattern is very restrictive and conviction of a felony destroys all or most civil and constitutional rights. Some constitutions declare felons civilly dead with all the collateral disadvantages that entails. Montana places the burden on the court to specify and to justify all rights taken from the prisoner. The Constitution and the Montana statutes automatically restore all rights upon termination of state supervision.

For community correction facility administrators, the first concern is to maintain due process and equal protection.

As to equal protection within the community correction facility, it is necessary to treat each resident in an even-handed fashion. This does not mean each person is treated exactly like every other person. Each person is a separate human being with unique needs, but all should receive medical care as needed; all should be treated in an equal manner for violating the same regulation.

The resident must know what is permitted and what is prohibited. Written rules with explanation are essential.

In any treatment center the resident should understand "why" conduct is permitted or is prohibited. Even though the resident disagrees with the rule or contests the logic or effectiveness of the rule or its purpose, at least he knows what it is and why it is. Further, explanation forces the creator of the rule to consider the justification and if he can find no justification the

administrator would do well to reconsider the rule.

The rules and their explanation should include the disciplinary measures that attach to the breach of each rule. The ultimate sanction in a community correction facility is a very easy one as compared to a central prison facility, i.e., transfer back or re-commitment by a court, or outright release if based on voluntary consent with no coercive aspect; often, however, this could mean sentencing or facing criminal charges.

Rules should be clear and concise. Insofar as possible, they should be geared to specific limited punishments. Not only to satisfy due process but also to meet the legitimate demands of treatment.

Fact finding should be a very serious matter if the resulting punishment could be substantial. Due process requires that the client be given notice of the charges, an opportunity to be heard with a decision by an impartial decision maker. A written record and a careful investigative process should be part of every determination.

The problem areas most likely to erupt can be divided into two groups. Group I includes:

- a) drugs b) theft c) assaultive conduct d) misuse and abuse of property or of staff.

Group II includes

- a) refusal to maintain sanitary conditions b) refusal to go to work or c) refusal to help in the center.

The first group are in all probability potential criminal offenses and generally will result in the offender going before the court. The second group should be handled internally.

Punishment must be proportionate to the offense and cannot be cruel and unusual.

Kinds of punishment classified as cruel and unusual by the U.S. Supreme Court include the following: 1) Anything unnecessarily cruel (Trop v. Dulles, 365 U.S. 86, 99 (1958)); 2) Any punishment which is disproportionate to the offense (Weems v. U.S., 217 U.S. 349 (1910)); 3) Any punishment which is unnecessarily painful or unreasonably severe (La. ex rel Francis v. Resweber - 329 U.S. 459, (1967), Wilkinson v. Utah, 99 U.S. 130, 135 (1878)); 4) Any punishment for status crimes is cruel and unusual. (Robinson v. Cal., 370 U.S. 660 (1962)).

In judging punishment in the institutional setting the questions most often raised are: Is the prison penalty disproportionate to the offense? Is the implementation unreasonable? Corporal punishment is out, that is, whip, fists, and electric prods. This does not mean physical contact is always illegal. Force to move a prisoner or in self defense may be required. Confinement in a maximum security facility does not constitute cruel and unusual punishment. Prolonged nudity, overcrowding, unjustified physical assaults, inadequate food and water, inadequate ventilation or heat, inadequate medical care, unsanitary living conditions, and excessive length of confinement are cruel and unusual.

Cruel and unusual punishment should not be a real problem in a community correction facility unless some unusual psychological techniques are employed.

A lot of discussion has recently centered around the concept of "least restrictive alternative." Cruel and unusual punishment could build on that base and be given a more understandable direction. Such a legal premise might, for example, support capital punishment in one case and deny jail time in another. It might support isolation in prison but not in a community correction facility.



In prison freedom of movement, of action, of association and of expression is necessarily limited. The most significant right that remains is the right to be protected from physical and psychological assaults that threaten health and sanity.

But there is a very real difference between prisons and community correction facilities. Prisons are forced to deal with the most difficult population that can be found in a given geographical area, whereas residents of community correction facilities will be selected individuals. Further, if any action by the resident is so severe that the staff cannot manage within the limits of their ingenuity and the limits of the facility the act almost surely will be criminal and potentially subject the offender to a new court determination or justify a transfer to a more secure facility.

Generally, a prisoner has a right of access to the courts and some kind of right to counsel. In Montana the right to counsel is primarily maintained via a law student program. Access to courts and counsel is maintained by direct interview and mail. The prison's right to block or censure correspondence between inmate and court or counsel is limited but exists.

Inmates have a right to worship and to be visited by religious representatives. Religious belief and religious ceremony cannot be enforced or prohibited. This is not unlimited. If the religious activity represents a clear and present danger to prison security it may be restricted. There have been some disputes as to what constitutes a religion. As to speech and correspondence, the new trend is toward requiring the prison officials to justify any restrictions. The prison's legitimate concern for security and discipline is balanced against the inmates' interest and need to correspond. Rights to receive visitors may be more restrictive but must be based on security or administrative manageability. There are very limited rights as to

grooming and attire. Rights as to court access, to counsel, to exercise of religious freedom, to correspond and to receive visitors are at least as broad for clients in a community correction facility as in prison and should be more expansive, although courts are not likely to demand more rights or more complete exercise of rights for community correction facility residents.

Each community correction facility should develop a process for dealing with disputes between inmates and inmates and staff. The process should be swift, fair and decisive, including a process of complaint, investigation, hearing and resolution.

Disciplinary methods employed cannot be cruel or unusual. They must follow procedural due process. They may include punitive segregation, loss of good time and loss of visitation rights. The process required will vary depending on the seriousness of the potential resulting punishment. The more serious cases may require notice, hearing, proof, counsel and the decision should be subject to some kind of appeal.

Every inmate or client has a right to a safe and healthy environment. A first requirement is the protection of inmates from each other, from themselves if they are self-destructive, and to provide them with a facility which meets minimum safety standards.

An equally impartial and collateral right is the right to adequate medical treatment. Broad discretion is permissible but must be reasonable. The medical service provided need not be the best but cost cannot justify limiting health care.

A prisoner's right to be free from searches and seizures is narrowly limited. Generally, prison officials may subject inmates to institutional searches unimpeded by 4th Amendment barriers. The developing case law seems to be not so much toward the elimination of the 4th Amendment protections for

various classes of persons, but rather the utilization of a sliding scale of reasonableness. For example, there is a vast difference in the need to search and the scope of search depending on whether the search is in an airport, at a border, in a private home, in a prison, or in a community correction facility. Standards for a community correction facility search should avoid undue force, embarrassment or indignity; they should rely on non-intensive sensors whenever feasible; and should be no more frequent than absolutely necessary. Rights of privacy and the right to not have conversation surreptitiously seized are of doubtful availability to prisoners.

Miranda rights and the right to counsel are available if the interrogation goes to a new crime, but not if it relates only to a prison investigation leading to potential punishment for violations of a prison regulation.

Finally, every person has some right to privacy, even prisoners and persons in community correction facilities. The right is first based upon the U.S. Constitution, second upon state constitutions, third upon federal statutes, fourth upon state statutes, fifth upon a number of court decisions, and finally upon a plethora of regulations. With such impressive credentials you would think the right is well protected. Not so!

We are in the age of cybernetics - a technological revolution centered around the computer. No people in the world are scrutinized, measured, counted and interrogated by so many poll takers, social science researchers and government officials as are Americans.

There is too much data. The data is too sensitive and subjective. Access is too easy for too many. The controls are too few and not effective. There is too much inaccuracy and it is too difficult to get corrected.

The information is gathered and disseminated by Banks' credit agencies and other private businesses; by hospitals, doctors and educational institu-

tions; and by governmental agencies, including most specifically the FBI, CIA, NCIC, LEAA, state criminal bureaus, and local police. In the process of interchange controls are lost and accuracy is sacrificed.

Law is traditionally slow to respond to emerging needs, especially as to an emerging technology as complex, frightening and apparently uncontrollable as the computer. Law is not quite up to handling the printed page and the file cabinet.

LEAA has been pressing the states for control plans and computer capacity to develop computerized criminal histories. The information now being collected includes arrest data, offense data, court data and prison data.

Montana's legislative package to support the program failed. North Dakota is exempt because they received no LEAA money for computer or communication systems. They have developed a relatively primitive manual of criminal histories. South Dakota's Attorney General promulgated rules to meet the federal guidelines and is developing career criminal files, plus a statistical analysis center. Colorado passed implementing legislation effective as of January 1, 1978, but doubtful the plan will be implemented by January 1, 1978. Utah has promulgated rules to meet LEAA guidelines by executive order. Utah has a computerized criminal history probably now on line. Wyoming's situation is unknown.

Other information that is being accumulated and poses significant problems includes intelligence information, juvenile information and medical information including both psychiatric and physical.

Montana's legal approach gives an adequate guide to dealing with the problems in a practical fashion. Montana's Constitution provides:

Article II, Sec. 10. Right of Privacy.

The right of individual privacy is essential to the wellbeing of a free society and shall not be infringed without the showing of a compelling state interest.

Article II, Sec. 9.

No person shall be deprived of the right to examine documents . . . of public bodies - except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Article II, Sec. 28.

Full rights are restored by termination of state supervision for any offense against the state.

The thrust of all the law of privacy is based on the balance between compelling state interest and the right to be let alone.

The right of privacy vis-a-vis any state interest varies according to classification of the people involved. The usual classifications of persons involved would include juvenile-adult, male-female, prisoner and, within the term prisoner, could be sub-classifications of dangerous-non-dangerous, on parole, on probation, and in community correction facilities. The next step is to identify the information which ranges from official court records, to closed court pre-sentence investigations, to comprehensive social histories, to intelligence information.

The problem is what information should be collected and what information should be released and to whom. First, consider the nature of the information. Second, consider the person requesting the information. Third, consider potential tort liability. Fourth, consider fairness. I urge limited accumulation of sensitive personal material to be stored in perpetuity. The need for such material may seem crucial to the social scientist; the danger of careless dissemination is apparent to the attorney. Be extraordinarily cautious in the release of such material. Err on the side of refusal and you will more likely avoid adverse legal consequences.

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