Getting Smart as Well as Tough on Crime

by Judge K.L. McIff

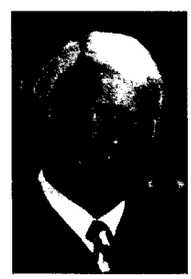
Everyone these days is on the side of being "tough on crime." Members of both political parties, those with no party affiliation, persons on and off the bench, legislators, and other local, state and national public officials, literally everyone has embraced the get-tough position. That debate is settled and no longer deserves the focus that continues to put it center stage in political campaigns and public discussion. As one *Deseret News* writer observed: "Tough talk wins votes;"[1] but we can ill afford to allow political sloganeering to begin and end the inquiry. The "one-upsmanship" in tough talk should give way to an examination of what works; simply put, we need to get smart as well as tough on crime.

TOUGH TALK BYPRODUCTS

Virtually every legislative session brings a raft of new bills designed to increase the scope of what constitutes criminal conduct, expand the number of offenses that can arise in a single criminal episode, increase the penalties that can be imposed and narrow judicial discretion. Minimum mandatory sentences have gained a counterproductive level of popularity. Class B misdemeanors are ratcheted-up to class A's and A's are moved to third degree felonies, etc. The only exception that comes to mind is a bill in 1997 which reduced the unlawful taking of a cougar from a third degree felony to a class A misdemeanor. No doubt there are others, but they would be few and far between.[2] As one legislator put it, "This body never met a penalty-enhancement bill it didn't like."[3] The down side to all of this is not necessarily found in the legislation adopted, but rather the diversion of attention from a meaningful analysis of approaches that could produce more long-range benefits. Adding new crimes and increasing the level of old ones can become simply another form of tough talk which never reaches the issue of changing criminal behavior and protecting society.

DRAMATIC LOCKUP EXPANSION

Perhaps the most far-reaching consequence, both locally and nationally, of "getting tough on crime" has been the dramatically increased reliance on incarceration – lockup. Prison populations have skyrocketed. In Utah, for example, the prison population has increased from 1341 in 1982 to over 5100 at the time of this article.[4] This near 400% increase is largely a product of changes in philosophy and the manner of dealing with offenders rather than changes in demographic factors such as growth in the population or crime rate. In 1995, state and federal prisons logged their largest prison population increase since record keeping began in 1923.[5] Some states, notably Texas and California, have charted what may prove to be an impossible course of imprisoning their way out of the crime problem. Each has engaged in a massive multi-billion dollar prison-building spree. Last year the prison population in Texas reached 717 prisoners per 100,000 residents. California weighed in at 475. Utah ranks 8th from the bottom at 205,[6] but as Correction's legislative fiscal analyst, Bill Dinehart, pointed out, "We're racing toward the national average in terms of the number of people we incarcerate."[7] The success of this impris-



Judge K.L. McIff was appointed to the Sixth District Court in November 1994 by Gov. Michael O. Leavitt. He serves Garfield, Kane, Piute, Sanpete, Sevier and Wayne Counties. He received his law degree from the University of Utah College of Law in 1967 and thereafter served as law clerk to the Chief Judge of the U.S. Tenth Circuit Court of Appeals. From 1968 until his appointment to the bench, he maintained a private law practice in Richfield, and also served as Sevier County Attorney from 1970 to 1978, and as Piute County Attorney from 1978 to 1995. Judge McIff is a past president of the Southern Utah Bar Association and former Examiner for the Utah State Bar. He served as a member and chair of the Board of Trustees of Southern Utah University and as a member of the Utah State Board of Regents. Judge McIff was awarded an honorary doctorate of Humane Letters from Snow College in 1996. He is married and has five children.

onment expansion philosophy has not been demonstrated and remains open to serious question. In Texas, for example, the editor of the *Waco Tribune - Herald* points out that, "Despite a multi-billion dollar prison building frenzy, Texas still has more than 29,000 prison-eligible convicts backed up in county jails."[8] The results of California's experiment have been labeled "foggy."[9]

COUNTING THE COSTS

Enhanced reliance upon imprisonment does not come cheap. During the years I served on the Board of Regents or on a University Board of Trustees, we were briefed annually by the legislative fiscal analyst. Each year, he noted, somewhat apologetically, that education's share of the funding pie was going down while Correction's was necessarily going up. In this regard, California's experience may be instructive. During 1994, for the first time in its history, California's correction's budget surpassed the budget for the entire University of California system.[10] The long range implications of this priority reversal are staggering. When it commenced its prison-building spree, California had a higher education system that was among the very finest in the world. All students were assured at least a two-year tuition-free college education. California's prisons were limited to eight. Most were household words: Folsom, Alcatraz, San Quentin and a handful of others. Now prisons dot the California landscape and growth in the inmate population greatly outstrips growth in student population. During the last ten years California has built 20 new prisons while adding only two college campuses; 26,000 jobs have been *added* to corrections while 8,000 jobs have been *lost* in higher education.[11] The annual increase in correction's budget has doubled the increase in the state budget. The number of prison guards has risen from 7570 in 1985 to a 1994 figure of 25,547 and counting.[12] With all of this, the days of tuition-free and expanding educational opportunities in California are on hold and the end is not yet in sight. Another twelve prisons have been planned by century's end, though it appears this will not keep pace with anticipated inmate growth.[13] Utah should carefully consider whether California, a pioneer and pacesetter in many things during this century, is on the right track in its criminal justice system.

THE LIMITATIONS OF PUNISHMENT

Imprisonment has become the overwhelming choice for inflicting punishment. Punishment serves the useful objective of allowing citizens to vent anger, frustration and moral disgust in a controlled and civil manner. Further it puts offenders out of circulation for a time and can have a deterring impact on others. The more swift and sure the more useful, but punishment, and particularly indiscriminate incarceration, has its limitations. The view that an offender "pays his debt to society" by going to jail, disregards the fact that it is society that pays. The cost is about $30,000 per year; roughly the equivalent of tuition, books, room and board and auto expense for three college students,[14] and some ten times what Utah spends to educate a child.[15] Moreover, prison tends to educate in the wrong direction thus magnifying the disparity of the one-for-three or one-for-ten trade. Inmates exchange "war stories," develop new ties, and sever old ones. Hope of future stability may be dashed in the process. Finally, the most compelling fact of all is that prison is a temporary fix. The sobering reality is that over 95% of all offenders will be back on the street in due course.[16] We can construct more prison beds, increase the length of stay, make it as miserable as possible, but the pipeline will fill up, the extra time purchased will expire and we will be pushing people out the one end to allow room in the other. This immutable fact fairly requires judges to impose individualized sentences and for the system as a whole to increase its focus on preparing offenders for reintroduction into society. Corrections advises that 60% of current inmates are functionally illiterate while 75% have a history of substance abuse. These should be compelling statistics in the formulation of public policy and the development of programs both within and without lockup facilities. Efforts at education and rehabilitation arise not from a "bleeding-heart," but from an attitude of self-defense. Most convicted criminals deserve the punishment they receive and more, but that is not the only issue. We must carefully weigh costs and benefits, and not allow a preoccupation with punishment to dictate dispositions that work to society's disadvantage. Nor should we consider "prison" as the singular synonym for "punishment." There are other ways to punish that may be more effective and less costly. Contrary to the course charted in some states, it is doubtful that we will be able to imprison our way to civility and civic decency.

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UTAH AT THE CROSSROADS

Utah's sharp incline in prison population has not been endorsed by Correction officials. In 1992, Lane McCotter, then Executive

Director, told the Legislative Judiciary Committee, "We're beginning to face a crisis in offender growth . . . . We must look at options other than incarceration. The most expensive thing we can do is incarcerate offenders."[17] McCotter went on to advise that Utah cannot afford to build prison cells for every inmate and indicated that alternatives to incarceration are the only realistic alternative.[18] Current Correction's Executive Director "Pete" Haun has fully endorsed a *getting smart* approach: "This administration is intent on determining what works and what doesn't . . . ."[19] These expressions are telling when considered in light of the general tendency of public officials to expand and defend rather than endorse change. In the most recent revision of its strategic five-year offender population management plan, Corrections quotes, with approval, the following observation by Utah's Governor Leavitt: "Emphasis must be placed on improving the ability of offenders to return to our communities as productive citizens . . . ."[20] The plan goes on to lament that the department "has found it extremely difficult to obtain funding for treatment and programming services over the last ten years." The funding dilemma was appropriately stated by the Utah Sentencing Commission last year:

> Utah is approaching a crossroads in Correction's policy. Facing tremendous growth, it can decide to attempt to build its way out of the dilemma with many more prison beds and dedicate all new Corrections money into constructing prison cells, or it can adopt a more balanced, adaptive approach including a significant increase in intermediate sanctions and revising probation and parole's supervision.[21]

To its credit, the Utah Sentencing Commission is currently focused on increasing sentencing alternatives for judges and to extend these options south of Salt Lake City. The latter is welcome news to the judiciary in southern Utah. Additional sentencing options, including most notably those that have been classified as "intermediate sanctions," will be of much greater worth to judges than the increased penalties which the legislature is inclined to adopt. A wider range of intermediate sanctions will serve the positive objectives of matching programs with offender types, reducing competition for prison beds, avoiding the adverse effects of lengthy prison stays, allowing societal engagement at a safe level, plus substantially reducing the cost.

HELP FROM THE JUDICIARY

Corrections has very little control over the size of the prison population. That is determined by the legislature in defining crimes and penalties and by the judiciary in its sentencing philosophy. Judges are not immune from the same pressures which fuel the political "tough talk" heretofore discussed. The easy way out is to simply sentence an offender to jail or prison. It requires no imagination. It immediately passes the ball to someone else's court. The media usually responds favorably and the judge achieves the valued distinction of being tough on crime. For these reasons, I am both impressed and appreciative of judges and others who are attempting to make a difference by taking routes that are more difficult and require much more time, attention and imagination. I tip my hat to the judge who pioneered the "drug court," to the judges who have inmate reading programs and to others who employ creative approaches that look down the road to the time of inmate release. The *Deseret News* recently carried a deservedly complimentary story about the Construction Training Program that exists under the auspices of the Utah County Sheriff's Department.[22] In my jurisdiction we have attempted to take advantage of §67-20-1, et seq. which allows designation of prisoners as "compensatory service workers" with workman's compensation protection. In this way, the public can offset the cost of incarceration while attempting to teach responsibility and better work habits. We have put prisoners to work for cities, counties, the Forest Service, Bureau of Land Management and Snow College. In the more successful efforts, prisoners upon release have gone to work for one of these entities or have received a positive referral resulting in immediate productive employment. The attraction of this result is not necessarily its benefit to the offender but to society. It narrows the offender population, reduces our costs and increases our security. Utah's Governor, its Director of Corrections and its Sentencing Commission are attuned to the need for intermediate sanctions that cost less than imprisonment and offer some hope of rehabilitation. The judiciary needs to lend its supporting influence whenever possible.

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CONCLUSION

Getting smart as well as tough on crime requires that we reexamine what works. Protection for a few months while an offender is put out of circulation is not enough. We need solutions that will last for the 20 or so years (between the late teens

and late thirties) of the typical offender's involvement with the criminal justice system. The ease and comfort of the "out-of-sight-out-of-mind" lockup remedy should not blind us to the fact that it is temporary and, in most cases, will have to be repeated over and over again unless thinking patterns are altered, substance abuse and illiteracy addressed, and work skills developed. Nor should our penchant for punishment, though justified, overcome our sound judgments about the wise and prudent use of scarce public resources. Unless we find ways to punish other than prison, we inevitably end up punishing ourselves with escalating costs that sap economic strength and diminish government's ability to address other compelling needs. Moreover, failure to be discriminating on the front end of the pipeline reduces the system's ability on the other end to retain those who pose the greatest risk to society's safety and well-being. Large scale funding shifts which in essence trade textbooks for prison cells will, in the long run, prove unwise, the direction of some states to the contrary notwithstanding. We should recognize that current problems reflect profound cultural changes that do not lend themselves to quick, simple fixes. Clever slogans such as "do the crime – do the time" and "three strikes and you're out" may produce legislation satisfying our get-tough objective while failing to address root causes or provide solutions that have some reasonable chance of working. The judiciary should welcome and embrace and the legislature should be willing to fund intermediate sanctions and other alternatives, perhaps less retributive but having a better cost-benefit ratio. Finally, we need to tone down the tough talk and quietly and thoughtfully explore all reasonable options without joining a stampede whose destiny is uncertain at best and a sociological and economic disaster at worst. Intelligently addressing the problem of crime in a society whose basic fabric shows some evidence of fraying will require our collective, innovative best.

[1]Jay Evansen, "Time to Get Tough on Crime, Not Just Talk Tough", editorial page, Dec. 8, 1996.

[2]The cougar bill was overshadowed by a second bill which moved other big game violations from misdemeanors to felonies and imposed mandatory restitution obligations that make these offenses among the "most expensive" in the criminal code.

[3]Representative Lee Ellertson, as reported in "Corrections System Struggles to Stay Afloat", *Deseret News*, March 9, 1992.

[4]Information supplied by H.L. ("Pete") Haun, Executive Director, Utah State Dept. of Corrections. Hereafter, this source shall be referred to simply as "Corrections Information."

[5]"U.S. prison population up 90,000 over '94", *Deseret News*, December 4, 1995.

[6]United States Department of Justice, Bureau of Justice Statistics Bulletin, August 19, 1998.

[7]"Corrections System's Struggle to Stay Afloat", *Deseret News*, March 9, 1992.

[8]Rowland Nethaway, Senior Editor, Waco Tribune - Herald as reported by Cox News Service, *Deseret News*, February 15, 1994.

[9]"Result of Zeal to Imprison Is Still Foggy," *Deseret News*, May 8, 1994.

[10]*Id.*

[11]"California's Prison Industry Authority", *California Prisoner* and *Prison Legal News*, on file at Prison's Issues Desk, Prisons Activist Resource Center, P.O. Box 339, Berkeley, California 94701.

[12]*Id.*

[13]Source cited note #9.

[14]I have personal experience on this one.

[15]The comparative costs of incarceration vs. educating a child was observed by Federal Judge, Bruce Jenkins, on the occasion of his taking senior status. Reported in "Judge Blasts Mandatory Sentences," Marianne Funk, *Deseret News*, August 30, 1994.

[16]Corrections information.

[17]"Inmate Population Becoming a Crisis in Utah, Official Says," *Deseret News*, August 31, 1992.

[18]*Id.*

[19]Letter from Director Haun to Judge K.L. McIff, September 29, 1998.

[20]1998 5-year Offender Population Management Plan, page 1.

[21]Intermediate Sanctions Recommendation, Utah Sentencing Commission - 1997, page 1.

[22]"Inmates' Skills Help County Build a Better Future," *Deseret News*, August 24-25, 1998.