BUSH JUSTICE: SENTENCING REFORMS, A ROLE FOR THE COUNCIL

The Alaska judiciary has stated repeatedly that the underlying principles of penal reform in Alaska are reformation and protection of the public.[1] In determination of the exact time that a defendant should serve, the court has recognized that the court's decision is basically a sociological problem to be resolved by carefully weighing the principle of reform and the need to protect the public.[2]

If reform and protection of the public are the touchstones of judicial discretion (within statutory limits), the decision that a judge confronts in sentencing a village defendant or in reviewing his case and its disposition is necessarily subjective. Where he is confronted with the offender whose crime is a village crime and whose conduct relates fundamentally to that life style, the court is required to look beyond the law and evidentiary facts to other considerations.

It is our conclusion from field work in Athabascan and Eskimo villages that attitudes toward correction in the village allow the Alaska justice system an opportunity to offer rehabilitative treatment to offenders that has never been accomplished in prisons or within the urban context because:

1. Village society is not naturally hostile to re-entry of an offender.

2. While modifications of a person's physical contacts with individuals in the village is neither practical or likely, there are individuals within the village who have helped offenders re-adapt to village relationships. In fact, this remaking of relationships, could be

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[1] Hartwell v. State 423 P.2d 282 (Alaska 1967)

[2] Bear v. State 439 P.2d 432 (Alaska 1968)

said to have been the essence of traditional law ways.

Who is then capable of refocusing village correction? A social scientist has written this about the role of his peers in the courts:

> What the social scientist can do in the courtroom is to present certain social facts that serve as conditions affecting the outcome of the case; that is, there are certain cases in which the judge must assume certain social facts to be true before he can arrive at any decision. He may or may not be aware that he is assuming certain beliefs to be social facts.[3]

Social facts and their interpretation are indeed at the heart of meaningful rehabilitative policy. As the Alaska Legislative Council has described it:

> "Essential to the validity of a rehabilitation policy are the following points:
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> (1) The antecedent causes of human behavior can be isolated and identified.
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> (2) Knowledge of these causes is of primary importance to the sociologist and psychiatrist in order to control behavior.
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> (3) The measures used to treat an offender should be designed to insure changes in his behavior in the interests of his own happiness, health and satisfaction and in the interests of society.
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> Learning is a very complicated process. It is:
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> 'a combination of biological drives, interpersonal relationships and social structure that must be conceived in mutual relationship and pursued through a span of life, if the criminal disposition is to be visited with an effect of consequence...'

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[3] Rose, Arnold M., "The Social Scientist as an Expert Witness in Court Cases," pp. 100-118, 112, in Lazarsfeld, Paul F., Sewell, William H., Wilensky, Harold L. (eds.) The Uses of Sociology, (New York: Basic Books, 1967).

This is why:

> '...the expert analytic tools of sociology and psychiatry, professions whose job is the analysis of the individual and of society, are thought to be requisite to the achievement of rehabilitiation.'" [4]

Absent trained sociologists or other professional assistance, to whom can the courts turn to help them apply appropriate sanctions to offenses in the bush? Our short answer is to the individuals and bodies who have performed this task on behalf of village society until the recent past: the village chiefs in Athabascan society and the village councils in Eskimo villages.

The goal of punishment in Native society was resocialization that would protect the public and would reform the individual's future conduct. The substance of that punishment was not as important as the determination and implementation of punishment.

Rehabilitative measures should be applied by known and respected individuals from the village. Onerous non-rehabilitative punishment (disablement) through jail terms can be left in the hands of outsiders.

Whether the range of punishments is broadened or not (e.g., whether or not restitution replaces fines), it is the structural dynamics of punishment that are most important and most in need of reform in rural Alaska.

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[4]Alaska Legislative Council, Legislative Affairs Agency, Criminal Penalties Under the Alaska Criminal Code, 1969, p. 23.

Two variations in the present sentencing activity of magistrates might allow for participation of the village council and for the introduction of useful conciliatory processes between wrongdoer and his village (and victim) that would allow resocialization to proceed along cultural lines.

The first is simply for the council to discuss the case and the personalities involved in the magistrate's presence after a plea of guilty has been entered or a hearing on the merits by the magistrate has lead to a finding of guilt in the case, but before sentence has been entered. The advice that the council gives him would not be binding upon the magistrate. It would serve the same purpose as pre-sentence reports by the Division of Corrections in felony cases before higher courts. However, the context of this pre-sentence review, one that would allow for an open airing of feelings about the wrongdoers' role in village society and his past conduct -- a discussion that the wrongdoer would participate in -- would perhaps be itself a form of sanction that would reinforce any decision of the magistrate and give it an appropriate societal backing. It might even carry such weight that the magistrate could finally suspend the sentence or condition it upon future conduct that was more acceptable to the community. The sentence and the hearing before the magistrate would still be subject to review in Superior Court and the defendant would not be denied rights to appeal.

The second variation is for conciliation to take place as a condition for suspension of a fine or jail sentence already entered by the magistrate

after a plea of guilty has been entered or a hearing on the merits has lead to a finding of guilty in the case.

The magistrate is accorded discretion in sentencing to suspend the imposition of sentence and place on probation a defendant "when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby."[5] The conditions and terms may be those that the court considers best.[6] Among those conditions specifically described by Alaska Statute is that the defendant may be required "to make restitution or reparation to aggrieved parties for actual damages or loss caused by the crime for which conviction was had..."[7]

The suggested avenue for reform would be that offenders have their sentence suspended on condition that they engage in good faith conciliation before the council or other designated village leadership with their disputant. The council or leadership would suggest some alternate form of reparation for the act or endorse the sentence of the magistrate. In the deliberations before the council, even the magistrate's sentence would be placed within the appropriate corrective context as the conduct of the wrongdoer is reviewed in its entirety.

If possible, the magistrate would sit with the council in this deliberative effort. However, where the magistrate is physically (or socially) removed from the village, the results of the conciliation process would be reported back to the magistrate who would record the agreement reached.

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[5] Alaska Statute 12.55.080 and 12.55.085
[6] Ibid.
[7] Alaska Statute 12.55.100 (2)

If the agreement was reasonable, the magistrate could allow the agreement to stand as a condition for suspension of the sentence. The agreement would be modified if it was cruel or unusual punishment or more excessive than the terms of the original sentence. The magistrate would retain his statutory responsibility to make the final determination as to the sentence.[8]

Even where no agreement has been reached, the magistrate may use information gleaned from this deliberative process before the council to set conditions for probation for the term of the original sentence.

The final sentence would be reported back to the council. If the agreement or conditions upon behavior determined by the council play a part in te the judge's determination, the council would be charged by the court with periodic review of the offender's conduct. If the council found that the offender did not abide by the terms of the agreement that constituted terms of his sentence, it would report this to the magistrate for further action on his part. Again, the council's review would take place as part of its deliberative activity but within the limits of the sentence. It could not

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[8] The discretion of the magistrate in imposing or in modifying sentences is limited in some respects. The sentence must be definite, unequivocal, and unambiguous. Chase v. State, 479 P.2d 337 (Alaska 1971). A court does not have the power to amend a sentence in a manner which would increase its severity of the original punishment. Faulkner v. State, 445 P.2d 815, 819-820 (Alaska 1971). The sentence may not constitute cruel or unusual punishment. U. S. Const. Amendment VIII.

However, none of these directives demand inflexible responses from magistrates or other judges when confronted with unusual social situations or the judicially recognized cultural disparity between natives in villages and members of the Alaskan urban population. Alvarado v. State 486 P.2d 891 (Alaska 1971).

For example, the Alaska Supreme Court has stated that magistrates are not discouraged from amending sentences to allow a period of liberty to to, for example, support one's family through gainful employment.

"Indeed, said the court, such flexibility in sentencing is desirable and should be encouraged..." Chase 342.

modify the sentence on its own authority. Again, the magistrate might sit with the council as it reviewed the offender's conduct as conditioned by the agreement and suspended sentence during the term of probation.

To the extent that the magistrate under either of the proposed formats has departed from personal formulation of all options that may become significant in his articulation of a punishment, he has deferred in that process of formulation to acknowledged experts in matters of social control for the village in order to achieve the purpose of correction as defined by statutes and case law. It is not interpretation of statute but rather articulation of social facts that the council or other leaders would provide The goal is providing correctional activity that achieves protection of village society and rehabilitation of the offender in a more appropriate manner for the village, the village offender and his victim.

What form would conciliation by the village leaders take in order to affect correction? It might be useful to consider a single example from another culture of a judge who conciliated as a part of his own defined activity.

The presidente of the Zapotec court in Mexico engaged in an authoritate form of dispute resolution that seeks, according to Professor Laura Nader, to make a balance.

> "(T)he decision is the presidente's understanding of what is best for 'making the balance' -- which as often as not means the restoration of relations to a former condition of equilibrium, a condition when conflict was absent...Settlement and

> prevention are the task of the court and even punishment is meted out with this in mind...The presidente's role is that of mediator, adjudicator, group therapist." 9

The village conciliators' role, though limited, would be similar in style to the presidente's. The focus of the presidente's work is not the pursuance of matters of legal fault. He seeks the middle ground. Settlement and prevention are his goals. His view of the dispute must encompass more factually than the initial plea or the finding of guilt. He would view the utility of a privately directed sanction, such as restitution for the victim, in light of the entirety of the relationship between the parties and between the parties to the dispute and the community.

The elements of compromise directed toward prospective behavior between the parties are embodied in his decision. However, this would not influence the establishment of the limited range of evidentiary facts necessary for an initial determination of innocence or of guilt by the magistrate.

The elements of compromise that would be put into effect by a process of conciliation, made a condition of probation or of a suspended sentence, would not be a compromise that was purely that of wrongdoer and victim. It would not result from their initial interpretations of wrong or of personal solutions as individual litigants only. The interests of the village, whether customary or modern, would become part of the compromise. The compromise would be coerced to the extent that the ultimate authority of the court and its coercive power to make the ultimate decision would en-

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9 Nader, Laura, "Styles of Court Procedure," pp. 69-92, 85 in Nader, Laura (ed.), Law in Culture and Society, (Aldine Publishing Company: Chicago, 1969)

courage the defendant to take non-violent restitutive steps suggested by the council or village leader. The victim, also, would be limited by the legal sentence in the scope of his demands. The authoritative feature, according to our field work, would not detract from correction in the village but rather allow it to take place within the village in a depersonalized and non-violent manner. The authoritative feature of conciliation within the proposed structure for criminal justice would be analogous to the role of outside authority as it induced compromise during the days in which the village council was the single local agent for social control in Eskimo villages.

The process of punishment within Alaska law could be reviewed by the village from a different perspective, taking into account the entire relationship of defendant and victim at the point of sentence formulation. It would enhance the meaning of criminal justice for rural natives and their society. Yet, beyond this, there are particular advantages for the justice system in this proposed reform.

First, the suggested reform would be implemented within the extant Alaskan legal system. It would not necessitate legislative amendment because the limited judicial authority of the magistrate in determination of innocence or guilt and in the final determination of punishment would not be delegated to second parties. It would offer the magistrate a new option that would help him in determination of what punishment most effectively serves the ends of justice.

The individual defendant would preserve his rights to plead not guilty, to have a fair hearing and to appeal for judicial review of his case and his sentence in the Superior Courts. No reform is suggested here of the existing procedure for arrest, prosecution or right of representation in criminal matters or for amendment of the standards of proof necessary for a finding of guilt.

The reform could bring to the disposal of the judicial system assistance from village leadership and desired information about social control in the village at a point where it is not only acceptable but crucial according to well-established doctrines of correction and its ultimate purpose for the community. Village leadership would be given a role to make judgments of social fact that it is uniquely equipped to make, but not judgments of law and its application to evidentiary fact.

Rather than placing an economic burden upon the state or the court system, the economics of the suggested reform would result in a likely decrease in jail sentences for natives. Even if village councils were paid fees as correctional consultants for their work in individual cases, this would not be as large as costs to the state for institutional housing, costs in transportation of prisoners and in police man/hours. While it is true that the state or municipality might receive fewer dollars in fines, two other circumstances make this less a factor of cost than might be supposed.

First, the Supreme Court (Tate v. Short, 40 U.S. 395 1970, 28 L.Ed. 130) has held that a jail term imposed solely because an indigent could not pay fines imposed was a violation of the equal protection clause of the Fourteenth Amendment. The practical result of this has been for many judges to impose jail terms only and not fines upon indigents. In the village, the impact of this case will be to increase the state and village costs of institutional housing unless alternatives to fines or jail terms for indigent Natives can be formulated.

Second, the payment of fines to the court system by family members other than the offender has meant that they, and not the offender, are punished.

The suggested reforms could allow the magistrate to measure the punishment against the economic and physical capacity of the defendant only. The council might include in its deliberations the subsistence or non-monetary economic role of the offender. This information would lay the basis for an alternative sentence that would serve to rehabilitate the village offender in the village where he resides.

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