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## As if Prison Wasn't Bad Enough: COVID-19 and Intensified Interest in the Politics of Crime (Luncheon Address)

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## SYMPOSIUM REMARKS

# AS IF PRISON WASN'T BAD ENOUGH: COVID-19 AND INTENSIFIED INTEREST IN THE POLITICS OF CRIME

PAUL SCHNELL\*

**Schnell:** I want to thank St. Thomas. As mentioned, I'm a proud graduate having earned a Bachelor's degree in Social Work from the St. Paul Campus. I also want to thank the Law Journal for contributing to St. Thomas' great tradition of being committed to critical thought, searching for the truth, and advancing the common good.

Today's topic is a fitting example and exploration of the institutional effort to live out its mission. As you reflect on what you heard this morning, and as you embark on everything that you will hear this afternoon, I wanted to step back and go a bit broader than what my title for the listed session might suggest. I know that the focus is on prisoners' rights and prison conditions, and I'm going to talk about that, plus the terrible impact of the pandemic on our prisons.

It is my belief that as we look at how to respond to the issues that we face across our country, especially as it relates to crime, we should focus on how it is that we create true community safety, and at a time where we see some upticks in crimes in certain areas of our country and certain crimes specifically. We also see a simmering pandemic and a war in Ukraine that has captured global attention and concern.

You've all heard it so much over the past two-plus years that it's almost become cliché to say that COVID-19 has changed everything. The pandemic, as we know, has transformed how we work, and frankly, how we live. Office workers have become the experts on the operation of their own home Wi-Fi networks thereby becoming IT specialists in the workplace, which happens to be their living room or basement. Factory workers have

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adapted to new social distancing requirements and masks. And, I dare say, even lawyers have been impacted. Lawyers in all fields have had to adapt to the various ways they communicate, manage clients, address their own workforce issues, and deal with online court appearances and jail visits done through video conferencing. While the pandemic created so many challenges for all of us, the pandemic has also had a profound impact on the lives of the men and women committed to this state's prisons and the prisons across our nation. Despite never setting foot outside of the walls of a prison during the pandemic, COVID affected them in substantial ways.

Pandemic or not, prison is most often a heartbreaking and relentlessly challenging place to be. Throughout the morning, you've heard how the system often fails those it intends to serve. You've heard about the challenges and difficulties faced by the men and women incarcerated in our prisons. Of course, the physical features of the prisons are challenging enough: the razor wire fences, steel bars, heavy gates, brick walls, and concrete floors. But I'm also concerned about the compelled reduction in the social connection that incarcerated folks have with the outside world, the diminished opportunities for them to engage with their loved ones, and the even fewer opportunities for them to connect and visit with their loved ones in person.

I think about the prison facilities themselves—imposing structures. Many of the buildings, at least in our system, are more than one hundred years old and have crumbling infrastructure with poor ventilation and a laundry list of deferred maintenance projects. Yes, prison is and always has been a difficult place to be, and COVID made it far worse.

During the pandemic, in addition to the direct, horrific impact on the health of those who contracted COVID-19, everyone who was incarcerated had even fewer opportunities to address their needs and improve their chances of success upon release. Managing the pandemic meant more limited access to substance use disorder treatment, educational programming, cognitive skills programming, and job programming. COVID also destroyed the modest in-person access to religious services and prosocial connection that faith-based programming can provide for some. The fact is, COVID meant more isolation—in an already isolating environment—creating more disconnection than ever before. We've seen the impact: less programming means more idle time. Extended idle time for anyone can be a challenge, but in prison, it's devastating. Idle time makes prisons less safe for both the incarcerated and the staff who report to work there each day.

The pandemic laid bare and elevated the stark realities of life behind prison walls. It showed us more clearly what some have not been able to see before: how important sound, effective, data-driven rehabilitative programming is inside of prison, and how critical it is that those who are incarcerated be engaged in the fullest range of prosocial activities possible.

Programming addresses criminogenic factors, and importantly, it can help people develop and maintain a prosocial connection with others. Despite my discomfort with the reality of prisons generally and my recognition of the certain failings of our system, I am not a prison abolitionist. I believe that prisons are overused and, in their current form, often miss an opportunity to encourage, support, and foster true transformation.

But I do believe—and it's important that I believe—that prisons can play an important role in our collective effort to assist people and make our communities safer. But, we must ask ourselves, what is the proper role of prison? As we come together to think about prisoners' rights and prison conditions, we are also in the midst of an uptick—at least in Minnesota—of violence in our communities.

On a daily basis, it seems we see news media stories about horrific, sometimes random, acts of violence. While crime had been at historic lows prior to the pandemic, homicides, aggravated assaults, robbery, (and very notably in Minnesota) carjackings have increased markedly over the past two years. While the fear that results from this uptick in crime is understandable, the various components of the criminal justice system have turned their attention, and not to finding effective solutions. Instead, we have seen the system, police, prosecutors, the judiciary, and corrections, blame and finger-point at one another.

There is space for system accountability. Certainly, the approaches we take in addressing the complex problem of crime and the resulting harm should be subject to vigorous debate. Community and governmental focus on crime makes sense, and we should expect nothing less. But finger-pointing and simple, sound bite-based solutions to complex problems only serve our more emotional or base instincts. They do not make us safer.

I had hoped that the confluence of factors we've lived through over the past couple of years—namely a global pandemic, a health crisis, pronounced social isolation, the murder of George Floyd in this very community, the local, national, and international unrest in response to systemic racism, and the notable uptick in certain violent crimes—would represent a real opportunity: an opportunity to try some new things and an opportunity to make a concerted effort to better identify and intervene in the foundational causes of crime.

For too long as a society, we have failed to ask the difficult questions about the role of prisons, and more broadly, about our approach to community safety and the conditions that create and maintain true community safety. When it comes to dealing with criminal wrongdoing, why are we not doubling down on the practices that research tells us makes a difference? Why are we not investing in community-based programs, systems, and structures that transcend the tough-on-crime rhetoric by focusing on the smart response to crime?

I had real hope that we were on the cusp of a moment to have a debate and answer some of these critical questions, but frankly, it isn't happening. Make no mistake, discussions are occurring in a large granite domed building on the other side of the river, in St. Paul,—perhaps at this very moment—that are focused on crime and the politics surrounding crime. However, instead of a vigorous debate over what will actually make us safer, in the current legislative session, the so-called tough-on-crime politics are on full, full display.

The policies being advocated by some would have us spend hundreds of millions of dollars on policies that have failed us in the past—repeatedly—and fostered the reality of mass incarceration. It is understandable to have a desire to want to do something, to address the very real harm and fear that's caused by this recent wave in crime. But relying on what sounds good or feels good does not make good policy. None of us want these crimes to go unchecked or unstopped.

But right now, our recent legislative proposals include the creation of entirely new variants of crime with their own unique sentencing schemes: the creation of new and longer mandatory minimum sentences and, in our state, extending the term of incarceration from two-thirds of the pronounced sentence to three-fourths. If passed, these proposals would overwhelm our prison capacity within a couple of years. And, over the next ten years, these “get tough” policies will increase our bed space needs by more than 2,000 beds. To meet this need, Minnesota would need to build a prison at an estimated cost of as much as \$1 billion.

I'm not pollyannaish about the problems that we face. I believe we must implement new strategies to address violent crime and repeat offending. People are rightfully scared by the violence they see, and we have to take steps to stop it. But we must be honest about the reality that the work doesn't end with arrest, prosecution, and imprisonment. Prison commitment may well serve the retributive, incapacitating, and—perhaps to a lesser degree—deterrent objectives of the criminal justice system. But these cannot—must not—overshadow the objectives of rehabilitation and restoration.

When I started this role, I went to the respected and longtime members of the Department of Corrections (DOC) staff from every discipline to ask if we could produce better outcomes for the people our prisons serve. The answer from every person was “yes.” When I asked how we could improve those outcomes, the answer was also consistent: we can improve them through real investment in responsive (meaning the right approach for the right person), evidence-based practices that meet individualized needs, and reduce the risk of re-offending.

Further, they said we would need to utilize strategies to help motivate those we serve to overcome their historic thinking and behavioral patterns as well as incentivize prosocial engagement and living. Simply put, our

prisons could be better. We could be better by doubling down on and investing in rehabilitation and restoration as our primary focus. The research is clear, it's not about how much time a person spends in prison, it's about how that time is spent.

Over the last few years, I've had the privilege of having thousands of conversations with DOC staff, people incarcerated in our prisons, those on community supervision, their family members, community members, and our professional partners including community corrections, victim advocacy, treatment providers, social service agencies, mental health advocates, and so many more. A product of these conversations is a deeper sense of awareness of the interconnectedness of all the various components of the criminal justice system and the system's role in achieving the essential governmental function of ensuring public safety. We also see more clearly the limitation of the system's role in achieving public safety.

We must not forget, and too often we do, that public safety is not a product of the criminal justice system alone. Public safety is also the product of connected communities supported by non-governmental and governmental service sectors. The DOC's role at the back end of the criminal justice system is clear and reflected in our mission of desiring to transform lives for a safer Minnesota. But, transformation and community safety, just like justice, do not start with arrest and end with imprisonment.

While some here may disagree, I believe community safety does require safe and secure correctional settings. In my view, there are some people so dangerous that they must be securely and humanely detained, but the truth is that ninety-five percent of those who are in prison in Minnesota are getting out and coming to neighborhoods in large and small communities across our state. Public safety can only be achieved when the system, as a system, meets those needs for the good of and in partnership with the community. In order to transform lives for a safer Minnesota, we must also have fair and reasonable policies that dismantle the persistent disenfranchisement of people in our state because of their race, ethnicity, gender, sexual orientation, economic status, or ZIP code.

While I represent the Department of Corrections, I must also recognize and advocate for other essential elements of the criminal justice system including victim advocacy and safety services; a rigorous public defense system; a well-resourced judicial branch; trusted, problem-focused, and community-oriented law enforcement; availability of specialty crime-solving services, like the state's crime and computer forensics lab; and, of course, prosecution services that seek to serve the state's objective of fair, proportionate, and balanced sentencing.

As lawyers and prospective lawyers attending the symposium, I ask you to expect more of us. Challenge us more. Use your knowledge, your expertise, and the law to hold us to account. As I close, I must repeat that ninety-five percent of the people in our prisons will one day get out. They

will be our neighbors, so it is in our collective best interest for them to be successful and to become prosocial, contributing members of our communities. Improving the likelihood of their success is not a pipe dream. While we certainly expect change from them, it is also important that we recognize that in order to realize success, there will need to be change on our part and on the part of the system I represent.

Nearly every organized religion in the world calls on believers to recognize the possibility of redemption. Yet we, as a society, struggle to determine how much punishment should be required to pay a debt for wrongdoing. Believing that giving someone a good, long time to think about what they have done is not enough. It's too passive. We must have the courage to invest in what works, what actually makes a difference, and what creates more connected, stronger, and safer communities. You may have noticed that several times during my comments, I've referenced the need for prosocial connection.

John Braithwaite is an Australian criminologist who took a unique approach to the question of criminology. He did so by flipping the traditional criminological question of: why do people engage in criminal wrongdoing? Instead, he asked: why is it that most people do the right thing most of the time? Indeed, why is it that most of us do the right thing most of the time? Many will say it's their moral compass, some will say it's their innate sense of right and wrong, and others will say it was the desire to avoid punishment. On the other hand, Braithwaite, who studied justice practices in Aboriginal and tribal communities, believes that the reason that most of us do the right thing most of the time is because of our desire to maintain a connection with either the people that we respect and admire or the people that we wish to be respected and admired by. After all, Braithwaite noticed that the most pronounced and rare form of punishment in those communities was the punishment of banishment.

Our presence and the outcomes of most criminal justice processes—be it partial disconnection or the never-ending collateral consequences that people face—are the modern-day vestiges of banishment. I am heartened to see so many of you spending an entire day, this day, thinking about prisoners' rights and prisoner conditions. With your help and with your work, we can—and we must—do better. Thank you.