

A Change of Course: Developments in State Sentencing Policy and Their Implications for the Federal System



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The last four decades have borne witness to a historic expansion in the use of incarceration as a method of combating crime. While incarceration was originally conceived of as an alternative to corporal punishment, and used in the absence of other, less-intrusive measures to force compliance with community norms, the last 40 years have seen nothing less than a tectonic shift. Incarceration has moved from the option of last resort for the most recalcitrant individuals to the predominant public policy model of addressing crime. Consequently, the prison population has expanded exponentially. In 1970, 96 out of 100,000 Americans were detained in prisons (not including local jails), or 1 in 1,042.¹ By the middle of 2008, that figure had increased by more than 400% to 509 per 100,000, or 1 in 196.² This rapid growth was not the product of unprecedented crime rates, but rather a function of deliberate decisions by policymakers to pass laws that dramatically increased prison admissions and extended the length of stay.

I. The Prison Construction Boom

In the 1980s, the contemporary “war on drugs” began in earnest, leading to a spike in arrests for narcotics offenses, tougher mandatory penalties of incarceration, reduced access to parole, and consequently, increased pressure on lawmakers and prison administrators to accommodate a prison population that was increasing significantly. Until recently, the solution was simply to expand capacity by constructing new prison facilities. States and the federal government built prisons at a rapidly increasing rate, with more than 130 institutions opening between 1992 and 1994 alone.³ As long as there was public support for “tough on crime” policies and the commensurate tax revenues and bond issuance, states and the Federal Bureau of Prisons were able to keep green-lighting prison construction. However, the increasing rates of admission coupled with a jump in the amount of time served resulting from increasingly restrictive release policies made this approach untenable as a long-term strategy, and by the late 1990s, states were beginning to succumb to prison overcrowding and were unable to continue to access the funds necessary to expand capacity.

II. Change of Course

The recession of 2001 and the current economic challenges have forced policymakers to examine different strategies to address criminal offending, including reassessing many of the “tough on crime” policies of the preceding four decades. In the meantime, researchers have been able to collect and analyze volumes of data on the impact of the rapid increase in incarceration on crime rates and the community, including evaluating potential alternatives. In recent years, this body of empirical literature has proven to be helpful in shaping the discourse on incarceration policy and the potential value of alternatives.

By the end of 2008, 31 states reported a combined total budget gap of \$30 billion, an amount that is expected to grow in FY 2010.⁴ Corrections budgets comprise a substantial proportion of the overall general revenue fund in many states, with nearly \$70 billion spent annually on corrections.⁵ In FY 2007, total corrections expenditures rose nearly 10% from the previous year, and states have been compelled to look at prior policies through a different lens, paying heed to cost-effectiveness and population impact.⁶

The balance of this article will review legislative and policy efforts undertaken in the United States since 2001, a period defined by a broadening of the dialog on criminal justice policy and a renewed willingness to consider alternative options. A caveat about the differences between the federal and state sentencing systems is warranted, as many of the reforms described below face statutory and procedural obstacles that preclude their adoption in the federal system. However, many of the state reforms will help identify areas of needed reform in the federal system and catalyze a discussion about potential areas of policy change to be undertaken in Congress, by the United States Sentencing Commission, and by executive-branch agencies.

III. Developments at the State Level

Since 2001, state sentencing reforms targeting the reduction of the prison population have focused on three areas: drug treatment and diversion, community supervision, and earned discharge and release policies.

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A. Drug Treatment and Diversion

During the last 20 years, the integration of drug treatment into the criminal sentencing model for certain categories of defendants has come to define a shift in thinking in the enforcement of narcotics laws. Beginning in Dade County, Florida in 1989 with the first modern drug court, alternative sentencing models for drug offenses have increased rapidly in the ensuing decades. There are now more than 2,100 drug courts in operation in the United States, and a number of additional statutory drug diversion options have been enacted by the states.

California's Proposition 36 took effect in July 2001, and permits persons convicted of a first or second charge of non-violent drug possession to be diverted to probation with a court-mandated treatment component. The treatment option is also available to persons under community supervision who either commit a new, non-violent, drug possession offense or commit a drug-related, technical violation of their conditions of supervision. An ongoing evaluation of the diversion program by researchers at UCLA concluded that Proposition 36 was effective at reducing prison costs, and for those persons who completed the program, the state saved \$4 for every \$1 invested.⁷ With more than 30,000 persons entering treatment under Proposition 36, the impact on the overall incarcerated population is estimated to have been significant.

While Proposition 36 has attracted much of the national attention as an alternative sentencing option, in recent years other states have also passed diversionary provisions, beginning in 1996 with the passage of Proposition 200 in Arizona. The Arizona Drug Medicalization, Prevention, and Control Act of 1996 mandated treatment for those arrested for the first or second time for non-violent simple possession. The Arizona Supreme court estimates that the Act has diverted 2,600 persons into treatment in its first year.⁸ A key difference between the Arizona model and California's Proposition 36 is that Arizona requires a plea of guilty to a felony in order to access treatment.

Other states would follow suit in the following years. Kansas, Hawaii, Maryland, and Washington State passed diversion legislation primarily targeted toward diverting persons convicted of low-level, non-violent drug offenses with a limited criminal history into treatment and out of the jail and/or prison system. While the results of rigorous evaluations of some of these reforms remain inconsistent, the available evidence points toward their effectiveness at diverting people from prison.

B. Community Supervision

States have made a renewed effort to make better use of community supervision mechanisms, to prevent people from entering prison as well as to avoid revocation into custody. This is a hallmark of the Hawaii's Opportunity Probation with Enforcement (HOPE) program. The central premise of the HOPE approach, in operation since

2004, is to subject persons on probation to high-intensity supervision and to respond to violations with swift, but modest, sanctions. The program is designed to target persons seen to be at high risk of reoffending or violating the terms of their supervision, and reflects the premise that swiftness and certainty are linked with compliance more so than severity. This usually means a sentence to jail of a few days to a week for a violation of probation. Evaluations of the program suggest that missed probation appointments declined by 80% in the first three months, while positive drug tests fell by 86%.⁹ After three and one-half years, those measures had declined by 92% and 96%, respectively.¹⁰

A central component of the HOPE approach is the effort to triage available substance abuse treatment to the most needy, thereby conserving precious jail space for those persons facing the most significant substance abuse challenges. Proponents argue that this targeting results in a far better allocation of resources, and subverts the tendency in some jurisdictions to sentence persons to treatment who may be addicted, but do not suffer from a diagnosed substance-abuse disorder.

Back-end reforms to the parole system are also expanding the range of available alternatives to incarceration. Nationally, a little more than one-third of annual admissions to state prison are the result of a parole violation.¹¹ One in 6 persons on parole was returned to prison in 2007, 71% of whom returned due to a revocation.¹² Many of these returns to prison came as the result of technical violations of supervision, such as failing a drug test or not meeting other terms of supervision. The fact that parole, and failures in community supervision more generally, are such a significant engine of growth for state prisons systems has galvanized a reconsideration of revocation procedures as states seek to balance accountability with dwindling resources for incarceration.

A number of states, including Arizona, California, Connecticut, Georgia, Kansas, Louisiana, Mississippi, and Oklahoma, have altered parole policies to grant greater latitude in dealing with technical violations. These reforms generally establish intermediate sanctions that permit probation officers to amend the terms of supervision, in some cases increasing supervision to address persons who appear to be at high risk of reoffending, rather than resorting to a revocation to custody. And some states are taking steps to incentivize creative thinking to reduce revocations. This includes training of staff on best practices of community supervision. Kansas provides performance-based grants to agencies that reduce probation and parole failures by 20%. Prison admissions for probation and parole violations are down 7% and 2.2% respectively and the overall prison population declined nearly 4% between 2007 and 2008.¹³

In 2008, Arizona implemented a policy that permits persons on probation to accrue "earned compliance credits," and allows the court to reduce a person's time on probation by 20 days for every month that an individual

abides by the terms of supervision. In addition, counties that are able to reduce the number of probation violators that return to prison, without jeopardizing public safety, can receive up to 40% of the savings in reduced incarceration from the state to invest in specific programs, including drug treatment and victims' services. Innovative programs like those described above hold promise in providing alternatives to incarceration for technical violators, and dampening what has been a significant generator of prison growth.

C. Prison Release Policies

A third area of reform undertaken in the states has been the expansion of parole eligibility, frequently by granting more opportunities for incarcerated persons to earn early release through program participation and compliance. The expansion in earned-discharge programs in many states has become a politically salient approach to addressing prison overcrowding, and warrants consideration. While a number of states have tweaked the amount of sentence reduction that can be earned for program participation and general rule compliance, Pennsylvania has taken a particularly innovative approach with the passage of a Recidivism Risk Reduction Incentive (RRRI) sentencing scheme. A judge may issue an RRRI sentence for eligible persons who have no current or past history of violence, no weapons offenses, and have not been convicted of one of a range of personal injury offenses. The RRRI sentence is 3/4ths of the minimum sentence of three years or less, or 5/6ths of the minimum sentence of more than three years. Individuals are assessed prior to admission and if they complete necessary programs and maintain good behavior, they become eligible for an accelerated release.

IV. What Can Be Learned from the States?

While statutory and procedural barriers prevent the federal system from embarking on some of the pathways of reform discussed above, there are broader lessons that can be applied in helping rethink the role of diversion, sentence length, and community supervision. With appropriate caveats about the unique contours of the current federal criminal justice system, there is value in considering the elements of state reform that might be portable to a reconstituted federal system.

A. Enhance Treatment and Diversion for People Suffering from Substance Abuse

Nearly 1 in 5 persons in federal prison committed his or her crime to obtain money for drugs, while half of all persons in federal prison have used drugs in the month prior to their current offense.¹⁴ Nearly two-thirds of persons in federal prison state that they used drugs regularly, lending credence to the claim that even for those persons who are not incarcerated for a drug offense, substance abuse plays a negative and frequently destructive role in their lives.¹⁵ A survey of persons in federal prison revealed that 46% met the diagnostic criteria for being dependent on or abusing

drugs, compared to 2% among the adult population of the United States.¹⁶ Despite this high prevalence of drug abuse or dependence, only half of persons in the federal prison system who met these criteria participated in any treatment or other substance abuse programs.¹⁷ Moreover, the vast majority of those persons who did access services while in federal prison are in self-help or peer-counseling groups or education programs. Only 17% were enrolled in a residential treatment facility or received counseling by a professional.¹⁸ Considering the extensive drug-using histories of many of these individuals, this is a lost opportunity for an intervention.

The lack of viable treatment options for persons in federal prison is likely due to insufficient financial resources to meet the demand. This should not come as a surprise, considering that there are nearly 100,000 persons in the custody of the Bureau of Prisons who can be identified as suffering from a drug abuse problem. Many of these persons are in custody because of the severity of their offense, but there is some question as to whether the federal system is making the most efficient use of its available alternative sentencing options. Could more people be diverted from prison into treatment and/or community supervision, thereby freeing more treatment space for those persons who are in custody?

As of 2004, 55% of persons in federal prison were incarcerated for a drug offense.¹⁹ One-quarter were on probation or parole at the time of arrest, and 16% had a criminal history that included a violent offense.²⁰ On balance, persons in federal prison had a less extensive criminal history than persons in state prison, but were sentenced to longer terms of incarceration as a result of more punitive federal sentencing laws and a higher proportion of trafficking offenses. One study analyzing the current offenses, criminal histories, and weapon history of incarcerated inmates in state and federal correctional facilities, concluded that as much as 27% of the federal prison population incarcerated for a drug offense could be defined as low level.²¹ This group includes persons with first-time or some repeat drug offenses, no concurrent non-drug convictions, no related firearms charges, and no high-level involvement in a drug enterprise. Narrowing this population to first-time drug convictions still leaves 14% of the federal prison population incarcerated for a low-level drug offense.²²

When one considers that 92% of those sentenced to federal prison for a drug offense in 2007 were given a prison-only sentence, this suggests a disconnect between existing alternative sentencing provisions for drug offenses and the overall prevalence of low-level offenders that populate federal prisons.²³ The overpopulation of federal prisons with low-level drug offenders is likely due in part to barriers in the guidelines regarding criminal history or offense type that prohibit non-prison sentences. The disconnect presents an opportunity to examine current practices and offer amendments to expand the use of alternatives where appropriate.

B. Expand Cost-Effective Alternatives to Incarceration

While alternatives for persons suffering from substance abuse problems have drawn the most legislative attention in recent years, nearly 90% of persons in federal prison are incarcerated for a non-violent offense, and many of these persons would be better served under supervision in the community while enrolled in programming and training services that address their underlying needs.²⁴ The empirical literature is replete with the cost savings associated with treatment and educational services instead of simple incarceration. However, in the federal system, 81% of sentences in 2007 were for incarceration, while only 9% were for straight probation.²⁵ While many of these sentences were based on current offense and prior criminal history, as previously discussed with drug offenses, the profile of persons in federal prison suggests that there may be the potential for an expanded use of alternative sentences. However, there are obstacles in federal statutes and guidelines that preclude the use of alternatives, including restrictions on sentencing alternatives for persons with a prior felony record or for those convicted of drug offenses “involving substantial quantities.” Because of these and other restrictions, nearly 80% of persons sentenced in federal criminal court are not eligible for a blended or community sentence.²⁶ It is an ideal time for Congress and the Commission to revisit these policies and determine the utility of these restrictions. Even a modest reform to increase eligibility can have a profound impact on the prison population without jeopardizing public safety.

C. Expand Options for Earned Release

Another common state reform has been to increase options to reduce sentence length if the inmates participate in programs or comply with institutional rules. The Sentencing Reform Act puts a cap of 54 days, or 15% of any given year, on the amount that a sentence can be reduced through good time credits.²⁷ The actual number of days per year that a sentence can be reduced is contingent on overall sentence length. However, in 1988, the Bureau of Prisons took the position that good time should be calculated based on *time served*, not sentence length. This resulted in an annual cap of 12.8% of the total sentence.²⁸ While this may seem minor, this difference of a week in good time calculation keeps people in prison longer than otherwise necessary, and is estimated to cost the Bureau of Prisons an additional \$93 million per year.²⁹ A change to this interpretation by the Bureau of Prisons would be a modest, but sensible, first step. Additionally, policymakers and practitioners in the federal system need to revisit the statutes, guidelines, and current implementation practices in order to identify more opportunities for persons in prison to earn greater reductions in time served.

D. Reconsider Punitive Sentencing Practices

Four decades of severe criminal sentencing, embodied most notably in mandatory minimums and tough-guide-

line sentencing, have resulted in more people sent to prison for a broader range of offenses and longer stays, all with marginal and diminishing returns regarding crime prevention. The Commission should update its 1991 report on mandatory sentencing in the federal system in order to begin the conversation with policymakers about the proper role of discretion in criminal sentencing. As long as the United States is governed by the “incarceration first” mentality that defines mandatory sentencing and, to a large degree, the federal guidelines, the role of alternatives to incarceration will remain limited. Thus, in addition to working within the current structure to expand opportunities to divert individuals from federal prison, lawmakers need to undertake a broader review of all sentencing practices with an eye toward reserving prison only for those persons for whom other less-intrusive interventions are unlikely to prove appropriate.

Notes

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