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SENTENCING GUIDELINES

Expert Analysis

Deflating the Prison Balloon With Alternatives, Prevention

With the economy in the throes of a financial crisis, America is experiencing a period of deep reflection. Through an endless stream of Congressional hearings, investigative reports, and newspaper editorials, we have turned inward, exploring the myriad decisions made years ago that caused our economic bubble to burst.

The banking and automotive industries, however, are not the only sectors of our society now suffering the pain of past choices. Policy decisions made over the past three decades have created a prison crisis within this country that has brought with it dire effects, both financial and social. Just two weeks ago, New York's governor announced an agreement with the state Legislature to bring an end to one of the most prominent examples of those policies: the Rockefeller drug laws. While motivated primarily by the tremendous financial impact that prisons have on the state's budget, Governor David A. Paterson's announcement marked an important step down a long road toward prison reform.

A Nation in Crisis

America is a land full of prisons. The United States has by far the highest incarceration rate in the world—as of 2007, 756 out of every 100,000 U.S. residents were behind bars. That leaves the U.S. with an incarceration rate more than twice that of China (119), Iran (222) and Nigeria (22) combined. It is 27 percent greater than Rwanda's (593), and is many multiples more than England (152), Germany (88), and France (96). We



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have now reached the point where one in every 100 U.S. adults is incarcerated¹ and one in every 31 adults is under some form of correctional supervision.²

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Twenty-four state prison systems are over capacity, including New York's, where prisons are at 107 percent capacity.³ With more than 170,000 prisoners, California's prisons are at twice their capacity. Overcrowding has become such a tremendous problem in California that correctional authorities are housing 300 inmates at a time in non-prison gyms and other crowded public spaces.⁴

How We Got Here

It has not always been this way. The prison population boom traces its roots to the mid-1970s, when the U.S. incarceration rate stood at just 149 prisoners per 100,000 adult

residents.⁵ The 1970s and 1980s found our country gripped by what New York Governor Nelson Rockefeller once termed a drug-related "reign of terror."⁶ In response, New York, like many states, passed stiff mandatory minimum prison terms for drug offenses, ranging from large-scale distribution to simple possession. A decade later, the federal government, through the Anti-Drug Abuse Act of 1986, followed suit.

The result has been a 1,100 percent increase in the number of drug offenders in prison since 1980. Nearly half of those sentenced to prison in the federal system in 2007 were drug offenders. One-half of those inmates had no prior criminal history, and 82 percent were sentenced for offenses that did not involve weapons.⁷ In fact, over 95 percent of all federal drug offenders in 2007 received some period of incarceration.⁸

The war on drugs is not, however, solely responsible for the rise in incarceration. More than half of the prison growth between 1972 and 2000 took place after 1990.⁹ During that time, several jurisdictions adopted tough-on-crime initiatives that had the effect of increasing not only new prison admissions, but also the length of prison stays.¹⁰ Florida, for instance, instituted "truth-in-sentencing" laws that eliminated good time credits for inmates; California implemented a "three-strikes" law, sending even non-violent habitual offenders to prison for life; and many states implemented "zero-tolerance" policies for parole violations, sending parolees who missed even a single meeting with their counselors back to prison.

On the federal level, the combination of then-mandatory sentencing guidelines and the abolition of parole translated into a 25 percent increase in the average prison sentence

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imposed for first-offenders—from 34 months in 1986 to 42 months in 2008—and a 131 percent increase in the average sentence served by first-offenders—from 15.6 months in 1986 to 36 months in 2008.¹¹

The combined effect of these policies and other decisions was a 628 percent increase in the American prison population between 1970 and 2005. By the dawn of the 21st century, 3 percent of all Americans had spent some time in a federal prison. The trend has not stopped. Nationally, the number of inmates in custody increased on average by 2.6 percent per year from 2000 to 2006. The federal prisoner rate alone averaged a 4.9 percent increase per year during that period.¹² At the same time, the number of offenders on probation or parole soared, from 1.6 million 25 years ago to over 5 million today.¹³

The Cost of Incarceration

To be sure, there is some evidence that these policies did, in fact, help reduce crime. The national crime rate fell dramatically during the 1990s. Homicide rates nationwide fell 45 percent from 1991 to 2001, ultimately reaching their lowest level in 35 years, and crime rates overall are down from the 1970s.

It is not clear, however, how much of that trend is the result of the booming prison population. Studies investigating the impact of increased incarceration on crime rates have reached wildly varying conclusions. Some argue that a 10 percent increase in prison population results in a 22 percent decrease in the crime rate, while others find no statistically significant correlation between crime and imprisonment rates at all.¹⁴ One study even concluded that there is an inflection point, where prison populations get so large that a 10 percent increase in prisoners actually yields a higher crime rate.¹⁵ Notably, while New York experienced the highest reduction in prison population in the nation from 2000-2007, it also experienced the greatest reduction in crime.¹⁶

Whatever impact increased incarceration played in the plummeting crime rate, what is clear is that it was one of many factors. According to a recent Vera Institute study, several researchers have concluded that an increase in education and employment opportunities and effective policing strategies during the same time period likely played a role as well.¹⁷

At the same time, incarceration is extremely

expensive. Nationwide, we spent over \$50 billion on prisons last year. California alone spent \$8.8 billion, more than \$1.5 billion greater than the entire budget of the federal judiciary. In contrast, we spend much less on non-custodial supervision. New York spent \$2.6 billion last year to house a prison population of over 62,000. It spent only 3 percent of that amount to monitor nearly as many parolees (53,669) and less than one-tenth of that amount to monitor nearly twice as many probationers (119,963).¹⁸

All of the money we spend on prisons comes out of other programs that also have an impact on crime. In the 20 years between 1987 and 2007, state spending on incarceration more than doubled, increasing 127 percent. Spending on higher education during that same period rose just 21 percent.¹⁹ Similarly, every dollar spent on prisons is one less spent on policing, or on mental health services, which many criminal defendants need.²⁰

The cost of incarceration, moreover, is not measured only in financial terms. Prisoners often leave behind children and families that they cannot support while behind bars. Nationally, 2 percent of all minor children have a parent in prison. Nearly 10 percent of minors have a parent under some form of correctional control. Those children are not evenly distributed. In Chicago, for instance, 36 percent of all prisoners came from just 5 percent of the city's neighborhoods. Incarceration for minor offenses thus increases the risk of broken families and neighborhoods—perpetuating the cycle of crime that incarceration is intended to break.²¹

Alternative Sentencing

Under the weight of these burgeoning costs, many jurisdictions are looking to alternatives to incarceration to reduce their prison populations. These programs typically take one of two forms: pretrial diversion from the standard court and prison system, and re-entry programs.

First implemented in Miami-Dade County in 1989, drug courts are the most widely recognized form of pretrial diversion.²² There is at least one drug court in every state, and a total of 2,301 courts were in operation nationwide as of Dec. 31, 2008.²³ The need for such courts is clear: two-thirds of all adult arrestees and over half of all juvenile arrestees test positive for illicit drugs at arrest,²⁴ and the national recidivism rate for drug offenders is nearly 67 percent.²⁵ Drug courts attempt to break the cycle of

addiction and incarceration by providing access to drug treatment and incentives to complete it. By successfully completing the treatment programs, offenders can avoid prison time and, in some cases, have convictions erased from their records.

These programs have proven remarkably effective at reducing both recidivism and correctional costs. For instance, Dallas's Initiative for Expedited Rehabilitation and Treatment (DIVERT) provides low-level drug offenders with no prior felony or violent misdemeanor convictions the opportunity for supervised drug treatment in lieu of prison. A recent study of the program revealed that graduates experienced a 68 percent lower rate of recidivism compared with a matched group of released prisoners.²⁶

The Brooklyn District Attorney's Office's Drug Treatment Alternative to Prison (DTAP) program has seen similar success. Started in 1990, the program accepts drug addicts with a prior felony conviction who are currently charged with a non-violent felony. Participants are required to plead guilty to the offense and accept a suspended sentence pending residential drug treatment. If they successfully complete the treatment, the charge is dismissed.

Seventy-six percent of participants complete the program. A five-year Columbia University study concluded that the recidivism rate for DTAP graduates is 45 percent lower than that of an equivalent group of offenders who served prison time.²⁷ Even more remarkable, DTAP graduates have a 92 percent employment rate, compared with a 26 percent employment rate for offenders released from prison.²⁸ DTAP achieved these results at half the average cost of incarceration, with a cost savings of \$44 million over time.²⁹

Like drug courts, re-entry programs aim to break the cycle of recidivism by focusing on the social problems associated with repeat offenses: drugs and unemployment. The correlation between unemployment and recidivism is striking: according to the Independent Committee on Reentry and Employment, 89 percent of people who violated the terms of probation or post-release supervision were unemployed at the time of the violation.³⁰ Helping get offenders back to work is (or should be) a critical goal of the criminal justice system.

The Brooklyn District Attorney's Office, for instance, maintains a program of services

for parolees called ComALERT. Program participants are offered a period of transitional employment at an hourly rate, a portion of which is withheld. During that period, participants are provided with vocational classes, including computer, resume writing and interview skills. They are also provided with educational opportunities, including GED classes and courses for college credit. As they reach the end of their transitional employment, participants are given \$1,000 from the withheld funds in order to secure an apartment lease. A study of the program revealed that, one year after release, graduates were half as likely to be rearrested as a matched group of parolees and four times as likely to be employed (and for higher wages).³¹

On the local federal level, two district judges in the Eastern District of New York—Judges Dora Irizarry and Charles P. Sifton—also oversee re-entry programs for defendants on either probation or supervised release with a history of substance abuse. Defendants appear in court on a regular basis to report on their educational, vocational or employment progress, under the personal supervision of the judge and Probation Department, and undergo drug testing. Defendants who successfully complete the one-year program receive an early termination of their probation or supervised release term.

Recognizing that 40 percent of all inmates in its facilities have a diagnosable substance abuse problem, the federal Bureau of Prisons provides a Residential Drug Abuse Program (RDAP) for these inmates. Participants in the program, which serves 18,000 inmates a year, undergo a 500-hour treatment program. In exchange they receive, on average, a 7.64 percent reduction in their sentence. The program has been shown to reduce recidivism by 16 percent.³²

In addition, the federal Second Chance Act of 2007 introduced a number of new re-entry initiatives into the Bureau of Prisons. These focus principally on vocational programs and early reintegration into the community. Such programs have been shown to lead to a 33 percent reduction in recidivism rates.³³

Effective policing also plays a critical role in more economical crime reduction. Not surprisingly, a number of studies have correlated increases in the number of police with a drop in the local crime rate.³⁴ New York City's experience dramatically reflects this trend. Between 1990 and 2001, New

York City's homicide rate fell 73.6 percent. During approximately the same period, New York City's police force increased in size by 45 percent, three times the national average. One scholar attributed upwards of 18 percent of New York City's drop in crime to the increase in the size of its police force alone.³⁵ Somewhat less obvious is the fact that increased policing is a far cheaper crime fighting strategy than imprisonment. Studies have found that a 10 percent increase in the size of a city's police force and a 10 percent increase in the size of its prison population yield the same 3 percent drop in crime. In 2004, that increase in New York City's police force would have cost \$97.2 million; increasing New York's prison population to achieve the same result would have cost an additional \$24.3 million, or 25 percent more.³⁶

The Road Ahead

For a wide variety of offenders, prison makes sense. Certain defendants are truly dangers to society; others are inveterate criminals who cannot be deterred by lesser punishments; and others are beyond redemption or rehabilitation. But we can no longer afford to rely on a justice system that aims to reduce crime by relying so heavily on warehousing so many inmates for ever-greater lengths of time. Rather, we must employ policies before, during and after an individual's contact with the prison system that will help achieve the twin goals of reducing crime and saving money. Our country's recent experience with alternate sentencing programs shows that they make sense, and can work.

The pressure to reverse the prison boom was placed on us by a dire financial situation, but as Judge Marvin E. Frankel once wrote, we "hope that our need to humanize criminal sentencing will be served for reasons more worthy than fear of disaster."³⁷



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9. Steven D. Levitt, "Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not," 18 *J. Econ. Persp.* 163, 177 (Winter 2004).

10. Judge Marvin E. Frankel once described such policies as "a kind of simpleminded Puritanism in which it is premised that conduct we dislike will end or sharply decrease if we pass a criminal law, with harsh sanctions against it." Marvin E. Frankel, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972) at 9.

11. U.S. Census Bureau, *Statistical Abstract of the United States* at 186, Table 323 (1989); United States Sentencing Commission, 2008 Sourcebook of Federal Sentencing Statistics at Table 14, available at <http://www.uscc.gov/ANNRPT/2008/SBTOC08.htm>.

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28. *Id.*

29. *Id.*

30. Indep. Comm. on Reentry and Employment, *Report and Recommendations to New York State on Enhancing Employment Opportunities for Formerly Incarcerated People* at 9 (2006).

31. U.S.S.C. Symposium at 119.

32. *Id.* at 23, 72.

33. *Id.* at 23. One facility, FCI Butner, partnered with Meineke Car Care to introduce an automotive training program. Meineke promised to hire graduates of the program on release.

34. Vera Report at 10 (collecting studies).

35. Levitt, *supra*, at 168, 173.

36. Vera Report at 10.

37. Frankel, *supra*, at x.