REFORMING THE CORRECTIONAL PROCESS AT THE FRONT AND BACK ENDS: SENTENCING AND GOOD-TIME REFORM

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Over the last few years, the issues that have dominated discussions of federal correctional reform are these: (1) What offenders should we send to prison, how, and for how long? (2) When and how should we release them?[2] Renewed interest in the utility of the federal mandatory minimum sentencing laws (particularly the drug laws) and a concern over the rising federal prison population has spurred that discussion. The proposed reforms generally approach incarceration from very different perspectives. Sentencing or "front-end" reforms—particularly any recommended modification (however great or small) of mandatory minimum sentencing laws—rest on the assumption that life-tenured district judges occupy a position superior to that of legislators in deciding what specific term of imprisonment best serves purposes of the criminal law in each case, while avoiding individual cases of injustice resulting from the strict application of mandatory sentencing laws. Good-time or "back-end" reforms assume that professional correctional officials are best situated to determine what effect (if any) rehabilitative programs have had on an offender because only those officials have seen how an offender responds to incarceration.

Those options ultimately do not compete with each other for the same seat in class; Congress could select both of them. Both are discussed below.

I. SENTENCING OR "FRONT-END" REFORMS

Each of the two principal sentencing proposals would expand a district court's ability to exempt certain offenders from mandatory minimum sentences. One approach would allow a judge to depart downward from any mandatory minimum if the court finds that it is necessary to do so in order to avoid imposing an unjust sentence. The other approach is more limited. It

would apply only to nonviolent drug criminals with a minor criminal record, so in theory it would apply far less often, but it would lower the mandatory minimum sentence in every case it reaches.

There are costs and benefits from each approach, and neither one is perfect. The broad approach, like the one proposed in the Justice Safety Valve Act,[3] ensures that district courts can depart downwards to avoid an injustice, but it poses a risk of overcorrection. By granting district courts virtually unlimited discretion to depart downward from a mandatory minimum sentence, the broad approach poses the risk that we will see the same type of sentencing disparities that led Congress to enact the Sentencing Reform Act of 1984. A narrow approach, like the one proposed in the Smarter Sentencing Act,[4] avoids that risk while addressing the most troubling aspect of mandatory minimums: their capacity to impose unduly severe sentences on relatively low-level offenders in drug cases. That problem is particularly acute in drug cases, because an additional gram of a controlled substance quantity can have an enormous impact on sentencing, even though that additional gram has little marginal bearing on the offender's moral culpability. Nonetheless, a modest approach poses the risk of leaving unremedied compelling cases of grossly severe terms of imprisonment.

At the end of the day the narrow approach is preferable as a first step at reform. Law should be tempered with equity, and rigid sentencing rules should leave room for adjustment where a legislatively fixed sentence would be manifestly unjust. No statute can account for every variable in every case, and the attempt to do so with mandatory minimums has given rise to punishments in some small-scale drug possession cases that are completely out of whack with the purpose of the federal sentencing laws. Granting district courts some additional limited sentencing discretion would improve the status quo by eliminating some unjust sentences without

obviously undercutting the retributive, incapacitative, deterrent, and educative benefits of the criminal law. Modest sentencing reforms, such as the Smarter Sentencing Act, seek to ameliorate some of the extremely harsh sentences that district courts have imposed, without taking too large a bite out of the efforts that the government has made over the past four decades to improve public safety.

II. GOOD-TIME OR "BACK-END" REFORMS

Another way to address correctional reform (and prison overcrowding) is to revise the law governing the back end of the process. At one time, parole was the principal mechanism for early release, but Congress tried to repeal the parole laws as part of the Sentencing Reform Act of 1984.[5] Another option is to rely on so-called "good-time" laws. A well-settled feature of correctional policy, good-time statutes enable prisoners to earn credit towards an early release for good behavior and help correctional officials maintain discipline by offering an inmate a carrot in return for his good behavior.

Several bills introduced in the 113th and 114th Congresses would have revised the back end of the correctional process.[6] Recently, Senators Cornyn and Whitehouse (along with several co-sponsors) introduced the CORRECTIONS Act[7] for that purpose. The act would direct the Attorney General to develop a risk-needs assessment for use by the federal Bureau of Prisons in connection with a revised good-time system. A risk-needs assessment is an actuarially-based prediction of the likelihood of a particular individual committing one or more types of infractions, for example, while on release pending trial or sentencing. Risk-needs assessments enable criminal justice professionals to make predictions in a manner akin to the actuarial calculations that insurance companies use to set life insurance premiums. Just as a person who smokes will pay a higher premium than a nonsmoker, so, too, an unemployed, drug-using, recidivist gang member will re-

ceive a score indicating a higher risk of reoffending than someone without those characteristics. The CORRECTIONS Act would direct the Attorney General to develop and use those assessments when making initial (and subsequent) classification decisions whether an inmate needs maximum-, medium-, or low-intensity supervision, with prisoners eligible for different amounts of good-time credit depending on their classification, the amount of credit increasing as a prisoner moves down that scale. Prisoners can then earn credit for good in-prison behavior and for completing rehabilitation-oriented courses.

The principal criticism of risk-needs assessments is that they rely on impermissible factors, such as sex and age, over which a prisoner has no control and that are unrelated to blameworthiness, which leads to arbitrary and potentially discriminatory results.[8] Criminologists, however, have long endorsed the use of risk-needs assessments, and they are a salutary development.

Criminal justice officials currently make numerous decisions at each stage of the criminal process—*e.g.*, identifying those offenders most likely to commit another crime or to violate a condition of their release, determining whether an offender should be confined in a maximum-, medium, or minimal-security facility, making placement decisions regarding available programs (*e.g.*, day reporting centers, half-way houses), and so forth[9]—based on their prediction that an offender will recidivate. Risk-needs assessments direct the decisionmaker away from reliance on personal knowledge, experience, and judgment and toward reliance on a formula consisting of scored objective factors based on data compiled from a large number of cases—*e.g.*, age; sex; criminal, educational, and employment history; financial, family, and mental history and status; living arrangements; leisure and recreational activities; friends, companions, and associates; alcohol and drug use; emotional issues; antisocial thinking; and personal attitudes—because research

has shown that predictions of recidivism are more accurate when based on a pool of actuarial data than on clinical judgments.[10] Risk-needs assessments reduce the peril of arbitrary decisionmaking by relying on objective, statistically defensible factors.[11]

The combination of risk-needs assessments and modification of the good-time (or earned-time) program supplies a valuable "carrot-and-stick" approach. Offenders can benefit from programs designed to address their specific needs, and only while offenders are "in custody" can the government ensure that offenders are available to take advantage of those programs. Some programs, such as ones helping an offender obtain a GED, have been in existence for quite some time. Others, such as the South Dakota 24/7 Sobriety program and Hawaii's Opportunity Probation with Enforcement (or HOPE) program, are newly developed regimens.[12] Starting from the proposition that certainty and celerity are more important than severity when measuring the effectiveness of punishment and using a rigorous alcohol- and drug-testing regimen, South Dakota and Hawaii independently developed a similar approach to drugs and crime, subjecting certain offenders to rigorous, random drug urinalysis coupled with the certain imposition of a modest stint in jail for those who fail the required tests. Those creative approaches are worth serious consideration as an effective and humane means of addressing the grim problems that alcohol- and drug-abusers pose for victims, society, and themselves.[13]

III. CONCLUSION

Front- and back-end reform of the correctional process is possible and desirable. Either one alone would improve the system. Adopting both would double the benefits.

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[2] For a summary of the various proposed reforms, see JULIE SAMUELS ET AL., URBAN INSTITUTE, STEMMING THE TIDE: STRATEGIES TO REDUCE THE GROWTH AND CUT THE COST OF THE FEDERAL PRISON SYSTEM (2013), http://www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf.

[3] The Justice Safety Valve Act of 2013, S. 619, 113th Cong. (2013). The act was reintroduced in the 114th Congress as the Justice Safety Valve Act of 2015, S. 353, 114th Cong. (2015).

[4] The Smarter Sentencing Act of 2014, S. 1410, 113th Cong. (2014). The act was reintroduced in the 114th Congress as the Smarter Sentencing Act of 2015, S. 502, 114th Cong. (2015).

[5] For the argument that the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), had the effect of resurrecting the federal parole statutes as a matter of law, see Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303 (2013).

[6] In the 113th Congress, several bills would have reformed the good-time process. *See* the Recidivism Reduction and Public Safety Enhancement Act of 2014, S. 1675, 113th Cong. (2014); the Federal Prison Reform Act of 2013, S. 1783, 113th Cong. (2013); Public Safety Enhancement Act of 2013, H.R. 2656, 113th Cong. (2013).

[7] S. 467, 114th Cong.

[8] *See* Larkin, *Managing Prisons*, *supra* note 1, at 17-18.

[9] *See id*. at 5-6.

[10] *See id*. at 13-17, 18-21.

[11] With exceptions for sex and age, risk-needs assessment factors are the type of considerations that, in 1984, Congress directed the United States Sentencing Commission to use when drafting the U.S. Sentencing Guidelines.

[12] For a discussion of the 24/7 Sobriety and HOPE programs, see Paul J. Larkin, Jr., *Swift, Certain, and Fair Punishment—24/7 Sobriety and HOPE: Creative Approaches to Alcohol- and Illicit Drug-Using Offenders*, 105 J. OF CRIM. L. & CRIMINOLOGY (forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2465644.

[13] The CORRECTIONS Act would authorize creation of pilot programs to try the 24/7 Sobriety and HOPE approaches in other jurisdictions.