

State Sentencing Reforms: Is the “Get Tough” Era Coming to a Close?



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The unprecedented thirty-year rise in the prison population in the United States has been a complex and far-reaching social development. The institutional buildup has engendered a debate regarding its impact on crime, and scholars are increasingly beginning to explore the expanding range of collateral consequences that affect not only incarcerated individuals, but also their families, communities, and the nation at large.¹

In assessing the factors that have led to this vast expansion, what seems clear is that crime rates alone represent a relatively modest portion of the explanation. The most sophisticated research examining these changes in the 1980's and 90's generally ascribes most of the increase to changes in sentencing policy and practice.² Essentially, offenders convicted of a felony offense became much more likely to be sentenced to prison and for a longer period of time. These dynamics resulted from a confluence of deliberate policy choices – the broad adoption of mandatory sentencing statutes in the 1980's, the stepped-up pace of law enforcement arrests for drug offenses, the advent of “truth in sentencing,” and the scaling back of parole release. These policy changes help to explain why the national prison population continued to increase in the 1990's even as crime rates declined in most of the nation. After a surge of drug offenders entered the system in the 1980's, the prison expansion of the 1990's was largely fueled by offenders on average spending more time in prison, even as admissions stabilized by the end of the decade.

Analyzing why these particular policies and approaches were selected among the array of possible choices is a complex task. A variety of factors contributed to creating a political and media climate in which “get tough” policies were embraced by a broad spectrum of the public and political leadership. Thus, despite a wealth of research documenting the limited effect of such policies on crime, they remained largely unchallenged.

I. Recent Developments

In the first years of the new century, there is now reason to believe that the “get tough” movement may have peaked and that a reversal in public policy may be in order. The evidence is tentative and sketchy to date, but significant when contrasted with the virtual juggernaut of punitive sentencing policies of the previous twenty

years. Consider the following legislation recently enacted to increase the use of diversion from prison or to scale back mandatory sentencing laws and similar policies, in some cases occurring in states long considered to be leaders in the “tough on crime” movement:

- Louisiana enacted a measure that will reduce certain drug and non-violent sentences and eliminate mandatory minimums for non-violent crimes. It also requires that all three “strikes” under the state’s three strikes law be violent offenses, whereas previously only one offense was required to be violent.
- Washington state adopted new sentencing guidelines for drug offenders, cutting the presumptive prison time for many offenders by a quarter, with the resulting savings to be directed to drug courts and treatment programs.
- The Hawaii legislature passed a measure mandating drug treatment in lieu of incarceration for offenders convicted of first-time drug possession, as long as they have not been convicted of a violent felony in the past five years.
- Connecticut will now permit judges to depart from mandatory minimum sentences for certain non-violent drug offenders.
- Mississippi scaled back its truth in sentencing law so that certain first-time, non-violent offenders will be eligible for parole after serving one-fourth of their sentence, rather than the previous mandate of 85%.
- North Dakota enacted legislation that repeals mandatory minimums for first-time drug offenders.

In combination with declines in crime and stabilization of prison admissions in many states, the number of state prisoners has been heading toward a more stable rate in recent years. From 1999 to 2000, twelve states experienced a reduction, albeit generally modest, in their prison population. When compared to state prison growth rates that reached as high as 12% in the 1980's, this is clearly a significant development. (To be fair, the growth rate of the 1980's emerged from a smaller base rate, yet the absolute prisoner increase in those years was still quite substantial.)

II. Possible Explanations

These developments raise the intriguing question of why they have emerged now, particularly in a world in which, not very long ago, it appeared as if the prevailing political consensus was dominated by a commitment to punitive sentencing policies. Several factors appear to have played a prominent role in this regard:

Declining Crime Rates. The decline in crime for most of the 1990's engendered several developments in turn. While, as previously noted, state prison populations continued to climb, they began to do so at a less accelerated rate. But, more significantly, by the late 1990's the crime drop contributed to a reduction in the sense of crisis surrounding the problem. Where issues of crime and drugs had registered as major concerns for Americans in opinion polls of the late 1980's and early 1990's, by the year 2000 these issues drew considerably less popular attention. We should note with caution that this is a relatively new development. As recently as 1994, national political debate was focused prominently on a \$30 billion federal crime bill loaded with substantial financial incentives for new state prison construction.

Loss of Political Saliency. As a result of lowered public concern with crime, the issue has now lost some of its political saliency and usefulness to politicians. This was probably most prominently observed in the 2000 presidential debates, in which, aside from an obligatory defense of the death penalty's supposed deterrent effect by the two candidates, there was essentially no discussion at all of crime. In part, this reflected the narrowing of the gap between the two parties on crime policy. While Democrats had long been accustomed to being labeled as "soft on crime," in fact the party had long since abandoned any pretense to a non-punitive orientation. This was probably best epitomized by Bill Clinton's treatment of crime issues in his first presidential campaign in a manner that led him to boast, "I can be nicked on a lot, but no one can say I'm soft on crime."³

But the reduced role of crime in political campaigns also reflected the reality that political rhetoric generally works best when focused on an issue perceived to be of high concern for the public. Once the reality of the crime drop became widely understood, accompanied by a sharp decline in lurid news magazine covers highlighting the issue, crime resonated less with voters concerned about such issues as job stability, health care, and Social Security. This does not suggest that crime is now, or should be, absent from the political agenda. But, in contrast with the experience of just a few years ago, there are fewer high profile campaigns in which crime has been a critical determining issue.

Fiscal Realities. Particularly in the post-September 11 world, the fiscal constraints experienced by most states have served as a braking force on continued prison

expansion. In 2001-02, at least 13 states considered closing existing prisons or curtailing expansion plans as a direct result of declining revenues.

In contrast to the federal system, corrections constitutes a substantial portion of state-level expenditures. When competing for resources with higher education and other vital services, this has become a fiscal and political tradeoff in many states. The state of Michigan, for example, spends nearly as much on its prison system (\$1.6 billion) as on colleges and universities; one out of every six dollars from the general fund is now being spent on corrections.⁴

While these developments may merely appear to reflect common-sense budgeting, in fact they represent a substantial departure from past practice. State expenditures on prison operations have risen for thirty years, yet it is difficult to identify many instances in which fiscal realities entered into policy considerations in any significant way. In California, for example, the four-fold rise in the inmate population from 1980 to 1994 resulted in the corrections share of the state budget rising from 2.3% to 9.8%, but did not generate serious opposition in policymaking circles.

Thus, while fiscal realities now represent a constraint on further prison expansion, they operate in conjunction with other political and cultural forces that permit policymakers to engage in alternative measures to control state spending and address the needs of the criminal justice system. Were a perceived new "crime wave" to emerge, it is far from clear that the fiscal constraints would be sufficient to prevent a new round of "get tough" sentencing initiatives.

Experience with Alternative Sanctions and Drug Diversion. While sentencing options were once largely limited to incarceration and probation, a broad range of choices now exists in many courtrooms. Community service and restitution programs are commonplace, and the rapid expansion of drug courts in the 1990's has put into practice a model that demonstrates that court-supervised treatment is often preferable to a period of incarceration.⁵ None of this suggests that the range of such options is sufficiently broad or adequately funded, but the collective experience is one that has permeated many court systems and communities, and communicates a message that viable sentencing options have a legitimate role in the courts. This in turn creates a broader opening for policymakers to consider an expanded range of sentencing options.

Public Receptivity to Alternatives. Policymakers at various levels of public office have often contended that they have enacted harsh sentencing policies in response to public concern. While Americans are undoubtedly concerned about crime, the findings of public opinion research over a good deal of time have in fact been far more nuanced than many political leaders have recognized. Along with support for "tough" sentencing

policies has also come an endorsement of rehabilitative programs in prison and a variety of crime prevention measures. Until recently, these sentiments have gone largely untapped in political discourse. We now can see evidence of broad public support for such approaches, particularly in regard to drug-related offenses. California's Proposition 36, for example, is a drug offender diversion initiative that was approved by more than 60% of the electorate in 2000. The political message that such developments communicate is that focused reforms can not only provide sentencing courts with a wider array of options, but can also gain mainstream support. Similarly, the growing practitioner interest in restorative justice, initially the province of religiously-affiliated reformers just twenty years ago, indicates an openness to new ways of thinking as well.⁶

III. Future Directions

While the above analysis might be interpreted to suggest that we have moved beyond "get tough" politics into an era of rational policymaking, such a conclusion would be far too speculative given the evidence at hand. What we can say is that there are now openings for consideration of state sentencing reform that were generally not present even a few years ago, and that there is potential for expansion of new initiatives and perspectives. The extent to which these prospects are realized will depend on developments both within the justice system and the larger political arena.

One critical determining factor will be the economic picture, although how this plays out in terms of sentencing reform is complex. Clearly, some of the recent sentencing initiatives have been enacted at least in part due to tightened economic circumstances and the recognition of the growing costs of imprisonment. Therefore, one might speculate that if the economy improves, the pressure to slow prison growth would be eased. Yet, this need not be a direct result. First, a growing economy is likely to contribute to lowered crime rates; this appears to have been one of the factors at play in the 1990's. And, second, to the extent that newly-enacted sentencing initiatives can demonstrate their utility, they hold the potential for a shift in policy and practice toward more results-oriented sentencing.

After declining crime rates for most of the 1990's, preliminary FBI data for 2001 show a modest increase in the national crime rate. While it is too early to assess whether this portends another rise in crime in the

coming years, it may affect public and policymaker perceptions of the problem. Indeed, in gubernatorial races in California and Michigan this year, candidate commitments to "getting tough" have become increasingly prominent.

Finally, we should recognize that the contribution of sentencing reform initiatives to a slowing rate of growth in the prison system may be tempered by other realities. First is the fact that an increasing proportion of the growth in recent years has been the result of a substantial increase in the rate of parole violators being sent back to prison. Currently, a third of all admissions to prison consists of parole violators, either for a new offense or for a technical violation of parole. Slowing these trends will require greater attention to the reentry initiatives currently being discussed in many jurisdictions, as well as a sustained focus on substance abuse issues, a key contributor to violating behaviors.

The second, and somewhat more amorphous, factor relates to what we might classify as the inertial effect of the prison buildup. After three decades of continuously rising incarceration, it is difficult to conceive that, only thirty years ago, the inmate population was one-sixth of the nearly two million today. Along with this growth has come the virtual institutionalization of a massive penal system, with many employees and communities increasingly dependent on its economic benefits. These dynamics may change, of course, but they represent an influential backdrop to the further consideration of sentencing reform.

Notes

- ¹ JEREMY TRAVIS ET AL., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY (2001).
- ² Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, 26 PRISONS: CRIME AND JUSTICE—A REVIEW OF RESEARCH 17 (1999).
- ³ Michael Kramer, *Frying Them Isn't The Answer*, TIME, March 14, 1994, at 32.
- ⁴ Gary Heinlein, *Gubernatorial Foes Split on Prison Costs*, THE DETROIT NEWS, June 22, 2002, at A1.
- ⁵ STEVEN BELENKO, RESEARCH ON DRUG COURTS: A CRITICAL REVIEW (2002).
- ⁶ For information on the concept of restorative justice and its implementation nationally, see the United States Department of Justice Restorative Justice website (<http://www.ojp.usdoj.gov/nij/rest-just/index.htm>). The Center for Restorative Justice and Peacemaking at the University of Minnesota (<http://ssw.che.umn.edu/rjp/>) houses a large collection of related resources.