

A Review of the Evidence on the Effectiveness of Alternative Sanctions and an Assessment of the Likely Impact of Federal Sentencing Guideline Reform on Public Safety

James M. Byrne
Professor, Department of Criminal Justice and Criminology
University of Massachusetts, Lowell

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Regional Hearings Marking the 25th Anniversary
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Summary of testimony:

In my written testimony I reach the following conclusions about alternative sanctions:

- ✚ **First, Alternative sanctions are underutilized** for federal offenders who fall into zones A, B, and C on the Sentencing Guidelines grid.

- ✚ **Second, Alternative sanctions can be expanded** to include offenders currently receiving prison terms without undermining the original intent of the Sentencing Guidelines.

- ✚ **Third, The current Sentencing Guidelines grid needs to be restructured** to reflect changes over the past twenty five years in the type of crimes—and in the public’s view of seriousness of crimes--prosecuted in our federal courts. Reducing the number of cells in the Sentencing Table (both for offense levels and criminal history) is the first step in this process.

- ✚ **Fourth, Alternative sanctions –when implemented fully and focused on offender change—can improve public safety and save taxpayers money**, but even greater gains may be achieved by (1) revising mandatory minimum sentencing laws, (2) designing strategies that recognize the link between individual and community change; and (3) addressing the problems posed by the continued use of incarceration—at both the pre-trial and sentencing stage—for non-U.S. citizens held for immigration violations.

Recommendations: the following three simple recommendations-- focusing exclusively on federal offenders who are U.S. citizens—would have reduced our Federal prison population by approximately 15%, if they were fully implemented in 2007. While others (e.g. Austin, 2009) have proposed changes in Federal sentencing practices that promise much greater gains, I have focused exclusively on Guideline-based reforms targeting U.S. citizens here.

(1) **Restructure** Federal Sentencing Guidelines to limit the use of prison-only sentences for zone A, B, and C offenders(U.S. citizens only), resulting in an estimated drop in the overall federal prison population from 63,753 to 61,677 offenders, a 3% decrease.

(2) **Redesign** existing alternative sanctions based on a review of “what works” with specific subgroups of Federal offenders (e.g. drug offenders, white collar offenders, sex offenders, etc.); it is estimated that these “new generation” sanctions will reduce recidivism and the rate of return to prison among federal offenders, resulting additional (but small, on the order of 3%) decreases in Federal prison populations.

(3) **Expand** the alternative sanction zone in the current sentencing guideline table, targeting offense levels 12-14 for alternative sanctions, increasing the number of U.S. citizens eligible for alternative sanctions by 5,400, decreasing the Federal prison population by 8.5 %.

Introduction:

Judge Hinojosa, Members of the Commission, and distinguished guests:

Thank you for asking me to provide my assessment of the utilization of alternative sanctions in our Federal sentencing system. I will begin by briefly highlighting how the types of offenders and types of crimes prosecuted in our federal court system have changed since the passage of the Sentencing Reform Act of 1984. I will then describe how various types of alternative sanctions—probation, probation and confinement, and prison/community split sentences—are currently being used in conjunction with Federal Sentencing Guidelines in the sentencing of this new generation of federal offenders. I will then consider the issue of whether specific changes in sentencing guidelines are needed to increase the use of alternative sanctions, and reduce post-*Booker* guideline departures. I conclude my testimony by summarizing what we currently know about the effectiveness of community-based alternative sanctions in comparison to incarceration, and then assessing the impact of both sentencing guidelines reform and community based program reform on public safety and the cost of corrections.

1. Changes in Federal Offenders and Federal Crimes

Much has changed since the passage of the Sentencing Reform Act of 1984, due to changes in *laws* (e.g. mandatory minimums for drug offenders, weapons law violators, and other categories of offenders; new laws to address techno-crime), changes in *technology* (e.g. the internet has spawned new opportunities for a variety of old crimes-- fraud, gambling, sex crimes—and created new categories of offenders and victims) and changes in *immigration* (in particular, the recent surge in illegal immigration from Mexico). As a result, the federal offender population today looks quite different from the federal offender population in 1984. Examination of the most recent figures available from the U.S. Sentencing Commission (October 1, 2008 through March 31, 2009) reveals that there are currently four major categories of federal offenders:

- (1) Immigration violators (32.2%),
- (2) Drug Law violators (30.6%), with the following three major drug types: powder cocaine, crack cocaine, and marijuana),
- (3) Fraud, larceny, and other white collar offenders (14.8%)
- (4) Weapons law violators (10.4%)

While an examination of the immigration issue is beyond the scope of this review, it should be noted that as of March 31, 2009, 43.8 % of all federal offenders were non-U.S. citizens, and 2/3 were being held for violations of

immigration laws. By comparison, In 1984, only a fraction of all federal offenders were non-U.S. citizens; and of these, the majority were convicted of drug trafficking .Unlike their earlier counterparts, the majority of non-U.S. citizens currently held –both pre-trial and post-conviction—in federal prisons are not a threat to public safety(Hickman and Sutorp, 2008).

One final change that can be documented over the past twenty five years is *public attitudes* towards the sentencing of offenders. While the public appears to support a more punitive approach to offenders who commit financial crimes and sex crimes, the same “public” now recognizes the need for rehabilitation, particularly for the subgroup of our Federal and state offender population with serious mental health and substance abuse problems. While several new state-level initiatives have been initiated and evaluated (e.g. drug courts, mental health courts, new proactive community supervision initiatives), the federal system has lagged behind. However, the recent addition of new Federal Judges with prior successful experiences with the use of rehabilitation-focused sanctions at the state level may be at least a partial explanation for the increased proportion of Federal sentences that are below the recommended Federal Sentencing Guideline range. This suggested that many Federal Judges may be amenable to the expanded utilization of alternative sanctions, particularly if there is mounting evidence that the imposition of these sanctions does not pose a

public safety threat, but does provide an opportunity for not only short term offender control, but also long term offender change.

2. The Current Use of Alternative Sanctions

According to a recently released report by the U.S. Sentencing Commission (Jan. 2009), 21.5 % (or 13,771) of the 63,906 federal offenders sentenced in 2007 were classified as zone A, B, or C offenders, which made them eligible—potentially-- for alternative sanctions. However, it is prison that is the sanction of choice for offenders in each of these alternative sanction zones. For offenders in zone A, 48.4% receive prison-only sentences; in zone B, 58.4% of all offenders receive a prison-only term; and in zone C, 66.4% receive a prison-only sentence. By comparison, 94.6% of all zone D offenders received a prison-only sentence in 2007.

Why are we over-utilizing prison and under-utilizing alternative sanctions? One explanation offered in the U.S. Sentencing Commission report (Jan., 2009) is the citizenship effect: “more than one-third (37.4%) of offenders are non-citizens, the overwhelming majority of whom are illegal aliens”(2009:4).The percentage of non-citizen offenders in each zone is as follows: zone A(43.7%); zone B (45.0%); zone C (50.8%); and zone D (33.1%).

Because illegal aliens are assigned by the U.S. Bureau of Prisons to the second highest custody level, they are –by policy, not guidelines—essentially ineligible for alternative sanctions. The fact that these offenders (1)do not have high criminal history scores and (2) have been convicted of crimes that are deemed of lesser seriousness, is worth noting. Before the Federal Sentencing Guidelines were fully implemented (Nov. 2007), the proportion of non-citizens in our Federal corrections population was much smaller. For example, immigration violations comprised 4.0% of all federal prisoners in 1986, and only 5.6% in 1997; by March 2009, 34 % of all federal prisoners were immigration violations (U.S. Sentencing Commission, 2009). Clearly, this is a problem that must be addressed, although it appears to be beyond the boundary of the U.S. Sentencing Commission.

However, it is important to consider the fact that alternative sanctions are still under-utilized for the subgroup of U.S. citizens sentenced in the federal system. In 2007, 18.1 % of zone A offenders, 32.6% of zone B offenders, and 37.7% of zone C offenders received a prison only sentence. This represents approximately 5 %(2076 of 40,720) of all U.S. citizens sentenced in 2007.In zone D, U.S. citizens received prison-only sentences 92.5% of the time. Overall, 81.1% of all sentenced U.S. citizens received prison-only sentences (U.S. Sentencing Commission, 2009).

Examination of within zone sentencing patterns reveals that Judges appear to have the most difficulty identifying the appropriate “intermediate” sanctions for offenders in zones A, B and C. In zone A, 75% of U.S. citizens are sentenced to probation-only, which is consistent with the guidelines, but the second most likely sanction was prison only(18.1%). In zone B, 42.2% of offenders received a sentence of probation and confinement, which appears consistent with the guidelines, but again the second most likely sanction was prison (32.6%), followed by probation (17.1%), and prison/community split (8.1%). In zone C, the lack of uniformity in sentencing is the most pronounced, with sentences as follows: prison only (37.7%), prison/community split (32.1%), probation and confinement (17.2%), and probation only (13.0%).

For a variety of reasons—the citizenship effect, mandatory minimums for drug offenders, and Judges’ lack of confidence in alternative sanctions for guideline-eligible offenders are three that come immediately to mind—the past decade has been marked by slight increases in the use of prison-only sentences; this upward trend has slowed but persists post-*Booker* (U.S. Sentencing Commission, 2006; Cole, 2009; U.S Sentencing Commission, 2009, *Preliminary Quarterly Data Report, figures A thru E*).The fact that the percentage of within range sentences dropped significantly post-*Blakely* and post-*Booker*(from 73% in 2004 to just under 60% in 2009) underscores the need to rethink our current

sentencing guidelines system. By definition, a guideline system with this proportion of out of range sentences is a system in need of reform.

Between 1997 and 2007, the percentage of offenders receiving a prison-only sentence increased from 75.4% to 85.3%, with a corresponding decrease in the utilization of alternative sanctions-- from 24.6% to 14.7%-- during this same period (U.S. Sentencing Commission, 2009). These changes are not simply a product of the increasing size of the non-citizen federal offender population. Looking only at U.S. citizens, we see the following: in zone A, the percentage of offenders receiving probation-only sentences has increased slightly between 1997 and 2007(from 73.6% to 75.5%), but in zone B, the percentage receiving the presumptive term(probation with confinement) has decreased from 49.8% to 42.2%, while in zone C, the percentage receiving the presumptive term(prison/community split) dropped slightly, from 35.3% to 32.1% .Based on these figures, it appears that strategies designed to increase the utilization of alternative sanctions for zone A, B, and C offenders should be considered.

During this same review period, the corresponding decreases in the utilization of alternative sanctions for non-citizens are dramatic: by 2007, only 13.1% of zone A non-citizens received a probation only sentence, 4.4 % of zone B offenders received a probation/confinement sentence, and 3.2% of zone C

offenders received prison/community split sentence (U.S. Sentencing Commission, 2009: 6-8). If this sentencing trend persists, we will see an increased proportion of non-citizen federal prisoners over the next several years. The fact that a significant number of these federal offenders do not have either extensive criminal histories or serious offense convictions—in 2009, 11,162 of the 16,162 non-U.S. citizens in federal prison were convicted of immigration violations-- raises obvious concerns, but the solution to this problem appears to lie outside the purview of the U.S. Sentencing Commission (U.S. Sentencing Commission, 2009; Lopez and Light, 2009).

3. Assessing the Likely Impact of Sentencing Guideline Reforms Designed to Increase the Utilization of Alternative Sanctions

Any recommendations for reform of current sentencing practices through changes in federal sentencing guidelines must begin with the following caveat: the sentences imposed on non-citizens must be examined separately from the sentences imposed on U.S. citizens; in large part, this is because the vast majority of non-citizens are not eligible for alternative sanctions despite their guideline location in one of the three alternative sanction zones, because they are classified as deportable. For this reason, my initial assessment will

focus on recommendations for reforming the sentencing of U.S. citizens, which represents about 2/3 of all sentenced Federal offenders.

A review of current federal sentencing practices reveals that about 8 of every 10 sentenced offenders received a prison sentence; for U.S. citizens receiving a prison sentence, the average prison sentence is 76 months (U.S. Sentencing Commission, 2009). The remaining federal offenders are sentenced to one of the following alternative sanctions:

(1) *Prison split with community confinement* was used for 4.7% of sentenced offenders in 2007. This typically involves 9 months of prison followed by 6 months of community confinement, which may involve either home confinement (3/4 of the cases) or residence in a community treatment center or halfway house of some kind (1/4 of these cases);

(2) *Probation with confinement* was used for 5.8% of all sentenced offenders in 2007. This typically includes 6 months of confinement followed by 33 months of probation. For 9/10 of these cases, the offender was “confined” via home confinement;

(3) *Probation only* was the sanction used for 8.4% of all offenders sentenced in 2007. The average length of probation supervision is 33 months.

With only a few exceptions, monetary penalties—including fines, cost of supervision/home confinement, and restitution—are imposed as add-ons to one of the four sanctions just identified. According to the U.S. Sentencing Commission (2009:10): “Overall, monetary penalties...are imposed for

approximately one-third (34.7%) of U.S. citizen offenders sentenced in fiscal year 2007...the median monetary penalties...range from \$3,834 for offenders sentenced to probation, to \$20,568 for offenders sentenced to prison/community split”.

Focusing on federal offenders who are U.S. citizens, it is clear that alternative sanctions are being under-utilized for zone A, B, and C offenders who are eligible for alternative sanctions under current sentencing guidelines. In 2007, 2,076 alternative sanction zone offenders received prison-only sentences. The U.S. Sentencing Commission should consider revising current guidelines in ways that will preclude the imposition of prison-only sentences for these offenders, while also providing additional education/training opportunities for Federal Judges on the efficacy of alternative sanctions. If such procedures were in place in 2007, the overall number of federal offenders(including both citizen and non-citizens) sentenced to a prison-only term would have dropped from 63,753 to 61,677 offenders, a 3% decrease.

One reason for opting for a prison-only sentence is a lack of confidence in available alternative sanctions. Given the above sentencing patterns, it appears that Judges may not be convinced that (1) sentencing zone B offenders to probation and confinement is the appropriate sanction(they use it about 42% of the time for zone B offenders), or that(2) sentencing zone C

offenders to prison/community split sentences is the appropriate sanction(they use it 32% of the time for zone C offenders).In response to the under-utilization of these sanctions, this may be a good time for the U.S. Sentencing Commission to rethink the types of alternative sanctions needed for the current group of Federal offenders, because the evidence supporting the use of split sentences as a recidivism reduction strategy is weak, as is the evidence supporting the use of home confinement(Byrne, 2009).

My point is simple: we need to develop a new generation of community-based sanctions designed to address the problems of the ever changing federal offender population .Since a significant proportion of these offenders have serious, but treatable, substance abuse and/or mental health problems, we need to develop alternative sanction programs that not only emphasize short-term offender control (through home confinement), but also on long term offender change(through participation in both residential and non-residential treatment).A significant number of federal offenders return to federal prison each year because they have violated alternative sanction conditions and/or they have been convicted of a new crime(Sabot, et.al., 2000). To the extent that these “new generation” sanctions work to reduce recidivism and the rate of return to prison among federal offenders, additional (but small, on the

order of 3%) decreases in Federal prison populations would be realized according to one recent simulation study (Austin, 2009).

Up to this point, I have focused my review on the subgroup of U.S. citizen Federal offenders who are eligible for alternative sanctions because they fall in zones A, B, and C of Sentencing Table in the Federal Sentencing Guidelines Manual. However, it appears that the U.S. Sentencing Commission may want to use the 25th anniversary of the passage of the Sentencing Reform Act of 1984 as a watershed moment, and consider possible reforms to the table. Several recent reviews of federal sentencing guidelines, post-*Booker*, have recommended simplifying the offense seriousness levels, and reconsidering where we draw the line between zone C and zone D (the incarceration zone).

By reducing the current 43 offense levels to 10, and dropping the number of criminal history categories from 6 to 5 (by collapsing the last two categories), the uniformity of sentences should be improved (at least in theory). However, the key to any revisions to the existing sentencing table will be the determination of which cells on the table fall in the incarceration zone. While the upper cut-off point for zone C is currently offense level 12, it appears that even minor changes in cutting points using the existing offense levels would result in a much larger proportion of federal offenders being eligible for

alternative sanctions. Consider the following 2007 data on Federal sentencing (citizen and non-citizen combined) by offense severity level:

- ✚ 4767 offenders were designated offense level 12,
- ✚ 280 offenders were designated offense level 13,
- ✚ 3188 offenders were designated offense level 14

Expanding zone 3 to include all offenders with severity scores between 12 and 14, thereby moving the start point for the incarceration zone to offense level 15, would have increased the number of offenders eligible for alternative sanctions by 8,235; in 2007, 11% of all federal offenders (citizen and non-citizen) were classified as levels 12-14. Clearly, even small changes in the cutting points of the sentencing table will have a large effect on the size of the federal prison population. Assuming that 2/3 of the offenders included in these three categories are U.S. citizens, another 5,400 offenders would have been eligible for alternative sanctions. If these alternatives were used exclusively for all level 12-14 offense level offenders in 2007, then the U.S. prison population would have dropped from 33,022 (U.S. citizens in prison) to 27,622, a decrease of 16.4%.

To summarize, the following three simple recommendations--focusing exclusively on federal offenders who are U.S. citizens—have been proposed here:

(1) Restructure Federal Sentencing Guidelines to limit the use of prison-only sentences for zone A, B, and C offenders(U.S. citizens only), resulting in an estimated drop in the overall federal prison population from 63,753 to 61,677 offenders, a 3% decrease.

(2) Redesign existing alternative sanctions based on a review of “what works” with specific subgroups of Federal offenders (e.g. drug offenders, white collar offenders, sex offenders, etc.); it is estimated that these “new generation” sanctions will reduce recidivism and the rate of return to prison among federal offenders, resulting additional (but small, on the order of 3%) decreases in Federal prison populations.

(3) Expand the alternative sanction zone in the current sentencing guideline table, targeting offense levels 12-14 for alternative sanctions, increasing the number of U.S. citizens eligible for alternative sanctions by 5,400, decreasing the Federal prison population by 8.5 %.

Overall, these three recommendations would have reduced our Federal prison population by approximately 15%, if they were fully implemented in 2007. While others (e.g. Austin, 2009) have proposed changes in Federal sentencing practices that promise much greater gains, I have focused exclusively on Guideline-based reforms here.

4. What works: A Review of the Empirical Evidence

In the following section(adapted from my testimony before Subcommittee on Commerce, Justice, Science, and Related Agencies ,Alan Mollohan (WV), Chair March 12, 2009), I highlight the results of the available evidence-based reviews of what works in each of the following areas: prison, probation, intermediate sanctions, and offender reentry(see Byrne, 2009 for a more detailed discussion) .

4a. The Specific Deterrent Effects of Prison

The Federal Sentencing Guidelines were initially designed to reduce sentencing disparity, and in the process to send offenders a clear signal that most forms of criminal behavior covered in federal criminal codes will result in a prison term. The initial question becomes: does the uniform application of a “you do the crime, you do the time” strategy deter these federal offenders from future criminal behavior? A review of recidivism and return to prison rates among various cohorts of offenders released from prison over the past twenty five years reveals that the majority of federal offenders released from prison do *not* return. In fact,“ only 16% of the 215,263 offenders released from Federal prison between 1986 and 1994 returned to Federal prison within 3 years of

release”; and 60% of all federal offenders returned to prison were technical violators of release conditions, while only about 5% were convicted of a new offense (30% of 16% returned to prison) Sabol, et.al., 2000:1). While some would argue that this is evidence of a specific deterrent effect, others point out that a case could be made that since these offenders pose little risk to public safety, they could easily have been sanctioned in the community(Austin, 2009).

When examining the specific deterrent effects of various sanctions—including prison—most researchers compare two or more sanctions directly. Ideally, this would be in a random assignment experiment, or a well designed quasi-experiment. A review of this body of research leads to a different, more nuanced conclusion about specific deterrent effect of incarceration on subsequent behavior. In terms of specific deterrence effects on *individual* offenders, there is no methodologically rigorous evidence that incarceration reduces an offender’s risk of re-offending upon return to the community; in fact, it appears that when compared to similar groups of offenders placed in one of a range of alternative, non-custodial intermediate sanctions, prisoners actually re-offend at a higher rate (Stemen, 2007; Farabee,2005). Unfortunately, any definitive statements on the comparative effects of incarceration versus non-incarcerative sanctions must await the completion of more—and higher quality—research, preferably using experimental designs.

Villettaz and associates (2006) conducted a systematic evidence-based review of prison vs. community-based sanctions in conjunction with the Campbell Collaborative. Villettaz, et al.(2006), identified only five controlled or natural experiments have ever been conducted on custodial versus non-custodial sanctions. They concluded that “Although a vast majority of the selected studies show non-custodial sanctions to be more beneficial in terms of re-offending than custodial sanctions, no significant difference is found in the meta-analysis based on four controlled and one natural experiments” (Villettaz, et al.,2006:3).

When considering the results of this evidence-based review it is important to keep in mind that only three of the five experiments included in the review targeted adult offenders. One study comparing prison to probation (Bergman,1976) showed probationers fared significantly better; however, a second study comparing prison to community service had mixed results (Killias, Aebi, and Ribeaud, 2000), while a third natural experiment comparing the effects of a 14 day prison term to a suspended sentence reported mixed results as well (Van der Werff, 1979). Two thoughts come immediately to mind: first, you don’t conduct a meta-analysis on just five studies, especially if these studies have different target populations (3 adult, 2 juvenile) and different experimental and control group comparisons (see above); second, systematic, evidence-based reviews are only going to be useful to the field when sufficient

numbers of well designed research studies are available for review. Obviously, this is not the case here.

I focus on the findings of this systematic, evidence-based review to highlight the potential dangers inherent in an over-reliance on meta-analysis techniques to analyze studies that are as different as apples and oranges; this problem is compounded by the decision to use the “gold standard” and exclude the quasi-experimental research from this analysis. The conclusions reached in the Villetta, et al (2006) systematic review focused exclusively on the five experimental studies examined in their meta-analysis, and did not include the other 18 studies they identified meeting the study’s minimum review criteria. Eleven of these 18 studies showed positive effects for a range of non-custodial sanctions, including probation, home confinement, community service, and mandatory alcohol treatment in drunk driving cases. Only two studies showed positive effects for a prison sanction (prison fared better than electronic monitoring , but only for low risk offenders; shock incarceration fared better than probation).The remaining five studies identified no significant differences between experimental (three prison, two shock incarceration) and control (home confinement, probation, community service, and no prison) groups.

In my view, the available experimental and quasi-experimental research findings—although of poor quality overall-- challenge the underlying

assumptions of the classical, deterrence-based theories of crime causation that provide the basic foundation for the prison typology we use to justify our reliance on prison for a wide range of offenders. However, I offer one possible caveat: it could be argued that the higher recidivism rates generally reported in these quasi-experimental research studies for prisoners (compared to non-prisoners) do provide evidence that the prison typology did, in fact, select a target group of convicted offenders who posed a *greater* risk of re-offending than those sentenced to some form of community-based sanction. Is it selection bias or an intervention effect? There is no way of knowing for certain. This is the limitation of moving from a gold standard evidence-based review to a less rigorous “bronze” standard.

Despite this caveat, it appears that we are better at identifying *risk level* than at developing strategies that result in *risk reduction*. I am not arguing that currently sentencing schemes are accurate, because it is entirely possible that the *prison experience* increased the risk posed by prisoners upon release to the community (Stowell and Byrne, 2008). But it seems obvious that there are some individuals who exhibit behavior that can only be addressed in institutional settings; it is a sad reality that a number of the individuals sent to prison need to be there, for the safety of the community.

Can offenders be changed during their time in prison, or is the most we can hope for a short-term incapacitation effect and relief on the part of victims that these offenders are “out of sight and out of mind”, at least temporarily? The answer appears to be that it depends on whether you design a prison system that focuses on offender control or offender change (in those areas that *can* be changed, such as educational deficits, employment skills, addiction issues, and mental health). According to two recent systematic, evidence-based reviews of prison-based treatment programs , prisoners who receive treatment in prison have fewer incidents of misbehavior while in prison(Byrne, Hummer, and Taxman, 2008), and fare significantly better upon release from prison, than prisoners who don't receive treatment (MacKenzie, 2006).Although the reported effect sizes for prison treatment and program participation are modest (a 10% reduction in recidivism upon release using standard follow-up measures), there is reason to anticipate improvements in these effects in prison systems designed to focus on offender change rather than short-term offender control (Welsh and Farrington, 2006; Byrne and Pattavina, 2007).

In my assessment, *comprehensive assessment-oriented and intensive treatment-focused prisons* may be the appropriate classification for some convicted offenders, but not because there is evidence that the prison experience will deter these individuals from future involvement in crime; rather, prison may

represent the appropriate location (and control level) for the provision of the types of treatment and services targeted to the offender typology being used (e.g. sex offender, drug offender, mentally ill offender, batterer, violent offender, etc.). The key is to identify the subgroup of all convicted offenders that will require this level of intervention; the assumption here is that we can reduce the size of prison population, and provide more services to the group of offenders we do incarcerate, without threatening public safety. This is precisely the point being argued by those in favor of downsizing prisons (Jacobson, 2005) and by advocates of prison reform (or rather prison transformation), who argue that we need to replace “bad” control-oriented prisons with “good” change oriented prisons (Maruna and Toch, 2006; Deitch, 2004; Gibbons and Katzebach, 2006).

4b. The General Deterrent and Incapacitation Effect of Prison

My examination of the research on the general deterrent effect of prison underscores the observation attributed to Mark Twain: “there are three types of lies- lies, damn lies, and statistics.” In his recent, detailed review of the research on the impact of prison on crime, Stemen (2007) found that variation in effect sizes across studies—for the studies looking to demonstrate a general deterrent effect in particular-- could be attributed to such factors as (1) how the effectiveness of the prison sentence is to be determined (e.g. impacts on

individuals, impacts on neighborhoods, state or national level effects;(2) the use of comparison groups and/or comparison policies;(3) the criterion measure employed (violent crime, overall crime); (4) the statistical procedures, including controls for simultaneity , that were applied; and (5) whether cost effectiveness comparisons were included(e.g. if you spent the money on such alternative crime reduction strategies as improving treatment, the quality of education, early childhood intervention, or employment/ anti-poverty initiatives that you spent on incarcerating an increased number of offenders, what would be the crime reduction effect?).

Despite these cross-study differences, I agree with Stemen (2007) that it is possible to use this body of research to answer the question that policymakers and the general public continually ask: does prison work as a general deterrent? By focusing on the results of research conducted at different levels of aggregation with—where available-- appropriate statistical controls for simultaneity, a clearer picture of the general deterrent impact of incarceration begins to emerge (Levitt, 1996; Spelman,2000; Spelman,2005). At the *national* level, a 10 percent increase in the rate of incarceration is estimated to result in about a 4 percent decrease in the rate of index crimes, with estimates of the impact on violent crimes between 3.8 and 4.4 percent. Studies claiming larger reductions in crime (between 9 and 22 percent) using national level data did not

include controls for simultaneity. Based on *state* level data, a 10 percent increase in the incarceration rate is associated with a decrease in the crime rate between 0.11 and 4 percent. At the *county* level, a 10 percent increase in incarceration is associated with a 4 percent reduction in the crime rate (Stemen, 2007).I agree with Spelman, Levitt and others who have concluded that our recent incarceration binge has had—at best—only a modest impact on crime rates at the national, state, and local level.

One underlying assumption of general deterrence is that the costs of a particular prohibited behavior must outweigh the benefits of the action, but only marginally, for an individual to be deterred. There is no assumption that more punishment translates into more compliance with the law. Indeed, too much punishment could have the opposite effect. Two recent studies provide support for this contention, suggesting that there is a “tipping point” for incarceration levels that can be demonstrated at both the state level and the neighborhood level(Liedka, Piehl, and Useem, 2006; Rose and Clear, 1998; Clear, Rose, Waring, and Scully, 2003). Incarceration reduces crime, they argue, but only up to a point. Once the incarceration rate hits a certain level (at the state level the tipping (or inflection) point appears to be around 325 inmates per 100, 000 population), crime rates actually increase. Although they do not identify a

specific neighborhood level tipping point, Rose and Clear (1998) explain why they believe this occurs at the local level:

“High rates of imprisonment break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender a deep resentment toward the legal system. As a result, as communities become less capable of maintaining social order through families or social groups, crime rates go up” (Rose and Clear, as summarized by Stemen, 2007:6).

The implication of this new research on possible tipping points is not that we should abandon prison as a sanction, but that we need to be parsimonious in its application. When viewed in the context of a typology, it is apparent that definitions of the “in-prison” group were expanded in the 1980’s to include “large numbers of nonviolent marginal offenders” (Stemen, 2007: 8). Since there is no evidence that this expanded definition had an added effect on crime rates (Zimring and Hawkins, 1997), it makes sense to consider our earlier, more restricted definitions of who should be considered for prison, which focused primarily on the identification of serious, violent offenders.

Finally, it is worth noting that much of the research on general deterrent effects does not include an examination of various “what if “ scenarios: what if we spent the same money used to expand our prison capacity on other

strategies designed either as a general deterrent (e.g. police) or as a risk reduction strategy (education, treatment, employment, wages)? According to Stemen (2007), Blumstein(2008), Wilson(2008), and others, only about 25 percent of the major crime drop that occurred in the United States between 1990 and 2005 appears to be linked directly to our increased use of incarceration(Pew Center on the States, 2008,Pew Center on the States, 2009). The other 75 percent of the drop can be linked to a variety of other factors, including fewer “at risk” youth in the general population, decrease in crack cocaine markets, lower unemployment rates, higher wages, higher graduation rates, the recent influx of Latino immigrants, and of course, changes in police strength and arrest tactics (Leavitt, 2004; Sampson and Bean, 2006) According to Stemen (2007), a review of the research on several of these factors suggests that they offer more crime reduction benefits than prison expansion, at much less cost. Consider the following:

(1) a 10 percent increase in the size of a city’s *police force* was associated with an 11 percent lower violent crime rate and a 3 percent lower property crime rate (using county level data);

(2) a 10 percent decrease in the state’s *unemployment* rate corresponded with a 16 percent reduction in property crime, but had no effect on violent crime(state and county level data);

(3) a 10 percent increase in *real wages* was associated with a 13 percent lower index crime rate, a 12 percent lower property crime rate and a 25 percent lower crime rate at the national level; state level analyses identified a 16 percent lower

violent crime rate; and individual-level analyses reveal that a 10 percent increase in real wages is associated with a 10 percent decrease in crime participation; and

(4) a one year increase in the average *education* level of citizens resulted in a 1.7 percent lower index crime rate, while a 10 percent increase in graduation rates resulting in a 9.4 percent reduction in the index crime rate and a 5-10 percent reduction in arrest rates, through the increased wages associated with graduation (as summarized by Stemen, 2007: 9-12).

While the link between police strength (more police per capita), arrest levels (more arrests, especially for public order offenses) and subsequent reductions in crime is certainly consistent with deterrence-based strategies, few research studies have compared the crime reduction effects of both strategies. And perhaps more importantly, it seems clear from my brief review that research on the general deterrent effect of incarceration should always be examined in the broader context of non-deterrence based social policy changes that may achieve the greater crime reduction effects at a fraction of the cost.

4c. Probation

Despite the fact that probation is the sanction of choice in this country for offenders sentenced at the state and local level, there are very few quality research studies that have been conducted on the effectiveness of traditional probation. No systematic, evidence-based review of probation research has been conducted since the release of Martinson's now famous "nothing works" review (Lipton, Martinson, and Wilks, 1975). Similarly, we know very little about the

effectiveness of our parole system, apart from a few studies that highlight the high return to prison rates for different cohorts of parolees over the past three decades (see, e.g. National Research Council, 2007 for an overview); and there are few independent, external evaluations of the effectiveness of our federal probation system.

We do know that traditional probation and parole programs are not as effective today as they were thirty years ago; we just don't know why, because the necessary research has not been done. In 2005, only 59% of probationers and 45% of all parolees successfully completed their supervision terms; the failures were due to rearrest and/or a technical violation(Byrne, 2008). Any serious discussion of new strategies for addressing the prison reentry problem must begin with an examination of the reasons why these programs—the core of our correctional control strategy—are ineffective. As my colleague, Faye Taxman, has suggested, we spend too much time and evaluation effort focusing on small, boutique programs and not enough on traditional programming. While it certainly appears that our federal probation system is in need of additional resources to address the supervision and treatment needs of the new generation of federal offenders, support for these initiatives will not be found in evidence-based research reviews. There are two reasons for this: (1) the federal probation system has yet to fund large scale “best practice” initiatives; and (2) as a result,

the necessary research evaluating the effectiveness of these initiatives does not exist.

4e. Intermediate Sanctions

A wide range of programs can be examined under the general heading of intermediate sanctions, but systematic evidence-based reviews can only be identified for three sanction types at this time: intensive supervision, electronic monitoring programs, and boot camps. Unfortunately, we currently have little independent, external evaluation research evaluating the effectiveness of each of the three main alternative sanctions currently used to sentence Federal offenders(split sentences, federal home confinement, and Federal probation).Without this research, the federal system will have to rely on the results of evidence-based reviews of state-level initiatives targeting offender groups that may not be comparable to Federal offenders. Clearly, there is an immediate need to evaluate the effectiveness of current alternative sentencing strategies available in the Federal corrections system.

MacKenzie(2006) reviewed the research on the effectiveness of both intensive supervision and electronic monitoring programs. She identified 16 separate intensive supervision programs and 9 electronic monitoring programs that met her minimum review criteria. She reported that “a large body of research, including random assignment studies, consistently shows the failure of

ISP and EM to lower recidivism” (2006:323). Similarly, negative findings were reported in a recent evidence-based review by Wilson, MacKenzie, and Mitchell (2003 study; 2008 update), which was based on a review of 14 adult boot camp programs.

However, recent reanalysis of the research on intensive probation supervision suggests a more nuanced view of the effectiveness of each of this sanction. In those intensive supervision programs that placed an emphasis on treatment (in Massachusetts and California), significant reductions in recidivism were reported. In addition, many of the evaluations included in the original review did not include an implementation assessment; the one study that measured level of implementation found that effectiveness varied by level of implementation. These findings point to the need for reentry program evaluators to measure implementation as well as impact, while also underscoring the need for reentry program developers to design community supervision programs with significant treatment components.

4f. Prison Reentry

No systematic, evidence-based review of prison reentry programs has been completed to date. The lack of quality research on prison reentry was highlighted in the recent review of parole and the desistance process by the

National Research Council (2007). At this point, we have several interesting state-level reentry program models available for review (see Travis and Waul, 2003; Byrne, et. al, 2002 for an overview), along with the results of implementation reviews at selected reentry programs across the country. However, we know very little about Federal reentry initiatives at this point, which once again underscore the need for a Federal research and development effort in this area. For example, some Federal jurisdictions are now examining the efficacy of moving certain categories of drug offenders out of prison and into residential drug treatment; a similar strategy can be envisioned for other categories of Federal offenders, including sex offenders and white collar offenders. These new early release initiatives need to be fully implemented at demonstration sites and then independently evaluated.

In terms of specific intervention strategies, Mackenzie's recent evidence-based review of a wide range of prison and community-based cognitive behavioral interventions, drug treatment programs, vocational programs, and offender employment programs is certainly worthy of careful consideration by reentry program developers. According to MacKenzie:

“ As reentry programs are developed and implemented, there will be a temptation to focus on programs that increase opportunities for work, reunite families, and provide housing...However, my “what works” review suggests

that an emphasis on these opportunities for ties with the community will not be effective if there is not also a focus on individual-level transformation. The results from my review suggest that such opportunities should be preceded by programs focusing on changing the individual through cognitive change, education, or drug treatment”(MacKenzie, 2006:339). I would venture that whether the focus of offender reentry programs is on employment, housing, or the types of individual” transformation” just mentioned, we should not anticipate significant reductions in recidivism—and community-level crime, unless we also address the need to transform the “ high risk “communities in which offenders reside.

Concluding Comments: The limits of reform

In a recent article in *Criminology and Public Policy* (Byrne, 2008:263-274), I offered an assessment of “what works” in corrections, which I will summarize here. There is no reason to doubt the claim that rehabilitation is back in vogue in the United States; for many critics of current correctional policies, this rediscovery of individual offender rehabilitation is long overdue (Cullen, 2007; Jacobson, 2005, MacKenzie, 2006). However, it certainly appears that there is something fundamentally different about the current policy debate about the need to infuse corrections programs with a healthy dose of

rehabilitation. Individual offender rehabilitation is being presented to the public at large—and to federal and state policymakers in particular—as the single most effective crime control strategy currently available. The argument is simple, seductive, and not all that offender friendly: don't provide convicted offenders with treatment because it will *help* them as individuals. After all, better education, better mental and physical health, better personal relationships, better housing, and better job skills are all laudable features of individual offender transformation, but doesn't everyone deserve these opportunities for personal improvement? We need to provide rehabilitation to these individuals, not because it is the right thing to do, but rather because the provision of rehabilitation has been demonstrated to significantly reduce the likelihood of re-offending, which makes us--and our communities --safer. We are not doing it for them; we are doing it for ourselves and our communities.

Of course, some would argue that this represents one of the big lies of individual offender rehabilitation, because even significant reductions in the recidivism of the seven million offenders currently under correctional control in this country will not likely change the crime rates of most communities, because offenders do not live—in large numbers-- in *most* communities. They live in a small number of high crime/ poverty pocket neighborhoods in a handful of states. For example, California and Texas alone account for almost a quarter of

all offenders under correctional control in this country today; and within both states, offenders are clustered in a small number of high risk neighborhoods (Byrne, 2008). While crime rates have been steadily dropping across the country over the past thirty years, these high crime/ poverty pocket areas have not changed for the better; in fact, just the opposite is true (Sampson and Bean, 2006). Since residents of these communities do not have the social capital to adequately address the long-standing problems found in high risk, poverty pocket areas, the prospects for community change are bleak, with some arguing that *relocation* may be the only viable strategy at this time; even here, the research on the impact of large scale relocation experiments offers—at best—a mixed bag of positive and negative consequences (Sampson, Sharkey, and Raudenbush, 2008).. The fact that these poverty pocket, high crime areas are areas with very large concentrations of minority—mostly black—residents suggests that racial disparity continues to play a central role in the creation—and control—of this country’s crime problem(Sampson, 2004).

While much of the current debate about offender surveillance vs. offender treatment has centered on offender risk level and individual risk reduction, an equally important dimension of the problem has been drawing much less attention: community risk level and community risk reduction. As we consider how and where to target correctional resources, offender location—and

community context—represents a critical issue to consider, along with offender risk level, and the timing, location, and quality of service/treatment provision.

A number of jurisdictions are now considering the development of a concentrated community supervision strategy that incorporates the following three risk dimensions: (1) high risk offenders, (2) high risk locations, and (3) high risk times for re-offending (Pew Center on the States, 2009;Byrne,*in press*). The Maryland Proactive Community Supervision model that Faye Taxman has evaluated represents one of the best examples of how to operationally define this multi-dimensional view of risk (Taxman, 2008).

The “new” underlying assumption of rehabilitation advocates is that individuals convicted of both violent and property crimes should be given a “second chance” to transform their lives, but this must occur under the watchful eye of our surveillance-oriented corrections system. While the hoped for transformation process will likely vary from offender to offender, rehabilitation programs designed to “treat” individual problems in such areas as mental health, substance abuse, educational deficits, and lack of employment/vocational skills represent the core technology of offender change(Byrne and Pattavina, 2007). However, even the most ardent supporters of rehabilitation recognize that the criminal behavior of offenders is not likely to change dramatically unless we also address the underlying community context of criminal behavior (Mears and

Bhati, 2006; Kubrin, Squires, and Stewart, 2007). Based on the research evidence highlighted in several evidence-based reviews and meta-analyses conducted in recent years, the provision of “treatment” has been directly linked to statistically significant, but marginal reductions—about 10 percent—in criminal behavior (MacKenzie, 2006, Cullen, 2008).

I suspect that the general public—already wary of the prospects for individual offender change—will be expecting a bit more for their investment in rehabilitation than marginal reductions in offender recidivism. If we can not demonstrate the link between participation in the next generation of individual offender rehabilitation programs and community protection, then support for rehabilitation—tenuous at best—will quickly dissipate. While the general public appears to believe in the *possibility* of individual offender change, I think you will find that most of us are skeptical about the *probability* of individual offender change, particularly among individuals with serious substance abuse and/or mental health problems.

This leads to a final, broader question: why do we criminalize certain behaviors—drug use in particular—in the first place? The answer to this question is unclear to many, which makes it difficult to understand our continued reliance on mandatory prison terms for drug offenders. If our goal is to change the behavior of federal offenders with drug problems, then it seems

that the federal system will need to move away from deterrence-based approaches and incorporate the treatment-driven strategies now being used at the state and local level (e.g. drug courts). In developing these strategies, it is critical to consider –and address—the underlying community context in which this behavior(drug use) occurs. Expanding the availability of treatment for offenders in our Federal probation and Federal prison system is a necessary first step, but individual offender rehabilitation programs represent only a partial answer to a complex problem.

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