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Back-end Sentencing A practice in search of a rationale

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THE PHENOMENON OF BACK-END SENTENCING—THE PRACTICE OF SENDing people back to prison for violations of the terms of their parole supervision—has grown significantly over recent years and now occupies a prominent role in the new realities of incarceration and prisoner reentry (Travis and Christiansen 2006; Travis 2005; Travis and Lawrence, 2002a). In 1980, approximately 27,000 people were sent to back to prison for violating the terms of their parole. By 2000, that number had grown to over 200,000. America now sends more people to prison for parole violations than were sent to prison in 1980 for any reason, including commitments on new convictions and parole violations. The growth in back-end sentencing has far outstripped the overall growth in incarceration in America. The per capita rate of incarceration increased slightly more than fourfold between 1973 and 2000; over the same period of time, the growth in incarcerations for parole violations grew sevenfold. Another perspective on back-end sentencing illustrates the impact of the robust practice of parole revocation on America's prisons. In 1980, 18 percent of all prison admissions were individuals who were being returned on parole violations; by 2000, that number had increased to 34 percent. The new reality that one in three people coming in the front door of our prisons had relatively recently left through the back door underscores the importance of the efforts now under way to rethink the efficacy and purposes of parole supervision (Petersilia, 2003).

THE NEXUS BETWEEN PAROLE REVOCATION AND SENTENCING

Some may criticize the use of the word "sentencing" to describe the revocation of parole for violation of the conditions of supervision. Sentencing, they would say, is the act of imposing sanctions for criminal behavior, proven in a court following a trial or plea of guilty. What happens in the parole violation context, the critique might continue, is merely the continuing application of that original sentence. In other words, the process of adjudicating the violation of terms of parole release, including a return to prison in some cases, is part of the original sentence. The defendant knew—and everyone else knew—at the time of sentence that following the release from prison, he would be subjected to a term of supervision, with conditions, and failure to abide by those conditions could result in a removal from the community and deprivation of liberty.

Certainly it is unassailable to assert that the process of adjudicating parole violations is recognized as flowing from the original conviction and sentence. Stated differently, the only reason that the former prisoner is subjected to this process is because of the original conviction and sentence. But the conceptual and operational similarities between the two systems are, to me, so compelling that I see every reason—and believe there should be no hesitation—to call the process of adjudicating parole violations a form of sentencing.

In both systems, we use the enforcement agencies of the state (police or parole) to detect violations of rules (criminal laws or conditions of supervision), arrest and detain those suspected of those infractions (defendants or parole violators), bring cases and suspects before a neutral adjudicative entity (judge or hearing officer), provide an opportunity for determinations of fact through adversarial process (with some distinctions between the systems), determine guilt (with differing levels of proof) and impose sanctions for violations of those rules, up to and including the deprivation of liberty.

In the case of the process of adjudicating parole violations and revoking parolee liberty, if it walks like a duck, looks like a duck, and quacks like a duck, we should call it what it is: a system of sentencing.

ASSESSING THE LACK OF ATTENTION TO BACK-END SENTENCING

This analysis raises an obvious question, namely, why has the sentencing framework not been applied to the practice of parole revocations? The answer to this question resonates with a larger concern regarding the new focus on prisoner reentry. Those of us who have been engaged in research, policy analysis, and advocacy on reentry issues are often asked, "Why has the nation paid so little attention to the realities of reentry—with over 630,000 people leaving state and federal prison last year—while paying so much attention to other issues of sentencing reform, prison expansion, parole abolition, and related justice policy concerns?"

There may be no satisfactory answer to this question. We can speculate that the sentencing debates of the last generation—regarding mandatory minimums, just desserts, truth in sentencing, rehabilitation versus retribution, selective incapacitation, life without parole, the death penalty, determinate versus indeterminate sentencing—were so engrossing, so hard-fought, so all-consuming that there was little oxygen left in the air of our discourse on justice to consider the deep personal, social, political, and jurisprudential consequences of our decisions to significantly expand the use of incarceration as our predominant response to criminal behavior.

We can also note our language of sentencing jurisprudence has not given much weight to the workings of the back end of our justice system. For example, we have been taught to use the phrases "civil disabilities" or "collateral consequences" to refer to the sanctions that legislatures place on individuals convicted of felonies. This regime of diminished liberty has become quite extensive—millions of people in America cannot vote, drive a vehicle, receive food stamps or welfare payments, return to their homes in public housing, receive student loans, reunite with their children, or even remain in this country because our legislatures have determined to add new sanctions to their felony convictions (Travis, 2002). I prefer to call these enactments what they are—a form of punishment—and, because we have not paid

attention to their role in our system of sentencing, have called them "invisible punishment" (Travis, 2002). So, too, we have allowed the system of back-end sentencing to become invisible, hidden from public view, difficult to discern in part because we do not use the language of punishment, criminal sanctions, and sentencing to describe these phenomena.

One could also argue that, as a consequence of our demonization of criminals and our deeper impulse to create distinctions between "us" and "them," we neglected to consider the individuals affected by our justice system, and therefore have lost sight of the fact that we had more than quadrupled the rate of incarceration in this country, with all the ripple effects upon prisoners, their families, and their communities. We put them not only out of sight—in faraway prisons—but we put them out of mind.

Just as we neglected, for whatever reason, to consider "the iron law of imprisonment" (Travis, 2005)—the reality that, with the rare exceptions of people who die in prison, all people incarcerated return to free society—so too we neglected to pay sufficient attention to the profound changes in the way that the parole system was managed, how it responded to the same get-tough impulses affecting every other aspect of our criminal justice policy, and the relationship between parole revocations and the growth of our prison system. For years, Joan Petersilia was perhaps the lone scholar conducting serious research on this topic. Now we can say that she has been joined by dozens of others, but we have a lot of lost ground to recover.

IMAGINING THE APPLICATION OF MODERN SENTENCING DEBATES TO BACK-END SENTENCING

Had we kept the back-end of our criminal justice system at the front of our sentencing discussions over the past generation—had we considered the parole violation process a form of sentencing—perhaps we would have systematically subjected this form of sentencing to the robust and sometimes raucous debates of this era. It is an instructive exercise to subject the practice of back-end sentencing to the analytical

frameworks of three sentencing debates that dominated the American discourse on punishment policy over the past generation.

First, we should apply the fundamental justice principle that "like cases should be treated alike" to the practice of back-end sentencing. This principle animated a sustained critique of the system of indeterminate sentencing, a critique which found political acceptance in California's adoption of a determinate sentencing system in 1976. How could a system of sentencing, it was argued, be considered just if two defendants, facing similar charges and with similar backgrounds and criminal records, receive significantly different sentences, depending on the judge imposing the sentence (Frankel, 1973)? A parallel critique was leveled at the system of parole release. Critics pointed out that the decision to release a prisoner on parole varied according to the composition of the parole board, the state of overcrowding of the prisons, or other extraneous factors, thereby violating the fundamental principle that like cases be treated alike. This principle also energized a critique of our sentencing practices as being racially discriminatory. Research showing that defendants of color received harsher sentences—and were less likely to be released on parole—fueled the attacks on indeterminate sentencing.

If the equal treatment principle were applied to back-end sentencing, we would first want to know empirically whether the current system treats like cases alike. We would collect data, on a regular basis, showing the dispositions of parole violations according to the characteristics of parolees, the severity of the underlying offense, and the prior record of the parolee, including the record of previous parole violations. To complete the analogy, we can assume, *arguendo,* that this analysis would show variations in sanctions that could not be easily reconciled with the justice mandate of the equal treatment principle. This would appear to be a reasonable assumption, based on research conducted in California and elsewhere (Travis and Lawrence, 2002b), but the troubling point is that we simply do not know the answer to this question today.

Assuming we find unequal treatment in back-end sanctions, we would then borrow a page from the history of front-end sentenc-

ing reform. We would ask what steps should be taken to reduce the disparities. The legislature could intervene to establish criteria for parole violation and revocations, as has been the case in sentencing policy around the country. Or the legislature could empower sentencing commissions to create sentencing grids for sanctions for parole violations, with allowances for upward and downward departures from those guidelines. Or the executive branch, which oversees most parole systems, could develop these guidelines, following a period of notice and comment consistent with administrative rulemaking. Or, in more extreme cases, the judicial branch might find that some back-end sanctions violate constitutional or statutory protections and require or impose corrective measures. The basic point is that the branches of government responsible for overseeing the exercise of the profound power to deprive individuals of their liberty should step in to ensure that the system itself operates in ways consistent with notions of equal treatment.

Second, we should consider the application of "just desserts" principles to the practices of back-end sentencing. Under these principles, a criminal sanction is deemed appropriate, or legitimate, if the severity of the sanction reaffirms the social norms underlying the creation of the crime itself (von Hirsch, 1976). In other words, the "just desserts" principle is violated if a murderer is punished less severely than a burglar. The legislative decision to designate murder as a more severe crime than burglary is devalued if the criminal justice system is allowed to punish the former more leniently than the latter. Application of this principle to justice reform efforts over the past 30 years has resulted in greater degrees of legislative specification of criminal sentences, such as mandatory minimums, so that the judicial branch had greater difficulty meting out sentences that could be seen as diminishing the severity of the offense.

If we were to apply this principle to back-end sentencing, we would, once again, begin by conducting some empirical research to determine the sanctions applied to different violations of social norms. In carrying out this exercise, we would quickly confront one

of the underlying tensions in this policy arena: the blurred distinction between parole violations for technical offenses and those for new crimes. In some states we would find, as Sarah Lawrence and I did in our analysis of parole revocations in California, that prison sentences imposed for relatively minor parole violations, such as failed drug tests, are not substantially shorter than sentences imposed for parole violations where the underlying misconduct was recorded as murder, rape, and assault (Travis and Lawrence, 2002b).

Before addressing the question of the proper treatment of parole violations for new crimes, we should focus attention on the "just desserts" question regarding parole revocations for technical violations. Perhaps it is appropriate to send someone back to prison for four months for a failed drug test, as Sarah Lawrence and I found in California. An argument supporting this deprivation of liberty would be stronger if this sanction were reserved for those determined to be recalcitrant, who had consistently engaged in drug use after trying a series of progressively restrictive alternatives. This policy would be considered more legitimate if there were research demonstrating that this new prison sentence was positively correlated with reductions in criminal behavior and drug use. This policy would generate some well-deserved skepticism, but the larger policy point that we should engage in a debate, backed up by empirical research and reflecting sound sentencing principles, before we authorize the exercise of state power as is now the case in sanctions for parole violations.

Third, we should apply the principles of "truth-in-sentencing" to the system of back-end sentencing (Ditton and Wilson, 1999). One can view the "truth-in-sentencing" movement that swept the country in the late 1980s as simply a stalking horse for the get-tough-on-crime agenda of the conservative wing of the crime policy debates. Setting this critique aside, however, there is an important kernel in this rhetoric that we should cultivate. In language borrowed from earlier critiques of indeterminate sentencing, proponents of "truth-in-sentencing" argued for greater transparency in sentencing practices, greater certainty in outcomes, and public accountability for matching rhetoric with prac-

tice. Public confidence in our system of justice is undermined, the argument went, whenever the system operated in the dark and decisions were not subject to public scrutiny.

As was noted earlier, however, the system of back-end sentencing is hidden from public view. Who knows the rules of this particular game? Do our legislatures know the punishments meted out for various parole violations? Is a parolee told that certain infractions will result in designated punishments, so that he can modify his behavior accordingly and, if sanctioned, cannot say, "no one told me this might happen." The establishment of a sentencing grid—whether by the legislature, a sentencing commission, or the executive branch—would at least provide for public accountability and fair notice to parolees, their families and their advocates.

The application of "truth-in-sentencing" principles to back-end sentencing would also expose, for public debate, the practice of sending parolees back to prison for new crimes. This practice poses serious issues in terms of the underlying fairness of our criminal justice system. On one extreme, there are cases, such as those that Sarah Lawrence and I found in California, in which the return to prison on a parole violation appeared to be inconsistent with the seriousness of the underlying behavior. Our analysis highlighted cases involving murder, rape, and robbery that were treated as parole violations and resulted in returns to prison, not on new convictions for those offenses, but on the violation of parole. California is certainly not alone in this practice—nearly a third of all returns to prison for parole violations in 2000 were for new crimes. But the California analysis highlights the problems with this aspect of back-end sentencing. The murder and rape cases in our analysis received an average of several months in prison, far less than they would have received had they been prosecuted and convicted as new arrests.

What is remarkable has been the lack of public outcry about these cases. There has been no agitation by crime victims groups, demanding that these crimes be taken seriously. Nor have the survivors of these rapes and families of the homicide victims picketed the offices of crimi-

nal justice leaders, asking how they could devalue the lives that had been damaged or lost. The hidden world of back-end sentencing has allowed the justice system to escape accountability—an ironic result in an era when public outrage, media excess, and political attention have brought every other aspect of justice policy into the blinding glare of public scrutiny.

Certainly there are different policy solutions to the dilemma of posed by technical versus new crime parole violations. I have argued that the two should be decoupled, and new crimes should be prosecuted as new crimes, with possible penalty enhancements to recognize that repeated offenses should be treated more severely (Travis, 2005). But the larger point is that we should have this debate in public, before legislative committees, sentencing commissions, or rulemaking entities such as parole boards, so that our system of justice is firmly rooted in a legitimate political process, rather than carried out in the back rooms of our prisons and parole agencies.

BACK TO BASICS: RECONSIDERING THE GOAL OF SUPERVISION

Development of a jurisprudential rationale for back-end sentencing will require reconsideration of the nature of parole supervision itself. Historically, courts had relied on several different theories to justify the imposition of conditions upon the liberty of individuals released from prison, including the ultimate revocation of that liberty. As set forth by Fisher, these rationales all envision a strong-state, weak-individual relationship between the parole system and the parolee (Fisher, 1974). In one view of parole, the prisoner is released back into the community as an act of grace by the state, meaning that the liberty was a privilege, not a right. In another theory, the terms of supervision are viewed as a contract between the state and the formerly incarcerated individual, such that violation of the contract carries the implicit understanding that the liberty itself may be revoked. In a third theory of parole supervision, the formerly incarcerated individual is considered a "quasi-prisoner," not a free man, still subject to the control of the state, so

that a return to prison is simply another form of regulation of custody. Finally, parole is sometimes justified as a form of *parens patriae*, which holds that the parole board is operating in the best of intentions for the former prisoner, namely to accomplish successful rehabilitation and reintegration. In this view, a return to prison is legitimate because the parolee is not acting in his own best interests and the state, as watchful guardian, is entitled to remove him to prison.

These theories have been undermined by a string of judicial decisions, including the landmark case *Morrissey v. Brewer* (408 U.S. 417, 1972), which have established minimum procedural requirements for parole revocations, but the conceptual confusion remains. More recently, legal theorists have developed the argument that parole supervision has become a form of state regulation of deviant subgroups in our society, with significant racially disparate consequences (Feeley and Simon, 1992). In this view, the goal of parole supervision is state control over deviant groups, and the methods of parole supervision have shifted to accommodate the control mission to include more surveillance, confinement, and revocation of liberty.

If, in the modern era, we consider the purpose of parole supervision to be maintaining control over a high-risk population, then the justification for the revocation of parole will reflect theories of risk management. Revocation would be deemed appropriate in cases where the parolee was deemed high risk, and the misconduct giving rise to the parole violation was determined to be a predictor of more serious misconduct. In this view, a revocation of parole for a failed drug test would not be justified on the basis of theories that parole is a matter of grace, a contract, or form of continued custody. Rather, the revocation would be based on an assessment of the individual prisoner's high-risk status, and an assertion that, for this particular parolee, a failed drug test likely means that he will commit a more serious infraction in the future. In this view, the role of the court or judicial officer, in considering a recommendation for the revocation of parole, is to determine whether the parole authorities had developed an appropriate assessment of risk for the individual parolee.

Although this is the justification frequently cited for our system of parole revocations—that the parole agencies are very efficient at detecting misconduct that could lead to serious public safety violations—there is little research to back up the claim. On the contrary, a provocative body of literature is emerging that undermines the basic argument that placing former prisoner under supervision is an effective way to enhance public safety. A report by the Urban Institute found supervision itself does not reduce crime (Solomon, Kachnowski, and Bhati, 2005). Those prisoners released to parole supervision were no less likely to be rearrested than those released with no supervision. An earlier study by the Rand Corporation found that intensive supervision does not reduce crime (Petersilia and Turner, 1993). Before we could justify a system of back-end sentencing as being necessary to manage the risks posed by parolees, we should first develop supervision and revocation policies that are proven, in rigorous research, to be effective at reducing crime. This would require, in turn, a fundamental rethinking of our approach to parole. Once the general policies are proven effective, we would then require that supervisory agents have the research-based tools to individualize the application of those policies. In other words, before the liberty of a parolee is taken away, the state should be required to demonstrate that the parole agent has 1) accurately assessed the parolee's overall risk, using a scientifically valid instrument, and 2) empirically determined that the behavior giving rise to the revocation proceedings is a likely precursor to new criminal behavior.

In an alternative view, one I have advocated elsewhere (Travis, 2005), we could understand the parole system as society's mechanism for supporting the process of transition of returning prisoners from a condition of incarceration to a state of freedom, with the ultimate twin goals of reducing recidivism and achieving reintegration. In this view, a successful parole system is one that reduces failure (for example, the return to crime, or relapse to drug or alcohol abuse) and promotes positive reconnection to family, work, peer networks, and community. Revocation of parole would be deemed appropriate in only two instances. First, if the parolee commits another crime, this failure would result in a new prose-

cution for that crime, with the possibility of enhanced penalties because the new crime was committed during a period of supervision. Second, if a parolee is persistently unwilling to engage in the activities necessary for successful reintegration (for example, drug treatment, or mental health counseling), then his parole could be revoked for a short period of time to reinforce the legitimacy and seriousness of the supervisory process. This is the rationale used in drug treatment courts to justify the deprivation of liberty for short periods of time for offenders under supervision of a drug court who do not comply with conditions of drug treatment.

Again, we should require the research community to provide the basis for this rationale for parole and the revocation of parole through back-end sentencing. In this view, the deprivation of liberty for failure to meet the conditions of parole (other than avoidance of new crimes) would be a rare event, exercised only when necessary to ensure compliance with those conditions of supervision demonstrated in rigorous research to promote the goals of public safety and prisoner reintegration. As previously mentioned, the literature on drug courts suggests that this approach might be effective (Harrell and Roman, 1999), but there has be no similar study on the parolee population which, by definition, is more diverse and shares the experience of reentry from prison that is not common to the drug court population.

We thus come full circle, reaffirming the value of considering back-end sentencing as a form of sentencing. As traditionally formulated, criminal sentencing is intended to accomplish a number of societal goals, including retribution, rehabilitation, deterrence, and incapacitation. When we consider the specific form of sentencing we practice under the guise of parole revocation, we need to determine whether his form of sentencing is intended to express moral condemnation, rehabilitate the parolee, deter him and others from misconduct, or simply put him back in prison to avoid new crimes.

A CHALLENGE TO LEGITIMACY

In an era marked by historically high rates of incarceration, we have also constructed a system of back-end sentencing that lacks a firm

jurisprudential rationale. This failure to provide a well-reasoned basis for the deprivation of liberty of hundreds of thousands of individuals a year poses a risk of undermining the legitimacy of the criminal justice process, indeed the rule of law, in the small number of communities that are now experiencing record high rates of incarceration, reentry, and removal. If viewed as a form of sentencing, the practice of parole revocation does not pass muster under various analytical frameworks typically applied to sentencing systems. The development of a jurisprudence of back-end sentencing must begin with an understanding of the purposes of parole supervision itself, and then square the purpose of parole with the traditional justifications for sentencing. If academics, legal scholars, and practitioners can launch a robust debate on the jurisprudence of back-end sentencing, then there is hope that we can shed some light on a very dark corner of our criminal justice policy: the American practice of routinely sending hundreds of people a day back to prison.

NOTES

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