11-4-2006

Symposium on Back-End Sentencing and Parole Reform. Keynote Address at Stanford Law School on November 4, 2006 in Stanford, CT.

Jeremy Travis
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Dear colleagues:

I am honored to be invited to join this Symposium, on both a professional and a personal level. First, on a personal level, it is very gratifying to be speaking at a conference organized by Elizabeth McBride and Joan Petersilia (admittedly with the help of many others). Elizabeth was one of my closest colleagues at the Urban Institute and the book on prisoner reentry that resulted from my four years of work at the Institute in many ways reflects her intellectual, editorial and organizational skills. Joan Petersilia has been my guide and inspiration on the reentry journey, starting almost a decade ago. So to be in the same room with her, continuing our conversation on parole and reentry, is a special treat.

On a professional level, I am thrilled beyond words that Stanford Law School has launched this examination of "back-end sentencing." I coined this phrase several years ago, hoping that the provocative use of the word "sentencing" to describe the processes of arrest, adjudication, sanctioning and imprisonment for parole violators would challenge scholars and practitioners – particularly those in the law professions – to subject these processes to the same scrutiny that is applied to all other forms of sentencing. So I count it as a singular honor that a law school with Stanford's reputation has convened this impressive group to test the power and limits of the sentencing framework as applied to parole practices.

Certainly the timing of this symposium is right. Today, about one third of all admissions to our state prisons are individuals being returned on parole violations. About twenty percent of all prisoners held in this state's prisons are there on parole violations. The "reentry movement" has focused new policy attention on the large number of prisoners returning home, and the need for better systems to support their reintegration. Here in California, the Valdivia v. Schwarzenegger litigation is bringing the state's supervision practices under new scrutiny. So I hope that, as one apparently says in California, that this discussion catches the perfect wave.

We should begin by defining our terms. I recognize that some may criticize the use of the word "sentencing" in the context of parole 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 continues, 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.

I grant the point 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 deprivation of liberty.

To use a colloquial phrase, the parole violation process walks like a duck, looks like a duck, and quacks like a duck, so let's call it a system of sentencing.

What are the benefits and risks of using the sentencing construct in this way, and why has this construct not been applied to date?

The answer to the second question, I think, is part and parcel of a related question that lies at the core of the work that Joan, Elizabeth and I have done on prisoner reentry, namely, "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?"

I have no satisfactory answer to that second question. We can speculate that the sentencing debates of the last generation – regarding mandatory minimums, just desserts, truth in sentencing, rehabilitation vs. retribution, selective incapacitation, life without parole, the death penalty, determinate vs. 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. 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." 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 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 far-away prisons – but we put them out of mind.

Just as we neglected, for whatever reason, to consider what I have called "the iron law of imprisonment" – with the rare exceptions of people who die in prison, they all come back – 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.

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 – we would have systematically subjected this form of sentencing to the robust and sometimes raucous debates of this era. Allow me to suggest three sentencing constructs that should be applied to the practice of back-end sentencing.

First, I think we should apply the fundamental justice principle that "like cases should be treated alike." 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? 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, I will assume for argument purposes that this analysis would show variations in sanctions that could not be easily reconciled with the justice mandate of the equal treatment principle. I believe this is a reasonable assumption, based on research conducted here in California and elsewhere, 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 sentencing 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 rule-making. 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, I believe we should apply "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. 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 thirty 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, namely 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 when we published 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.

In a moment I will offer some thoughts on how to handle parole violations for new crimes, so would now like to 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.

I would personally be very skeptical about such a policy. But my personal view is less important than 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, I believe we should apply the principles of "truth-in-sentencing" to the system of back-end sentencing. 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 practice. 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.

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, can't 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. I am deeply troubled by this practice. As mentioned earlier, in our analysis of parole revocations in California, Sarah Lawrence and I found cases involving murder, rape and robbery that were treated as parole violations and resulted in returns to prison. 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 highlighted, for me, the problems with this aspect of back-end sentencing. The murder cases in our analysis received an average of x months in prison, the rape cases y months.

Where was the public outcry about these cases? Where were the victims groups, demanding that these crimes be taken seriously? Where were the survivors of these rapes and families of the homicide victims, picketing the offices of criminal justice leaders wanting to know 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.

Again, I have my preferred solution to the dilemma of technical vs. new crime parole violations. I argue in my book 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. But the larger point is that we should have this debate in public, before

legislative committees, sentencing commissions, or rule-making 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.

In closing, let me applaud the Criminal Justice Center of Stanford Law School for sponsoring this important and timely discussion. I hope that this prestigious law school can, through its faculty, students and publications, begin a movement to engage the worlds of legal scholarship and legal practice in a robust debate on the jurisprudence of back-end sentencing. Others are taking up the challenge – journalists, legislative committees, sentencing commissions, parole boards, advocacy groups – but we need legal scholars and practitioners to provide the theoretical frameworks that will help us find the way out of a very dark forest.

Thank you.