
Commentaries on:
Sentencing and Corrections in the 21st Century:
Setting the Stage for the Future

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What Sentencing Policies and the Correctional System Should Look Like in 2030

There are two issues I would like to raise: 1) enhancing the rationality of sentencing policies, especially with regard to mandatory minimums and the enforcement of drug laws; and 2) reintroducing into the correctional system the concern for reintegrating offenders into the community.

Sentencing policies: Enhance rationality

There is considerable tension in this country today between the political objectives of criminal justice system policies and the concern that these policies be more rationally based—on some appropriate weighting of crime control and retribution. The policies are set largely by legislatures, which have the most intense interest in obtaining political benefit from them. If these policies were based on more rational considerations, they might, for example, be developed by a diverse body of wise and caring people who constitute an ideal sentencing commission that would establish nonmandatory sentencing guidelines for judges. Whoever develops policy must be adequately concerned about the escalating costs of incarceration and about limiting the intrusion of the criminal justice system into people’s lives. For better or worse, the political impulse to escalate the toughness of sentences seems to be winning most of the battles, as recent sentencing legislation (particularly laws establishing mandatory minimums and their counterparts in three-strikes laws) and evolving sentencing guidelines make evident.

Perhaps the drug war is the most distressing aspect of the political resolution of this tension. The dominant strategy directed at the admittedly grave problem of substance abuse (and its relation to other criminal involvement) is incarceration. Even though there is now widespread agreement that the drug war is not “winnable,” more than 60 percent of Federal prisoners and more than 20 percent of the Nation’s prisoners are in prison on a drug charge. This is part of the reason the State incarceration rate has increased tenfold since 1980. What is particularly distressing is how many of these people were put behind bars as a result of mandatory-minimum sentencing laws, which legislators enact to show how much they abhor drug abuse and which prosecutors pursue for similar reasons and also, at least in part, because of the budgetary gains prosecutors make through asset forfeiture.

Exposures of the ineffectiveness of these laws as well as the pleas of virtually the entire judiciary have been totally ignored. The striking irony is that strong evidence suggests that harsh sentences for drug offending have little effect on the volume of drug transactions. This is largely because

the volume of transactions is most strongly affected by the level of demand, and the market recruits new sellers to replace those incarcerated or deterred by the threat of sanctions. Even if policy were more rationally based, there remains an inherent tension between the retributive and the crime-control objectives of sentencing. This is best expressed by way of example. When faced with a robber who is a drug addict and who steals to support his habit because he is also economically deprived, the retributivist would find the addiction a mitigating factor because of the offender's diminished culpability and the crime controller would find it an aggravating factor because of the higher likelihood of recidivism.

Correctional policies: Emphasize prisoner reintegration

The major issue here is the virtual disappearance in this country of any concern for the reintegration of offenders into the community—the quaint notion of rehabilitation. The decline of rehabilitation was in large part the result of a variety of randomized experiments with particular rehabilitation “technologies” (that is, particular approaches intended to reform the individuals in the experiment). Not surprisingly, none of these technologies was found to be significantly better than the status quo ante, largely because people were selected to participate without adequate consideration of the particular needs and amenability of the offender or of the skills of the treatment therapist. This situation stands in stark contrast to the normal treatment mode, in which the treater is armed with a diverse array of treatments and uses his or her professional judgment to try one and then another until the one that works best is found. The field of medicine, where optimum treatments are much more often known, is an example.

This problem is exacerbated by the fact that more than 500,000 prisoners are released back to the community each year after incarceration. Addressing their reentry needs will entail a mixture in prison of development of job skills and promotion of prosocial behavior. Once prisoners are released, they should be supervised in the community by support staff, who can use information about services available locally to help with their individual needs. In addition, they need enhanced surveillance by both police and parole officers (or their equivalent in places that have eliminated parole). Such surveillance should use a mix of advanced information (such as a geographic information system to help police keep track of offenders' residences) and geographic monitoring technology (like a global positioning system (GPS) to keep track of their whereabouts at all times). If an offender violates the conditions of release (including committing technical violations as well as new crimes), the justice system response should be graduated, so that excessive incarceration can be avoided, but it should also make clear that such violations will result in further punishment.

What Will Happen if We Maintain the Current System

I find it difficult to conceive of maintaining all our current sentencing policies for the next 30 years. Three-strikes laws will lead to further growth of the geriatric sector of the prison population, with consequent cost increases but no corresponding decline in crime. One result will be a reduction in funds available for other programs, typically higher education, in States that have tax caps. Mandatory-minimum laws will mean prisons will be filled increasingly with people who have committed minor crimes (the constraint of these laws is binding only when the judge would otherwise choose a sentence below the mandatory minimum). Moreover, the

number of people imprisoned for drug offenses will grow in proportion to the intensity with which we pursue policies based primarily on sentences to incarceration for these offenses, especially given the very long sentences mandated by most sentencing guidelines.

With respect to the corrections system, as the number of released offenders grows and there is no meaningful rehabilitation, there could well be a “natural growth” in offending. That might be a direct effect of the criminalization of people through their prison experience, the diminution of the deterrent effect of the stigma of prison as incarceration becomes widespread among their peers, and the increasing extension of prison-based networks into the community.

What Can Be Done to Make the System Better

To make sentencing policy more rational and to address prisoner reintegration, I propose the following:

- Sunset all mandatory-minimum and three-strikes sentencing laws. I consider outright repeal of these laws to be politically unlikely because it would be seen as “soft” on the crimes addressed, whereas sunseting is typically an act of good government because it permits the abandonment of outmoded actions while preserving the opportunity to reenact those laws that are still desired.
- Devote more attention to developing medical approaches to substance abuse involving treatment and similar methods and minimize the use of incarceration as the dominant way to handle this problem.
- Develop model programs for transitioning individuals from prison to community, with program development beginning in prison and coordinated with people and organizations in the community who will provide oversight and control.* Supervision should use contemporary information systems, including GPS-based tracking systems, to ensure that the whereabouts of very high-risk parolees are known at all times and an alarm is sent when they enter prohibited places.

* Since this writing, and partly in response to concern expressed by the Attorney General, the U.S. Department of Justice launched an initiative to address the issue of prisoner reentry. The Department is sponsoring pilot programs in eight jurisdictions nationwide that will develop better risk management of released prisoners via enhanced surveillance. Also under the Department’s sponsorship, pilot reentry courts based on the drug court model are being established in nine jurisdictions. They will tap the courts’ authority to use sanctions and incentives to help released offenders remain crime free.

Commentary by Tony Fabelo, Director Texas Criminal Justice Policy Council Austin, Texas

Three emerging technologies—electronic tracking and location systems, pharmacological treatment, and genetic or neurobiologic risk assessment—will change the face of sentencing and corrections by 2030. Corrections will become “technocorrections.” A correctional establishment that pursues all of the opportunities offered by the new technologies to reduce the costs of supervising criminal offenders and minimize the risk they pose to society will define the field of technocorrections. This is the premise on which the answers to the questions about the future of corrections are based.

What Should Sentencing Policies and Corrections Look Like in 2030?

The new technologies should be integrated into corrections in a manner that increases treatment flexibility, reduces social regimentation, and restores the offender to a productive relationship with society while providing more efficient public safety. This view contrasts with the scenario of an extensive government-technocontrolled surveillance, incapacitation, and preventive incarceration apparatus.

Ideally, by 2030, application of the new technologies will allow sentencing officials more flexibility in tailoring sentencing options to the needs of individuals and communities. Technocorrections will provide sentencing officials with effective techniques to ensure public safety with minimal use of incarceration. For example, drug-addicted offenders might be prescribed “wonder drugs” that block their addiction cravings. To guarantee the success of the blocking agent, these drugs could be delivered by means of implants. That means these offenders could be more successfully treated in the community, so the need for their incarceration would be reduced. After appropriate punishment, mechanisms could be implanted in sex offenders and their movement monitored in the community as an attempt to deal with their sex-offending propensities by means of community-based treatment.

Assuming this technology is effective, the requirement for incarceration may be reduced if recidivism is reduced. Incarceration would be reserved for hardcore, violent offenders who do not deserve the flexible and more humane approach of the new technocorrectional options and for offenders who manage to sabotage these options. Incarceration itself also may radically change to encompass a more humane environment. This too would reduce costs. By using electronic perimeter security and surveillance, it would be possible to design prisons “without walls.” A prison experience that resembles free society may perhaps be a more effective incarceration environment, encouraging prosocial adaptations that will be useful in the community.

Genetic and neurobiologic risk assessment techniques may help health officials—*not* law enforcement officials—design interventions for offenders found to have propensities for

behaviors that increase their risk of committing crime. This would be no different from current preventive medicine that applies to individuals with a genetic propensity for some forms of cancer or other diseases. Such preventive interventions for offenders would not be administered by the state law enforcement apparatus, although the state would encourage individuals, through insurance coverage, to seek treatment in the private healthcare market. Information about the offender would be kept confidential and could not be used as evidence for either defending or prosecuting a person accused of crime.

If the Present Course Continues, What Will Corrections Look Like in 2030?

The application of these technologies to corrections will take place in a free market basically driven by profits and the need to seek political advantage. Moreover, the economic and political free markets are dominated by the imperative of achieving “market advantage,” of being the first to benefit from the development of a new product by either market. That places society at a disadvantage, because technologies change faster than the ability of society to manage them, to understand all their interactive applications and impacts, and to debate their ethical implications.

The entrepreneur who develops a new technocorrections product just wants to make money by selling it. For the policymaker who becomes the main sponsor of the product in the political marketplace, the political benefits—in the form of recognition, of doing something good for constituents, of reelection, or of seeking higher office—will determine proposals on how to use the product. Policymakers would have to determine which would gain more political advantage for them: proposing that the new product be used more for control and incapacitation or for rehabilitation.

The face of corrections is about to change because of new technologies. Given the current tough-on-crime political culture that dominates the development of correctional policy, it may be more likely that policymakers will apply technocorrections in more regimented and potentially intrusive ways, rather than for rehabilitative and restoring interventions. The emotional atmosphere and intensive media coverage of crime policy discussions also may offer policymakers few incentives to examine the long-term implications for democracy of the way they promote technocorrections. As control by the state became less costly and more effective, would less attention be paid to use of new technologies to help institutions of informal social control manage offenders in the community or to enhance the effectiveness of rehabilitation policies? Would there be greater incentives to define a broader set of deviant, unpopular, or just unconventional behaviors as criminal? If more people were labeled “criminal,” would the apparatus of technological control continue to expand, invisibly intruding into the privacy of individuals? Would this apparatus furnish the state with more tools and opportunities to centralize its powers and abuse them if it ever became corrupt enough to do so?

What Should Be Done to Move Toward Sound Policy?

In our democracy, the debate over how best to balance the use of correctional techniques to maintain public safety against the need to preserve essential freedoms must take on a new

urgency as technocorrections develop. In the free economic and political marketplace, open ethical discourse is the only venue where the values framework necessary to guide the application of new technologies to corrections can develop. We can shape the way these technologies will be used in corrections if we start today to make explicit the “value options” available for deciding how to apply these technologies.

Policy should attempt to generate—through research, symposiums with private industry and policymakers, and contact with relevant interest groups—the understanding needed to arrive at a consensus on a values framework for promoting technocorrections. This values framework should be widely circulated to generate the ethical awareness needed at the policymaking level to influence the direction of technocorrections. The initial steps would be as follow:

- Fund an initiative to identify emerging technologies, indicate how they may be applied to corrections, and develop scenarios for applying them, with timelines for their potential market viability.
- Conduct private-public symposiums to develop “desirable scenarios” of how best to apply these technologies, then identify the values underlying each scenario in relation to the potential threats posed by the technologies if they are misapplied.
- Develop models that State policymakers can consider in applying the new technologies to corrections.

Given our historical commitment to democracy and individual rights, we should hope that technocorrections will lead to less regimented and more effective ways to enhance public safety, while preventing the development of an extensive government-technocontrolled surveillance, incapacitation, and preventive incarceration apparatus.

Commentary by Martin Horn
Secretary of Corrections
Pennsylvania Department of Corrections
Camp Hill, Pennsylvania

In 2030, I hope to see sentencing and corrections policies that are demonstrably related to increasing public safety, that are fair and honest when imposed, and that increase public confidence in the sentencing and corrections systems rather than diminish it.

Liberty is so precious a commodity that if we curtail it, we must do so sparingly and when demonstrably necessary for the public welfare, and then only in the precise measure necessary. In each and every case brought before the courts, we must answer the question, “Under what circumstances and for what purpose are we depriving this person of his liberty?” We must also ask what obligation is imposed on us when we take away an offender’s liberty. What do we owe to the community and what to the offender?

Imprisonment Should Be Used Sparingly

Punishment—imprisonment in particular—should be tailored to its purpose. Imprisonment should be reserved for incapacitating dangerous people, as retribution for especially egregious offenses. To impose this level of punishment less discriminatingly would foster the growth of social anomie among offenders. In selecting a punishment, certain conditions limit or proscribe the choice of imprisonment. Because it is one of the most severe sanctions, imprisonment is imposed when other sanctions have failed, as a way to highlight the need for adherence to social norms. Savings that accrue from any decreased use of imprisonment would be redirected to more socially useful undertakings that yield greater public safety.

The length and nature of a prison sentence should be fixed in all its elements (for example, whether and how much time will be spent in a halfway house) at the time it is imposed. Such specificity is necessary to increase accountability to the public and public confidence in the system, also, fairness demands that it is owed to both victims and defendants. Discretionary parole release is an anachronism and should be abolished altogether because it is inconsistent with this principle. Instead, the process of prisoner reentry should be rethought, and the opportunity for redirecting currently wasted resources and investing them in programs that promise a greater payback in public safety should be pursued. Resources now spent on parole supervision can and should be redirected to more socially useful purposes.

These are the premises that offer an opportunity to rethink the role of the prison as a means of enhancing public safety, and to empower inmates to take responsibility for their lives and their obligations to the society. The fact that prison is the most expensive sanction is another reason it should be used sparingly. Taxpayer dollars can be spent only once, and once spent, are not available for other purposes. If the dollars spent on imprisonment and postrelease supervision

buy less public safety than if they were spent in other, more productive ways, we will have lost an opportunity to make our communities safer.

Offender Accountability Is Key

The current system holds the state accountable for the failures of the offender upon his release, thereby creating in the mind of the public the impression that the officials who authorize release are misguided—or worse—when dangerous releasees reoffend. The sentencing system and the corrections environment can be recreated so that responsibility is where it belongs: with the offender. Rather than addressing rehabilitation, with its connotations of illness and cure, we should focus on the requirements for success following release.

Unfortunately, research reveals very little about what differentiates releasees who succeed from those who fail. Every offender, upon release, has some statistical probability of success or failure. Does it make a difference—does it change the odds—if the offender returns to a stable home or if he returns to a homeless shelter? Does it make a difference if the offender finds a job the first week after release or does not find a job at all? Does it matter whether we enroll the offender in relapse prevention immediately upon release or if his supervising officer does nothing until indicators of substance abuse are detected? What can we do while the offender is still in prison to effect coordinated, successful transition, and what do we do now that undermines achieving these goals?

Until we answer these questions, our approaches to the release process will be normative only, based on factors that have little to do with promoting public safety. With the answers in hand, we can offer prisoners access to the knowledge and skills needed to succeed upon release. To succeed upon release, inmates need to know how to remain sober, how to read and write, and how to work. We can equip the offender to manage these matters upon release and, by making release part of the sentence, place the responsibility for success in his or her hands. More important, the release date will not come as a surprise to the victim or the inmate. Such an approach will promote fairness on the part of the criminal justice system and greater confidence in it.

The Danger of Maintaining the Status Quo

If we adhere to the present course, we will steadily deplete the resources available to government to address pressing issues in areas such as education, economic development, and public safety. The prison population will continue to grow. Even if it remains at its current level, the inexorable growth in the cost of prison payrolls and prisoner health care will slowly drain public treasuries. Aging physical plants will eventually need to be replaced, consuming public resources better spent for roads, bridges, and schools and for projects that can help revitalize decaying urban cores.

We also face the growing prospect of having a powerful, wealthy national corrections officers' union—potentially a dangerous development. This organization is likely to make enormous monetary contributions to political campaigns, while entire communities confront the prospect of

the disenfranchisement of a substantial proportion of their population and of generations of children at risk because their fathers are in prison. Change can make a difference. Virginia's experience provides evidence that substantial changes in sentencing and in release decisionmaking can forestall the growth of the prison population.

Public Safety-Based Corrections

The first step toward a more viable system is to honestly assess the impact on public safety of the current configuration of sentencing and corrections. We need to develop a way to assess the relative public safety benefits of various policy choices and the cost of each. We also need to conduct the research that will identify the accelerants of postrelease success and find ways to build on that knowledge. Institutional corrections cannot be more than it is. It is not—and should not be—the vehicle to promote “collective efficacy” in communities. Collective efficacy, or social cohesion, may be a desirable state of affairs, but there are organizations and institutions both better suited to and more skillful in promoting it than corrections. Asking corrections to do too much imposes inordinate social control on the offender simply to enable him or her to derive the benefit of a corrections system that would be wrongly geared to promoting collective efficacy. In the correctional system, the need to feed and secure prisoners will always take precedence over everything else. The purposes of imprisonment need to be recognized for what they are—incapacitation and punishment. There are better ways to promote collective efficacy, such as through fines, restitution, sentencing circles, and community service administered in the community by community organizations.

We need to challenge parole authorities to demonstrate how they make a difference, then measure the difference they make. It is important to be bold enough to consider the potential of the private sector to assist in reintroducing the offender into the community once we have identified the accelerants of success. Inmates need to be empowered to control their own access to these success enhancers. They need to be held accountable for the use they make of these resources by requirements that they, not the government, are responsible for their behavior.

Finally, we need to continue to promote candid, probing discussions and considerations of the costs of imprisonment and the value of liberty. We in the justice system must promise less and do more. We should not offer to be all things to all people. We should be clear about purpose—our “mission”—and then concentrate on achieving it. We should be willing to forego the vast resources now at our disposal and exchange them for investment in strategies and policies that offer greater long-term promise of promoting public safety.

Commentary by Joseph D. Lehman, Secretary Washington State Department of Corrections Olympia, Washington

A new vision for sentencing and corrections is best expressed as a series of principles upon which sentencing policy would be based and a correctional system structured and operated.

Focus on Community Safety

The overarching purpose of sentencing and corrections is to contribute to community safety. However, the criminal justice system alone cannot produce safety. The informal social controls of family, neighborhood, community, church, and workplace are more powerful than the coercive authority of the criminal justice system in producing safety. Safety, as seen from this broader perspective, has both a real (crime incidence) and perceived (fear of crime) quality. Sentencing and corrections policies must be mindful of both. Harnessing and empowering the relationships of informal control should be central to sentencing and corrections.

Community safety is not ensured simply by focusing on the offender. According to the routine activity theory, “The likelihood that a criminal event is going to occur is affected not only by the motivation of the offender, but also by the opportunity afforded by targets being present under circumstances of reduced guardianship.”¹ This means we need to deal with more than the motivation and characteristics of the offender; we need to take into consideration the physical (place characteristics) and relational context in which crime occurs.

This broader view of crime has implications for both the substance of sentencing policy and the process. If community safety is the desired result and if we regard the offender as only one variable (albeit the principle one) in the equation, then others need to participate in the sentencing process. The victim(s) and the community need to be involved and to have a say in what will happen. Particularly for nonviolent and situational violence, which is considered less serious and where offenders are likely to remain in the community or return to it in a short period of time, community accountability or reparation boards consisting of citizen representatives should be used in sentencing.

Beyond “Just Deserts”

While just deserts and proportionality must be guiding principles in sentencing, they are in and of themselves not sufficient. They derive from *lex talionis*,² which limits the amount of punishment, and does not address effect. That is, they do not address the end for which the punishment is imposed.

Put simply, the principle of just deserts should define the duration of the sentence and the amount of time during which the coercive authority of the state should impose a punishment. For violent crimes, separation from the community in the form of incarceration may also be an aspect of the

just desert sentence. In other words, it should be imposed when the crime is so serious as to demand this form of banishment from the community.

Further Principles for a New Vision

Beyond this, the sanction imposed and the correctional response must be based on three other principles: the level of coercion needed, the amount and form of reparation, and the deterrence achieved.

The amount of external coercion needed to manage the risk of reoffending

The purpose of a sentence is risk mitigation. In deciding on the use of any form of incapacitation, a distinction would be made between violent and nonviolent crime. For nonviolent offenders, incapacitation would be limited to situations in which other sanctions and interventions had not worked, and then only for short durations.

What the correctional system does with offenders would be based on level of risk and focused on reducing risk. Sentencing and correctional supervision would be based on an assessment that takes into consideration not only static risk factors but also dynamic ones; that is, those that correlate with recidivism but are changeable. Programs and activities for people in prison would be directed at risk mitigation: they would aim to change offenders' characteristics that are dynamic and correlated with crime.

On-the-streets supervision will be community oriented rather than offender centered. At the core of such a strategy is the use of "guardians." They are people in the community (either in the free community or in prison) who are able to influence the behavior of offenders, the safety of victims or potential victims, and the safety of places.

The accountability plan for an offender would be shaped by identification of dynamic risk factors and the use of guardians to monitor, influence, treat, and support him or her in the community.

The amount and form of reparation

Reparation is central to the notion of justice. It involves process and substance. The system has to listen to victims and provide real services to them. Reparation is not only a question of paying restitution, but also a matter of making the victims or potential victims feel safe again. Protecting victims from future harm and harassment must be the correctional system's first concern.

To achieve these ends, corrections officials deployed on a neighborhood/community basis must work with victim advocates and service providers to develop community response to victims. They must help others in the community determine ways to support and protect victims.

The extent to which deterrence is achieved

Deterrence would be achieved when high-risk offenders participate in the development of their accountability plans, when expectations are clear, and when there is greater certainty in detecting

violations and in imposing consequences. That is, deterrence occurs when certainty takes precedence over severity.

Deterring unwanted behavior (that is, preventing it from happening) is first and foremost a function of the ability to detect it. Low levels of detection mean little deterrence. Of equal importance is good behavior, which is sustained only if recognized and rewarded.

Focusing on a limited number of high-risk offenders, delivering the message to them and others about what will be tolerated, and having the capacity to detect and respond to violations when they occur will make a difference.

What If the Present Course Is Maintained?

If we maintain the present course, the corrections system in 2030 will not be much different than it is today, but it will be much more costly. The fiscal impact of today's policies may result in some marginal changes in incarceration rates. But as long as the underlying principles remain the same, there will be very little effect on crime, and the public's frustration with the system will periodically be expressed vociferously.

Making the New Vision Reality

In order to realize the new vision and move away from the current course, the debate cannot be framed as it is now, by the question of whether to incarcerate offenders. The more appropriate strategy is to reframe the debate to focus on community safety, who "owns" it, and what we can do about it. That essentially is what the Offender Accountability Act, recently passed in Washington State, attempts to do. In good measure, many of the principles outlined above apply to that endeavor.

Notes

1. Lehman, Joseph, "Reinventing Community Corrections in Washington State," *Correction Management Quarterly*, 5 (Summer 2001): 44.
2. The law (lex) of retaliation, or equal and direct retribution; in common terms, "an eye for an eye, a tooth for a tooth."

**Commentary by Deanell Reece Tacha, Judge
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What Sentencing Policies Should Look Like in 2030

My perspective is shaped largely by my 4 years as a member of the U.S. Sentencing Commission. Because I know less about the correctional system than about sentencing policy, my remarks deal with sentencing issues and the judicial system almost entirely. I make these remarks assuming that there will continue to be a fairly complex set of Federal sentencing guidelines and that crime-control legislation and policy will incorporate them.

Federal sentencing guidelines

In general, the Federal sentencing guidelines seem to reflect, to a remarkable extent, the public's expectations with regard to uniformity and proportionality in sentencing.¹ Among the judiciary, however, there remains a significant number of judges who fault the guidelines for eliminating judicial discretion in sentencing. Nonetheless, I have observed that Federal judges have increasingly adapted to the guidelines, understood the political imperatives behind them, and learned to use them with sensitivity and integrity.

I hope that the general scheme of the Federal sentencing guidelines will remain as it is throughout the next few decades. I believe the guideline drafters "got it right" to a significant degree. As long as the system is close to being right, any change in the basic structure of the guidelines would add enormous burdens for both courts and litigants, promote greater uncertainty in the criminal justice system, and not produce a substantially better system. Furthermore, as we continue to litigate the issues raised by the statutory and regulatory framework of the guidelines, uncertainty about the guidelines continues to diminish. When I was a member of the U.S. Sentencing Commission, I was generally not in favor of greatly changing the guidelines except where there was a demonstrable problem. Thus, I think sentencing policy in the next three decades should focus on areas in which there are demonstrable problems.

Mandatory minimum sentences

One problem that many people in the criminal justice system have often identified is the "pegging" of the sentencing guidelines to mandatory-minimum sentences. However, as long as there are mandatory-minimum sentences, this is the only rational way to draft the guidelines. By 2030, I hope we will have rethought the whole construct of "mandatory minimums." I suspect that a fairly significant proportion of incarcerated people fit into the category of defendants whose sentences were dictated by mandatory minimums. I would be interested in seeing systematic research conducted on this issue.

I think it is fair to say that a considerable number of commentators are dissatisfied with mandatory minimums, especially when they are imposed for offenses on the low end of the drug tables. They believe that imposing mandatory minimum sentences on drug users—and perhaps even on low-level couriers—may be costing the correctional system a disproportionate amount of resources when these costs are compared with the penalogical benefits. Of course, defining the term “low level” is a challenge—one that would require a great deal of thought and research before major changes are made. Indeed, the whole issue of drug sentencing policy is the subject of considerable public and policy debate. I have no answers, but I hear what I think could best be described as major differences of opinion about current policies.

Federal versus State jurisdiction

Between now and 2030, I think we also need a thoughtful discussion, among all three branches of government, of the division of responsibility between the Federal Government and State Governments in criminal justice policy. I am of the firm opinion that in engaging in this discussion, we should look to the basic principles of federalism. It seems clear to me that Federal courts, Federal prosecutors and defense lawyers, and the Federal correctional system simply cannot continue to absorb an ever-increasing number of defendants. We must reexamine the important role of the States in exercising their policing and related powers and recognize that the Federal Government’s role is to handle only a limited number of truly Federal crimes. Attention to the appropriate demarcation between the Federal Government and the State governments in making and enforcing criminal justice policy could, perhaps, be the single most important contribution to rationalizing responsibility for the criminal justice system in the next few decades.

Immigration and the courts

Immigration issues will no doubt continue to be an important theme in sentencing and corrections policy. The five Federal court districts along the Mexico/United States border have among the highest number of criminal filings in the country—a number very disproportionate to the area’s population and size. The Administrative Office of the United States Courts and the Federal Judicial Center recently sponsored a conference on this topic. In conjunction with that conference, they compiled data that demonstrate that the incredibly heavy caseload of the entire criminal justice system in the border regions is now, and will continue to be, a crisis for the system over the next few years.

I hope that by 2030 we will have given careful attention to enlightened ways to address immigration policy issues and some way to make the criminal justice system response more rationally based. I resist any notion that we should create specialized courts or appoint specialized judges to handle these cases. I will continue, as I have done for the past two decades, to advocate vigorously for maintaining the bedrock view that an Article III² judge is a generalist and to insist on the exercise of Article III powers to protect the rights of people under the supervision of the criminal justice system.

Selectively revisiting the guidelines

Finally, I hope that by 2030 we will have taken a hard look at sentencing guidelines that may not reflect the seriousness of the crime. I refer specifically to crimes other than drug crime. A number of judges and commentators have suggested that the guidelines for manslaughter sentencing and those for fraud and money laundering do not adequately take into account the harms resulting from these crimes. That is partly because for the latter two categories, developments in technology are challenging current definitions of criminal conduct. If our definition of fraud and related property crimes does not take into account crimes committed using new technologies, it will be very difficult to define the harms they cause.

What Corrections Will Look Like If the Present Course Is Maintained

As noted above, I know less about the correctional system than about sentencing, but one would have to be naive not to recognize that the Federal prison population has expanded exponentially. It almost goes without saying that if it continues to grow at the current rate, a grossly disproportionate part of the Federal budget will have to be spent on the criminal justice system and correctional facilities. We must make certain that the public and public policymakers are aware of the long-term effects of current policies. The only realistic way to confront this issue is through a dialogue among all three branches of government and the public at large about their vision of the future of criminal justice policy.

We cannot underestimate the public's fear of crime. The effects of guns and drugs have increased law-abiding citizens' fear to the point where it is very difficult to engage in rational discussion of these unsavory topics. Nonetheless, the fiscal impact of current policies will no doubt eventually impinge on Federal programs and services that may be as important as prisons to the electorate. I leave it to policymakers and elected officials to resolve this issue but, in the process, they will have to pay close attention to the current strain on the judicial branch and the correctional system.

Moving Toward New Policies and Systems

Issues in current sentencing and corrections policy require a very broad-based and coordinated approach if there is to be consensus on change. As a judge, I will not presume to make specific recommendations for new policies and systems. That is entirely the province of the legislative and executive branches. Nonetheless, I have said in many speeches and law review articles that it is time to engage in a very broad national debate about crime policy. To be productive, any such debate must include all three branches of government and must be conducted at the highest levels. The issues of Federal versus State responsibility; mandatory minimum sentences; and drugs, guns, and immigration policy intersect in so many ways and affect so many people that all three branches of the Federal Government and the public must be involved in the dialog.

One specific step I would recommend is a concerted effort in the next few years to seat judges, members of Congress, and high-ranking officials from the executive branch at the same table so that we can begin to isolate the issues and consider ways of moving purposefully toward rational, integrated goals. The issues I have already mentioned should be considered, as well as a host of

others. Clearly, the questions of mandatory- minimum sentences, low-level drug users and couriers, property and technology-based crimes, and the amount of resources needed to ensure that the criminal justice system functions adequately are among the most important. To this list I also would add offenses committed by children. It seems to me that the juvenile crime problem is best dealt with as a part of a discussion about where we draw the line between State and Federal responsibility.

I would be remiss indeed if I did not note that the number of Federal judges and the percentage of the Federal budget allocated to the judicial branch have in no way kept pace with the growth in the number of Federal cases prosecuted and tried. Although I do not advocate proportional growth, I must reiterate that there is an enormous strain on the Federal judiciary and the Federal criminal justice system. Defenders, prosecutors, and judges alike are attempting to respond appropriately to the growth of Federal criminal law. It is increasingly difficult. My colleagues in the judiciary stand ready to assist and to participate in any discussions about the future of the Federal criminal justice system. They are doing a superb job of carrying out their constitutional and statutory duties, but they share the concerns of the other two branches of government about the future of the Federal criminal justice system.

References

For Judge Tacha's views on several of the topics discussed here, see:

"The Federal Courts in the 21st Century," *Chapman Law Review* 2(9) (1999).

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Notes

1. See Maxfield, Linda Drazga, Willie Martin, and Christine Kitchens, *Just Punishment: Public Perceptions and the Federal Sentencing Guidelines*, Research Bulletin, Washington, DC: U.S. Sentencing Commission, March 1997; Rossi, Peter H., and Richard A. Berk, *Just Punishments: Federal Guidelines and Public Views Compared*, Hawthorne, NY: Aldine de Gruyter Publishing Company, 1997.

2. Refers to Article III of the U.S. Constitution, which defines the judicial power of the United States.

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The answer to the question, “What should U.S. sentencing policies and correctional systems look like in the year 2030?” is really quite simple: We want the bad guys in prison, the good guys out in community-based programs, and middle-risk offenders in intermediate sanctions.

Base the Sentence on the Level of Risk

The first challenge is deciding which group an individual offender falls into: good, bad, or middle-range. I see the “bad” group as easy to define: anyone who has committed a serious, violent crime against a person (from aggravated assault through the most serious offenses) deserves to be incarcerated, and for a considerable amount of time. The “good” group consists of offenders who have short or no criminal records, whose current offense (and all prior convictions) involves no crime against a person, only the less serious property crimes and/or the less serious drug crimes. The “middle” group consists of people who have committed the more serious property offenses (for example, burglary) and the more serious drug offenses (for example, low-level sales).

Given these categories, the first challenge is to get the sentence right: to ensure that it reflects the level of offender risk. Right now, we do not have that. There are many people in prison who are poor, illiterate, mentally ill, disabled, or otherwise unable to function in this fast-paced society. That is not to say there are not a great many violent people in prison. I believe that there are, and that many (if not most) of those now in prison belong there. But I also believe that about 15 to 20 percent of all prison inmates are simply “unfortunate souls” who got caught up in the justice system and did not have the financial or intellectual resources to get out.

The tough-on-crime mood of the public shows no indication of abating. We may be seeing more funding for substance abuse treatment and prevention, but it pales in comparison to mandatory sentencing and similar initiatives. So, more and more people will be locked up, younger and earlier in their criminal careers, for longer periods of time. In 2030 there are likely to be many more people in prison than the 2 million there now. That has major implications for State budgets, social services, and the lives of millions of offenders and their families.

Focus on Job Skills and Employment

The second challenge is to ensure that there are opportunities for offenders to acquire job skills in the programs to which they have been sentenced and to find jobs upon release. “Paper probation” must end. If an offender is such a low risk and his crime so minor that probation requirements

consist only of mailing a postcard, probation should be given another name. This type of offender (currently one-third of all people on probation in the Nation) could be ordered instead to pay a fine and be put on administrative accounting; in other words, be taken off the probation caseloads. Caseloads could then be reduced to a manageable 50–60. Offenders also could be ordered to make reparation to their victims and to society, and possibly better themselves.

Offenders who are put on intermediate sanctions must make reparation to their victims, do something to restore the community, and receive job training and help in finding a job. Training and jobs must be key program components in the future. We have moved much too far from work and job training, instead spending most of our treatment dollars on substance abuse. Few intermediate sanctions programs concentrate on employment. It is difficult to operate an employment program well, and the risk of liability, for offenders as well as employers, is increasing. But without work, little else that is good can happen to offenders.

Prepare Prisoners to Reenter the Community

For those in prison, we need to not only restore productive activities during their incarceration but also, and perhaps more importantly, to assist in prisoner reentry. Fewer than 10 percent of the 110,000 inmates released from California prisons in 1999, for example, received any prerelease assistance. Many were put out on the street with no more than the \$200 given to them by prison officials. After paying for a few phone calls and transportation home, they hardly have enough to rent a hotel room for a night. Many remain homeless and their job prospects are dim. No wonder California's return-to-prison rate, which now hovers around 70 percent, is the highest in the country.

Prisoner reentry is likely to emerge as the key crime policy issue between now and 2030. Each year, approximately one-half million inmates return to communities nationwide. Parolee reentry is not just a criminal justice problem; it will come to be seen more generally as a social problem. Parolees who cycle in and out of prison affect the lives of their children, other family members, and their close associates and, in the aggregate, the economic and social conditions of the communities they live in.

Parolees who are homeless and unemployed may contribute to “incivilities” (by panhandling, for example), which increase fear among community residents and ultimately lead to loss of social capital and increased community disorganization. Community disorganization is one of the strongest predictors of crime and violence. Prisoners also have higher rates of infectious diseases (particularly HIV, AIDS, tuberculosis, and hepatitis) than the general population. Their unhealthy lifestyles can spread the diseases quickly and the public health consequences may be significant. Many also are concerned about the risk of politically alienating the large number of prisoners, a disproportionate number of whom are African-American men, who are no longer able to vote or engage in certain occupations as a result of a criminal conviction.

Perhaps most importantly, we are returning tens of thousands of (mostly) young minority men—often angry, unemployable, and addicted to illicit substances—to communities, families, and neighborhoods. If they come back to the community unrehabilitated and unprepared to live in

a law-abiding way, not only will they return to crime and create new victims, they also will likely export the culture of prison to the next generation of young men. If young people are continually exposed to a social norm in which criminal activity and incarceration are standard operating procedures, they may become “presocialized to prison.” Until these contextual issues are addressed, offenders will not be reformed and communities will not be safe.

Emphasize Prevention

In summary, we need to 1) do a better job of “sorting” offenders on the basis of risk to public safety; 2) focus more intensively on job training and employment for sentences to probation, intermediate sanctions, and prison, and 3) begin to pay serious attention to the unintended consequences of imprisonment.

How do we get there from here? I see little hope in trying to convince the public that anything other than prison makes sense. People seem unwilling to hear that right now, especially since the current lower crime rates are viewed as the result of higher levels of imprisonment. The best hope for turning around the situation in which the “corrections tail” wags the “criminal justice dog” is to focus on prevention. Until we can stop so many young people from launching criminal careers, there is little hope of diminishing increases in imprisonment. Once these young people are in the system (arrested and convicted), the public will fund massive amounts of incarceration; this is particularly true now, when the U.S. economy is booming. Thus, we must assign the highest priority to finding prevention programs that work for the young people who are at highest risk. Such programs must focus heavily on those who live in the urban cores, who will increasingly be socialized to prison and alienated from mainstream society.