

Prison Reform:

**Did Drug Convictions Lead to Overcrowding,
Should Drugs Be Legalized?**

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Introduction

Professor G Robert Blakey opined that the principal tenets for punishment in the criminal justice system should be for reparation, retribution and rehabilitation.

Professor Blakey knew something about proportionality in punishment, as he was a principle author of the RICO statutes, the anti-racketeering statutes used so successfully against organized crime.

Of course when Professor Blakey made these comments to my Criminal Law class in my first year of law school at Notre Dame, 35 years ago, the crack cocaine epidemic had not yet occurred, our prison systems were not yet at over-capacity and corrections budgets at the federal and state level had not yet become a political issue, forcing legislators to look at ways to save money while assuring their constituents that they were tough on crime.

Is there widespread prison overcrowding? Yes. Are many of the individuals imprisoned there because of drug charges? Yes. So now the next question to be asked is, are there alternatives to building more prisons whereby we still punish those individuals who break our laws, holding them accountable, without putting the public's safety at risk? Much research suggests that many alternatives do exist, some having been implemented successfully here in Allen County, and that a studied, conservative approach is underway in many states to analyze these alternative programs not just with a dollars and cents approach, but as a means to

safely bringing certain individuals 'home' under tight supervision and with expectations tailored to their needs as well as to the community's.

Prison Statistics: The Prison Population and The Budgets

In 1973 both federal and state prison populations combined to equal 204,211 inmates per day but by 1989 there were 710,054. (Vaughn)

In 1980, the federal government housed about 24,000 prisoners at a cost of \$333 million a year. (McMillion) In 1980, 40,000 people were imprisoned for drug offenses, but by 2005, the number had risen to 450,000 people. (Exum) The over population issue became so severe that it resulted in local jails being forced to house about 10% of the felons awaiting transfer to prison. (Vaughn)

Currently, over one million individuals leave our prisons and jails yearly, while slightly more than that enter those institutions. (Haney) From 1992 to 2007, the US incarceration rate grew from 550 prisoners per 100,000 people to an estimated 756 prisoners per 100,000. (Andrews) One out of 10 adults is behind bars in the United States. (Andrews) To put this into perspective, the number of federal and state prisoners total, in 2007, of 2,299,116 inmates, equated to more than 1% of American adults (Trachtenberg) and 20% of the world's prison population (Andrews).

To relate this to the growth in the United States' population, one should consider that since 2000, the population of the United States has grown by about 7% while the prison population has increased by 19%. (Trachtenberg)

Now relative to the issue before us, how many are related to drug charges?

According to a review of drug sentencing in states, 20% percent of states' prisoners may be held on drug charges, but over 50% of them are considered substance abusers. (Lawrence)

So numbers show, across federal and state lines, that prisons are exploding. At one point the overpopulation issue in prisons became so severe that it resulted in local jails being forced to house about 10% of the felons awaiting transfer to prison.

(Vaughn) Commensurate budgets for those prisons have increased too. From 1989 to 1990, 44 states increased capital expenditures by almost 100%, from \$2.7 billion to \$4.5 billion, for their prisons. At that time, 41 states increased capacity by 17% to bring their total number of beds to 790,806. The cost of adding one 'prison bed' was approximately \$52,865 over 20 years ago, and the cost of housing a prisoner at the same time was about \$16,950. (Vaughn)

Those costs have changed dramatically over the years. Currently the federal budget for the federal prison system has increased upwards of 800% and we are now housing about 217,000 federal prisoners at a cost of \$6 billion a year. (McMillion) Coincidentally these monies are equivalent to the same amount that the US Bureau of Prisons spent on building new prison facilities in 1999. These increasing costs

have resulted in the U.S. Department of Justice now spending about 24% of its annual budget on the care, housing and operation of these prisoners and prison facilities. (McMillion) In spite of this alarming increase in prison costs, these numbers are not nearly as significant as the states', since the federal system only accounts for 9% of American inmates. (Trachtenberg)

State Systems

In the state systems, these numbers, in terms of the dollars and cents in state budgets, have also increased dramatically. In 2009, states' budgets provided \$52.3 billion dollars worth of taxpayer monies to build and operate their prisons. (Exum) States were increasingly alarmed at their burgeoning corrections' costs. In California, in 2007, it was predicted that by 2012 the cost to run their prison system would cost more than their statewide university system , at a cost of over \$10 billion annually. (Trachtenberg)

A closer look at one state will demonstrate the impact of rising prison costs on that state's budget. In Ohio, in 2011, they faced a budget shortfall of \$8 billion. Their prisons were 33% over capacity. It cost Ohio \$69.19/day to house a prisoner, bringing the annual costs to \$25,254 per year for each inmate. (Exum) Overall, Ohio was spending over 7% of its total budget on their corrections' system alone; it was one of the single largest expenditures in their budget.

Prison Overcrowding and Probable Causes

The Problem

So we know that the costs of opening and operating a prison are up significantly, and that the prison population has increased exponentially as well over the last several decades. What we have not discussed yet is that these costs, while increasing, certainly are not increasing in such a fashion as to maintain the same type of prison conditions experienced over three decades ago.

Prison overcrowding has become a significant and serious problem in almost every prison system in the United States.

Overcrowded prisons are functioning over capacity in terms of their ability to house, manage and safely provide for the prisoners in custody. Additionally, the burden on the corrections budgets in states and the federal system has resulted in a decrease in programs offered, including drug treatment, educational curriculum, occupational training and work-related assignments within the prison itself.

Some experts even opine that these prisons themselves become different types of educational training grounds, resulting in more hardened and more devious criminals upon their release. (Andrews)

The GAO has stated that ‘federal overcrowding is jeopardizing both the safety and security of inmates and staff’. (McMillion) Currently the federal system is about 40% over capacity. (McMillion) In the federal system ,this overcrowding means that prisoners no longer have access to drug treatment programs, educational and occupational training and work opportunities. (McMillion)

This overcrowding issue is not unique to the federal system. Half of all California inmates were not able to join rehabilitation programs or have work assignments; and that same number of inmates were also not enrolled in any formal program when they were paroled. (Haney) These numbers are significant, if one assumes that training and treatment may reduce recidivism rates, because California also has a correspondingly high recidivism rate. Two thirds of California parolees will return to prison within three years of their release. This rate is twice the national average. (Haney)

The Causes

Is this increase in the prison population due to a significant and corresponding increase in crime, or are there other factors resulting in an exploding prison population? The rapid rate in the incarceration rate in the United States, both federally and statewide, can be directly linked to the ‘get tough on crime’ impetus in the 1970s and to tougher drug sentences.

“War on Drugs” and Sentencing Guidelines

In the 1970s, politicians and the public generally had become increasingly concerned about crime rates. Sentencing guidelines were then crafted to emphasize more the retributive aspect of punishment and subsequent incarceration. These policy changes resulted in more mandatory sentencing guidelines as well as more severe sentences. This pattern was seen in the federal as well as in the state courts.

Federal

In the federal system, the preeminent act was The Sentencing Reform Act of 1984(SRA), which required mandatory sentences and eliminated parole. This Act also established the Sentencing Commission, a nonpartisan body formed to make sentencing guideline recommendations as well as subsequent amendments to the 1984 Act. Subsequent federal laws with strict sentencing requirements were passed across party lines. In addition, the Anti Drug Abuse Act of 1986, which was passed by House Democrats, required significantly more severe sentences to crack cocaine cases than other cocaine cases. These minimum mandatory sentences specifically distinguished crack cocaine from powder cocaine. In spite of the extreme disparity in sentencing guidelines, these mandatory minimums survived constitutional

attacks and even were modified and amended to add the death penalty for some drug –related cases in the 1988 amendment to this Anti Drug Abuse Act.

As one could imagine, the effects of these more stringent laws were subsequently realized in the increasing prison populations. In 1994 the Sentencing Commission specifically urged Congress to reduce the disparity in these cocaine sentences from its current 100:1 ratio, i.e. crack cocaine to powder cocaine received infractions.

(Siebert) Congress declined to act. In 1994, President Clinton noted, “I can be nicked on a lot but no one can say I’m soft on crime.” (Tanry)

The harsh nature of these sentences, and the stark disparity between crack and powder cocaine sentences, eventually received the attention of the United States Supreme Court. In 1997 and 2002 the Supreme Court suggested, in deciding in different cases argued before it, that a reduction in this disparity was called for, but did not specifically act. Subsequently in 2002, Congress passed the Feeney Amendment, which gave mandatory sentencing decisions to the US Department of Justice. (Siebert)

So, the United States Supreme Court finally decided to address the constitutionality of these mandatory sentencing guidelines put forth from the Department of Justice, the executive branch, and acted in 2005 in US v. Booker. The Court determined that applying mandatory sentencing guidelines ‘violated the Sixth Amendment of the Constitution’ and that they should be strictly advisory in nature. (Siebert) The full

effect of this decision was to result in granting more discretion in sentencing to the federal courts at the district level.

Judge Michael Posner, a federal district judge, addressed these federal issues as recently as February 18th this year in an editorial he wrote for the Wall Street Journal. He noted that at the start of his career, the United States was incarcerating 188 people for every 100,000, but this number has now increased to 497 prisoners for every 100,000 citizens. The Fair Sentencing Act of 2010 gives federal judges more discretion in looking at the circumstances of each individual in order to determine their punishment. However, Judge Posner believes the Senate should go even farther and adopt the Smarter Sentencing Act that would reduce mandatory sentences even more and allow prisoners sentenced under these more severe acts to seek reductions of their current sentences so that they are more in line with current sentencing guidelines. (Posner)

States

This 'get tough on crime' approach also extended to the state courts in the 1970s and 1980s. 'Three strikes and you're out' laws were very popular in many states, many times eliminating the chance for parole and landing defendants in prison for life sentences if they had been found guilty of three crimes of drug possession. In New York, the Rockefeller Laws mandating long prison terms for the possession or sale of small amounts of drugs were so effective that, by 1990, 46% of the prisoners

sentenced in New York were imprisoned for drug offenses. (Schoenfeld) Also, many states adopted 'truth-in-sentencing' laws, or 85% sentencing mandates, whereby convicted felons would serve all or almost all of their original sentences.

So during the 'War on Drugs' period, sentences were harsher for certain drug offenses, e.g. crack over powder cocaine, and longer and were meant to be served in their entirety. All these factors resulted in larger and larger prison populations. But, as previously noted, these incarcerated individuals were not only staying in prison longer, they were receiving fewer work assignments, less vocational or educational training and certainly less drug rehabilitation or treatment.

Recent Sentencing Reform

The constitutional decisions discussed in Booker demanded that changes be made in federal sentencing guidelines. But states too have been re-examining their mandated, enhanced criminal penalty guidelines, and their effects on that state's high incarceration rate. Although this paper did not examine the legislative histories to ascertain the reasons for these changes, 16 states passed legislation in 2013 that changed their sentencing requirements. (Porter) Another recent approach by state legislators is to expand parole and probation opportunities, instead of incarceration, and to enhance earned release policies.

Alternative Programs to Incarceration and their Costs

The prison-overcrowding problem has reached a critical mass in the past several years. The sheer numbers, and the relentless increase, gave pause to some state legislatures when faced with the task of allocating the commensurate increasing dollars necessary to house these prisoners. And, although there may not always have been good data on recidivism rates, clearly the reduction of previously heralded in-prison training programs was not going to bode well for the many, many more incarcerated substance abusers who were leaving prison untreated due to funding issues.

Financially desperate, or progressive states, depending on your view, looked to alternatives to their previous system of incarcerating non violent drug offenders for longer periods of time without participation in any type of rehabilitation.

Public-Private Partnerships

Some states have significantly expanded the definition of public private partnerships, such as in the state of Ohio, by selling their prisons outright. Ohio recently sold its Lake Erie Correctional Facility to Corrections Corporation of America for \$72.7 million dollar. States who are hard-pressed to fill budget deficits may be tempted to turn to private entities such as CCA to not just run, but own, their prisons. Some of these deals, however, then require that the state guarantee a 90%

occupancy rate in these same prisons. (Carter) Of course, these partnerships would not necessarily decrease the prison population, but they may relieve some of the budgetary issues for some states.

Drug Courts and Other Alternatives

Other states have taken a different tact. Drug courts and other alternatives to imprisonment have been growing in number and breadth since the 1990s. In 2009 the National Association of Criminal Defense lawyers released a report on ‘problem-solving’ or drug courts. (Organ) Although the intent of these courts was originally to serve as alternatives to incarceration, that report was critical of the drug courts’ results. The first drug court was established in Miami FL in 1989, at the height of the ‘War on Drugs’. (Jensen) At that time, Miami Judge Herbert Klein looked at the increasing drug offender problem and thought, “we could try to help them”.

Not surprisingly the use of these courts has grown rapidly thanks to increased federal dollars for their implementation. (Jensen) These types of ‘problem solving’ courts have expanded to other specialty areas, such as mental health courts, veterans courts and domestic violence courts, to name a few. (Jensen)

The National Association of Criminal Defense Lawyers ‘s report was very critical of most of the 2000plus drug courts, faulting them for treating the substance-abusing prisoners in these programs too harshly. (Organ) However, studies actually have

shown that this tough love type of parenting style applied to drug abusers can actually be successful. The goal of the drug court, once guilt is admitted on the part of the criminal participant, is to focus on ten key components:

- Due process rights of the defendant are protected in a non-adversarial setting
- Eligible participants are identified early for placement
- Participation includes access to drug treatment and rehabilitation
- Abstinence is monitored frequently
- Compliance is strategically dealt with by the court
- Judicial interaction with the drug court participant is ongoing
- Measurements are in place to evaluate effectiveness
- Interdisciplinary education is required for effective drug court implementation, and, finally
- Partnerships are needed among pertinent judicial and community organizations for the continued success of the drug court

Other Alternatives to Incarceration

As noted in a recent New York Times editorial, reducing the overcrowding in prison does not necessarily reduce all costs. Supervised programs can be staff heavy. It is estimated that the ratio of incarcerated to those supervising them, whether on probation or on parole, is 1:2. (Keller)

Criminal Code Reform

However drug courts alone will not solve the problem of prison overcrowding. Several other alternatives to incarceration for non-violent drug offenders have been offered in various state criminal code revisions. One of the most successful prison reform states is Texas, which actually closed a prison in 2011. Texas sentenced individuals in possession of less than 1 gram of drugs to probation, not jail time. These Texas reforms, begun in 2007, saw little or no change to sentencing laws, but saw a drop in the incarceration rate by 9%, a drop in the crime rate by 10% and a significant drop in corrections expenditures, by \$241 million dollars.

The key to reform though is to be able to prove that the programs work, and that the corresponding recidivism rate is low too. The 'new best practice' is the HOPE (Hawaii's Opportunity Probation with Enforcement) approach established by Hawaii judge Steve Alm; it is a new probationary system. This system is described as 'firm parenting style' but it gets results. Judge Alm has seen an 80% drop in positive drug tests and a similarly significant decrease in the recidivism rate. (Carter) Several states, including our Allen County court system here, have adopted this approach too.

There have been other suggestions proffered to help treat these significant numbers of drug offenders, but none have a proven track record yet. The varied alternatives to imprisonment are: accelerated supervised release after eligibility is reviewed; more proportional drug sentences; good behavior credits; and more probation and expungement for minor offenders.

This movement to reduce the number of prisoners serving time for minor drug offenses has crossed party lines. In 2010, the coalition Right on Crime was initiated, with members such as William Bennett and Newt Gingrich. But the push to reduce corrections costs, rehabilitate those most likely to integrate back into society, and to provide vocational type job training to these offenders has not always proven successful. (Carter)

Kansas, for example, was an early adopter of sentencing reform, and saw a 61 % success rate in its revamped probation system, compared to 46% in the two years prior. This success was matched by a 6% reduction in their state prison population. However, recent budget woes caused them to cut the program in 2009. (Carter)

We know that some of these reforms are at least effective in reducing the prison population. In fact, for 3 years in a row, the overall prison population has decreased and 13 states closed prisons in 2013. (Keller)

The key is to be able to show that these alternative programs work effectively and that there are subsequent reductions in prison populations, resulting in overall

budget savings. It is expensive to house a prisoner, but it is also expensive to continually rehabilitate or incarcerate these individuals. However, there are studies that have examined the effectiveness of various drug court programs, and their statistical significance. (Jensen) Studies examining various drug courts, from Baltimore and Cincinnati to the State of Washington, have been shown that they do in fact reduce the recidivism rate. (Jensen) A 'swift and certain' approach to mentoring individuals is a tough love approach that has been proven effective. (Keller)

Re-Entry

Although beyond the scope of this paper, there are efforts underway in many states to make 're-entry' into society much easier for those individuals who have successfully completed their prison terms, supervised parole and probation. Some states have adopted 'ban the box' initiatives that prevent employers from asking about a job applicant's history on a job application. Instead the employer must wait until the potential employee is actually interviewed in order to ask that question about the employee's past history.

It is important to track the success of these re-entry programs because these changes result in increased costs to the judicial system and /or to the private employer. It would be disastrous to implement programs to reduce incarceration

rates only to have high recidivism rates and merely end up shifting costs elsewhere. However, the numbers are daunting: 650,000 prisoners released every year, and the recidivism rate is currently about 66% within 3 years. (Keller)

Interestingly, none of the studies mentioned previously suggests as an alternative that states, or the federal government, should look at legalizing drugs. Obviously, Colorado and Washington have recently adopted this approach with respect to the decriminalization of marijuana in their states. Additionally, the federal government has implicitly acquiesced to this approach since the current administration declines to prosecute these federal drug offenders. However, states have adopted the approach that many drug offenders need to be rehabilitated, rather than incarcerated, because being a substance abuser is a bad thing. In spite of the Obama administration's opinion, current federal law also adopts this approach.

In conclusion it is not as simple as Marc Levin of the Texas Public Policy Foundation would have us believe, when he said , in terms of incarceration policy, that we need to "distinguish between those we are mad at and those we are afraid of". (Carter) The numbers are daunting when considering current prison population numbers, incarceration rates and recidivism rates. Sentencing reforms and alternative programs to prison are on the rise particularly for drug offenders. Today, legislators are faced with a difficult task. They must balance their state's respective budget

crises , prison overcrowding issues and the need for maintaining public safety while attempting to return rehabilitated productive citizens to society.

Over 80% of states' budgets for the entire system of parole, probation and prison is spent on offenders who in some way, shape or form, are involved with drugs. In addition, over half the prison population can be classified as substance abusers. (Lawrence) We imprison these offenders to punish, retribution; they are not typically making reparation, but we do hope that those who are released will be rehabilitated. However, currently it appears that effective rehabilitation is not always happening. Because legislators realize we cannot afford to let them out if they still pose a public safety risk, nor can we afford to keep them in at this rate either, many have wisely looked to alternative programs. Alternative programs to imprisonment for some drug offenders, programs that have a proven success record in reducing the recidivism rate , will also be a success by relieving these unsupportable budgets, an unusual win-win in government.

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