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# Before the Cell Door Shuts: Justice Reform Efforts Should Focus on Steps Besides Sentencing

BARBARA MCQUADE\*

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## INTRODUCTION

Mark Osler writes that criminal justice reform efforts have been hampered by what he calls “the slows.”<sup>1</sup> He explains that despite bipartisan support, which resulted in the First Step Act of 2018,<sup>2</sup> criminal justice reform remains elusive. He then offers some insightful suggestions for how to increase the pace.

Professor Osler focuses primarily on reducing the length of sentences and releasing inmates early. While he offers plausible theories for the lethargic pace of change in sentencing reform, one additional theory for the slow pace is that sentencing is the wrong place to focus. By the time someone gets to sentencing, a crime has been committed, a victim has been harmed, and a suspect has been arrested and convicted at trial or by guilty plea. A better place to focus may be earlier in the process, before harms to society have occurred and offenders have spent time in prison. While reducing the prison population alone is a laudable goal in a nation that values liberty, reform should be done for other reasons as well: to make communities safer, to improve the participation of citizens in society, to keep families together, and to reduce costs so that funds can be reallocated to better uses.

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\* Professor from Practice, University of Michigan Law School, and former United States Attorney for the Eastern District of Michigan, 2010 to 2017. McQuade and Osler served as Assistant United States Attorneys together in Detroit in the late 1990s. Although the author does not agree with all of Professor Osler’s observations and opinions about the criminal justice system, she agrees with reducing the prison population and removing racial and economic disparities from the criminal justice system.

<sup>1</sup> Mark Osler, *The First Step Act and the Brutal Timidity of Criminal Law Reform*, 54 NEW ENG. L. REV. 161 (2020).

<sup>2</sup> First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018) (reducing the length of certain mandatory minimum sentences, among other reforms).

Cost alone is a factor that makes criminal justice reform attractive to members of both political parties. According to the Bureau of Justice Statistics, we spend \$81 billion per year on corrections in America,<sup>3</sup> as the inmate population has grown from about 300,000 prisoners in 1980 to close to 1,400,000 prisoners in 2019<sup>4</sup>

If we instead invested in education, social services, infrastructure, and additional police officers, the commission of crimes would likely go down. In the long term, such efforts would be more effective than simply reducing and commuting sentences, and likely would enjoy more public support. Consequently, such efforts might also avoid “the slows.”

This Article examines criminal justice reform beyond the sentencing context. Part I will focus on prevention initiatives relating to drug and mental health treatment. Part II will focus on diversion programs. Finally, Part III will focus on prisoner reentry, which is itself a prevention strategy.

## I. Prevention

When I worked as a prosecutor, I observed that a significant number of crimes are driven by drug addiction and mental illness. While addiction to drugs or mental illness does not excuse most crimes, many individuals suffering from these problems need treatment rather than punishment. Punishment is designed to protect the public, deter crime, promote respect for the rule of law, and rehabilitate offenders.<sup>5</sup> Other than rehabilitation, these goals do not match up well with an offender who is driven to commit his crime by a drug addiction or mental illness. As a result, imprisonment may be less just and less effective in such cases. Instead, treatment programs are more effective for helping offenders to rejoin society as productive members.

### A. Drug Treatment

Large-scale drug trafficking often goes hand-in-hand with violence. Strong drug laws are needed to protect communities from the harmful effects of illegal drugs and the gunfire that can accompany turf battles and drug deals gone bad. But in some instances, drug addiction causes people to commit crimes to obtain cash to feed their addiction. The connection between substance abuse and crime has been documented, with 52% of violent offenders reporting that they were under the influence of alcohol or other substances when they committed crimes, and 39% of property

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<sup>3</sup> Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), <https://perma.cc/5Z5H-QTRD>.

<sup>4</sup> *Fact Sheet: Trends in U.S. Corrections*, THE SENT’G PROJECT 1, <https://perma.cc/83VR-R8VC> (last updated May 2021).

<sup>5</sup> See 18 U.S.C. § 3553(a) (2018).

offenders reporting the same.<sup>6</sup> For individuals whose crimes are driven by drug addiction, we would be wise to consider treatment as a more effective alternative to incarceration. Not only would treatment give offenders a second chance, but it would also be more effective in reducing recidivism by solving the underlying problem that led to the criminal behavior.

One form of treatment is medication-assisted treatment, or MAT. MAT has been successful in helping opioid addicts overcome their dependencies. MAT is the use of medications approved by the Food and Drug Administration, such as methadone or buprenorphine, in combination with counseling and behavioral therapies<sup>7</sup> to relieve withdrawal symptoms that cause chemical imbalances in recovering addicts. MAT programs have been used to help opioid users overcome addiction by providing a safe level of medication to overcome the physical urge to abuse an opioid.<sup>8</sup> According to the FDA, MAT “is effective in the treatment of opioid use disorders (OUD) and can help some people to sustain recovery.”<sup>9</sup>

For offenders whose crimes were fueled by a desire to support their addictions, MAT may be a useful strategy to reduce their drug dependencies and motives to commit further crimes. Making MAT or other kinds of drug treatment a condition of probation or supervision for offenders can help them to overcome their addictions and their desires to commit crimes.

We can wind the clock back even further by preventing drug abuse among the population at large. Drug takeback programs, public education about the addictive properties of opioids and other drugs, and limits on the amount of drugs that doctors can prescribe can all help prevent addiction that can lead to crime. The success of such efforts may be difficult to measure, but they would likely make a significant impact on crime and the prison population.

### B. Mental Health Treatment

People with mental illness often end up in the criminal justice system. According to a Brennan Center report, “America’s largest psychiatric facilities are not hospitals, but jails and prisons.”<sup>10</sup> Mentally ill offenders are

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<sup>6</sup> Adrianna McIntyre, *Treatment for Substance Use Disorders May Pay for Itself Through Reduced Crime Rates*, THE INCIDENTAL ECONOMIST (Oct. 6, 2014), <https://perma.cc/GPG3-F8FG>.

<sup>7</sup> Substance Abuse and Mental Health Serv. Admin., *Medication-Assisted Treatment (MAT)*, SAMHSA, <https://perma.cc/GJ75-VGBU> (last updated Jan. 4, 2021).

<sup>8</sup> Substance Abuse and Mental Health Serv. Admin., *MAT Medication, Counseling, and Related Conditions*, SAMHSA, <https://perma.cc/A3BA-XEYT> (last updated Aug. 19, 2020).

<sup>9</sup> *Information About Medication-Assisted Treatment (MAT)*, FDA, <https://perma.cc/JV5S-LBC6> (last updated Feb. 14, 2019).

<sup>10</sup> Fair and Just Prosecution et al., *21 Principles for the 21<sup>st</sup> Century Prosecutor*, BRENNAN CENTER FOR JUST. 7 (Dec. 3, 2018), <https://perma.cc/4JYR-PMNJ>.

less likely to make bail and more likely to face longer sentences.<sup>11</sup> While at least 50% of U.S. prisoners have some mental health issues, 10% to 25% suffer from serious mental illnesses, compared to about 5% in the general population.<sup>12</sup>

Like individuals addicted to drugs, people with mental illness are not well-suited for prison. The need to punish and deter them is minimized by their relative lack of true culpability for their crimes. And incarceration is unlikely to provide them with the mental health treatment that is needed to prevent recidivism.

Instead of prosecution and incarceration, some proposed solutions for dealing with offenders with mental illness include providing community-based mental health services,<sup>13</sup> so that people can get the mental health diagnoses and treatment they need before engaging in criminal behavior. Police officers should also receive sufficient training to equip them to de-escalate situations involving individuals with mental illness, so that officers can reduce the likelihood of arrest or use of force.<sup>14</sup> Before charging decisions are made, prosecutors should conduct mental health assessments in appropriate cases to determine whether the offender and society would be better off with mental health treatment rather than with criminal prosecution.<sup>15</sup> Rather than incarcerating individuals with mental illness, we can offer better rehabilitation to offenders through treatment.

## II. Diversion Programs

Another way to reduce the number of people who are going to prison is to offer diversion programs. Drug courts, veterans' courts, and other so-called "problem-solving courts" are becoming more and more popular. In these specialty courts, offenders are offered opportunities to have their prosecutions deferred if they agree to comply with certain conditions, such as drug treatment, alcohol treatment, or cognitive behavioral therapy.

One example of a successful diversion strategy is the drug court program in Michigan. Offenders with addictions who participate in the program agree to treatment, drug testing, and intensive supervision. They appear at frequent hearings before designated judges who take a "carrot and stick" approach by providing incentives for success, such as early termination, and sanctions for violations, such as short periods in jail. By receiving assistance coupled with accountability, offenders have been able

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<sup>11</sup> *Id.*

<sup>12</sup> Lorna Collier, *Incarceration Nation*, 45 *MONITOR ON PSYCHOL.*, Oct. 2014, at 56, <https://perma.cc/AM6R-VSU5>.

<sup>13</sup> See Fair and Just Prosecution, *supra* note 10, at 4, 7.

<sup>14</sup> See Fair and Just Prosecution, *supra* note 10, at 4, 7.

<sup>15</sup> Fair and Just Prosecution, *supra* note 10, at 7.

to overcome their addictions and avoid becoming repeat offenders. The success of the program has been measured in its reduced recidivism rate for offenders who have completed it. The rate at which participants in Michigan's drug courts re-offend after two years is 6.8%, compared to 30.9% for offenders prosecuted in the traditional criminal justice system.<sup>16</sup> After four years, the recidivist rate for drug court graduates was 17.6%, compared to 51.2% for other offenders.<sup>17</sup>

These problem-solving courts are often resource-intensive, but the investment in helping offenders overcome addiction or obtain treatment for mental health pays dividends in the long term by keeping people out of prison and preventing recidivism.

### III. Reentry

One other strategy that can reduce the prison population is prisoner reentry programs. While helping citizens successfully reenter society after serving a prison sentence is an initiative that occurs after the sentencing stage, it is an effective prevention strategy as well because it reduces the likelihood that they will commit new crimes. Recidivism accounts for a large portion of crime, as about two-thirds of all offenders are arrested for new crimes within three years.<sup>18</sup> A 2018 Bureau of Justice Statistics study showed that recidivism was even worse than previously thought.<sup>19</sup> While 68% of prisoners were arrested within three years of release, 83% of prisoners were arrested within nine years of release.<sup>20</sup> Reentry programs designed to help returning citizens succeed in society are an important reform effort that can reduce crime and save costs.

Large numbers of citizens return to their communities from prison each year with a felony conviction, making it more difficult for them to obtain employment. During my work in the U.S. Attorney's Office in Detroit, I frequently met with returning citizens, who said that their greatest obstacle to success was their inability to find work. Without a job, it is difficult for a person to make ends meet without violating the law. The lure of the drug trade beckons on a regular basis. For that reason, finding jobs for returning citizens is an important crime prevention strategy.

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<sup>16</sup> Kahryn Riley, *Detroit a Model When it Comes to Solving the Opioid Epidemic*, THE HILL (Feb. 7, 2018, 7:45 AM EST), <https://perma.cc/UJ9E-GV32>.

<sup>17</sup> *Id.*

<sup>18</sup> Andrea Fox, *Top 5 Recidivism Reducing Programs*, GOV1 (Jan. 27, 2017), <https://www.gov1.com/public-safety/articles/top-5-recidivism-reducing-programs-Y0Qm03jLSadTwD38/>

<sup>19</sup> See Mariel Alper, Matthew R. Durose & Joshua Markman, *2018 Update on Prisoner Recidivism: A 9-Year Follow-Up Period (2005-2014)*, BUREAU OF JUST. STAT. 4 (May 2018), <https://perma.cc/YW9E-4PKN>.

<sup>20</sup> *Id.*

Some of the most successful reentry programs focus on employment. One program, the Prison Entrepreneurship Program (PEP), is a non-government organization in Texas that connects returning citizens with executives as mentors to teach business and leadership skills.<sup>21</sup> PEP services include case management, housing, social services, and assistance finding employment. The recidivism rate for graduates of the program is below 7%. Another successful program is the Delancey Street Foundation, a residential program that began in San Francisco and helps returning citizens and other at-risk individuals obtain college degrees and find employment as truck drivers, movers, furniture makers, and employees in its café and bookstore.<sup>22</sup> The Last Mile, out of San Quentin State Prison in California, provides training to prisoners in digital communication and technology, including computer coding, leading to jobs in coding upon release.<sup>23</sup> All three programs were noted as recidivism programs with the highest rates of success and as models for communities that need help with offender re-entry.<sup>24</sup>

During my time as a federal prosecutor, I saw a successful reentry program called the Help Offenders Positively Excel (HOPE) Initiative in the U.S. District Court for the Eastern District of Michigan. Individuals who were on supervised release following the completion of their prison sentences and who scored at the highest risk for recidivism based on various factors were eligible to participate in the program. Participants were required to submit to intensive supervision along with any recommended treatment, such as substance abuse treatment or cognitive behavioral therapy. The incentive to participate and succeed was early termination of supervision. A team consisting of a judge, probation officer, federal defender, prosecutor, and a treatment provider met with each participant every month to help set goals in education or employment, and to monitor progress. The rates of success were very high, with most participants “graduating” from the program and ending their supervision early.

Various models for reentry exist and can be replicated around the country if adequately funded. While reentry programs can be costly, they might be the most effective way to reduce crime and ultimately save costs because they are narrowly tailored to a target population that is at substantial risk to re-offend.

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<sup>21</sup> *Empowering Innovation*, PRISON ENTREPRENEURSHIP PROGRAM, <https://perma.cc/3CYD-9YH6> (last visited July 6, 2021).

<sup>22</sup> *How We Work*, DELANCEY STREET FOUND., <https://perma.cc/H7SZ-QCNK> (last visited July 6, 2021).

<sup>23</sup> Andrea Fox, *supra* note 18.

<sup>24</sup> Andrea Fox, *supra* note 18.

## CONCLUSION

Professor Osler has identified some causes for slow progress in achieving criminal sentencing reform and offers ideas to hasten the process. One reason that progress may be slow for sentencing reform is that it may be perceived by some as inconsistent with the purposes of the criminal justice system of public safety, deterrence, punishment, and respect for the rule of law. Moreover, commutation of sentences on a large scale is inconsistent with our policy preference for finality in judgments.

Instead, reform efforts might be more widely accepted if we focus on the front end of the criminal justice process. If we want to promote liberty, protect public safety, keep families together, and reduce prison costs, we should focus on prevention rather than simply shortening sentences. By investing in drug treatment, mental health treatment, diversion programs, and prisoner reentry, we can achieve far more than we could by just reducing sentences and releasing prisoners early. If we can prevent crimes from occurring in the first place, then no social harm will have occurred, no victim will have been injured, and no one has to go to prison at all. Isn't it better for a citizen to have stayed out of prison altogether than to be released from prison early?



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