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HOW TO STOP FEDERAL JUDGES FROM RELEASING VIOLENT CRIMINALS AND GUTTING TRUTH-IN-SENTENCING LAWS

INTRODUCTION

As Congress reconsiders recent crime legislation, lawmakers have an opportunity to correct deficiencies in the law that encourage federal judges to cut short the sentences of criminals—often violent criminals—and release them back into the community.

Tucked away in the Violent Crime Control and Law Enforcement Act of 1994 is Section 3626, a little-noticed provision that deals with the role of the federal courts in prison and jail litigation: "A Federal court shall not hold prison or jail crowding unconstitutional" unless an "individual plaintiff inmate proves that the crowding" inflicts "cruel and unusual punishment" (Eighth Amendment violations) on him. Relief in such cases "shall extend no farther than necessary to remove the conditions that" afflict the particular inmate plaintiff. A "Federal court shall not place a ceiling on the inmate population of any Federal, State, or local detention facility" as a remedy for Eighth Amendment violations unless "crowding is inflicting cruel and unusual punishment on particular identified prisoners." Unfortunately, this provision has not had the intended effect.

Both in letter and in spirit, the crowding provision of the 1994 crime bill enjoyed wide bipartisan support in Congress, drew favorable on-the-record remarks from President Clinton and state and local officials of both parties, and won great praise from law enforcement organizations. Moreover, the provision reflected strong public support. In every relevant public opinion survey on crime conducted since 1980, the need to keep judges from interfering unduly with the detection, arrest, prosecution, and incarceration

of predatory street criminals has been supported by wide majorities of citizens of every demographic description in every region of the country.[1]

As a rule, federal judges are enormously respectful of both the public safety and the federalism concerns at stake in prison and jail litigation. But the first major test case of Section 3626 makes it clear that this provision, as drafted in the 1994 crime bill, will succeed neither in keeping irresponsible federal judges from releasing violent criminals nor in preventing them from gutting highly effective truth-in-sentencing laws and related public safety measures.

Prosecutors already are pointing to the need for fresh legislation. In December 1994, the National District Attorneys Association, a nonpartisan body representing concerned prosecutors throughout America, approved a resolution calling on federal lawmakers to adopt more detailed legislation to deal with the reality that "federal court orders in prison litigation often have severe adverse effects on public safety, law enforcement and local criminal justice systems." What these prosecutors and other law enforcement officials understand is that the federal courts have gone overboard in protecting prisoners' rights. They have done so at a huge human and financial cost to law-abiding Americans and at the expense of making a mockery out of democratically enacted laws. Some federal judges have made themselves the sovereigns of the cell blocks, forcing changes in operations that have resulted in inmate-on-inmate murders, inmate-on-staff assaults, a dramatic increase in spending on amenities and services for inmates, and the early release each year of literally hundreds of thousands of violent or repeat criminals.

Congress needs to strengthen Section 3626 to address this continuing problem.

THE FAILING CRIMINAL JUSTICE SYSTEM

In 1970, not a single prison system was operating under the sweeping court orders common today. By 1990, some 508 municipalities and over 1,200 state prisons were operating under judicial confinement orders or consent decrees. Indeed, led by the federal bench, judges over the last quarter-century have undone almost every major governmental anti-crime initiative.

For example, in the 1970s, when state legislatures attempted to cut funds for ineffective "rehabilitation" programs, judges declared that prisoners have a legally enforceable *right* to some such services. In the June 1993 edition of *Justice Quarterly*, Professor Charles H. Logan of the University of Connecticut and Dr. Gerald G. Gaes of the Federal Bureau of Prisons offered an exhaustive analysis of the literature on such programs. They found no evidence either that these programs rehabilitate prisoners or that they come any closer to doing so today than they did twenty years ago.[2]

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1 *Sourcebook of Criminal Justice Statistics* (Washington, D.C.: Bureau of Justice Statistics, 1994), pp. 194-195, and William G. Mayer, *The Changing American Mind: How and Why American Public Opinion Changed Between 1960 and 1988* (Ann Arbor: University of Michigan Press, 1992).

2 Charles H. Logan and Gerald G. Gaes, "Meta-Analysis and the Rehabilitation of Punishment," *Justice Quarterly*, Vol. 10, No. 2 (June 1993), pp. 245-263.

Largely because of the courts, today about half of every tax dollar spent on prisons goes not to the basics of security but to amenities and services for prisoners. Prisons have about twice as many staff per inmate today as they did in 1958. Yet most of the staffing increases have been to administer the services and programs that judges have declared essential to prisoners' rights—recreation, education, and medical services.

Likewise, in the 1980s, as many states passed mandatory-minimum sentencing laws, the judges checkmated the public and its elected representatives by imposing prison and jail caps. In the September 1994 edition of *The Prison Journal*, Dr. Gaes reviews the empirical literature on prison crowding and reaches the same conclusions as numerous other scholars: despite the conventional wisdom about the harmful effects of crowding, the data simply do not support the belief that inmates suffer greater levels of violence, illness, or other problems when prisons are crowded. In many places, prison managers have run very crowded prisons without any increases in critical incidents or other problems.[3]

Just the same, judges have continued to treat crowding as an automatic threat to the well-being of prisoners and have enforced orders resulting in the early release of dangerous criminals. In part because of these judicial interventions, mandatory-minimum sentencing laws have been largely ineffective: the median time that state prisoners spend in confinement is only about 35 percent to 40 percent of their maximum sentences.

Many states are now tightening or abolishing parole and instituting truth-in-sentencing laws that require offenders to serve at least 85 percent of their sentenced time behind bars before release. Some are also instituting measures that would result in life without parole for thrice-convicted violent offenders. But unless the Congress acts decisively to curb federal judges, they and their brethren on state and local benches—not the legislatures—will continue to be the chief doormen of America's revolving-door justice system.

REVOLVING-DOOR JUSTICE

According to studies by the U.S. Bureau of Justice Statistics (BJS), in America today there are over 5 million persons under correctional supervision—behind bars, on probation, or on parole. But about 72 percent of them are *not* incarcerated. Between 1980 and 1993, the nation's prison population increased by 184 percent, and in 1994 there were over one million convicted criminals in state and federal prisons. But over the same period the nation's parole population increased by 204 percent. In 1994 over 3.5 million persons were on probation or parole.

The vast majority of prisoners are violent or repeat offenders. The latest BJS data show that 49 percent of state inmates are in prison for a violent crime, 62 percent have been convicted of one or more violent crimes in the past, and 94 percent have been convicted of a violent crime or been sentenced in the past to probation or incarceration.[4] Thus,

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3 Gerald G. Gaes, "Prison Crowding Research Examined," *The Prison Journal*, Vol. 74, No. 3 (September 1994), pp. 329-363.

4 Lawrence Greenfeld, *Survey of State Prison Inmates, 1991* (Washington, D.C.: Bureau of Justice Statistics), p. 11.

barely 6 percent of state prisoners are nonviolent offenders with no prior sentence to either probation or incarceration.

While official statistics show clearly that virtually all prisoners are violent or repeat criminals, for at least two reasons the actual amount and severity of crimes committed by prisoners when they are free are still many times greater than these statistics reveal.

The first reason is plea bargaining. Numerous studies show that over 90 percent of all adjudicated felony defendants do not go to trial, because the offender pleads guilty to a lesser charge.[5] Countless crimes are swept under the criminal-records rug by plea bargaining.

The second reason is that most prisoners commit many times more non-drug felony crimes than the ones for which they are arrested, convicted, and imprisoned. In two studies conducted in the early 1990s and published in *The Brookings Review*, Harvard University economist Anne Morrison Piehl and this author found that the median number of crimes, excluding all drug crimes, committed by prisoners the year before they were imprisoned was twelve.[6]

Not surprisingly, therefore, letting violent and repeat criminals out of prison or jail and putting them on probation, parole, or pretrial release results in countless murders, rapes, assaults, weapons offenses, robberies, and burglaries each year. BJS data for the nation show that within three years of sentencing, nearly half of all probationers and parolees are convicted of a new crime or abscond. Among probationers with new felony arrests, 54 percent are arrested once, 24 percent are arrested twice, and 22 percent are arrested three times or more. Nearly one-third of parolees who were in prison for a violent crime, and nearly one-fifth who were in prison for a property crime, are rearrested within three years for a *violent* crime. Indeed, about 35 percent of all persons arrested for a violent crime are on probation, parole, or pretrial release at the time of their arrest.

The closer one looks, the clearer it becomes that a huge fraction of America's crime problem results from lax probation, parole, and pretrial release policies. For example, the August 1994 report of the Virginia Governor's Commission on Parole Abolition and Sentencing Policy reveals that in Virginia 68 percent of all murders, 76 percent of all aggravated assaults, and 81 percent of all robberies are the work of repeat offenders. Between 1986 and 1993 alone, the people of Virginia would have been spared over 1,000 violent crimes, including 73 murders, if non-drug felons out on parole had remained in prison.

Likewise, a 1993 Florida Department of Corrections study reported that between January 1, 1987, and October 10, 1991, some 127,486 prisoners were released early from Florida prisons. Within a few years of their early release, they committed over 15,000 violent and property crimes, including 346 murders and 185 sex offenses. Most of these crimes would have been averted had the convicted criminals spent even 85 percent of their sentenced time in prison. But as BJS data show, nationally, about half of all parol-

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5 Ralph Adam Fine, *Escape of the Guilty* (New York: Dodd, Mead & Co., 1986), p. 3; *Felony Defendants in Large Urban Counties* (Washington, D.C.: Bureau of Justice Statistics, 1993), p. 13.

6 John J. DiIulio, Jr., and Anne Morrison Piehl, "Does Prison Pay? Revisited," *The Brookings Review*, Vol. 13, No. 1 (Winter 1995), pp. 21-25, and "Does Prison Pay?" *The Brookings Review*, Vol. 9, No. 4 (Fall 1991), pp. 28-35.

ees serve 14 months or less in prison before they are released and spend well under half of their sentenced time in confinement.

THE PHILADELPHIA STORY

The public safety toll of court-ordered revolving-door justice and the difficulty of getting irresponsible federal judges to respect the Constitution and yield to these concerns is a grave problem. This is epitomized by the recent history of the prison cap imposed on Philadelphia by U.S. District Court Judge Norma L. Shapiro.

Typical of the judicial *modus operandi* in such cases, Judge Shapiro cajoled the city into signing two consent decrees, one in 1986 and one in 1991, which gave her virtually unfettered control over the system and its finances. This relieved her of the necessity of ever having to issue a finding that any particular inmate in the system was suffering from any specific violation of his constitutional rights. Philadelphia's Mayor, Edward Rendell, who is a former district attorney, has been battling for years to get Judge Shapiro to relinquish her control. So far, she has resisted successfully.

The main consequence of Judge Shapiro's intervention has effectively been to decriminalize drug and property crime in Philadelphia. Data compiled by the Philadelphia District Attorney's Office and by two independent researchers show that some 67 percent of all defendants released because of the prison cap simply fail to appear in court. In just one recent 18-month period in Philadelphia, 9,732 arrestees out on the streets because of the prison cap were rearrested on new charges, including 79 murders, 90 rapes, 701 burglaries, 959 robberies, 1,113 assaults, 2,215 drug offenses, and 2,748 thefts. Among those murdered by offenders released because of the court's prison cap was Danny Boyle, a 30-year-old rookie Philadelphia police officer.

The prison cap has played havoc with the city's downtown redevelopment efforts and forced local businesses to spend even more than they have been spending on security. It also has turned Philadelphia into a major drug smuggling port. One reason for this is that under the terms of Judge Shapiro's orders, a drug criminal who possesses less than 50 grams of heroin (street value $33,000), 50 grams of cocaine (street value $5,000), or 50 pounds of marijuana (street value $225,000) goes free. Some 76 percent of drug defendants do not even bother to appear in court.

In a statement issued on October 31, 1994, Judge Shapiro did what some federal judges all around the country have been doing in such cases for the last three decades: She rejected the public safety concerns of law-abiding citizens. She dismissed empirical evidence on the effects of crowding. And she ignored the relevant language of Section 3626 of the 1994 crime bill, which clearly mandates that consent decrees in such cases be reopened forthwith.

THE TEXAS CASE

The adverse public safety impact of rulings like Judge Shapiro's are bad enough. But one also must be mindful of how unbridled federal court intervention affects prison safety and prison budgets. A good illustration on both counts is the Texas case of *Ruiz v. Estelle*. The case began in 1972 and is still not completely resolved today. It was led throughout by Federal Judge William Wayne Justice of the Eastern District Court.

In a 248-page opinion issued in 1980, Judge Justice required scores of changes in the Texas prison system. Among them:

- ☞ **An end to the use of "building tenders"** (inmates who served as prison guards and often brutalized fellow prisoners);
- ☞ **A complete revision** in the inmate disciplinary process;
- ☞ **A division of the prison population** into management units of not more than 500 cells each;
- ☞ **The delivery of state-of-the-art medical services** to prisoners;
- ☞ **A reduction in the number of prisoners** in maximum-security blocks;
- ☞ **The provision of a spacious single cell** for each prisoner.

Some of these orders were constitutionally required and highly desirable (for example, the end of the corrupt building tender system). But most of the orders had not a single constitutional, scientific, or moral anchor. Nor did they acknowledge the fact that Texas prison officials had already developed some outstanding programs for prisoners, including the only fully accredited prison education system in the nation. Instead, the micromanagement simply reflected Judge Justice's ideology and that of his team of court monitors.

In 1982 the U.S. Circuit Court of Appeals for the Fifth District tried to talk sense to Judge Justice, admonishing him that "the district court's decree administers a massive dose when it is not yet demonstrable that a lesser therapeutic measure would not suffice" to remedy conditions inside Texas prisons. The Court of Appeals instructed him to "respect the right of the state to administer its own affairs so long as it does not violate the Constitution." Meanwhile, Texas prison officials continued to plead with him to recognize that certain of his sweeping administrative requirements would spawn short-term inmate violence and, in the decades to come, would bankrupt the system if not the State of Texas itself.

But Judge Justice turned a deaf ear to all such pleas. As a result, in the mid-1980s Texas prisons experienced wholly unprecedented bouts of murderous inmate-on-inmate violence. Between 1973 and 1980 there was a total of 19 homicides in Texas prisons, and inmate-on-staff assaults were exceedingly rare. But in 1983 and 1984, as the court's orders went into effect, scores of prisoners were murdered, thousands were severely assaulted, and rates of inmate-on-staff violence skyrocketed.

So did costs. Prison operating expenses in Texas grew from $91 million in 1980 to $1.84 billion in 1994, a tenfold increase in real terms, while the state's prison population barely doubled. In 1994 the Texas Comptroller of Public Accounts issued a report which documented the fiscal and administrative impact of the court's order on Texas prisons. The irony of this report was that, after years of being battered by Judge Justice for ostensibly failing to comply with his orders, Texas prison officials now were being criticized for "overcompliance" with them. But the full and final measure of responsibility for the human and financial toll of the court's sweeping intervention must lie with the court itself.

RESTRAINING JUDICIAL PANIC: THE JOB FOR CONGRESS

The history of judicial intervention into prisons and jails teaches that it is not enough to raise public awareness or pass new laws. For representative democracy to work on crime policy, and for Americans of every race, creed, and color to be protected against the ravages of street crime, more fundamental changes are needed.

Whatever Congress does in revisiting the rest of the federal crime bill of 1994, one of the most crucial steps must be to prohibit federal judges from becoming *de facto* legislators and corrections czars. Section 3626 of the 1994 federal crime bill was a step in the right direction, but only a tiny step. The Congress should revisit this issue at once and take pains to ensure that federal judges abide by federal laws governing the limited role of the federal courts in conditions of confinement and related cases.

The United States Constitution states in Article III, Section 2 that "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such exceptions, and under such Regulations as the Congress shall make*" (emphasis added). The Supreme Court has declared over and over again that federal courts must restrain themselves with respect to conditions of confinement cases. To cite just a few key decisions, in *Bell v. Wolfish* (1979), the Court declared that double-celling did not violate due process. In *Rhodes v. Chapman* (1981), the Court held that double celling was not cruel and unusual punishment. In *Wilson v. Seiter* (1991), the Court ruled that constitutional violations had to be based on specific conditions rather than "totality." And in *Rufo v. Inmates of Suffolk County Jail* (1992), the Court endorsed flexible standards for modifying consent decrees in light of changed circumstances.

But within weeks of the passage of Section 3626 of the 1994 crime bill, the National Prison Project of the American Civil Liberties Union issued a memo, dated September 15, 1994, on how to "confront" the provision. The memo mocked Congress for "taking a stand in favor of God, motherhood, and locking up criminals"—three values which, apparently, the ACLU does not hold so dear.

Irresponsible federal judges, along with prisoners' rights lawyers and anti-incarceration lobbyists, need to be reminded of the clear language of the nation's governing political document with regard to the power of Congress to set the appellate jurisdiction of the federal judiciary. Most Americans want prisoners to have basic amenities (decent food, adequate medical care) and services (educational opportunities, drug treatment). But they do not want prisons to be virtual resorts, and they most certainly do not want another generation's worth of violent and repeat criminals returned to the streets because of some judge's political ideology, rejection of statistical evidence, jurisprudential ignorance, or stubborn delusions about the consequences of "crowding."

To prevent judges from acting in this way, Congress needs to pass legislation that unambiguously defines and further limits appropriate remedies in prison and jail conditions cases. For unless and until the courts are curbed, no mere changes in the law—truth-in-sentencing reforms, three-strikes mandates, new death penalty provisions—will survive the judicial gantlet that has effectively stymied every major democratically enacted anti-crime measure of the last quarter-century.

What if Congress acts to strengthen Section 3626 of the federal crime bill but the lower federal courts do not abide by the additional restrictions on prison remedies set by Congress? If that happens, then the Congress, in the name of the people, should move at once to exercise its full powers under Article III, Section 2 of the Constitution. The most authoritative interpretation of that power is the plainest one. The late Edward S. Corwin is widely considered this country's premier scholar of the U.S. Constitution. As he wrote, "[T]he lower Federal courts derive *all* their jurisdiction immediately from acts of Congress....Also, all writs by which jurisdiction is asserted or exercised are authorized by Congress....The chief external restraint upon judicial review arises from Congress's unlimited control over the Court's appellate jurisdiction, as well as of the total jurisdiction of the lower Federal courts."[7]

Congress should no longer abdicate its responsibility for the human and financial harm done by activist federal judges. The place to begin is by curbing federal judges who substitute the ACLU's prisoners' rights manifesto for the Bill of Rights and impose prison caps and other orders which permit violent and repeat criminals to rule the streets.

Prepared for The Heritage Foundation by
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7 Edward S. Corwin, *The Constitution and What It Means Today* (Princeton, N.J.: Princeton University Press, 1978), pp. 213, 225 (emphasis in original).

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