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The Second Chance Act and the Future of Reentry Reform

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Mass incarceration in the 1980s and 1990s has spawned a prisoner reentry crisis in this decade. Although reentry has only recently gained currency as a national political issue, the problems associated with reentry were an utterly predictable consequence of a long-term trend toward increased reliance on imprisonment as a response to crime. Even at the height of the incarceration boom, only a tiny fraction of offenders were sentenced to death or life imprisonment, and the average prison term has remained below three years.¹ Thus, nearly everyone we send away to prison eventually comes back. They return, for the most part, to a small number of low-income, urban communities that are already struggling with a host of profound social problems.² They return, after the defunding of prison-based educational and therapeutic programs,³ with the same underlying deficits that contributed to their criminal behavior in the first place. Indeed, they are apt to return with those deficits widened as a result of their time in prison and the stigma of a criminal record.⁴ And they return in ever-swelling numbers, with an eightfold increase in the annual number of returning inmates since 1970 to more than 600,000 now.⁵ The few communities that attract the bulk of these returnees will almost inevitably experience increased crime, homelessness, substance abuse, and demands on social service agencies that are already spread thin.

As the magnitude of the problem has become clearer, the political system has begun to respond. In his 2004 State of the Union Address, President Bush proposed a \$300 million prisoner reentry initiative. “We know from long experience that if [inmates] can’t find work, or a home, or help, they are much more likely to commit crime and return to prison,” he observed.⁶ “America is the land of second chance, and when the gates of prison open, the path ahead should lead to a better life.”⁷ Heeding this call, the House of Representatives recently passed the Second Chance Act (SCA), and counterpart legislation in the Senate has already cleared that body’s Judiciary Committee. The SCA would build on the Department of Justice’s Serious and Violent Offender Reentry Initiative (SVORI), a \$130 million grant program that ran from 2003 to 2005, as well as a host of other initiatives that have been undertaken by federal, state, and local agencies across the country.

Passage of the SCA, which appears likely as of this writing, would further galvanize an emerging reentry reform movement and highlight the increasing importance of reentry in the national dialogue on crime and punishment. Indeed, as many commentators have noted, a focus on reentry has important implications not only for the management of prisons and parole but also for the way that *all* actors in the criminal justice system interact with offenders,⁸ including at the sentencing stage. In light of the growing and potentially pervasive influence of reentry considerations on the administration of criminal justice, this issue of *FSR* includes a diverse range of perspectives on the challenges facing returning inmates and their families, politics and policy making in the reentry field, and the broader implications of a focus on reentry for criminal justice. I am particularly delighted that Jeremy Travis, president of the John Jay College of Criminal Justice and a leading pioneer in the reentry field, has written an introductory essay that comments on each of the articles and contextualizes them within the history and development of the reentry movement.⁹

In these Editor’s Observations, I first comment on the SCA itself and then discuss the potential significance of a reentry focus at sentencing. Finally, I suggest some concerns about the ability of the

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reentry movement to live up to its potential. In brief, I am troubled by the tendency to frame and evaluate reentry initiatives as solely, or even primarily, recidivism reduction measures. Although decreased crime rates are certainly a plausible and desirable consequence of devoting more attention and resources to offenders during their transition from prison, conceptualizing the reentry “problem” as a crime prevention issue misses many important social welfare and social justice concerns implicated in the treatment of returning prisoners and threatens to reinforce, rather than supplant, the legalist mind-set that fuels mass incarceration.

I. The Second Chance Act

As passed by the House, the SCA authorizes about \$340 million in reentry-related spending over two years, most of which would be distributed in the form of grants to state, local, and tribal authorities. In itself, this would represent a significant new infusion of resources into reentry programs, for instance, more than doubling the annual funding provided under the SVORI. Additionally, because the grants require substantial matching contributions by the recipients, the SCA may also induce significant increases in reentry-related spending at the state and local level. On the other hand, when assessed against the number and needs of the 1.3 million or so prisoners who will be released over the two-year period (or, for that matter, the nation’s \$50 billion in annual spending on corrections¹⁰), the SCA’s commitment of funds can hardly be regarded as dramatic.

The SCA’s single-largest authorization (\$55 million per year) is intended for adult and juvenile offender demonstration projects. The program’s requirements exemplify the SCA’s general approach to reentry. Grant recipients (state, local, or tribal agencies) must develop a reentry strategic plan containing measurable performance outcomes, one of which must be a 50 percent reduction in recidivism rates over five years.¹¹ Other required performance measures include increased employment, education, and housing opportunities for offenders released back into the community.¹² Grant recipients must collaborate with corrections, health, housing, child welfare, education, substance abuse, victims services, employment services, and law enforcement agencies and convene reentry task forces composed of diverse agencies and community organizations.¹³ Priority must be given to applicants who provide prerelease reentry planning and continuity in the provision of services.¹⁴

In another notable provision, discussed by Eric Miller in his contribution to this issue,¹⁵ the SCA also authorizes \$20 million in grants for state and local reentry courts.¹⁶ Such courts, modeled on the specialized drug treatment courts that have been implemented in many jurisdictions over the past fifteen years, would give judges a pivotal role not only in monitoring returning offenders but also in ensuring that returnees are provided with “coordinated and comprehensive reentry services,” including substance abuse treatment, housing assistance, education, employment training, and the like.¹⁷ To that end, courts receiving grants are specifically required to consult and coordinate with law enforcement, social service, and community agencies.

Throughout, the SCA emphasizes recidivism reduction as a primary legislative purpose but recognizes that this objective is not just a matter for the courts and law enforcement agencies. Rather, the bill contemplates that assistance for returning prisoners in such areas as housing, employment, education, and substance abuse treatment will also contribute to crime prevention goals. Moreover, in promoting the delivery of such services, the SCA also recognizes the importance of planning (at both a global level and an individual prisoner level), multiagency collaboration, and continuity through pre- and postrelease stages. In short, the SCA repudiates the notion that recidivism reduction is best achieved through deterrent threats alone and calls for the delivery of services to former prisoners, not in a minimal or grudging way but in a systematic, proactive fashion.

II. Reentry and Sentencing

As exemplified by the SCA, a core (perhaps *the* core) principle of the reentry movement is that successful reintegration of an offender often requires the thoughtful collaboration of diverse actors over an extended period of time. The movement’s logic, as Michael Pinard suggests in his contribution to this issue, must inevitably direct attention to the actors who dominate the front end of the process, including the lawyers and judges who control sentencing decisions.¹⁸ And, indeed, as Ryan King indicates in his contribution, one of the most provocative recent developments in state-level sentencing law has been the adoption of legislation in New York and Oregon that requires consideration of reentry needs at the time of sentencing.¹⁹ The remainder of this Part discusses four ways that a reentry focus might affect sentencing.

A. Punishment Culture and Overall Severity

A reentry focus may contribute to a broader shift in the culture of punishment. Elsewhere, I have argued that American criminal justice policy has been dominated in recent decades by a legalist mind-set.²⁰ Legalists draw sharp moral distinctions between legal and illegal conduct, heap moral condemnation on lawbreakers, and emphasize consistent, severe penal responses to deter crime and reinforce law-based moral norms. Legalism is premised on the assumptions that criminals freely choose to break the law, that a choice to break the law constitutes a basic rejection of the entire system of shared responsibilities that holds society together, and that the criminal thereby surrenders any strong claim that he or she might otherwise have to the respect or support of others in his or her community. This legalist approach to criminal justice might be contrasted with a harm-reduction approach. Harm-reductionists eschew moral condemnation, recognize that criminal acts may sometimes represent a failing of society as much as a failing of the criminal, and emphasize constructive social responses to crime that are intended to minimize future harm (including the harm suffered by the criminal as a result of the conviction and sentence).

The reentry movement adheres more to the harm-reduction than to the legalist paradigm. Indeed, the whole notion of delivering services to offenders is, at some basic level, inconsistent with legalism. Establishing an affirmative role for others, in addition to the offender himself or herself, in addressing potential recidivism dilutes the legalist message that avoiding crime is a simple matter of making good choices between clear right and wrong. Moreover, systematic efforts to plan for an offender's reentry—particularly at the early stages in the process, such as sentencing or plea bargaining, before the offender has had much opportunity to demonstrate remorse and a genuine commitment to do better in the future—imply that the offender is *entitled* to return and resume membership in the community, thereby undercutting the legalist project of moral condemnation and harsh deterrence. Finally, the reentry movement's call for individualized planning and treatment of offenders is in tension with legalism's emphasis on consistency in punishment and its assumption that all similar offense conduct has the same moral significance, regardless of the offender's personal history and characteristics. In short, the reentry movement has the potential to join other growing movements in the criminal justice system with a harm-reductionist flavor (e.g., therapeutic jurisprudence, restorative justice, and, to some extent, victims' rights) in weakening legalism's hold over penal law and policy (which is best exemplified by truth in sentencing, mandatory minimums, and the Federal Sentencing Guidelines).²¹

Because the era of legalism has been one of extraordinary harshness in sentencing, there is reason to hope that a growing tendency to view offenders not in the abstract as undifferentiated, willful lawbreakers but in the concrete as individual human beings with unique needs and limitations will result in more humane punishment. Legislators persuaded of the appropriateness of proposals like the SCA will, for instance, have a hard time squaring that view with support of mandatory minimums, which are premised on a quite different set of assumptions about crime and criminals and which may dramatically impair the prospects of successful reentry for some offenders. Moreover, as police departments, corrections officials, and community supervision agencies focus more on reentry, it seems likely that their evolving attitudes and priorities will influence those of the key frontline sentencing actors (prosecutors and judges) with whom they regularly interact. Indeed, one important policy initiative of the reentry movement, the reentry court, gives judges a central role in managing reentry, which seems likely further to enhance the judicial focus on individual offender circumstances.

At the same time, it would be naïve to expect the reentry movement to produce any sort of dramatic, across-the-board reduction in severity. For one thing, there remain some categories of offenders, such as sex offenders, who provoke such moral revulsion that the harm-reduction paradigm seems unlikely to have significant effects on their sentencing any time soon. For another, we must recognize that the prospects for successful reintegration of some offenders are so poor that a reentry focus may, if anything, result in longer sentences. By way of illustration, consider the recent debate over the retroactivity of amendments to the Federal Sentencing Guidelines that reduce sentences for crack cocaine. Opponents of retroactivity, like the Department of Justice, argued that the chief beneficiaries of retroactivity would be offenders whose high criminal history scores suggest real danger to the community if they are released early from prison.²² Although ultimately endorsing retroactivity, the Sentencing Commission also recognized the importance of the reentry concerns and specifically directed that any resentencing of crack offenders should take into account whether lowering the sentence would pose a danger to public safety,²³ meaning that the Department's arguments will now be

repeated and evaluated in perhaps thousands of individual cases. In a good number of these cases, a particular judicial focus on reentry (as opposed to the justness of the original sentence when it was first imposed) is not likely to favor the defendant.

B. Relevance of Specific Sentencing Factors

A reentry focus may support expanded reliance on a variety of sentencing factors whose use has been controversial and limited, particularly under the Federal Sentencing Guidelines. For instance, reentry considerations might support giving more attention to defendants' presentencing rehabilitative efforts. Such efforts may not only indicate that the reentry prospects for particular defendants are unusually strong but also provide a good reason to prefer community-based sanctions or short terms of incarceration so as to minimize disruption of existing therapeutic relationships. At a minimum, an awareness of ongoing rehabilitative efforts might lead a sentencing judge to recommend incarceration in a facility with programs and conditions that would facilitate, rather than undermine, those efforts.

Likewise, reentry considerations might also support giving more attention to defendants' family ties. Mary Ann Farkas, Gale Miller, and Christy Visser, in their contributions to this issue, emphasize the critical role played by families in helping offenders through the reentry process.²⁴ Yet, family relationships can be irreparably damaged by long periods of incarceration, especially when imprisonment is far from home and family members are unable to visit regularly. A reentry focus might thus support community-based sanctions, shorter periods of incarceration, and/or a recommendation of placement in a nearby facility for offenders who have supportive family members.

Employment also plays an important role in successful reentry, as Mindy Tarlow and Marta Nelson demonstrate in their contribution to this issue.²⁵ Judges might thus seek to craft their sentences so as to permit employed offenders to retain their jobs, for instance, through reliance on community-based sanctions or (where an employer is willing to temporarily hold a position open) a relatively short term of incarceration. Conditions of supervised release might also take into account an offender's employment needs, for instance, with respect to travel. In determining sentence length, a judge might also consider a defendant's vocational skills and the risks that such skills will atrophy or become obsolete through a long period of incarceration.

Although their relationships to reentry are more speculative, a reentry focus might also change the way a number of other sentencing factors are assessed. For instance, an offender's efforts to assist law enforcement in apprehending or prosecuting his former colleagues in crime may represent a severing of relationships with "bad influences" that bodes well for successful reentry. Although the relevance and weight of "substantial assistance" has traditionally been gauged at sentencing by reference to its value to law enforcement, it might alternatively be assessed from this reentry perspective; judges might thereby find grounds for encouraging and recognizing "assistance" that ultimately provides little direct benefit to the authorities. Likewise, the significance of a guilty plea might be assessed based less on the amount of judge and prosecutor time that is saved and more on the extent to which the plea reflects a genuine recognition of wrongdoing and commitment to do better in the future. Finally, reconciliation with victims and victim statements of support at sentencing might also be evaluated from a reentry perspective to the extent that they indicate a healing of dysfunctional relationships that have in the past contributed to wrongdoing.

C. Sensitivity to Collateral Consequences

The reentry movement has focused public attention on the web of collateral consequences that flow from conviction and a period of incarceration. Such consequences include both formal legal disabilities (e.g., sex offender registration; felon disenfranchisement; and loss of eligibility for welfare, housing, and education benefits) and informal stigma effects (e.g., inability to get a job, get credit, or rent an apartment due to a criminal record). A growing body of legal and sociological scholarship documents the scope and severity of collateral consequences. For instance, Devah Pager recently conducted an experiment in which otherwise similar job applicants were randomly assigned either to have or not to have a fictitious criminal record.²⁶ She found that white applicants *with* a record had only half as great a likelihood of receiving a callback as white applicants *without* a record, while the chances of a black applicant with a record receiving a callback were cut by almost two-thirds.²⁷

A greater sensitivity to collateral consequences may affect sentencing in a variety of ways. For instance, a judge attempting to make the punishment fit the severity of the crime might, in light of anticipated collateral consequences, decide on a shorter period of incarceration than might otherwise

appear appropriate. Likewise, focusing on collateral consequences might convince a judge that recidivism risks and incapacitation needs in some cases are quite low, for instance, in white-collar cases in which the offender's conviction will result in the loss of a professional license that was necessary for commission of the underlying crime. Finally, a judge might craft a sentence so as to avoid particular collateral consequences that the judge deems inappropriate. For instance, if a sentence of *more than* one year would result in a particular disability, the judge might decide to impose a sentence of *exactly* one year.

D. The Sentencing Ritual

A reentry focus may also have important implications for the sentencing ritual itself, that is, the face-to-face, in-court encounter between judge and defendant. The drug court movement has highlighted the potentially powerful role played by a judge, in his or her courtroom with all of the associated symbols of authority, as a motivator for offenders to make lasting changes in their lives. To be sure, as Eric Miller points out in his contribution, drug courts have been a controversial innovation, and there are good reasons to question ongoing efforts to translate the drug court concept into the reentry context.²⁸ Yet, whatever the merits of the reentry court in particular, a substantial body of research lends support to the more general notion that the character of judge-offender interactions can affect the offender's long-run prospects for success. This insight has implications not only for the oversight of the reentry process but also for the way that the sentence is imposed in the first place.

In trying to determine why some offenders persist in crime while others desist, much research has focused on the different understanding that "persisters" have of their life narrative in comparison to "desisters."²⁹ While persisters tend to rely on "condemnation scripts," which convey a sense that the offender has no real choice but to continue in crime, desisters are more likely to employ "redemption scripts," which express conversion and downplay the difficulties facing the offender.³⁰ Maintaining the redemption script, however, may prove a formidable challenge for the offender. A public ceremony validating the script may be of great value in this regard, helping the offender to convince himself or herself of the script's authenticity.³¹ Such a ceremony might usefully include a public commitment by the offender to change, expressions of support by family members and others who know the offender, and an affirmation by a public authority (e.g., a judge) that the offender has the capacity to change and that the community will provide support along the way.³²

There is no reason such validating processes cannot be integrated into the sentencing ritual. Indeed, as Joan Petersilia has argued, even when the sentence to be imposed is a long one, the sentencing hearing may have therapeutic value if the judge avoids characterizing the offender as an incorrigible menace to society and instead makes note of the positive aspects of the offender's character and background and the aberrational aspects of the offense.³³ Further support for such an approach comes from social scientific research on the "procedural justice effect," which has found consistent correlations between respectful treatment by legal authorities (including judges) and positive attitudes toward the law and legal institutions.³⁴ Likewise, restorative justice programs, which have been associated with lower recidivism rates in comparison with conventional criminal case processing, emphasize interactive processes in which offenders have an opportunity to take responsibility for past misconduct and commit to mitigating the harm that has been done to victims and the community.³⁵ All of this suggests, among other things, that federal sentencing practices under the Guidelines may have become overly preoccupied with determining *outcomes*—which is often done in a dry, impersonal, numbers-driven way—and should more self-consciously employ *processes* that support successful reentry by validating the capacity of offenders to do better in the future and expressing the hope and expectation that offenders will eventually be reintegrated as full-fledged members of the community.

III. Challenges Facing the Reentry Movement

On the whole, increased attention to reentry strikes me as a hopeful, humanizing development in a criminal justice system whose harshness has reached unprecedented levels. At the same time, the reentry movement must meet many important challenges before it can live up to its promise. In this Part, I discuss three: a knowledge gap, a funding gap, and an ethical gap.

A. Knowledge Gap

Criminological knowledge has made real progress over the three decades since Robert Martinson released his famously bleak assessment of offender rehabilitation programs.³⁶ One may now point to

a variety of different prison- and community-based programs that have been shown to produce lower recidivism rates.³⁷ However, as David Farabee points out in his contribution to this issue, rehabilitation programs have not been consistently evaluated in a scientifically rigorous fashion, and the highest-quality studies have tended to show, at best, modest recidivism gains.³⁸ This does not mean that all existing programs ought to be rejected: since some have relatively modest costs, they likely produce net social benefits even with the sort of single-digit percentage reductions in recidivism rates that have been documented.³⁹ Yet, Farabee's call for a more scientific approach to developing and evaluating rehabilitative programs remains an important challenge for the reentry movement.

The gap in scientific knowledge threatens the reentry movement in at least two ways. First, public and political support may quickly wane if expenditures are not made with care and expectations kept realistic. When appealing-sounding, but poorly tested, ideas prove ineffective after millions of dollars of public investment, even higher-quality reentry initiatives may be cast into disrepute. Second, to whatever extent consistent recidivism reductions can be demonstrated over time, it is far from clear that the reentry movement will be able to retain its political momentum if those reductions do not reach a higher order of magnitude than is typically documented for state-of-the-art programs today. Given the sheer number of returnees, even a dramatic expansion of good existing programs would not necessarily save inner-city communities from experiencing rising crime rates as a result of the offender influx. A frustrated public may abandon rehabilitative approaches in favor of a return to the get-tough policies of the 1980s and 1990s—which, even if no more cost-effective than rehabilitation, at least offer some sort of cathartic release of punitive emotions. Of particular concern should be the possibility that a graduate of some much-touted rehabilitative program will become the Willie Horton of a new generation, a politically potent symbol of the dangerousness of criminal offenders and the costs of their recidivism. Although rehabilitative programs will never eliminate recidivism entirely, the achievement of demonstrably high reductions in recidivism may be necessary if the reentry movement is to grow and prosper over the long run.

B. Funding Gap

Responding to Farabee's call may be quite expensive, especially to the extent that there is pressure to achieve major crime prevention gains quickly. As a point of reference, the pharmaceutical industry, which Farabee cites as a model for scientific rigor, spent more than \$55 billion on worldwide research and development in 2006.⁴⁰ Even just meeting the demand for existing prison-based rehabilitative programs might require a large increase in spending. Inmate participation rates in residential drug treatment programs, education classes, and vocational training have declined in recent years as budgets have been cut, in each case to about one inmate in three, although demand may be twice that level.⁴¹ And this is to say nothing of the individualized prerelease planning and postrelease follow-through contemplated by reentry reform advocates. As the SCA recognizes, this may entail a wide range of community-based social services relating to health care, housing, family counseling, substance abuse treatment, education, job placement, and the like. Small budgets mean that programs may not be effectively implemented, and ineffectiveness may (as suggested in the prior section) lead to even smaller budgets—perhaps sending otherwise promising reentry initiatives into a death spiral.

C. Ethical Gap

What I have written thus far may suggest a catch-22: the reentry movement is unlikely to maintain its political support (and hence its funding) without achieving demonstrably high reductions in recidivism rates, but achieving such reductions will likely require large increases in funding over a sustained period of time (if it is possible at all). A failure to address recidivism effectively risks a return to the era of get-tough legalism and a concomitant diversion of limited criminal justice resources from programs that support successful reentry to funding for more police officers, prosecutors, and prisons.

Yet, perhaps the vicious circle need not be quite so vicious. If reentry initiatives are understood not as primarily recidivism reduction measures but as the fulfillment of an ethical obligation to some of the most socially marginalized and disadvantaged members of our communities, then the reentry movement may better be able to live up to its humanizing potential. Thus, the great ethical question for reentry-based reform is who are we doing it for: Us or Them, those outside the prison walls or those within? Are we doing it for Us, because we are afraid of Them? Or are we doing it for Them, because we recognize in Them a common spark of humanity (however revolting some of their mis-

deeds) and genuinely wish for Them to rejoin and enrich our communities, to rebuild their lives, and to atone in some way (not merely to suffer) for the harm they have done.

In the political and legislative spheres, recent reentry initiatives have been fueled by both fear and compassion. For instance, in his brief, influential State of the Union remarks on reentry in 2004, President Bush played on both themes, noting the crime risks posed by returning prisoners but also suggesting a broader vision than just recidivism reduction: “America is the land of second chance, and when the gates of prison open, the path ahead should lead to a better life.”⁴² As Beth Colgan observes in her contribution to this issue, other prominent politicians, such as Senators Sam Brownback and Joe Biden, have also framed reentry reform as a matter of compassion and morality.⁴³

Yet, the SCA seems to emphasize crime prevention more heavily. For instance, the House Judiciary Committee Report, excerpted in this issue, identifies three purposes of the legislation (“to reduce recidivism, increase public safety, and help State and local governments better address the growing population of ex-offenders returning to their communities”),⁴⁴ with none clearly echoing the president’s call to help former prisoners lead a better life. Likewise, the grant program for demonstration projects, as discussed in Part I above, requires that each recipient’s strategic plan identify “specific performance outcomes relating to the long-term goals of *increasing public safety and reducing recidivism*,” including the reduction of recidivism rates by 50 percent over five years. Although recipients must also identify performance outcomes relating more broadly to returnees’ quality of life, such as increased employment and education opportunities, the legislation does not impose specific, quantitative goals in these areas. Moreover, in order to receive a second grant under the program, a recipient must demonstrate “adequate progress” toward the goal of recidivism reduction but need not make such a showing with respect to other performance outcomes.

To be sure, even those who see reentry reform primarily in ethical terms might applaud a recidivism focus as good politics. Yet, I fear that recidivism reduction may ultimately prove a rather unstable foundation for reforms intended to make the criminal justice system more humane. First, there is the risk of disappointed expectations and the knowledge/funding catch-22 described above: given the limited capabilities of the current state of the rehabilitative art, reentry reform is not likely to produce the sort of dramatic gains that may be necessary to prevent a period of rising crime rates, which may result in a diversion of desperately needed funds to more punitive and incapacitative responses. Reentry programs may thus stand on a more politically secure footing if they are not conceptualized and assessed primarily as crime prevention measures.

Second, given a long history of well-intentioned criminal justice innovations that have gone awry, reentry reformers must be sensitive to the risks that their humanizing programs will fall prey to the powerful legalist impulses in American culture, possibly resulting in even harsher treatment of offenders over the long run. Consider, for instance, the Federal Sentencing Guidelines, which were initially proposed as a way to prevent dyspeptic judges from handing out unduly severe sentences but which, in practice, have contributed to a broad escalation in harshness.⁴⁵ Or consider the intermediate sanctions movement of the 1980s and 1990s, which was intended to divert offenders from prison into programs that were more conducive to rehabilitation but which, in practice, largely translated into more intensive surveillance of probationers and parolees and increased rates of revocation and commitment to prison on the back end.⁴⁶ Viewed in this light, innovations like the reentry court appear to be rather risky propositions. The provision of more services to returning prisoners will undoubtedly be accompanied by higher expectations for their performance, closer monitoring, and the discovery of more violations of release conditions. The legalist approach demands clear rules and serious consequences for their violation—meaning that the prisoner reentry movement may result in many more “re-exits.”

Against this backdrop, reformers ought to be concerned that a recidivism focus may subtly reinforce the legalist approach. Viewing returning prisoners primarily as threats to public safety underscores their “otherness” and validates perceptions of depravity. Moreover, making those who administer reentry programs, like reentry court judges, accountable principally for recidivism reduction may lead to neglect of the full human potential of returnees, as well as a tendency to pull the “re-exit” trigger too quickly for the returnees who appear to present the highest risks of reoffense.

To the extent that reentry reformers seek more humane treatment of offenders for its own sake, they should not downplay the ethical dimension of their program. They should squarely resist the tendency of the criminal justice system to see the value of a person solely in terms of the person’s past and expected future compliance with society’s rules and instead insist on the unique potential of each person to contribute to his or her family and community. Imprisonment should be seen as a

loss not only for the offender but also for society—as a last resort and not as a presumptive outcome for rule breakers. Likewise, reentry programs should be assessed as much by reference to the positive accomplishments of participants (getting a job, getting a diploma, overcoming mental illness or addiction, supporting a family) as by reference to their failings. However modest the associated reduction in recidivism rates, there would be much to applaud in a reentry program that otherwise produced demonstrable improvements in the lives of former prisoners and thereby enriched the disadvantaged families and communities from which so many of them come.

Notes

¹ JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 3 (2003).

² *Id.* at 8.

³ *Id.* at 5-6.

⁴ DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 31-32 (2007).

⁵ *Id.* at 22.

⁶ President George W. Bush, State of the Union Address (2004), available at <http://www.whitehouse.gov/news/releases/2004/01/print/20040120-7.html>.

⁷ *Id.*

⁸ To note just one example, I have argued elsewhere that reentry considerations should lead prosecutors to pay more attention to procedural justice norms when they engage in plea bargaining. Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. __ (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=982220.

⁹ Jeremy Travis, *Reflections on the Reentry Movement*, 20 FED. SENT. REP. 84 (2007).

¹⁰ PETERSILIA, *supra* note 1, at 4.

¹¹ H.R. 1593, 110th Cong. § 101(a) (2007).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Eric. J. Miller, *The Therapeutic Effects of Managerial Reentry Courts*, 20 FED. SENT. REP. 127 (2007).

¹⁶ H.R. 1593, 110th Cong. § 111. The reentry court concept was developed by Jeremy Travis while he served in the Department of Justice. See JEREMY TRAVIS, BUT THEY ALL COME BACK: RETHINKING PRISONER REENTRY (2000).

¹⁷ H.R. 1593, 110th Cong. § 111 (2007).

¹⁸ Michael Pinard, *A Reentry-Centered Vision of Criminal Justice*, 20 FED. SENT. REP. 103 (2007).

¹⁹ Ryan S. King, *Recent Developments in State Parole Reform, 2004–2006*, 20 FED. SENT. REP. 124 (2007).

²⁰ Michael M. O'Hear, *Victims and Criminal Justice: What's Next?*, 19 FED. SENT. REP. 83, 87 (2007). My discussion of legalist and harm-reduction paradigms was much influenced by FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SEARCH FOR RATIONAL DRUG CONTROL (1992).

²¹ For a discussion of how victims' rights might play into harm-reductionism, see O'Hear, *supra* note 20, at 87.

²² Relevant portions of the Department's statement to the Commission are reprinted in this issue of *FSR*. See 20 FED. SENT. REP. 144 (2007). A view contrary to that of the Department is also reprinted here. See *Statement of Steven L. Chanenson before the United States Sentencing Commission regarding Retroactivity of Crack Guidelines Amendments*, 20 FED. SENT. REP. 146 (2007).

²³ U.S. Sentencing Comm'n, Press Release, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (2007), available at <http://www.uscc.gov/PRESS/rel121107.htm>.

²⁴ Mary Ann Farkas & Gale Miller, *Reentry and Reintegration: Challenges Faced by the Families of Convicted Sex Offenders*, 20 FED. SENT. REP. 88 (2007); Christy A. Visher, *Returning Home: Emerging Findings and Policy Lessons about Prisoner Reentry*, 20 FED. SENT. REP. 93 (2007).

²⁵ Mindy Tarlow & Marta Nelson, *The Time Is Now: Immediate Work for People Coming Home from Prison as a Strategy to Reduce Their Reincarceration and Restore Their Place in the Community*, 20 FED. SENT. REP. 138 (2007).

²⁶ PAGER, *supra* note 4, at 59.

²⁷ *Id.* at 67, 70.

²⁸ Miller, *supra* note 15.

²⁹ PETERSILIA, *supra* note 1, at 207-8 (citing SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES (2001); DANIEL GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1969)).

³⁰ *Id.* at 208.

³¹ *Id.*

³² See *id.* at 208-10.

³³ *Id.* at 211; see also David Wexler, *Robes and Rehabilitation: How Judges Can Help Offenders "Make Good,"* COURT REV., Spring 2001, at 19, 21.

³⁴ For a summary of this research, see O'Hear, *supra* note 8.

³⁵ For a recent review of the restorative justice literature, see Mark S. Umbreit et al., *Restorative Justice in the Twenty-first Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 259-61 (2005).

³⁶ See Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 PUB. INTEREST 22 (1974).

³⁷ PETERSILIA, *supra* note 1, at 179. See also DAVID FARABEE, RETHINKING REHABILITATION: WHY CAN'T WE REFORM OUR CRIMINALS? 25 (2005) ("Not all offender programs are ineffective. . . . [S]ome appear to show some positive results.").

³⁸ David Farabee, *For the Second Chance Act, Great Strides Will Come in Small Steps*, 20 FED. SENT. REP. 136 (2007).

³⁹ PETERSILIA, *supra* note 1, at 179.

⁴⁰ Pharmaceutical Research and Manufacturers of America, *Who We Are*, at http://www.pfdrma.org/about_pfdrma/ (last visited Dec. 15, 2007).

⁴¹ PETERSILIA, *supra* note 1, at 95-97 (citing study finding that more than 68 percent of new inmates in Ohio reported that they would be “very likely” to take part in job training programs).

⁴² Bush, *supra* note 6.

⁴³ Beth A. Colgan, *The Presidential Politics of Prisoner Reentry Reform*, 20 FED. SENT. REP. 110 (2007).

⁴⁴ H.R. REP. NO. 110-140 (2007), reprinted in 20 FED. SENT. REP. 141 (2007).

⁴⁵ Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 759-61, 815-16 (2006).

⁴⁶ PETERSILIA, *supra* note 1, at 15-16.