

January 10, 2010

Prisoners of Parole

By JEFFREY ROSEN

IN 2004, STEVEN ALM, a state trial judge in Hawaii, was frustrated with the cases on his docket. Nearly half of the people appearing before him were convicted offenders with drug problems who had been sentenced to probation rather than prison and then repeatedly violated the terms of that probation by missing appointments or testing positive for drugs. Whether out of neglect or leniency, probation officers would tend to overlook a probationer's first 5 or 10 violations, giving the offender the impression that he could ignore the rules. But eventually, the officers would get fed up and recommend that Alm revoke probation and send the offender to jail to serve out his sentence. That struck Alm as too harsh, but the alternative — winking at probation violations — struck him as too soft. "I thought, This is crazy, this is a crazy way to change people's behavior," he told me recently.

So Alm decided to try something different. He reasoned that if the offenders knew that a probation violation would lead immediately to some certain punishment, they might shape up. "I thought, What did I do when my son was young?" he recalled. "If he misbehaved, I talked to him and warned him, and if he disregarded the warning, I gave him some kind of consequence right away." Working with U.S. marshals and local police, Alm arranged for a new procedure: if offenders tested positive for drugs or missed an appointment, they would be arrested within hours and most would have a hearing within 72 hours. Those who were found to have violated probation would be quickly sentenced to a short jail term proportionate to the severity of the violation — typically a few days.

Alm mentioned his plan to the public defender, who suggested that it was only fair to warn probationers that the rules were going to be strictly enforced for the first time. Alm agreed, and

on Oct. 1, 2004, he held a hearing for 18 sex offenders, followed by another one for 16 drug offenders. Brandishing a laminated “Wanted” poster, he told them: “I can guarantee that everyone in this courtroom wants you to succeed on probation, but you have not been cutting it. From now on, you’re going to follow all the rules of probation, and if you don’t, you’re going to be arrested on the spot and spend some time in jail right away.” He called the program HOPE, for Hawaii’s Opportunity Probation With Enforcement, and prepared himself for a flood of violation hearings.

But they never materialized. There were only three hearings in the first week, two in the second week and none in the third. The HOPE program was so successful that it inspired scholars to evaluate its methods. Within a six-month period, the rate of positive drug tests fell by 93 percent for HOPE probationers, compared with a fall of 14 percent for probationers in a comparison group.

Alm had stumbled onto an effective strategy for keeping people out of prison, one that puts a fresh twist on some venerable ideas about deterrence. Classical deterrence theory has long held that the threat of a mild punishment imposed reliably and immediately has a much greater deterrent effect than the threat of a severe punishment that is delayed and uncertain. Recent work in behavioral economics has helped to explain this phenomenon: people are more sensitive to the immediate than the slightly deferred future and focus more on how likely an outcome is than how bad it is. In the course of implementing HOPE, Alm discovered another reason why the strategy works: people are most likely to obey the law when they’re subject to punishments they perceive as legitimate, fair and consistent, rather than arbitrary and capricious. “When the system isn’t consistent and predictable, when people are punished randomly, they think, My probation officer doesn’t like me, or, Someone’s prejudiced against me,” Alm told me, “rather than seeing that everyone who breaks a rule is treated equally, in precisely the same way.”

Judge Alm’s story is an example of a new approach to keeping people out of prison that is being championed by some of the most innovative scholars studying deterrence today. At its core, the

approach focuses on establishing the legitimacy of the criminal-justice system in the eyes of those who have run afoul of it or are likely to. Promising less crime and less punishment, this approach includes elements that should appeal to liberals (it doesn't rely on draconian prison sentences) and to conservatives (it stresses individual choice and moral accountability). But at a time when the size of the U.S. prison population is increasingly seen as unsustainable for both budgetary and moral reasons — the United States represents 5 percent of the world's population and nearly 25 percent of the world's prison population — the fact that this approach seems to work may be its biggest draw.

The HOPE program, if widely adopted as a model for probation and parole reform, could make a surprisingly large contribution to reducing the prison population. In many states, the majority of prison admissions come not from arrests for new crimes, as you might think, but from probation and parole violations. Nationwide, roughly two-thirds of parolees fail to complete parole successfully. Todd Clear, a professor at [John Jay College of Criminal Justice](#) in New York, estimates that by eliminating imprisonment across the nation for technical parole violations, reducing the length of parole supervision and ratcheting back prison sentences to their 1988 levels, the United States could reduce its prison population by 50 percent.

Some in government are beginning to take notice. In November, invoking the HOPE program as a model, the Democratic congressman Adam Schiff of California and his Republican colleague Ted Poe of Texas introduced legislation in the House that would create federal grants for states to experiment with courts that deliver swift, predictable and moderate punishment for those who violate probation.

There also appears to be a national audience for a broader conversation about new ways to shrink the prison population. Last year, a three-judge panel in California ordered the overcrowded state prison system — the largest in the country, with more than 170,000 prisoners at its peak — to reduce the inmate population by tens of thousands of prisoners within two years in order to comply with constitutional standards for medical and mental health care. Facing a tightening

budget crisis in September, California legislators added to the pressure by demanding a reduction in the prison budget of \$1.2 billion. In the [U.S. Senate](#), Jim Webb of Virginia is leading a crusade for prison reform, insisting that fewer jail terms for nonviolent offenders can make America safer and more humane, while also saving money. And in the Obama administration, Attorney General Eric Holder is questioning the value of relentlessly expanding prisons. In July, he declared that “high rates of incarceration have tremendous social costs” and “diminishing marginal returns.”

The most effective way to shrink the prison population, of course, is not just to reform probation and parole but also to deter groups of potential lawbreakers from committing crimes in the first place. If, in addition to bringing down the numbers of probation and parole revocations, police officers and judges could also address the core problems of drug arrests and street violence, the United States might even be said to have solved its notorious prison problem. Is such an ambitious goal possible? While it might sound too good to be true, the HOPE-style thinking about deterrence offers a promising road map for addressing all these challenges.

ALTHOUGH HE ACTED on his own, Judge Alm did not design the HOPE program without inspiration. In the mid-1990s, when he was a U.S. attorney in Hawaii, Alm heard a presentation by David M. Kennedy, who is considered the patron saint of the new thinking about deterrence. Kennedy, who now teaches at John Jay College of Criminal Justice, spoke about Operation Ceasefire, a program he was designing to reduce youth violence in Boston. Along with his colleagues Anne M. Piehl and Anthony Braga, Kennedy worked with the head of the Youth Violence Strike Force, a division of the Boston Police Department. The police officer explained that while conventional deterrence hadn't worked, he had begun to persuade gangs to behave by issuing a credible threat: namely, that when a gang attracted attention with notorious acts of violence, the entire gang — all of whose members likely had outstanding warrants or probation, parole or traffic violations — would be rounded up.

Kennedy recalls this today as a breakthrough moment in his thinking. Ever since the days of Cesare Beccaria, the 18th-century philosopher and death-penalty opponent, classical deterrence theorists had focused on credibly threatening individuals; Kennedy's first innovation was to focus on increasing the legitimacy of law enforcement in the eyes of groups. "The legitimacy element has risen in my mind from being an important element of the strategy to the most important element," Kennedy told me. Convinced that the best way to increase legitimacy was to enlist what he calls the "community's moral voice," Kennedy set out to deter the most dangerous young gang members by persuading their friends and neighbors to pressure them into obeying the law.

In May 1996, Kennedy, Piehl and Braga helped to design the first of what came to be known as "call-in" sessions, intended to put gangs on notice that they would face swift and certain punishments. Working with Kennedy, probation and parole officers ordered gang members to attend face-to-face meetings with the police. The gang members were given three warnings. First, they were told that if anyone in their group killed someone, the entire group would suffer consequences. Second, the gang members were told that if they want to escape from street life, they could get help and job training from social service agencies and churches. And finally, they heard from members of their community that violence was wrong and it had to stop. The results of the forums were striking and immediate. Within two years, youth violence in Boston fell by two-thirds and city homicide rates by about half.

Why was Operation Ceasefire so effective? One reason was that the warning hearings gave the gang members a sense of what to expect. Increasingly draconian sentences don't always reduce crime, and sometimes increase it. (After increasing in the 1980s, crime fell by 25 percent in the 1990s, but states that put more people in jail had a smaller decline than states that imprisoned fewer.) In part, this is because many people actually don't know the punishments they face.

In addition to offering knowledge, Operation Ceasefire provided certainty. The small numbers of gang members singled out meant they could trust that the police would be able to follow through

on their threats. “If you can get people to behave by threatening them credibly, you’ll need less actual punishment than if you let them run wild and punish only occasionally,” says Mark A. R. Kleiman, author of the new book “When Brute Force Fails: How to Have Less Crime and Less Punishment.” Kleiman, whom Alm consulted soon after initiating the HOPE program, became interested in swift, certain and moderate punishment when he was a colleague of Kennedy’s years before. Lastly, Operation Ceasefire gave gang members an incentive to obey the law by promising that they would get positive reinforcement from their families and neighbors for changing their behavior.

In all of this, Kennedy’s insights were supported by a variety of recent research suggesting that people are more likely to obey the law when they view law enforcement as fair and legitimate. Tom Tyler, a psychology professor at [New York University](#), has found that compliance with court orders is highest for offenders who perceive that they have experienced a fair process. And in a recent book, “American Homicide,” the [Ohio State University](#) historian Randolph Roth argues that throughout American history, the homicide rate has decreased when people trust that the government is stable and unbiased and believe in the legitimacy of the officials who run it. Similarly, the legal scholar Paul Butler argues in his new book, “Let’s Get Free: A Hip-Hop Theory of Justice,” that widespread incarceration in the 1980s and ’90s undermined the legitimacy of law enforcement in the eyes of the affected communities by converting a prison term into something heroic rather than stigmatic.

After Operation Ceasefire, Kennedy turned his attention from gangs to open-air drug markets. He set out to change how the criminal-justice system was viewed from the perspective of the offenders and their communities — and how the offenders and their communities were viewed by the police. As Kennedy told me, “I saw law enforcement believing plausible but untrue things about the communities they police” — namely, that the communities were corrupt and didn’t care about the violence that was destroying them — “and the communities believing untrue things about the police” — namely, that the cops were part of a racist conspiracy to lock up black offenders while overlooking white ones.

To correct what he calls a “corrosive and tragic mistake,” Kennedy came up with the idea of a kind of truth-and-reconciliation commission in which offenders would talk to the police accompanied by the people they trusted the most: their mothers. In 2003, working with James Fealy, the police chief in High Point, N.C., Kennedy arranged some preliminary meetings. Although Fealy had been shocked to learn that the community thought he and his officers were almost as bad as the drug dealers, Fealy, in turn, surprised community members by declaring that no one in law enforcement thought the drug war could be won.

These meetings prepared the groundwork for the strategy that followed. After identifying 16 active drug dealers, Fealy arrested four and then prepared warrants for the other 12 that could be signed whenever the police chose. He then called in the other dealers, nine of whom arrived accompanied by their mothers and other “influentials” like grandmothers, and delivered the following message to them as a group: “You could be in jail tonight. We don’t want to do that, we want to help you succeed, but you are out of the drug business.” The mothers and grandmothers, seemingly impressed by the decision not to arrest, cheered on the police. In subsequent meetings, the “influentials” shouted down naysayers, including a conspiracymonger who accused the [C.I.A.](#) of having created the crack epidemic to oppress black people. The drug market in the area dried up.

IN ADDITION TO influencing Judge Alm’s probation reform, Kennedy’s efforts to rethink deterrence have also inspired one of the most powerful recent models for national parole reform, which comes from Tracey Meares, a law professor at [Yale](#). (Unlike probation, which involves a sentence instead of prison, parole involves supervision after part of the prison sentence has been served.) In 2002, Meares, who was then a law professor at the [University of Chicago](#), was asked by the U.S. attorney in Chicago, Patrick Fitzgerald, to analyze how best to address crime in the city. She concluded that they should begin on the West Side, in West Garfield Park and the surrounding area, where rates of murder and gun violence were more than four times the city average. Fitzgerald suggested that they might implement a version of Project Exile, a controversial program in Virginia that sought to deter gun violence by threatening federal

prosecutions — and a five-year mandatory minimum sentence — for repeat offenders convicted of illegal gun possession. But Project Exile had experienced only mixed success: federal prosecutors could prosecute only a small proportion of the gun cases submitted by the Richmond police. The threat of a severe sentence was, in effect, something of a bluff.

Meares told Fitzgerald that threats of zero tolerance wouldn't work because they simply weren't credible. Instead, Meares argued that law-enforcement officials should concentrate on specific groups of wrongdoers in ways they could accept as both reasonable and fair. Using Operation Ceasefire in Boston as a model, Meares identified everyone who had committed violent or gun-related crimes and had been released from prison and recently assigned to parole. She gathered them in random groups of no more than 20 for call-in sessions in what Meares calls “places of civic importance” — park buildings, local schools and libraries — where they sat at the same table as the police in order to create an egalitarian, nonconfrontational atmosphere. They then heard a version of Kennedy's three-part presentation. The results of the program were drastic: there was a 37 percent drop in the average monthly homicide rate — the largest drop of any neighborhood in the city. Violent crime in Chicago today is at a 30 year low. “All these strategies are a way of signaling to groups of people that government agents view them with dignity, neutrality and trust, which is the best way of convincing them that the government has the right to hold them accountable for their behavior,” Meares told me.

From Kennedy and Kleiman to Alm and Meares, the judges and scholars developing new deterrence strategies are changing the way we think about parole, probation, gang violence and drug markets. But the strategies also present a rare opportunity to persuade the nation's policymakers that the most urgent case for prison reform is not only economic but also moral and practical. Yes, it's an outrage that the United States locks up citizens for so long with such uncertain effect; but it's also self-defeating, because long sentences give rise to a crisis of legitimacy that can lead to more crime, not less.

A crisis of legitimacy may sound like a huge, perhaps intractable problem, but the tantalizing promise of the new deterrence thinking is that the crisis can actually be solved, practical step by practical step. The relative simplicity of the solutions, it turns out, is at the core of their radical potential.

Jeffrey Rosen, a law professor at George Washington University, is a frequent contributor to the magazine. He is at work on a book about Louis Brandeis.

<http://www.nytimes.com/2010/01/10/magazine/10prisons-t.html?sq=H.O.P.E.&st=cse&scp=1&pagewanted=all>