Negative: Barber Amendment

By Jeremiah Moseby

***The United States Federal Government should significantly reform its policies regarding convicted prisoners under federal jurisdiction***

Case Summary: The AFF plan increases the allowance of “good time” days that a federal prisoner may earn in an attempt to reduce overcrowding and recidivism. Status Quo allows federal prisoners to get up to 54 days off per year of their sentence conditioned on good behavior. The Barber Amendment increases it to 128 days/year.

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Negative: Barber Amendment

INHERENCY

1. A/T “Prison overcrowding” – Status Quo policies will solve

First Step Act (2018) shortens sentences

Ames Grawert with Brennan Center For Justice 2020 (senior counsel and John L. Neu Justice Counsel in the Brennan Center’s Justice Program. He leads the program’s quantitative research team, focusing on trends in crime and policing and the collateral costs of mass incarceration.) June 23rd, 2020 “What Is the First Step Act — And What’s Happening With It?” <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it> (accessed November 1st, 2021)

The law we now know as the First Step Act accomplishes two discrete things, both aimed at making the federal justice system fairer and more focused on rehabilitation.

Its sentencing reform components shorten federal prison sentences and give people additional chances to avoid mandatory minimum penalties by expanding a “safety valve” that allows a judge to impose a sentence lower than the statutory minimum in some cases. These parts of the First Step Act are almost automatic: once the act was signed, judges immediately began sentencing people to shorter prison terms in cases came before them. Similarly, people in federal prison for pre-2010 crack cocaine offenses immediately became eligible to apply for resentencing to a shorter prison term.

Incarceration and overcrowding are declining fast

United States Courts 2017 (official U.S. government website) published April 25th, 2017 “Policy Shifts Reduce Federal Prison Population” <https://www.uscourts.gov/news/2017/04/25/policy-shifts-reduce-federal-prison-population> (accessed November 3rd, 2021)

A decline in the number of federal prosecutions and in the severity of sentences for drug-related crime in recent years has resulted in a significant drop in the federal prison population, according to statistics from the Judiciary, the U.S. Sentencing Commission (USSC), and the Bureau of Prisons (BOP). The federal prison population fell from a peak of nearly 219,300 inmates in 2013 to 188,800 in April 2017, a nearly 14 percent reduction, according to BOP statistics. The decrease reflects a dramatic shift in federal policies away from stiff penalties for drug trafficking and other drug-related offenses in recent years. It also has mitigated overcrowding at BOP facilities – the inmate population, once at 37 percent overcapacity, is now at 13 percent overcapacity.

SOLVENCY

1. A/T: “Improved prison safety”

No proof that good time improves prison safety and no empirical evidence from State programs

Prof. Nora V. Demleitner 2009 (Professor of Law at Washington and Lee Univ. School of Law) September 2009 “Good Conduct Time: How Much and For Whom? The Unprincipled Approach of the Model Penal Code” <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1453&context=wlufac> (accessed November 1st 2021, brackets and ellipses and in original)

Good time may serve a host of purposes. First, good time can provide an incentive for participation in educational, work, drug, or other types of programs. Correction officials have stated that “prisons are safer, more orderly, and more productive when inmates participate in programs.” Programming may enhance rehabilitation. Successful participation in the federal government’s Residential Drug Abuse Program (RDAP), for example, reduces recidivism. Second, “productive work programs permit inmates . . . to begin to repay their debt to society.” Finally, good time can incentivize compliance with prison rules or perhaps even exemplary behavior. Such compliance makes it possible for the institution to function more smoothly. For that reason, most states allow for good time, at least for most offenders. However, “[n]o one knows whether, or in what measure, a reduction in good time will produce greater disorder behind bars.” States without good time do not appear to experience more frequent prison riots than those with good time.

2. A/T: “Lower recidivism”

Good time programs don’t promote genuine rehabilitation and may actually be counterproductive

Prof. Nora V. Demleitner 2009 (Professor of Law at Washington and Lee Univ. School of Law) September 2009 “Good Conduct Time: How Much and For Whom? The Unprincipled Approach of the Model Penal Code” <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1453&context=wlufac> (accessed November 1st 2021, brackets in original)

In the federal system, previously proposed legislation would have increased good time up to sixty days per year for federal inmates if they satisfactorily earned a high school diploma, a GED, or “certification through an accredited vocational training program, college, or university.” Inmates would also have earned the maximum good time if they had completed “interventional rehabilitation programs, including mental health and drug abuse programs.” Sole responsibility for awarding the good time would have rested with the BOP. The bill was designed in part to increase the BOP’s accountability for programming that leads to better re-entry. As some have written, the proposed legislation pursued three goals: “to promote public safety by offering constructive incentives for exemplary institutional adjustment,” to “increas[e] educational standards” and to “decreas[e] the overall cost of corrections.” Some research, however, indicates that institutional adjustment and recidivism are relatively unrelated because prisons are an artificial environment. Therefore, compliance with prison rules may in fact be counterproductive to successful re-entry. When an inmate participates in a program to gain release, such a decision does not necessarily reflect moral growth or rehabilitation. More disturbingly, it may be solely indicative of successful functioning in an artificially controlled environment, rather than be predictive of success in a less structured setting. While all prisons require a certain structure and control, rehabilitative programs and especially work programs also need to allow for increasing choices to replicate life on the outside more accurately.

3. Optional compliance

BOP interprets time credits to be optional

Peter J. Tomasek 2021 (lawyer, Editor in Chief of “Interrogating Justice”) May 26th, 2021 “The BOP Has discretion under the First Step Act, But How Much?” <https://interrogatingjustice.org/ending-mass-incarceration/the-bop-has-discretion-under-the-first-step-act-but-how-much/> (Accessed November 2nd 2021, brackets and ellipses in original)

The government’s argument relies on subsection (h)(4) of 18 U.S.C. § 3621. That statute provides that, “[b]eginning on the date of enactment of this subsection, the Bureau of Prisons may begin to expand any evidence-based recidivism reduction programs and productive activities that exist at a prison as of such date, and may offer to prisoners who successfully participate in such programs and activities the incentives and rewards….” The BOP, capitalizing on the phrase “may offer,” has essentially taken the position that the entire concept of earned time credits under the First Step Act is optional. The BOP “may offer” earned time credits. Or it may not. And, regardless of which it chooses to do, there’s nothing anyone can do about it.

BoP can deny good time for virtually any reason

Law Office of Elias Damianokos, 2021 (experienced Tucson criminal defense attorney, and has handled hundreds of criminal cases, including as a former Arizona state prosecutor) February 16th, 2021 “Your Guide to Federal Good Time Credit” <https://www.damianakoslaw.com/2021/02/16/federal-good-time-credit/> (accessed November 3rd, 2021

The BOP will keep a running record of an inmate’s disciplinary action and use that record to reduce their potential maximum good time credit throughout the year. They will ultimately be awarded less than 47 days if they were involved in any disciplinary situations. Once good time is awarded to an inmate, it usually cannot be taken away. The BOP can retract good time if they find out that the prisoner was involved in something serious during that year and just didn’t happen to get caught. Those chickens can come home to roost and history can be rewritten to include undiscovered indiscretions. It can also be taken away for anything that the BOP calls “good cause”, which is generally interpreted to mean rioting, refusing to work, or hunger strikes. Since BOP has a reputation for interpreting rules however they please even when they’ve been told otherwise, they can technically call anything “good cause”.

4. No actual prisoner reform

Good time is awarded automatically-- not based on rehabilitative progress, and no one even knows how to measure progress

Prof. Nora V. Demleitner 2009 (Professor of Law at Washington and Lee Univ. School of Law) September 2009 “Good Conduct Time: How Much and For Whom? The Unprincipled Approach of the Model Penal Code” <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1453&context=wlufac> (accessed November 1st 2021)

In both federal and state systems, most inmates are awarded the entire available amount of good time. One may draw one of two conclusions: Either the good time system is effective in assuring compliance with prison rules, or good time is ineffective because prison policies are either too lax or insufficiently enforced. For practical reasons, in large prison systems, there is “an inexorable tendency for statutory and meritorious good time to be awarded automatically.” Some have suggested that good time should not be awarded for mere failure to run afoul of rules or solely for participation in work programs, but instead should assess actual rehabilitation. If such awards were to be based on rehabilitative progress, however, the assessment would require an effective measure of such progress, which appears virtually impossible. In addition, substantially more personnel would be needed for these assessments.

DISADVANTAGES

1. More crime

Shorter sentences would be bad because the “tough on crime” approach since the ‘90s has helped bring down crime rates

Prof. BARRY LATZER 2020. (emeritus professor at John Jay College of Criminal Justice, New York) 17 Feb 2020 “Democrats Prefer ‘Reforming’ the Criminal-Justice System to Punishing Criminals” (accessed 1 July 2021) https://www.nationalreview.com/2020/02/democrats-prefer-reforming-criminal-justice-system-to-punishing-criminals/

The United States is still in a crime trough, with violent crime rates [down 51 percent since 1991](https://ucrdatatool.gov/Search/Crime/Crime.cfm). When crime is low, pressures mount to reduce especially punitive measures, such as long prison sentences or the death penalty. Meanwhile, progressives are also motivated by the belief that the criminal-justice system is biased against African Americans, as a disproportionate number of them are in prisons and jails. Though blacks are roughly 13 percent of the United States population, they are [31 percent](https://www.bjs.gov/content/pub/pdf/p17.pdf) (see table 3 of the BJS report) of state prison inmates. (No one has convincingly demonstrated that this gap is the result of anything other than [a disparity in](https://ucrdatatool.gov/Search/Crime/Crime.cfm) crime rates, so the racism allegation is unsupported.) The truth is that we are already in a period of retrenchment in criminal justice, a cutting back on arrests, prosecutions and incarceration. Imprisonment rates have fallen steadily since 2007, dropping by 15 percent. For African Americans the decline was 31 percent. The Democratic candidates for president have latched on to the cutback trend, some a lot more aggressively than others, whereas President Trump, to the extent that he takes a stance at all, has chosen a more traditional road, aiming at crime control rather than system reform. The risk in the Democrats’ leniency approach is that it may fuel another crime wave, a long-term crime boom, such as the terrible ordeal the country endured from the late 1960s to the early 1990s. The weakening of the system (fewer arrests and imprisonments, shorter sentences) was a major factor in the late 60s rise in crime.

Large scale decarceration is extremely dangerous for communities

Rafael A. Mangual, City Journal 2019 (Senior Fellow, Head Of Research, Policing & Public Safety, Contributing Editor, City Journal) Summer 2019 “Everything You Don’t Know About Mass Incarceration” <https://www.city-journal.org/mass-incarceration> (accessed November 1st, 2021)

Getting these facts straight is important, especially since reformers unfavorably contrast the U.S.’s criminal-justice system with those of other nations—Western European democracies, in particular—with significantly lower incarceration rates. Because so few American prisoners are serving time for trivial infractions, aligning America’s incarceration numbers with those of, say, England or Germany would require releasing many very serious and frequently violent offenders. Yet many in the decarceration camp have been calling for just such a mass release. The #cut50 initiative, founded by activist and CNN host Van Jones, aims to halve the prison population. Scholars at the Brennan Center have called for an immediate 40 percent reduction in the number of inmates. Such drastic cuts could produce significant crime increases, as communities lose the incapacitation benefits that they currently enjoy. Already, there’s no shortage of cautionary examples. In March, the New York Police Department released a montage of security-camera footage that captured ten gang members in East New York, a Brooklyn neighborhood, as they hunted down and killed a man in broad daylight. The chilling images show the victim, 21-year-old Tyquan Eversley (out on bail, facing a rap for armed robbery), running, as his armed assailants give chase. Eversley gets entangled in barbed wire after jumping a fence into someone’s backyard; one of his pursuers hurls what looks like part of a cinder block over the fence at him, as another points his gun over the top and fires five fatal rounds. The rock-slinging thug, according to the NYPD, is 25-year-old Michael Reid, who has since been identified and arrested. Reid, it was subsequently reported, had been recently released from federal custody and was wearing an ankle monitor at the time of the murder.

Very high re-arrest rates for federal prisoners after release: 39.8% for non-violent, 64% for violent over 8 years

Matthew Clarke 2019. (journalist)  Long-Term Recidivism Studies Show High Arrest Rates, PRISON LEGAL NEWS, May 2019 (accessed 1 July 2021) <https://www.prisonlegalnews.org/news/2019/may/3/long-term-recidivism-studies-show-high-arrest-rates/>

Two reports on long-term recidivism among prisoners released from state and federal prisons showed very high arrest rates. The rate for state prisoners was 83% over a nine-year study period, while it was 39.8% for nonviolent and about 64% for violent federal prisoners over an eight-year period.

Kentucky study: 48% of early release prisoners were rearrested – and they were “non-violent” offenders, supposedly

Rachel Droze, ABC News, October 4th 2021 “Nearly 50% of Kentucky inmates released early due to COVID concerns face new criminal charges” <https://www.whas11.com/article/news/kentucky/kentucky-inmates-released-early-pandemic-face-new-criminal-charges/417-e517cb2c-e6f7-41cf-a178-91f3a955c601> (accessed November 3rd, 2021)

A report from the Kentucky Administrative Office of the Court found 48% of inmates released early have been criminally charged since their release. That same report shows 32% are facing felony charges. In order to qualify for early release, inmates had to be non-violent, non-sexual offenders, according to Morgan Hall, communications director for the Kentucky Justice and Public Safety Cabinet.

2. Justice undermined

“Good Time” violates justice because it changes a prisoner’s sentence by people not qualified to assess moral character

Institute for Social Research, University of New Mexico February 1996 “GOOD TIME AND PROGRAMS FOR PRISONERS (NATIONWIDE)” <https://nmsc.unm.edu/reports/1996/GoodTimePrograms.pdf> (accessed November 2nd, 2021)

The just deserts perspective focuses on both the moral quality of the offender's act and on a limited number of offender characteristics such as mental state, age and criminal sophistication. Supporters of the just deserts perspective point out that the good time system allows prison management to re-sentence the prisoner based upon character traits which become apparent in prison. They criticize this practice because they believe that prison administrators and line staff are not qualified and should not be authorized to reevaluate offenders' moral character and recalibrate their sentence.

Any sentencing that does anything besides giving what the criminal deserves is unjust and hands the government the power of tyranny

John Piper 2012 (chancellor of Bethlehem College & Seminary) “Life Is Cheap in Norway: C. S. Lewis on the Sentence of Anders Breivik” 27 Aug 2012 https://www.desiringgod.org/articles/life-is-cheap-in-norway-c-s-lewis-on-the-sentence-of-anders-breivik (accessed 9 Aug 2021)

If a criminal’s sentence does not have to accord with what he deserves, it does not have to be just. At that point we are all at the mercy of those who are in power to call anything we do a crime and give it any therapeutic or remedial solution they choose, including gas chambers and medical alterations. “The Humanitarian theory of punishment will put in their hands a finer instrument of tyranny than wickedness ever had before.”

Offenders should serve their full term because that’s what the jury decided

**[Referring in context to the abolition of parole in Virginia]**

Rusty Bishop 2015. (family of murder victim; former deputy sheriff and court bailiff) FOR VICTIMS' FAMILIES, PAROLE ADDS TO THE PAIN 10 July 2015 <https://www.pilotonline.com/opinion/letters/article_95967817-c724-5beb-ba4b-243ae78da6af.html> (accessed 1 July 2021)

On Jan. 5, 1985, my dear cousin Julie Crockett was murdered at the Oceanfront while she worked at my uncle's small hotel. The convicted killer was sentenced to 50 years in prison. This was before the 'no parole' law referred to by Davis, which was enacted by Gov. George F. Allen in 1994. Even though my cousin's killer had a criminal record dating back to his juvenile days, he had a mandatory release date after 22 years and has been out of prison about eight years. He served less than half his sentence for first-degree murder. My faith has moved me to forgive the killer for what he did, but he should have served the entire 50 years, because that is what a jury gave him.

Sentence reductions are unjust because they deceive society about what criminal sentences really are

Prof. Cecelia Klingele, 2012 (Associate Professor at the Univ of Wisconsin Law School) January 2012 “The Early Demise of Early Release” West Virginia University Research Repository <https://researchrepository.wvu.edu/cgi/viewcontent.cgi?article=1234&context=wvlr> (accessed November 1st, 2021)

The third, and perhaps most important, reason why early release efforts fail to endure is purely normative. Releasing a prisoner before his sentence is complete is a practice that stands in tension with the determinate sentencing philosophies of many jurisdictions, and with the overall punitive sentiment that animates penal policy even in many indeterminate sentencing jurisdictions. For the most part, truth in sentencing gained popularity because its advocates believed that it really did offer "truth" to victims of crime and to the public. From this perspective, people deserve to know with certainty that when a judge imposes a sentence of ten years, he means ten years and not "five years to discretionary release and then two and a half more until mandatory parole, for a total of five to seven and a half years, minus an extra twenty percent for good time, for a total of four to six years imprisonment." Although lawmakers may justify early release measures as short-term necessities, they are likely to retain grave misgivings about the justice of early release practices absent some indication that early release laws will not impede the public's desire for truth in sentencing. This moral conflict may explain why states like Washington and Kansas have tolerated modest early release measures, but have rejected attempts to expand release opportunities that more significantly shorten court-imposed sentences.

Founders’ view of justice requires equal time for equal crime. But sentence reductions mean offenders are treated differently for the same crime

Dr. Steven A. Simon 2021 (J.D.; PhD; Associate Professor of Political Science, and Coordinator of the Program in Philosophy, Politics, Economics, and Law, Univ. of Richmond ) RE-IMPRISONMENT WITHOUT A JURY TRIAL: SUPERVISED RELEASE AND THE PROBLEM OF SECOND-CLASS STATUS, CLEVELAND STATE LAW REVIEW 19 Apr 2021 (accessed 29 June 2021) https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=4131&context=clevstlrev

In the period shortly after the Constitution’s ratification, the predominant view of criminal penalties was that they served a retributive purpose: to mete out the punishment that criminals deserved based on the offenses committed. This view about the aim of punishment had implications for the manner in which sentences were determined. If the penalty was intended as retribution for the offense committed, then it made sense to link the determination of the sentence tightly to the nature of the offense. The relevant variables were those differentiating one kind of crime from another. This conception of punishment’s aim, then, did not focus attention on variables differentiating one perpetrator from another. Since, unlike individual human beings, the facts of an act already committed cannot change, this view of punishment’s aim did not require an updating of the time to be served in prison based on events transpiring after the sentencing. As a result, those sentenced to prison commonly served their terms in full.

“Saving money” doesn’t justify the unfairness of sentence reductions

Prof. Cecelia Klingele, 2012 (Associate Professor at the Univ of Wisconsin Law School) January 2012 “The Early Demise of Early Release” West Virginia University Research Repository <https://researchrepository.wvu.edu/cgi/viewcontent.cgi?article=1234&context=wvlr> (accessed November 1st, 2021)

Although deep concerns over the injustice of mass incarceration underlie many efforts to reduce overreliance on incarceration, recent efforts to reduce sentences have often been framed in fiscal terms in order to increase their perceived political palatability. Politicians and policymakers have asserted that decreasing the prison population is a way to be "smart on crime" and to demonstrate fiscal stewardship over dwindling state resources. While these statements technically may be true, and while they may persuade the public to support such measures in the short term, they are unlikely to be satisfactory justifications for practices that are not also seen as fundamentally fair.

Before you talk about money, you have to prove sentence reductions are just and fair first

Prof. Cecelia Klingele, 2012 (Associate Professor at the Univ of Wisconsin Law School) January 2012 “The Early Demise of Early Release” West Virginia University Research Repository <https://researchrepository.wvu.edu/cgi/viewcontent.cgi?article=1234&context=wvlr> (accessed 6 Nov, 2021)

When policymakers frame changes in carceral policy primarily as stop gap budgetary measures and only secondarily as the right response to criminal offending, they do not advance the interests of those they serve or the deeper convictions that animate their efforts. In order to create sustainable changes in sentencing and law and correctional policy, lawmakers must be able to justify reductions in sentences by reference to principles of justice. Ultimately, it is crafting principled laws and placing them in a broader conversation about the fundamental fairness of modern sentencing practice that is most likely to overcome moral obstacles to reducing prison populations through sentence reduction.

3. “Sentence Reduction” policy blocks real solutions to high prison population

Link: AFF fails to justify sentence reduction policy on the grounds of fairness and justice

Cross apply Disad #2

Impact: Real solutions blocked. Solutions to over-incarceration require wholesale changes, not tinkering with sentence reductions. But that won’t happen if the public believes reformers are acting unjustly

Prof. Cecelia Klingele, 2012 (Associate Professor at the Univ of Wisconsin Law School) January 2012 “The Early Demise of Early Release” West Virginia University Research Repository <https://researchrepository.wvu.edu/cgi/viewcontent.cgi?article=1234&context=wvlr> (accessed 6 Nov, 2021)

Tonry has it right when he suggests that lasting reductions in the scale and scope of imprisonment will only occur if policymakers change perceptions about the justice of current penal policy. To do that, "[t]he ultimately moral arguments about disproportionate punishments, ruined lives, and social injustice need to be made explici[t]." Insofar as current reform efforts are motivated primarily by financial pressures, they are doomed to failure on several fronts. Lasting changes in carceral policy will require more than simply reducing sentences by a few days here and there, or even shortening periods of community supervision. They will require a wholesale scaling down of custodial penalties, a rethinking of the ways in which punishment might be imposed in the community rather than behind bars, reconsideration of the kinds of behavior to which the criminal justice system should respond, and reevaluation of the ways in which the resources of the criminal justice system are deployed. While early release measures may play a peripheral role in those efforts, the changes needed are much larger. Political will to make such changes, and public support to sustain them, is only likely to occur if people believe that they are fair to victims, offenders, and the larger community.

Empirical Example: Early release policies in Illinois, Wisconsin and Washington failed because the public didn’t see any moral justification in them

Prof. Cecelia Klingele, 2012 (Associate Professor at the Univ of Wisconsin Law School) January 2012 “The Early Demise of Early Release” West Virginia University Research Repository <https://researchrepository.wvu.edu/cgi/viewcontent.cgi?article=1234&context=wvlr> (accessed 6 Nov, 2021)

If policymakers want to craft sustainable early release laws, they must be attentive to questions of clarity. Unless laws operate transparently and rely on explicitly-stated criteria that the public deems fair, they are unlikely to persist. The Illinois experience reflects this reality, and to a lesser degree, so does the failure of early release in Wisconsin and Washington. Overcoming the political obstacles to early release-particularly the fear of public backlash-requires more than clarity of process, however. It also requires attention to normative principles about what factors might justify recalibration of that punishment after a sentence has been imposed.