Criminal Justice Legal Foundation

July 9, 2018

Senator Tom Cotton
124 Russell Senate Office Building
Washington, DC 20510

Re: H.R. 5682, the FIRST STEP Act

Dear Senator Cotton:

The Criminal Justice Legal Foundation, an organization dedicated to the rights of victims of crime and the protection of the law-abiding public, has reviewed H.R. 5682, designated the FIRST STEP Act. This bill appears to be a giant step in the wrong direction.

H.R. 5682 is framed in terms of rehabilitation, and many well-meaning people may have backed it in the belief that it effectively advanced that lofty goal. The devil is in the details, as it usually is, and the details reveal a design to achieve a scattershot reduction in federal sentences — including cases where those sentences are thoroughly deserved — through means that sound like rehabilitation but actually do little to achieve that goal.

The potentially fatal consequences of early releases must not be overlooked or minimized. To cite just one well-known example, on January 5, 2016, a drug-trafficking felon who had been released well before his original date because of retroactive sentencing changes murdered three people — his former girlfriend Erveena Hammonds and her two daughters, Breya Hammonds, 7, and Anaesia Green, 10. See Decker, Man Charged with Killing Woman, 2 Daughters Had Early Prison Release, Columbus Dispatch, Jan. 12, 2016. Critics of the use of this example protest that Wendell Callahan is not typical of those who received sentence reductions, see Sullum, Opponents Of Sentencing Reform Recklessly Conflate Drug Offenders With Murderers, Forbes, Feb. 11, 2016, but it is the critics who miss the point. Innocent people died because the sentence reductions were made across the board and not carefully tailored to ensure that dangerous criminals did not qualify

for them. Their blood is on the hands of those who paint leniency with a broad brush.

The centerpiece of the bill is the provision for time credits in new 18 U.S.C. § 3632(d)(4). Prisoners would be eligible for as many as 15 days credit for each 30 days of participation, that is, up to a one-third reduction in time in prison, to be spent instead in "pre-release custody." That might be a worthwhile provision if the bill imposed rigorous requirements for the earning, application, and loss of such credits. Instead, the language is loose and flabby in the extreme, following the model of California's sloppily drafted and ill-conceived Proposition 57. The California measure should be regarded as a counter-example of what not to do, not a model to be followed.

Beginning with the earning of credits, one means of earning credits is completing "evidence-based recidivism reduction programming." That sounds good, but what quality of evidence and how much reduction? Instead of high hurdles requiring a leap, we find bars lying on the ground, easily stepped over.

"Evidence-based recidivism reduction program" is defined in § 3635(1), with two alternative means of qualifying in paragraph (A). First, a program may qualify if it "has been shown by empirical evidence to reduce recidivism." What kind and quality of empirical evidence? Historically, studies on the effectiveness of rehabilitation programs have been mostly methodological chaff with only scattered kernels of wheat. For example, a 2005 study of drug court studies by the General Accountability Office reviewed 117 studies and found only 27 that met minimum standards for inclusion in the meta-analysis. Not to put too fine a point on it, there is a lot of garbage out there. This bill imposes no requirement whatever of methodological rigor before a study of effectiveness may be considered "evidence."

What standard of evidence is required? Is it merely "some evidence," the deferential standard used by courts in some reviews? Is it "preponderance of the evidence," such as a plaintiff needs to prevail in an ordinary civil case? Is it "clear and convincing evidence," the elevated standard used for particularly serious decisions? Is it "proof beyond a reasonable doubt," the standard for conviction in a criminal case? The bill does not say. If we are going to let hardened criminals out of prison

before their time with the possible consequence of victimization of innocent people, a high standard should be required.

If a methodologically valid study does show clear and convincing evidence of a reduction in recidivism from a program, how much of a reduction should we require before that program is deemed worthwhile? Say that out of a sample of 100 convicts, 85 would recidivate if there were no program, but 84 would recidivate if all 100 completed the program. Would that program qualify as an "evidence-based recidivism reduction program"? Along with "statistical significance" that gives us confidence we are seeing an actual effect and not a random wiggle, we must also insist on "policy significance," that the effect is large enough to matter and be worth the cost. Programs cost money and early release has a cost in increased victimization. A substantial effect, not a trivial one, is required to offset these costs.

As bad as the first clause of § 3635(1)(A) is, the second clause is even worse. A program can qualify merely by being "based on research indicating it is likely to be effective in reducing recidivism." This language is so flabby as to be essentially meaningless. Would anyone go skydiving with a new model of parachute after being told "we have not tested this model, but it is based on research indicating it should work"? This clause should be completely out of the question.

Yet, incredibly, it gets even worse than that. Credits are not limited to participation in "evidence-based recidivism reduction programs," even as loosely as that term is defined. Credits can also be given for participation in "productive activity" with the wide-open definition of "group or individual activity that is designed to allow prisoners determined as having a low or no risk of recidivating to remain productive . . . ." That could be almost anything, and there is no requirement whatever that the activity have any effect in reducing recidivism. This converts the "evidence-based" premise for time credits, which was already weak, into a complete farce.

Time credits should be limited to participation in programs that have been proved by methodologically valid, convincing evidence to produce a substantial reduction in recidivism. Out of necessity, we would have to make an exception for participation in the studies needed to produce that

evidence, but such pilot programs should be limited in size, number, and duration so as avoid the exception swallowing the rule.

In applying the credits, § 3632(d)(4)(C) provides for a mandatory transfer to pre-release custody unless the warden "finds by clear and convincing evidence that the prisoner should not be transferred into prerelease custody . . . ." The drafters know how to apply a "clear and convincing" standard when it runs in the prisoner's favor. The evidence to be considered, though, is limited to "evidence of the prisoner's actions after the conviction of such prisoner and not based on evidence from the underlying conviction . . . ." The best predictor of future behavior is past behavior, yet this bill would write into law a requirement that we blind ourselves to the best available evidence of whether a prisoner will be a danger to others. Not only should the offense of conviction be considered, but prior offenses and other crimes that were plea-bargained away should be considered. Most criminal cases are resolved by plea bargain, and it is not at all unusual for the conviction offenses to be only a portion of the offenses committed, and not necessarily the most serious. Drug offenses may be the ones the defendant agrees to plead guilty to because they are the easiest to prove, while other charges dismissed in the bargain may provide stronger evidence of the defendant's propensity for violence.

Another problem with application is the requirement of § 3632(d)(6) that the credits be in addition to those from any other program. There needs to be an overall cap so that no prisoner serves less than a minimum portion of his sentence in actual incarceration. We passed "truth in sentencing" laws for good reasons, and the reasons remain valid. The victim of serious crime should have an assurance that the perpetrator really will be put away for the time stated or at least a portion of it (such as two-thirds) known in advance.

The third problem with the time credits provision has to do with the loss of credits. Loss of credits for misconduct is an important incentive for prisoners to behave. Yet the bill requires in § 3632(e)(3) that the Bureau of Prisons establish a procedure to restore them. It should be just the opposite — credits lost are lost, and the "procedure" is to start over on earning them. Loss of credits loses its power to increase obedience to rules if lost credits are restored as a matter of course, as is presently the case in California.

Aside from the time credits, the bill is riddled with other problems indicating a naive view of the prisoner population. There have been a handful of well-publicized cases of people who went to federal prison after leading a law-abiding life but then committing one significant offense. Assuming that these cases are typical or even universal rather than exceptional is a grave mistake, and making policy based on that assumption may be fatal to innocent people.

The bill requires provision of programs to all prisoners in § 3621(h). Taken literally, that would require recidivism reduction programs for prisoners on death row and others with sentences that preclude any realistic possibility of release. It would require programs for prisoners so dangerous that they must be confined in "supermax." This is absurd.

There are other problems with the bill, but these should suffice to preclude any precipitous action. The federal prisoner population includes a great many hardened criminals, and we do not have a magic wand to change them. A naive, idealistic, rainbows-and-unicorns view of prisons and prisoners is more than foolish; it is a clear and present danger to innocent people. This bill requires a thorough examination made with that reality in mind.

Very truly yours,

Kent S. Scheidegger

KSS:iha

Enclosure