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# What Is Changing? “The Future Is Not What It Used to Be”



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The question of what is changing in state sentencing after a change election brings to mind the title of a country song: “The Future Is Not What It Used to Be.”<sup>1</sup>

Change often is spurred by unplanned forces. These forces have been building for years; they did not come about because of the 2008 elections. Two trends are evident:

1. The states (except, perhaps, North Dakota) have no money.<sup>2</sup> The federal government may help, but as recent history suggests, states should be careful what they wish for. In the short run, federal assistance can enable states to live beyond their budgetary means. The problem, of course, is that federal aid may not be there in the long run, but the burden of expensive policies may remain.
2. The war on drugs grinds on. Any hope that policy-makers might change substantially the direction of the war seems to have faded.<sup>3</sup> But the growing movement to decriminalize or even legalize marijuana—through citizen referenda—may change markedly the way the nation views the war on drugs.

These two trends come to the fore as changes in state sentencing move forward, particularly as states continue to adjust sentencing policies and practices to incorporate principles of evidence-based sentencing and corrections. The states’ budgetary problems may make the need for sentencing changes more urgent, and the lack of money may hamper the expansion of drug courts and other therapeutic interventions despite their long-term cost savings.

### I. The States Are Broke

Early release of prison inmates has stirred controversy in California—where the prison population may need to be reduced by about 40,000<sup>4</sup>—and Illinois, where an early-release program was discredited by reports of new offenses committed by early-release offenders.<sup>5</sup>

The financial plight of the states highlights the problem of over-incarceration. As my colleague Chief Justice William Ray Price Jr. said in his State of the Judiciary address to the Missouri legislature earlier this year:

Given the difficult financial situation of the state, we must look hard at the costs and effectiveness of our current statutory schemes, especially for nonviolent offenders. The criminal justice system is very expensive. . . . The problem is that we are following a broken strategy of cramming inmates into prisons and not providing the type of drug treatment and job training that is necessary to break their cycle of crime. . . .

We may have been tough on crime, but we have not been smart on crime. . . . It does no good to commit resources to law enforcement and to arrest criminals if you don’t know what you are going to do with them, or you cannot afford to do what you should with them, after they have been arrested. It does no good. . . .

Perhaps the biggest waste of resources in all of state government is the over-incarceration of nonviolent offenders and our mishandling of drug and alcohol offenders. It is costing us billions of dollars and it is not making a dent in crime.<sup>6</sup>

The question that states ultimately have to confront is, How much punishment can we afford?

States have increased the number of crimes, the lengths of their sentences, and the numbers of defendants they are sending to prison. The states’ appetites for punishment greatly exceed what the people are willing and able to pay for. As an example, Missouri’s overall population has increased only 9.3 percent since the early 1990s, but the prison population has increased by 184 percent.<sup>7</sup> During the last twenty-five years, the number of drug offenders receiving felony sentences has increased 650 percent, whereas felony sentences for other crimes have increased 230 percent.<sup>8</sup> Some of these increases are driven by the creation of new crimes—sometimes by federal incentives or mandates, such as felony driving while intoxicated—and some increases are the results of federal encouragement, such as the truth-in-sentencing initiative promoted by the federal government in the 1990s.<sup>9</sup>

The dramatic increases in the numbers of crimes prosecuted—and the sentences imposed—have strained the resources of state criminal justice systems. As a result, these increases raise a related, pressing issue in various states: Can states afford to provide constitutionally

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mandated counsel to all those accused of crimes for which they face incarceration?

Funds to pay for indigent defense are just as much a necessity as costs of law enforcement personnel, equipment, and prisons. States that have busied themselves passing more criminal statutes and increasing criminal penalties over the years have paid scant attention to the full costs of their actions, including the costs of indigent defense. That situation may be changing as legislators throughout the country realize that money spent on criminal justice is money that cannot be spent on education and other pressing needs.

Congress, of course, is urged to help the states by providing funds to help them bear these costs.<sup>10</sup> Aid to the states for indigent defense may come to be characterized as a “bailout.”<sup>11</sup> The idea for federal aid seems a bit like helping an alcoholic by buying him a bottle of gin. Helping the states by footing the bill for some of the costs of defense does not encourage states to live within their means. The states already receive sizable sums from the federal government that, directly or indirectly, increase the capacity for prosecution.

In a society in which grown-ups are in charge, a state should have to figure out how much money is needed for all aspects of public safety—and budget accordingly. Rather than truly helping, federal aid encourages states not to budget, tax, or appropriate funds in a responsible fashion.

It is reasonable for state legislators to broaden the net of crimes and increase punishments; what is unreasonable is to expect some other government to pay for it.

The real question, in terms of the federal government’s responses to states’ crises, is whether the states will be encouraged to prioritize their public safety needs and live within their long-term revenue projections. To be blunt: Perhaps the federal government should think about doing less. Or, if it must do *something*, perhaps the federal government should concentrate on programs that reduce the risks of offenders’ reoffending and lessen states’ long-term costs.

The effects of contrary policy—which encouraged the states’ appetite for incarceration—are apparent as states deal with their fiscal crises by early releases of prisoners. Early releases show the downstream consequences of fiscal irresponsibility in criminal justice. If a state does early releases for budgetary reasons, some—perhaps only a relative few—of the early-released felons can be expected to reoffend.

The outcry, of course, is predictable. Perhaps the sensible idea is to avoid sending some of these offenders—particularly nonviolent individuals—to prison in the first place, when the exposure to the prison experience is likely to increase their risk of recidivism.<sup>12</sup> That is a hard lesson to learn.

Missouri, which has a discretionary sentencing scheme, has made special efforts in recent years to give judges full information about the kinds of sentences that

judges around the state are imposing and the recidivism risks presented by various kinds of offenders who receive various kinds of sentences. Information is available to the courts through Sentencing Assessment Reports, prepared by probation officers, which detail the risks and needs of the individual offender, provide recommendations for sentencing based on statistical analyses of sentencing practices statewide, and give information about the predicted time for parole release for individual offenders.

The Missouri Sentencing Advisory Commission also makes available on its Web site a sentencing information application that now provides two new pieces of information: the likelihood, under sentencing options, that an offender with a specific prior criminal history will be reincarcerated, and how much each sentencing option would cost the state.<sup>13</sup>

The crime rate in the United States has been going down in recent years for a variety of reasons, mostly demographic and mostly unrelated to sentencing and corrections policies.<sup>14</sup> Now may be an important time to rethink what we in the criminal justice system have been doing, get sentencing and corrections right, and be prepared with effective crime-control policies for the day when demographics, economic conditions, and other forces beyond our control push crime back to the forefront of issues most troubling the public.

## II. The War on Drugs: Dispatches from the Marijuana Front

In some states—where citizens can bypass the legislature and enact laws through the initiative process—the public seems to have lost faith in the war on drugs. So far, about fourteen states have legalized and regulated what is called medical marijuana.<sup>15</sup> This move seems to be nothing more than de facto legalization, because it would appear that medical marijuana is available for anyone who has chemotherapy treatments for cancer, or a headache, a toothache, a union, or the heartbreak of psoriasis.

California voters recently decided not to take the next step, rejecting a proposition to legalize the drug, regulate it, and tax it.<sup>16</sup> This approach would have marked a substantial shift in emphasis and in the overall psychology of the regulation of drugs.

Legalization and regulation would mark a substantial change that could lead to other problems—and to opportunities to make sense of U.S. society’s efforts to deal with drug use generally. Sale of legal marijuana may attract to the vicinity—where legal sales are being made—dealers of drugs that are illegal . . . a sort of shopping-mall effect.<sup>17</sup> But the discussion engendered by these campaigns also may cause society to differentiate and prioritize which drugs are of the most concern from the standpoint of public safety.

Perhaps one has to be a consummate optimist to believe that legalization of marijuana would lead to better drug policies, but stranger things have happened. Stay tuned; despite the fate of the California legalization proposal, this matter could get interesting.

## Notes

- <sup>1</sup> Ronnie Milsap, *The Future Is Not What It Used to Be, on IT WAS ALMOST LIKE A SONG* (RCA Victor 1977).
- <sup>2</sup> See, e.g., Monica Davey, *A State with Plenty of Jobs but Few Places to Live*, N.Y. TIMES, Apr. 21, 2010, available at <http://www.nytimes.com/2010/04/21/us/21ndakota.html?pagewanted=1&ref=northdakota>; Steven Greenhouse, *More Workers Face Pay Cuts, Not Furloughs*, N.Y. TIMES, Aug. 3, 2010, available at [http://www.nytimes.com/2010/08/04/business/economy/04paycuts.html?ref=united\\_states\\_economy](http://www.nytimes.com/2010/08/04/business/economy/04paycuts.html?ref=united_states_economy); Adam Liptak, *Poor Defendants and a Drained State Budget Cross Paths in Georgia*, N.Y. TIMES, July 6, 2010, available at [http://www.nytimes.com/2010/07/06/us/06bar.html?\\_r=1&fta=y](http://www.nytimes.com/2010/07/06/us/06bar.html?_r=1&fta=y).
- <sup>3</sup> See, e.g., Erik Luna, *Drug Détente*, 20 FED. SENT. REP. 304 (2008). There have been some shifts in federal drug policy—for example, letting states decide whether to allow medical marijuana. But it would be hard to characterize these shifts as major reforms.
- <sup>4</sup> Randal C. Archibold, *California, in Financial Crisis, Opens Prison Doors*, N.Y. TIMES, Mar. 23, 2010, available at <http://www.nytimes.com/2010/03/24/us/24calprisons.html?pagewanted=1&r=1&emc=eta1>.
- <sup>5</sup> Monique Garcia & Ray Long, *Quinn's Embattled Prisons Chief to Leave for New Job*, CHI. TRIB., Sept. 2, 2010, available at [http://newsblogs.chicagotribune.com/clout\\_st/2010/09/quinn-embattled-prisons-chief-to-leave-for-new-job.html](http://newsblogs.chicagotribune.com/clout_st/2010/09/quinn-embattled-prisons-chief-to-leave-for-new-job.html).
- <sup>6</sup> William Ray Price Jr., Chief Justice, Supreme Court of Missouri, 2010 State of the Judiciary Address (Feb. 3, 2010), <http://www.courts.mo.gov/page.jsp?id=36875>.
- <sup>7</sup> State ex rel. Missouri Pub. Defender Comm'n v. Pratte, 298 S.W.3d 870, 877 (Mo. banc 2009); Missouri Sentencing Advisory Commission, *U.S. Prison Population at All Time High*, SMART SENT., Apr. 15, 2009, at 1.
- <sup>8</sup> Pratte, 298 S.W.3d at 877; Missouri Sentencing Advisory Commission, *Drug Treatment Can Reduce Recidivism*, SMART SENT., July 20, 2009, at 1.
- <sup>9</sup> William J. Sabol et al., *The Influences of Truth-in-Sentencing Reforms on Changes in States' Sentencing Practices and Prison Populations 1-2* (2002), available at [http://www.urban.org/UploadedPDF/410470\\_FINALISrpt.pdf](http://www.urban.org/UploadedPDF/410470_FINALISrpt.pdf) (explaining the Truth-in-Sentencing Incentive Grants program in the 1994 Crime Act, Pub. L. No. 103-322, 108 Stat. 1796).
- <sup>10</sup> See, e.g., *The State of Public Defense Services in Michigan: Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security, H. Comm. on the Judiciary*, 111 Cong. 7-8 (2009) (statement of ACLU director, Robin L. Dahlberg, advocating for a mandatory dispersal of federal funds to state public defenders through the Byrne Justice Assistance Grants), available at <http://judiciary.house.gov/hearings/pdf/Dahlberg090326.pdf>. In June 2010, the House Committee on the Judiciary held a summit discussing the right to counsel and the impact the public-defense crisis had on that right. See Press Release, House Comm. on the Judiciary, *The Constitutional Right to Counsel Summit: A Dialogue on the State Public Defense Crisis & the Federal Response* (June 3, 2010), available at <http://judiciary.house.gov/news/100603.html>.
- <sup>11</sup> Alison Retka, *Scholars debate federal 'bailout' of defender systems*, MO. LAW. WKLY., Aug. 23, 2010, at 13 (“Within the next few months, the White House or U.S. Department of Justice may float a proposal to aid states in indigent defense,” said David Carroll, research director for the National Legal Aid & Defender Association.”).
- <sup>12</sup> Roger K. Warren, *Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries* (2007), available at <http://nicic.gov/Library/023358>; Michael A. Wolff, *Brennan Lecture: Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389 (2008); Michael A. Wolff, *Lock 'Em Up and Throw Away the Key? Cutting Recidivism by Analyzing Sentencing Outcomes*, 20 FED. SENT. REP. 320 (2008).
- <sup>13</sup> Missouri Sentencing Advisory Commission, SMART SENT., *Sentencing Information on www.mosac.mo.gov Now Includes Cost of Recommended Sentences and Risks of Reincarceration*, Aug. 17, 2010; *Automated Recommended Sentencing Information & Application*, MOSAC, <http://www.mosac.mo.gov/page.asp?id=181> (last visited Aug. 19, 2010); *Missouri Sentencing Advisory Commission*, MOSAC, <http://www.mosac.mo.gov/page.asp?id=27> (last visited Aug. 19, 2010).
- <sup>14</sup> FRANKLIN ZIMRING, *THE GREAT AMERICAN CRIME DECLINE 2007*; see also *THE CRIME DROP IN AMERICA* (Alfred Blumstein & Joel Wallman eds., 2000).
- <sup>15</sup> Dan Frosch, *V.A. Easing Rules for Users of Medical Marijuana*, N.Y. TIMES, July 13, 2010, available at [http://www.nytimes.com/2010/07/24/health/policy/24veterans.html?\\_r=1&adxnln=1&ref=marijuana&pagewanted=1&adxnlnx=1282248030-fiTLjjaBiXziF+w1Z4A65g](http://www.nytimes.com/2010/07/24/health/policy/24veterans.html?_r=1&adxnln=1&ref=marijuana&pagewanted=1&adxnlnx=1282248030-fiTLjjaBiXziF+w1Z4A65g) (stating that fourteen states allow medicinal use of marijuana).
- <sup>16</sup> Marc Lacey, *California Rejects Marijuana Legalization*, N.Y. TIMES, Nov. 3, 2010, available at <http://www.nytimes.com/2010/11/03/us/politics/03ballot.html>.
- <sup>17</sup> Suzanne Daley, *A Dutch City Seeks to End Drug Tourism*, N.Y. TIMES, Aug. 17, 2010, available at [http://www.nytimes.com/2010/08/18/world/Europe/18dutch.html?\\_r=1](http://www.nytimes.com/2010/08/18/world/Europe/18dutch.html?_r=1).