



The State of Sentencing 2008

Developments in Policy and Practice

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February 2009

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This report was written by Ryan S. King, Policy Analyst, of The Sentencing Project, with research assistance from Laura Brinkman and Sarah Schirmer.

The Sentencing Project is a national non-profit organization engaged in research and advocacy on criminal justice policy issues.

The Sentencing Project is supported by the generosity of individual contributors and the following foundations:

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OVERVIEW

For the better part of a decade, a common refrain heard in the halls of state legislatures is that there is a pressing need to address the growing prison population and the corresponding weight it places upon state budgets. The politics and the realities of incarcerating 2.3 million people and supervising an additional five million Americans on probation and parole have demanded a shift in thinking regarding the best strategies to maximize public safety while preserving justice and fairness. Since 2000, most states have taken some action to address the expanding prison population. These reforms have commonly included alternative sentencing provisions, establishing and expanding drug courts, amending parole eligibility requirements, and reforming parole and probation revocation procedures.

The legislative and policy reforms in 2008 were no exception, with 17 states enacting changes in the areas of sentencing, drug policy, parole revocation, and racial justice. However, the budget crisis faced by most states, coupled with looming deficits in subsequent fiscal years, have increased the urgency of grappling with these challenges. Nationally, 31 states reported a total budget gap of nearly \$30 billion in December 2008, a figure that is likely to grow as states struggle with their fiscal year 2010 budgets.¹ Since 1990, state corrections expenditures have grown by an average of 7.5% per year.² Thus, corrections represent a substantial contributor to the budget problems faced in many states.

¹ National Governors Association and National Association of State Budget Officers, *The Fiscal Survey of the States*, December 2008, p. 1.

² National Association of State Budget Officers, *State Expenditure Report, Fiscal Year 2007*, December 2008, p. 2.

This report highlights a number of key state-level criminal justice policy developments that occurred during 2008.³

STATE	REFORM
Arizona	Established probation revocation and crime reduction performance incentive system
Arkansas	Initiative declared marijuana enforcement lowest law enforcement priority (Fayetteville)
Colorado	Amended criminal code to permit certain juveniles charged with murder to be adjudicated in the Youthful Offender System
Connecticut	Authorized racial and ethnic impact statement to be prepared in conjunction with certain criminal justice legislation
Hawaii	Initiative declared marijuana enforcement lowest law enforcement priority (Hawaii County)
Illinois	Created Commission to Study Disproportionate Justice Impact
Iowa	Authorized racial and ethnic impact statement to be prepared in conjunction with certain criminal justice legislation
Kentucky	Amended parole release policies and expanded home incarceration for persons convicted of certain offenses; created committee to study Kentucky Penal Code and make recommendations for reform; rescinded certain requirements for persons seeking to have voting rights restored after the completion of sentence
Louisiana	Expanded dismissal of prosecution to persons who have completed a drug court diversion program
Massachusetts	Initiative declared marijuana enforcement lowest law enforcement priority (Statewide)
Mississippi	Amended parole release policies; expanded eligibility for compassionate release
New Jersey	Expanded drug court eligibility and permitted early termination of probation supervision for persons making exemplary progress
Pennsylvania	Created Recidivism Risk Reduction Incentive sentence to provide for accelerated release for eligible individuals upon completion of certain programs
South Carolina	Established the South Carolina Sentencing Reform Commission
Utah	Appropriated state funds for the provision of postsecondary education for persons in prison
Vermont	Expanded substance abuse programming for persons in prison and under community supervision and permitted a court to reduce probation sentence for persons making progress under supervision
Wisconsin	Established a coordinated strategy for the collection and analysis of criminal justice data for the purposes of identifying unwarranted racial disparities and created a Racial Disparities Oversight Commission

³ This report is not intended to be an exhaustive collection of state criminal justice legislation and policy reforms implemented during 2008. Rather, it is meant to highlight selected legislative and policy developments that address critical challenges in the field of criminal justice.

While the trend of states considering criminal justice reforms in light of fiscal pressures continues, the broader story of sentencing policy remains a mixed picture. The reforms highlighted in this document are promising, but they fail to address some of the most significant engines of growth in the correctional system. The increase in the incarcerated population is a result of more people facing prison for a broader range of offenses and staying there longer than at any point in history. And many of the policy decisions that resulted in this growth – mandatory minimum sentencing, “truth-in-sentencing,” extremely long sentences, and life without parole – remain statutory law. This is not meant to discount the reform efforts of policymakers across the country, but the reality is that many of the problematic policies that have created the current situation remain law and any efforts to divert low-level drug defendants or reduce parole revocations are likely to be dwarfed by many of the provisions mentioned above. Thus, any sustainable reduction in the correctional population will need to build upon the momentum of reforms covered in this report and past editions and seek to expand rational, evidence-based policies that achieve fairness and justice while protecting public safety.

PROBATION AND PAROLE POLICY

Arizona

The Arizona Legislature established a probation revocation and crime reduction performance incentive system with the passage of **SB 1476**. Up to 40% of any cost savings in each county resulting from a reduction in probation revocations for either technical violations or new offenses will be appropriated to the Adult Probation Services fund of the county. The money is intended to supplement, not supplant, other funding and will be targeted to substance abuse treatment, community supervision services, and victim services.

Kentucky

The Kentucky budget included a change to the state's rules regarding eligibility for home incarceration and the calculation of time on parole supervision. The state budget, **HB 406**, includes a provision permitting certain persons convicted of a non-violent offense and within 180 days of release to serve the balance of their sentence under home incarceration. The bill also permits persons who had their parole supervision revoked due to a technical violation to have time reduced from their total sentence for the period they had already served on parole supervision. Additionally, persons who complete drug treatment or education programs are eligible to receive an earned discharge credit of 90 days.

Mississippi

The Mississippi Legislature amended the state's parole policies with the passage of **SB 2136**. Persons convicted of a nonviolent offense after June 30, 1995 will be eligible for parole after serving a portion of their sentence. This removes these offense types from consideration under the "truth-in-sentencing" law, passed in 1994, that requires individuals to serve 85% of their sentence prior to applying for release on parole. The reform results in an estimated 7,000 persons convicted of nonviolent offenses becoming eligible for earlier parole consideration.

Mississippi

With the passage of **HB 494**, persons in prison for a nonviolent offense who are terminally ill are now eligible for release regardless of the time served on their sentence.

DRUG POLICY

Arkansas

Voters in the city of Fayetteville joined Eureka Springs to become the second city in Arkansas to pass an initiative declaring marijuana enforcement a lowest law enforcement priority. Two-thirds of voters supported the initiative that makes the investigation, citation, arrest, and prosecution of marijuana offenses the lowest law enforcement and prosecutorial priority.

Hawaii

Voters in Hawaii County approved an ordinance making marijuana the lowest law enforcement priority. The ballot initiative passed with 58% of the vote. The ordinance calls upon law enforcement and prosecutors to neither arrest nor prosecute adults for the personal use of marijuana, and requires that the county not accept any funds earmarked for the enforcement of marijuana offenses.

Louisiana

Louisiana law permits the set-aside of a conviction and dismissal of prosecution by a court for certain persons upon the successful completion of a probationary period. The passage of **HB 292** extends this protocol to persons who have completed a drug court diversion program. This dismissal has the same impact as an acquittal, although the court reserves the right to consider the dismissed prosecution for the purposes of calculation of sentence as a multiple offender on any future criminal actions.

Massachusetts

Voters in Massachusetts supported **Question 2** by a 2-to-1 margin, choosing to decriminalize the possession of marijuana in quantities of one ounce or less. Possession of one ounce or less of marijuana will now result in a \$100 fine and will not be recorded on a Criminal Offender Record Information report.

New Jersey

Opportunities for drug court diversion were increased by the General Assembly in 2008. The passage of **AB 1770** creates a special probation for certain persons charged with a drug offense who would have otherwise not been eligible for probation and would have faced the presumption of a mandatory minimum sentence and/or incarceration. The bill also permits judges to end the term of special probation early upon evidence of exemplary progress and to reduce fines in the case of demonstrated financial hardship.

Vermont

The Vermont General Assembly passed comprehensive legislation intended to address the role of substance abuse in contributing to the state's growing prison population. The bill, **HB 859**, authorizes an expansion of the state's Intensive Substance Abuse Program, more community-based substance abuse services for people under supervision, and a study of the feasibility of expanding drug courts to every county in the state. The bill also permits a court, at the request of the Department of Corrections, to reduce the length of the sentence to probation for persons who have been making successful progress, and limits the caseload of probation officers.

RACIAL DISPARITY

Connecticut

Connecticut was one of two states that passed legislation in 2008 intended to provide lawmakers with information regarding the racial and ethnic impact of certain sentencing and corrections legislation prior to passage. **HB 5933** calls for the preparation of a racial and ethnic impact statement in response to legislation that has the potential to increase or decrease the pretrial or sentenced population in state prisons and jails. Members of a committee with jurisdiction over legislation that could impact the correctional population can choose to request the preparation of a racial and ethnic impact statement. If there is a majority in favor of preparing a statement, the Office of Legislative Research has ten days to produce a document that assesses the impact of the specific legislation on racial and ethnic minorities.

Iowa

With the passage of **HF 2393**, Iowa established a process to assess the potential impact of legislation on racial and ethnic minorities. A minority impact statement will be included in a broader correctional impact statement that is attached to any legislation that changes the current criminal penalty structure or other sentencing or public supervision procedures. In addition, grant applications to state agencies must include a racial impact statement that assesses any potentially disproportionate impact and, if identified, provides a rationale for the disparate impact and evidence of consultation with representatives of the racial or ethnic group that is impacted.

Illinois

The state General Assembly passed **SB 2476**, which creates the Commission to Study Disproportionate Justice Impact. The Commission will study the extent to which the state's criminal sentencing structure affects communities of color and offer recommendations for legislative or policy reforms to address any identified areas of disproportionate impact.

Wisconsin

In light of findings and recommendations by the Commission on Reducing Racial Disparities in the Wisconsin Justice System, Governor Jim Doyle issued **Executive Order 251**, which directs government agencies to collect data regarding disparities in traffic citations, arrest, charging, sentencing, and revocation patterns. The executive order establishes a coordinated strategy to monitor criminal justice practices for the presence of unwarranted disparities and calls upon relevant agencies to provide training to address the factors that contribute to these disproportionalities.

Additionally, the Office of Justice Assistance is directed to study the role that prosecutorial discretion plays in contributing to these disparities, with a focus on the impact of criminal history. The executive order also creates a Racial Disparities Oversight Commission to monitor developments in the treatment of people of color in the criminal justice system.

SENTENCING

Kentucky

Kentucky lawmakers passed **SJR 80** in response to prison and jail overcrowding that the General Assembly attributes to an “uneven penalty scheme” in the Kentucky Penal Code. The resolution creates the Penal Code Subcommittee of the Interim Joint Committee on Judiciary, which will review the Kentucky Penal Code with an eye toward consistency and equity in proportionality of punishment, study the efforts of other states to modify their penal code, and consider whether current sentences for drug offenses, property crimes, and other non-violent offenses warrant adjustments. The report was to be completed by December, 2008.

Pennsylvania

The Pennsylvania General Assembly passed legislation aimed at reducing recidivism and addressing prison overcrowding. In addition to a minimum and maximum term, **HB 4** authorizes a sentencing court to provide a recidivism risk reduction incentive minimum sentence (RRRI) for certain non-violent offenses, equal to a fraction of the minimum sentence. If an individual completes certain programs and maintains good behavior, s/he will be eligible for accelerated release under the RRRI schedule.

South Carolina

In response to correctional budget pressures and prison overcrowding, the South Carolina Legislature passed **S 144**, which establishes the South Carolina Sentencing Reform Commission. The Commission will review current practices in sentencing and parole and identify potential areas of needed reform. The Commission will issue a report to the Legislature in the spring of 2009.

FELONY DISENFRANCHISEMENT

Kentucky

Governor Steve Beshear rescinded the requirement that any person seeking to have his/her voting rights restored following a felony conviction must submit an essay, three character references, and an application fee.

JUVENILE JUSTICE

Colorado

Prior to the passage of **SB 66**, Colorado law prohibited juveniles convicted of Class 1 first-degree murder and certain Class 2 felonies from being sentenced in the Youthful Offender System (YOS). Under the new law, a defendant facing charges for these offenses would be eligible to plead to a Class 2 felony and face prosecution in the YOS. In all likelihood, this would prevent the defendant from facing a life sentence in the adult system. The Colorado Legislative Council Staff notes that the maximum stay in a YOS facility is 72 months, while an average stay for a life sentence is estimated to be 720 months.

HIGHER EDUCATION IN PRISON

Utah

The Utah Legislature appropriated \$150,000 from the state education fund to be distributed to state institutions that are currently providing postsecondary education to incarcerated persons in conjunction with the Utah Department of Corrections. The intent of the bill, **HB 86**, is to stabilize current programs, pay staff, and purchase supplies.

POLICY RECOMMENDATIONS

State policymakers and practitioners will continue to face the challenges of an expanding correctional population in 2009. With each passing year, the cumulative effect of nearly 700,000 annual prison admissions will compound the urgency and difficulty of achieving true reform. Important steps that policymakers should consider in 2009 include:

Reconsider Overly Harsh Sentencing Policies

The last four decades of state criminal justice policy have been characterized by punitive sentencing legislation that has resulted in more people sentenced to prison for longer periods of time, with at best a modest impact on crime rates. Lawmakers should reconsider sentencing policies that result in unnecessarily lengthy terms of incarceration, including mandatory minimums, “truth-in-sentencing,” and life without parole.

Expand Cost-Effective Alternatives to Incarceration and Sentencing Diversion Options

Half of all persons in prison have been sentenced for a non-violent offense. Many of these persons could be supervised in the community while enrolled in community-based treatment and/or training services that have been proven to reduce crime at a fraction of the cost of incarceration. Policymakers should work to establish and expand options for judges, such as drug courts and community-based supervision mechanisms. It is crucial to provide adequate investment in strategies proven to reduce recidivism, such as substance-abuse treatment, counseling, education services, and vocational training.

Revise Parole and Probation Revocation Procedures

In 2007, one-third of the 700,000 admissions to prison were due to a revocation of parole. Many of these admissions were for technical violations of parole, such as failing a drug test or missing mandatory meetings. While it is important that persons under supervision be held accountable for their actions, it is questionable whether it is always necessary to return technical violators to prison, at significant financial cost. Lawmakers and state officials should revisit revocation procedures, for both probation and parole, with a focus on utilizing intermediate sanctions and other responses that do not result in a return to custody.

Revisit Parole Eligibility Criteria

In addition to longer sentences, many of the “tough on crime” policy changes of recent decades have focused on limiting parole eligibility or abolishing it outright. In addition, early discharge through earning “good time” credits has been greatly restricted. These policies have contributed to growth in the prison population while reducing the incentive for persons in prison to participate in programming. Lawmakers should revisit restrictions on parole eligibility that are tied to unnecessarily lengthy time served and provide incentives to earn reductions in sentence length through program participation.

Expand Eligibility for Proven Diversion and Treatment Programs

The advance in drug treatment diversion, particularly with the innovation of drug courts, has been a welcome development. However, many programs exclude persons with repeat, violent, or non-drug offenses. In some cases, these restrictions may be appropriate. However, a person convicted of theft, for example, who engaged in the crime to fund a drug addiction would also likely benefit from expanded treatment options. Lawmakers should consider expanding eligibility for these programs beyond first-time and non-violent offenses when appropriate.

FURTHER READING AVAILABLE AT www.sentencingproject.org:

The State of Sentencing 2007: Developments in Policy and Practice

Changing Direction? State Sentencing Reforms 2004-2006

State Sentencing and Corrections Policy in an Era of Fiscal Restraint



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