



KESWICK ADVISORS

Questions from Senator Grassley for Dr. Sedgwick and Responses

1. In your written testimony, you call attention to the unique characteristics of the federal prison population. Can you offer any insight into why federal prisoners differ so significantly from state and local prisoners?

Surely part of the answer to this question are the differences between state and federal criminal codes that specify which offenses are targeted by each jurisdiction for prosecution and, perhaps, sentencing to a term of incarceration. But equally important is a little-commented on development in the criminal justice system: the increasing use of multi-jurisdictional task forces, funded in many cases by DOJ's Office of Justice Programs, that involve federal, state, and local law enforcement targeting high priority offenses where state and federal criminal codes overlap. We have witnessed in recent years task forces targeting gun crime, drug trafficking, human trafficking, internet crimes against children and so on. These task forces facilitate discussions among levels of government which level is best equipped to serve public safety goals by assuming jurisdiction over a particular case and offender. In making this decision, United States Attorneys are guided by priorities set by the Attorney General and the Department of Justice. Thus, when we observe marked changes in federal prison population composition such as the current abrupt and marked increase in sentenced offenders imprisoned for public-order offenses (especially immigration crimes), we ought examine the incentives created and priorities articulated by DOJ that induce federal law enforcement officials to arrest, convict and incarcerate a very different population than do their state and local colleagues.

2. You also recommend caution about the claims to effectiveness of rehabilitation, prevention and intervention programs. Can you elaborate on this for the Committee? What is the current state of evidence on such programs?

On the matter of the effectiveness of rehabilitation/intervention programs, there has been considerable skepticism of such programs in the research community for the last forty years at least. Even among scholars most committed to rehabilitation and treatment programs, there is widespread recognition that the range of possible improvement in recidivism rates is on the order of 10% (meaning that we may be able to reduce the baseline recidivism rate for released offenders from around 66% to perhaps 60%) and that most of the currently utilized programs in this country are ineffective.¹ As recently as 2012 in her keynote address to the National Institute of Justice Research Conference, Joan Petersilia, Professor of Law at Stanford University and Faculty Co-Director of the Stanford Criminal Justice Center noted that of the 23 programs listed on the federal website for evidence-based anti-recidivism, only one—for burglars in England—has been shown to work. Speaking of effective community-based treatment as an alternative to incarceration, Petersilia continued, "We don't have the models, we can't replicate them, and if we can replicate them, we can't scale them up."²

3. We understand that California is engaged in a sweeping reform of its prison, jail and community corrections programs that has reduced prison populations significantly. Can you comment on these reforms and what impact they have had on public safety in California?

California's Public Safety Realignment (PSR) policy is designed to reduce the prison population through normal attrition of the existing population while placing new nonviolent, nonserious, nonsexual offenders under county

¹ Francis T. Cullen and Cheryl Lero Johnson, "Rehabilitation and Treatment Programs," in *Crime and Public Policy*, ed. James Q. Wilson and Joan Petersilia (New York: Oxford University Press, 2011), pp. 293-344.

² A YouTube video of Professor Petersilia's entire speech was uploaded by DOJ and can be seen at <http://www.youtube.com/watch?v=1KThzwhelDc>

jurisdiction for incarceration in local jail facilities. Inmates released from local jails will be placed under a county-directed post-release community supervision program (PRCS) instead of the state's parole system. The state is giving additional funding to the 58 counties in California to deal with the increased correctional population and responsibility, but each county must develop a plan for custody and post-custody that best serves the needs of the county. Thus, it should be noted that the PSR policy is really a cost-shifting program that reduces state prison and parole costs by dramatically increasing local jail costs. Some, but not all, of these costs are compensated for by increased county aid. And some of these costs are shifted onto the backs of citizens in the form of reduced public safety and increased costs of criminal victimization. As Heather MacDonald has noted in "California's Prison-Litigation Nightmare,"³ "the first full year of crime data after realignment is not reassuring. California's crime rate is up considerably over the national average. The differences are starkest regarding theft, which is precisely the category of crime most affected by AB 109. Nationally, property crime was down 0.9 percent in 2012; in California, it was up 7.6 percent. Car theft nationally was up 0.6 percent; in California, it jumped 14.6 percent. Burglary nationally was down 3.7 percent; in California, it was up 6.6 percent. Violent crime also showed a disparity: murder rose nationally 1.1 percent, compared with 4.7 percent in California; robbery was down 0.1 percent nationally, while California saw a 3.9 percent rise. I would caution against drawing sweeping conclusions from one year of data, but the portents are, in this case, not promising.

4. Of the various strategies for cutting the federal prison population analyzed by the Urban Institute, which seem to you to be most promising and why?

I think the top of my list of promising strategies would be to release more elderly and terminally ill inmates early. Everything research has shown us about criminal careers and career criminals indicates that desistance from crime is related to aging; quite frankly, a life on the streets as a criminal is hazardous and physically quite taxing. Consequently, there is little public safety benefit to incarcerating elderly and terminally ill inmates. It should be noted, however, that public safety (the product of incapacitation and/or deterrence) is not the only value at work in sentencing decisions. There is also the value of retribution or proportionality; the public may not be comfortable with lighter effective sentences for the same crime when committed by an older offender rather than a younger one.

A second choice would be to increase the number of international transfers where feasible. However, this particular option strikes me as highly improbable; it constitutes of form of cost shifting between our federal government and a foreign government who assumes the costs of incarcerating one of their own citizens for violating *our* laws. I find it rather hard to imagine any foreign government being willing to assume such costs for our benefit. A more likely outcome will be transferring a foreign national to his or her own jurisdiction where he or she will promptly be released.

A third choice would be transferring low-risk prisoners to home confinement after they earn enough credits. Again, there may be an element of cost shifting involved here depending on what jurisdiction is assigned responsibility for monitoring the confinement. The attractive part of this option is that it explicitly involves risk-assessment in the decision for early release; if this risk assessment is done well, then the impact on public safety can be minimized as experience reveals the optimum level of risk the public is willing to tolerate. This is a far better alternative than the remaining options mentioned in the 2013 Federal Prison Report Draft, none of which explicitly acknowledge risk differentials among offenders and treat all federal prison inmates alike regardless of their criminal histories and personal characteristics.

5. Can you give examples of strategies for reducing prison population states have tried that have succeeded in reducing both inmate populations and recidivism?

Since 1994 and the passage of Truth-in-Sentencing guidelines, the Commonwealth of Virginia has operated under a set of carefully constructed and evidence-driven sentencing guidelines. These guidelines were informed by the following goals and objectives: to reduce the gap between the sentence pronounced in the courtroom and the time actually served by a convicted felon in prison; to ensure that violent criminals serve longer terms in prison than in the past; to safely redirect low-risk nonviolent felons from prison to less costly sanctions; and to reduce disparity in the punishment of offenders unwarranted by the circumstances of the offense or the defendant's criminal history.

³ Heather MacDonald, "California's Prison Litigation Nightmare," *City Journal*, Autumn 2013 vol. 33. No. 4. Available online at http://www.city-journal.org/2013/23_4_california-prisons.html

How successfully have these goals been met? According to the Sentencing Commission's 2008 Annual Report, first degree murderers are estimated to serve 90% of the incarceration terms ordered by the court (as compared to less than 33% under the pre-guideline system), robbers 90% (as compared to less than one-third), larceny offenders 88% (compared to 30%), and drug sellers (excluding marijuana) 89% (compared to 20%). Overall, those convicted of murder, rape, robbery, burglary, drug sales, and larceny are all estimated to serve no less than 85% of their court-imposed sentence.

In terms of length of incarceration served by violent criminals, again the evidence is that sentences imposed for violent offenders under truth in sentencing provisions are resulting in substantially longer lengths of stay than those seen prior to sentencing reform. Sentencing reform and the truth-in-sentencing guidelines have been successful in increasing terms for violent felons, including offenders whose current offense is nonviolent but who have a prior record of violence.

But what about non-violent offenders? Based on study of sentencing reports received from the Commonwealth's courtrooms, in fiscal year 2008 approximately two-thirds of those for whom sentencing guidelines recommended incarceration were adjudicated guilty of a nonviolent offense. Since July 2002, such offenders, if they have no prior violent felony conviction (and if their instant offense is not sale of one ounce or more of cocaine), are eligible for risk assessment consideration for alternative sanction. In FY2008, 51% of eligible non-violent offenders were recommended for alternative sanction by the risk assessment instrument.

Combining these two trends (longer sentences for violent offenders and alternative sanctions for non-violent offenders), one would expect the composition of the Commonwealth's prison population to change. And that is precisely what has happened in practice: in June 1994, 69% of prison inmates were violent offenders; in June 2007, the percentage had risen to 79%.

As noted in the *2008 Annual Report* of the Commonwealth's Criminal Sentencing Commission, one of the goals of the sentencing guidelines was to target violent offenders for longer terms of incarceration in order to incapacitate them. By achieving longer lengths of stay for violent offenders, sentencing reform was expected to result in fewer repeat violent offenders returning through the circuit courts of the Commonwealth. And that is exactly what has happened since implementation of the sentencing guidelines.

More than 28% of violent offenders sentenced in 1996 had at least one prior violent felony convictions; by 2004, this figure had dropped to 24%, a decrease of 14.3%. The *2008 Annual Report* also notes that given the relatively short history of sentencing guidelines, the full impact of longer prison stays for violent offenders has not yet been achieved or accurately measured. So the observed change in violent recidivism noted above is surely underestimated.

One other aspect of the Commonwealth's sentencing guidelines bears on the question of whether or not prison stays are too long; the provision of longer prison stays for violent offenders was coupled with a geriatric release provision. In most cases, as offenders age, they are less likely to recidivate; at some point, advancing age and declining physical condition make an inmate less of a threat to public safety and more of a burden on the correction system's medical system. As a result, the geriatric release provision allows inmates to petition for conditional release upon reaching age 65 and having served at least five years of the sentence imposed or reaching age 60 and having served at least ten years of the sentence imposed. While the number of inmates eligible for geriatric release is currently limited to do the comparative youth of the sentencing guidelines themselves, the number is expected to double in the next few years and continue to rise at a fast pace as more inmates sentenced under the truth-in-sentencing system reach the necessary age and time-served thresholds.

In sum, the Commonwealth of Virginia is following a goal-driven, evidence-based strategy of incarcerating (and therefore incapacitating) violent offenders while diverting non-violent offenders to alternative sanctions without risk to public safety.

6. Does any scientifically rigorous evidence support the conclusion that prison overcrowding and budgetary constraints can be alleviated, without causing any harmful effect on public safety, through reducing sentences, placing inmates in successful anti-recidivism programs, and ordering the early release of inmates?

I think my answers to questions two and five above may be pertinent here. I would just add to those comments and observations the following point: nothing strikes me as more destructive to public safety than sweeping, across the

board reductions in sentences, placement in anti-recidivism programs, and early release of inmates *regardless of the risk they pose to public safety based on their personal characteristics and criminal histories*. Over and over again, we see reforms proposed based, for example, on differential treatment of offenders based on their most recent offense. This quite wrongly assumes a high degree of specialization among offenders and differentiation between offender types. It also ignores the prevalence of plea bargaining in the criminal justice system that results in, for example, an offender being convicted of drug possession when the arrest charge was drug trafficking. Any policy adopted to reduce prison overcrowding should rely on the abundant research on career criminals and criminal careers⁴ and look at an offender's entire history in making decisions about alternatives to incarceration.

7. The Judiciary Committee is set to consider three prison reform bills: S. 619, the Justice Safety Valve Act of 2013, S. 1410, the Smarter Sentencing Act of 2013, and S. 1675, the Recidivism Reduction and Public Safety Act of 2013. In your opinion, will the proposals in these pieces of legislation alleviate overcrowding in federal prisons without causing harm to or affecting public safety?

Of the three pending pieces of legislation, I would be more inclined to focus on revisiting sentencing guidelines to ensure that the existing guidelines still reflect the current state of criminal justice research that I have referenced throughout my testimony and in these answers to your questions. In doing so, I would reject the Urban Institute's proposal to repeal sentencing guidelines and restore judicial discretion. Such discretion, though not unbounded, already exists; and it is well to remember what drove the movement of sentencing guidelines in the first place: the manifest injustice of an offender's sentence being largely determined by the luck of the draw in his case's assignment to a particular judge in a particular jurisdiction. We have already traveled down the road of similar offenders committing similar crimes receiving very different sanctions due to judicial whim. We ought not repeat that mistake. But that does not mean that we should not ensure that sentencing guidelines are frequently reviewed to ensure that they reflect the most current research.

I would strongly urge against creating a "justice safety valve" that simply transfers costs from the Federal Bureau of Prisons to communities by widespread release of inmates regardless of the risk they pose to their communities; and I would heed Professor Petersilia's sage advice about the limits of evidence-driven rehabilitation programs.

⁴ See, for example: Alex Piquero, David Farrington, and Alfred Blumstein, "The Criminal Career Paradigm," *Crime and Justice*, 30 (2003), pp. 359-506; Alfred Blumstein and Jacqueline Cohen, "Characterizing Criminal Careers," *Science*, 237 (1987), pp. 985-991; Alfred Blumstein, David Farrington, and Soumyo Moitra, "Delinquency Careers: Innocents, Desisters, and Persisters," *Crime and Justice*, 6 (1985), pp. 187-219; Alfred Blumstein, Jacqueline Cohen, Somnath Das and Soumyo D. Moitra, "Specialization and Seriousness During Adult Criminal Careers," *Journal of Quantitative Criminology*, 4 (December 1988), pp. 303-345; and John H. Laub and Robert J. Sampson, "Understanding Desistance from Crime," *Crime and Justice*, 28 (2001), pp. 1-69.