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The United States of Incarcerated

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ABSTRACT: The United States Supreme Court recently gave federal judges more discretion in issuing prison sentences but it is unlikely to affect the highest incarceration rate in the world.

KEY WORDS: Sentencing, Discretion, Incarceration, Rehabilitation, Retribution

It was reported last week that 1 in 100 adults in the United States are behind bars. In a nation of 230 million adults, nearly 1.6 million are incarcerated in prisons and another 723,000 people are in jails.

American penal theory lends itself to overflowing prisons.

While many European countries focus on rehabilitating their criminals, retribution is emphasized in the United States.

Spain places a maximum limit of thirty years on sentences, no matter how egregious the crime. France for the most part only locks up violent offenders.

Conversely, the United States can put drug takers or repeat drunk drivers away for a decade, and frequently sentences convicted murders to life without the possibility of parole. Moreover, not only are punishments of this magnitude largely an American phenomenon, who they are applied to can be as well.

Depending on the state, juvenile offenders can be tried as adults, and in rare cases, convicts as young as 13-years-old have been sentenced to live and die their entire lives in prison.

The United States is more violent than the rest of the Western World and some criminals are unlikely to be able to be rehabilitated. Therefore, higher and longer incarceration rates may be necessary. However, combining concentrated criminality and draconian sentences may only exacerbate the problem.

Further, the report on the U.S. incarceration rate comes in the midst of F.B.I. statistics that indicate that violent crime has fallen 25% in the last 20 years. While the drop in violence has not reduced America’s overcrowded prisons, two recent Supreme Court decisions may play a role, if only a slight one.

In criticizing federal appellate courts for failing to extend sufficient leeway to district courts, the United States Supreme Court in Gall v. United States and Kimbrough v. United States declared that district court judges could depart from federal guidelines to
impose sentences that judges consider to be reasonable given the particular circumstances of the cases they were presiding over.

Specifically, in *Kimbrough v. United States*, the Court explicitly gave judges permission to deviate from sentencing guidelines relating to crack cocaine, which, pursuant to a 1986 federal law, mandated a sentence for 1 gram of crack cocaine that was equivalent to a sentence involving 100 grams of powder cocaine.

The law had been passed as crack use skyrocketed and its devastating wake swelled in the 1980s. The practical effect of the law’s ostensibly good intentions and political expediency resulted in issuing prison sentences to poor black offenders that were 3 to 6 times longer than their wealthier white counterparts who used the powder form of the drug.

While many legal academics lauded the *Kimbrough* decision, there are positives and negatives to both mandatory sentencing and discretionary sentencing.

Mandatory sentencing can provide uniformity. The judge is required to impose a sentence that comes from either a democratically elected legislature or a panel of sentencing experts who have agreed on what an appropriate sentence is for a certain crime regardless of the offender’s immutable characteristics.

The drawback to mandatory sentencing is while it seeks to treat every offender fairly, the concept depends heavily on foresight and does not take into consideration every particular mitigating factor that could arise that many judges would consider pertinent in sentencing. Uniformity is also not guaranteed as foresight failed the Congress and led to the severe disparity between sentences pertaining to crack and powder cocaine.

Discretionary sentencing, however, enables judges to tailor the sentence to the particular crime, and, as shown in *Kimbrough*, avoid sentencing disparities not foreseen by those who draft sentencing guidelines.

The problems with this approach include sentencing being inconsistent and the judgment of many being supplanted for the judgment of just one and the one may hold personal biases. This can be all the more disconcerting when a federal judge has been appointed to a life tenure and is therefore not accountable for her sentences.

*Kimbrough*’s short-term effect may be its only effect. While studies have shown that a defendant tends to benefit from a judge’s ability to be flexible, more discretion for judges could also be used to increase sentences. Further, *Kimbrough* is limited to federal courts, while most criminal defendants are tried at the state level.

So even if federal judges use their increased discretion to reduce sentences, it will have little effect if any in the overall penal climate that imprisons more people than China despite the Chinese population being 1.3 billion compared to the United States of Incarcerated’s 300 million.