Categorizing Crime and Determining Punishment in Oklahoma

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CATEGORIZING CRIME
AND DETERMINING PUNISHMENT
IN OKLAHOMA

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Introduction

This chapter seeks to answer four questions about sentencing in Oklahoma. An assumption underlying the discussion of these four questions is that Oklahomans may not be disproportionately deserving of incarceration and that Oklahoma offenders are not necessarily deserving of longer terms of imprisonment than offenders elsewhere.

The four questions this chapter discusses are as follows:

1. Does Oklahoma treat as felonies crimes that are treated in surrounding states as misdemeanors?
2. How do Oklahoma’s sentencing ranges compare to those of surrounding states?
3. Is Oklahoma’s rate of incarceration affected by the fact that officials such as judges, sheriffs, and district attorneys are elected?
4. Are the political costs of the governor’s role in the parole process worth the benefits of an additional layer of review?

The chapter is divided into four main sections, each of which discusses one of these questions.

The answer to the first question is yes. Oklahoma does treat some crimes as felonies that other states treat as misdemeanors. This chapter discusses the importance of the misdemeanor/felony distinction for corrections policy and makes some recommendations.

The answer to the second question is that, compared to the states surrounding it, Oklahoma has high minimum and maximum sentences for most of the crimes studied. Oklahoma offenders not only receive longer prison sentences than offenders elsewhere, they serve a greater percentage of their time than offenders elsewhere. This chapter lays out some of those disparities and makes some recommendations.

The answer to the third question is that we can’t tell if the popular election of certain criminal justice officials affects the state’s high incarceration rate, but that it is difficult to see how it would work to exert pressure toward a lower rate. This chapter also discusses Oklahoma’s high incarceration rate as it compares to other states and to the national average.

The answer to the fourth question is that the political costs to the governor far exceed any public safety gains by adding a layer of executive scrutiny to the parole process. This chapter recommends a constitutional amendment to relieve the governor of this burden.
The Misdemeanor/Felony Distinction

Crimes are typically characterized as being either felonies or misdemeanors. While states vary in their treatment of the distinction, felonies are generally serious offenses punishable by more than a year's imprisonment. Misdemeanors are less serious offenses punishable by fine, other penalty, or incarceration in a jail for less than a year.

How a state determines what offenses constitute misdemeanors and what offenses constitute felonies affects, in the first instance, the magnitude of the possible punishment for the act in question. Less obviously, the categorization has important consequences that relate to offenders’ subsequent criminal histories and the sentencing options available. In Oklahoma, these less obvious consequences play out in two ways. The first has to do with probation.

Probation is a criminal sentence in which the convicted person is released into the community instead of being incarcerated in jail or prison. Sentences of probation are conditioned on the behavior of the probationer (the convicted person). These conditions may involve a wide variety of matters. Most common among them is the requirement that the probationer not commit criminality during the course of the probation. Another is that the probationer not test positive for prohibited substances. If the conditions of probation are violated, the probationary term may be revoked and replaced with a term of incarceration.

A person convicted of a drug or other non-violent offense may well relapse due to an addiction. If the underlying offense is a felony, the consequences of such a relapse can have consequences for the state’s prison system: a term of incarceration that will replace the probationary sentence.

Because drug offenses result in so many people being incarcerated, many states have adjusted their sentencing schemes accordingly. They seek to divert larger numbers of drug and other non-violent offenders to community programs rather than to prisons, thus saving valuable bed space for more dangerous offenders. Where non-dangerous offenders are given probationary sentences rather than being sent to prison, substantial numbers of them are likely to violate a probation condition through a drug relapse – or series of relapses – and thus face incarceration.

This is not a problem if one wants to devote limited corrections dollars and limited prison space to substantial numbers of drug and other non-violent offenders. But lawmakers should be aware that one consequence of labeling an offense a felony is that even if probation is given, a sentence of incarceration may well be served because of revocation possibilities, and that this likelihood is significant with respect to drug offenders and many other non-violent offenders who we think we are diverting from prison through sentences of probation. After all, nearly 3% of inmates randomly tested in Oklahoma's public and private prisons test positive for controlled substances (Facts at a Glance, 2002).

The second way in which the felony/misdemeanor distinction makes a difference that relates to subsequent criminal history is through the operation of habitual offender statutes. Under these statutes, additional penalties attach to repeat offenders. The idea is to safeguard the community from those who have manifested a willingness to repeatedly offend. Because these enhanced sanctions result in increased terms of incarceration, lawmakers and policy makers need to be aware that one consequence of categorizing a particular offense as a
felony is its “multiplier” effect on punishment. In Oklahoma, this effect may be seen in a wide variety of crimes, including the possibility of life imprisonment for vehicle burglary or for concealing stolen property. In each of these cases, a life sentence may result if one has two prior felonies.

Table 1 sets out a number of crimes and indicates whether Oklahoma and its surrounding states classify them as misdemeanors or felonies. These crimes contain common elements and variations. Some crimes do not have clear analogues in all of the states. This is unsurprising, since the matter of recognizing and defining crimes is left to the states. Thus, blanks (a failure to indicate whether a particular state categorizes the particular crime as a felony or misdemeanor) in the table mean that no relevant crime was discovered for that state or that its categorization (felony or misdemeanor) was unclear.

**Table 1: Misdemeanor/Felony Categorization**

<table>
<thead>
<tr>
<th>Offenses</th>
<th>OK</th>
<th>LA</th>
<th>TX</th>
<th>KS</th>
<th>CO</th>
<th>AR</th>
<th>NM</th>
<th>MO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manufacturing Methamphetamine</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
</tr>
<tr>
<td>Machine Burglary</td>
<td>F</td>
<td>M</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
</tr>
<tr>
<td>Auto Burglary</td>
<td>F</td>
<td>F</td>
<td>M</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
</tr>
<tr>
<td>Concealing (or Receiving or Possessing) Stolen Property</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Less than $150 value</td>
<td>F</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>M</td>
</tr>
<tr>
<td>- Less than $250 value</td>
<td>F</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>F</td>
</tr>
<tr>
<td>- $250-$500 value</td>
<td>F</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>F</td>
</tr>
<tr>
<td>- $500-$1500 value</td>
<td>F</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
</tr>
<tr>
<td>- $1500-$25,000 value</td>
<td>F</td>
<td>F</td>
<td>M</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
</tr>
<tr>
<td>- Greater than $25,000</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
</tr>
<tr>
<td>Unauthorized Use of Motor Vehicle</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Less than $500 value</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>M</td>
</tr>
<tr>
<td>- $500 or more value</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>M</td>
<td>M</td>
<td>F</td>
<td>M</td>
<td>M</td>
</tr>
</tbody>
</table>

M = Misdemeanor
F = Felony

Additionally, the labels “felony” and misdemeanor” are used in the table to indicate whether the punishments for the crimes allow for imprisonment for a year or more (felony) or not (misdemeanor). This nomenclature differs from that used by some of the states. Finally, while jurisdictions may not recognize “machine burglary” or “auto burglary,” for example, as discrete crimes, some of the comparison states cover such conduct under their general burglary statutes. The breadth of a seemingly simple crime such as burglary can thus vary.
significantly, and because of this, so will the consequences of labeling such conduct as felonious.

Table 1 reflects a range of criminal conduct not involving offenses against the person. Its use here is merely illustrative of the categorization options (felony or misdemeanor) available to lawmakers. The table illustrates a uniformity of approach regarding some crimes, such as methamphetamine manufacture. All eight states categorize this as felonious. Other crimes are characterized by a diversity of approaches. "Machine burglary," for example, is punished as a felony in only three of the eight states, including Oklahoma. It appears to be unrecognized as a distinct crime or variation in four of the states, and is treated as a misdemeanor in Texas. Unauthorized use of a motor vehicle is treated as a misdemeanor in Missouri, Arkansas, Kansas, and (in certain circumstances) Colorado. Oklahoma, Louisiana, and Texas treat it as a felony. Such differential treatments are suggestive of alternatives Oklahoma could pursue if its lawmakers determined, for example, that losses in public safety caused by treating certain offenses as felonies were worth addressing.

A clear example of an area where lawmakers might want to reconsider whether conduct ought to fall on the felony side of the line is concealing stolen property. Of the eight states examined, only Oklahoma makes the crime a felony where the property in question has a value of under $150. Indeed, Oklahoma is the only state surveyed where the crime is a felony regardless of the value of the property. Oklahoma simply requires that the property be of "any value whatsoever." It is one of two states to make the crime a felony where the property's value is less than $250, and one of three states to make the crime a felony where the property's value is less than $500.

Recommendations

Oklahoma is not getting a large return on its investment in criminal justice. The State's punitive policies have not brought comparatively low overall or violent crime rates, for example (see Professor Damphousse's treatment of crime rates in this Report). In order to increase the public safety return on the state's investment in criminal justice, a number of options emerge. They could be pursued individually or collectively. The common theme of these recommendations is to use limited criminal justice dollars and limited prison space for offenders who are the greatest threat to public safety.

- Take a "zero-based budgeting" approach to the issue of felonies in Oklahoma. Look for compelling public safety reasons to label conduct as felonious.
- Adjust felony floors for crimes or variations of crimes that depend upon the worth of property involved. Concealing stolen property is an example of such a crime that could be re-drafted with felony limits consistent with other states.
- Redefine some crimes so that the absence of aggravating elements would render the crimes misdemeanors. For example, unauthorized use of a motor vehicle should be a misdemeanor, while unauthorized use of a motor vehicle with intent to permanently deprive could be a felony.
- Limit probation revocation to instances where the probationer has committed a new crime. In other cases, jail stays, day reporting, and other punishments should be used rather than revocation.
- Categorize certain felonies as “non-enhancement” felonies. These felonies would not enhance sentences for subsequent offenses. To the extent that non-violent conduct remains felonious, such felonies should not enhance the sentences of repeat offenders in the absence of a careful determination to the contrary. Examples include theft of property valued less than $1,500, concealing stolen property valued less than $500, and drug possession offenses.

**Sentencing Ranges**

The data displayed on graphs that appear in the Appendix represent the sentencing ranges for a number of crimes in Oklahoma and its surrounding states. The crimes are burglary, child abuse, indecent liberties, marijuana possession, methamphetamine manufacturing, rape, robbery, voluntary manslaughter, and involuntary manslaughter. Sentence ranges are for first-time offenders. While every effort was made to obtain an accurate comparison between the states, there are variations from state to state in terms of the elements of the crimes and there are other obstacles to certainty as well. Finally, some of Oklahoma’s crime definitions are quite broad relative to the other states, thus bringing more conduct under their coverage.

The sentences for Kansas reflect that state’s presumptive (non-voluntary, non-advisory) guidelines approach to sentencing for most felonies. Two major factors influence these sentences: offense severity and the offender’s criminal history. Judges are free to impose a presumptive sentence or a specified lower or higher option. Departures from this range may be made for “substantial and compelling” reasons.

New Mexico’s determinate sentencing scheme establishes uniform sentence lengths by felony level. Thus, there is generally not a sentencing “range” available in New Mexico. In some cases the offender’s criminal history may be used as grounds for departing from these prescribed sentences.

Among these eight states, Oklahoma has the highest maximum sentences for child abuse, indecent liberties, methamphetamine manufacture, rape, robbery, voluntary manslaughter, and marijuana possession (tied with Kansas and Missouri). It has the third highest maximum for burglary.

Among these states, Oklahoma has the highest minimum sentences for burglary, indecent liberties, and robbery. It has the second highest minimum for rape (tied with Arkansas and Missouri).

These crimes represent a wide range of types: crimes of violence against the person, crimes against property, and drug offenses. Oklahoma has comparatively high minimum and maximum sentences for all three types of crime. The consequences of such a penalty structure are unsurprising.

Table 2 shows that average sentences in Oklahoma for rape, robbery, aggravated assault, burglary, drug possession, and drug trafficking dramatically exceed national averages for these crimes. Exacerbating this effect, Oklahoma offenders on average serve a greater percentage of their sentence than do their counterparts elsewhere. The effects on time served in prison are startling. Drug traffickers in Oklahoma serve, on average, 275% more time than the national average. Drug possessors convicted in Oklahoma serve, on average, over 200%
more time than the national average. The disparity for burglars is 264%. Of the crimes listed in Table 2, the smallest disparity between national and Oklahoma average sentence served is for rape, where the average Oklahoma offender serves 142% more time than his average national counterpart.

**Table 2: Average Sentence Length and Time Served Oklahoma vs. U.S. Average**

<table>
<thead>
<tr>
<th>Crime Type</th>
<th>U.S. Avg</th>
<th>OK Avg</th>
<th>U.S. Avg</th>
<th>OK Avg</th>
<th>U.S. Avg</th>
<th>OK Avg</th>
<th>OK Avg</th>
<th>OK Avg</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Prison</td>
<td>Prison</td>
<td>% of</td>
<td>% of</td>
<td>Time</td>
<td>Time</td>
<td>Time</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Sentence</td>
<td>Sentence</td>
<td>Sentence</td>
<td>Sentence</td>
<td>Served</td>
<td>Served</td>
<td>Served</td>
<td></td>
</tr>
<tr>
<td>Rape</td>
<td>13.2</td>
<td>22.9</td>
<td>55%</td>
<td>45%</td>
<td>7.3</td>
<td>10.3</td>
<td>142%</td>
<td></td>
</tr>
<tr>
<td>Robbery</td>
<td>9.7</td>
<td>21.5</td>
<td>46%</td>
<td>49%</td>
<td>4.5</td>
<td>10.5</td>
<td>236%</td>
<td></td>
</tr>
<tr>
<td>Agg. Assault</td>
<td>6.6</td>
<td>12.2</td>
<td>49%</td>
<td>51%</td>
<td>3.2</td>
<td>6.2</td>
<td>192%</td>
<td></td>
</tr>
<tr>
<td>Burglary</td>
<td>5.8</td>
<td>14.2</td>
<td>39%</td>
<td>42%</td>
<td>2.3</td>
<td>6.0</td>
<td>264%</td>
<td></td>
</tr>
<tr>
<td>Drug Possession</td>
<td>4.2</td>
<td>7.4</td>
<td>32%</td>
<td>40%</td>
<td>1.3</td>
<td>3.0</td>
<td>220%</td>
<td></td>
</tr>
<tr>
<td>Drug Trafficking</td>
<td>5.5</td>
<td>16.4</td>
<td>38%</td>
<td>35%</td>
<td>2.1</td>
<td>5.7</td>
<td>275%</td>
<td></td>
</tr>
</tbody>
</table>

Oklahoma data from DOC Summary of Statistics of Inmate Population, 12/21/00, and
DOC Summary of Time Served Statistics for Prison Releases in 1999, report date 2/4/00

Compiled by Oklahoma Senate Fiscal Staff

Table 3 shows that, for Oklahoma in 1998, only 2% of felony convictions were obtained through trial. The remaining 98% of felony convictions, where the type of conviction is known, were obtained through pleas. Given Oklahoma’s comparatively high sentencing ranges, this means that defendants, faced with extraordinary maximum sentences, have incentives to enter pleas that entail much greater time served than their national counterparts. As a consequence, Oklahoma’s time-served averages far outpace national averages.
### Table 3: 1998 Convictions by Type

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
<th>% of Total Known</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Felony Cases Filed</td>
<td>41,632</td>
<td></td>
</tr>
<tr>
<td>Total Convictions</td>
<td>17,922</td>
<td></td>
</tr>
<tr>
<td>Type of Conviction Unknown / Other (J&amp;S report did not indicate type of conviction)</td>
<td>6,921</td>
<td></td>
</tr>
<tr>
<td><strong>Total of Known Types of Convictions</strong></td>
<td>11,001</td>
<td></td>
</tr>
<tr>
<td>Plea of Guilty</td>
<td>9,567</td>
<td>87%</td>
</tr>
<tr>
<td>Plea of Nolo Contendre</td>
<td>1,161</td>
<td>11%</td>
</tr>
<tr>
<td>Alford Plea</td>
<td>65</td>
<td>1%</td>
</tr>
<tr>
<td><strong>Total Plea</strong></td>
<td>10,793</td>
<td>98%</td>
</tr>
<tr>
<td>Guilty by Jury</td>
<td>141</td>
<td>1%</td>
</tr>
<tr>
<td>Guilty by Judge</td>
<td>67</td>
<td>1%</td>
</tr>
<tr>
<td><strong>Total Trial</strong></td>
<td>208</td>
<td>2%</td>
</tr>
</tbody>
</table>


Thus, Oklahoma’s higher sentencing ranges do not exist in a vacuum. Not only are higher sentences available for many crimes, such sentences are actually imposed, largely through plea bargaining. And while one might expect that release mechanisms would result in a disproportionate reduction relative to actual time served, as a way to limit impact on prison population, this is not so. Of the crimes treated in Table 2, only offenders convicted of rape and drug trafficking serve a smaller proportion of their sentence compared to the national average.

As a matter of corrections policy, this means that – to take two examples – offenders convicted of drug possession or trafficking crimes are consuming substantially disproportionate (compared to national averages) corrections resources. The prospects for the future are not bright. For fiscal year 2001, 6,887 new prisoners were received by the Department of Corrections. Nearly half of these receptions (44%) were for drug and alcohol offenses (Statewide Felony Sentencing for FY 2001). Offenders sentenced for drug possession who showed no prior convictions were given an average sentence length of 46 months (id.).
Recommendations

Oklahoma should consider, as have many states, revamping its punishment structure with an eye toward focusing expenditures on dangerous offenders. Among the means to do this are the following.

- Non-violent offenders should be diverted from imprisonment through mandatory probation or other diversion programs for non-violent first-time offenders and first-rate and second-rate drug offenders. These programs should recognize the likelihood of their participants experiencing relapses, and should therefore use realistic and non-punitive techniques to treat this issue.
- Sentencing ranges should be brought into parity with national averages, or failing this, with those in surrounding states.
- Long suspended sentences (over three years) for non-violent offenses should be discouraged.
- Alternative sanctions should be limited to diverting non-violent offenders who traditionally would have received a prison sentence, rather than being used to punish offenders who traditionally would not have been punished.
- Mechanisms should be put in place that help reduce political pressures to maintain sentences beyond affordable or deserved limits. Such mechanisms could include realistic presumptive sentencing guidelines and/or an effective educational campaign that would allow lawmakers to communicate to their constituents the economic and social costs of current punishment practices.
- Statutes should be amended to allow first-time, non-violent offenders to be parole eligible before serving 33% of their sentence.

Incarceration Rates and Electoral Politics

Oklahoma does not simply incarcerate its prisoners for longer periods of time than other states. It also incarcerates a greater proportion of its residents. This greater incarceration rate magnifies the effects of Oklahoma's unusually severe punishment scheme. Compared with its seven surrounding states (based on 2001 data), Oklahoma ranks third in incarceration rate, behind Louisiana and Texas. But Louisiana's rate of 795 incarcerated persons per 100,000 residents ranks first in the country. And the Texas rate of 731/100,000 ranks second nationally (Beck, Karberg, & Harrison, 2002).

Table 4 reports the rates for the eight-state region and the national average. Besides Louisiana and Texas, only Mississippi incarcerates a greater proportion of its citizens (689) than does Oklahoma. The District of Columbia, a totally urban jurisdiction, incarcerates at a lesser rate (592) than Oklahoma (id.). The national average of 472 was exceeded in 2001 by only twelve states, including Oklahoma (id.). Leaders in the top three states in incarceration rates -- Louisiana, Texas, and Mississippi -- are aware that their current rates are unsustainable and/or inappropriate.
TABLE 4: INCARCERATION RATES

<table>
<thead>
<tr>
<th>U.S.</th>
<th>OK</th>
<th>LA</th>
<th>MO</th>
<th>AR</th>
<th>TX</th>
<th>NM</th>
<th>CO</th>
<th>KS</th>
</tr>
</thead>
<tbody>
<tr>
<td>472</td>
<td>669</td>
<td>795</td>
<td>500</td>
<td>592</td>
<td>731</td>
<td>281</td>
<td>388</td>
<td>317</td>
</tr>
</tbody>
</table>

Per 100,000 residents. For prisoners sentenced more than a year. Data as of 6/30/01. Bureau of Justice Statistics Bulletin, April 2002.

Louisiana recently passed Senate Bill 239 by an overwhelming majority. This legislation reduces sentences for certain drug and non-violent offenses. It eliminates as well mandatory minimums for non-violent crimes and repeals legislation disallowing parole for a number of non-violent offenses. The legislation also limits the application of habitual offender legislation. Finally, it establishes a Risk Review panel to determine early release eligibility of inmates (King & Mauer, 2002).

In Texas, House Bill 1287 from the 2001 legislative session calls for expanding drug courts. Other legislation funds efforts to develop alternative methods of managing inmates with drug addictions or mental illness, to study ways to reduce drug use, and to study the problem of juvenile drug abuse and juvenile mental illness. Proposed legislation in Texas expands parole for inmates suffering from chronic illness (id.).

In Mississippi, recent legislation creates exceptions to “truth in sentencing” requirements that felons cannot become parole eligible until serving 85% of their sentence. The new law allows certain first-time non-violent felons to be parole eligible after serving 25% of their sentence (id.).

In order to sustain its high incarceration rate, Oklahoma has turned to private prisons. Only Texas exceeds Oklahoma in terms of absolute numbers of its prisoners in private prisons (Beck, Karberg, & Harrison, 2002). In terms of the proportion of its prison population in private prison, Oklahoma is one of only four states with 30% of its prisoners so housed (id.).

Despite its small population, Oklahoma ranks fourth nationally in the absolute number of female prisoners (id.). Since at least 1993, Oklahoma has had the highest incarceration rate for women, at more than double the national rate (Simpson & Wright, 2000).

This picture—of Oklahoma’s rate of incarceration—is not likely to change soon. From 1998 to 2000, state admissions into prison were up 1.7% nationally. Oklahoma’s increase during the same period was 3.4%. State releases from prison were up nationally 8.4% during this period, while Oklahoma’s releases actually declined 3.2% (Beck, Karberg, & Harrison, 2002).

Is Oklahoma’s high incarceration rate (the fourth highest nationally) affected by the fact that numbers of its criminal justice officials (judges, sheriffs, district attorneys) are elected? Here data can only be suggestive.
The problem with methods of selecting judges has always been the threat the method poses to judicial independence, the rule of law, or notions of political accountability. Reform efforts have favored one method of judicial selection and then another. Early on in America’s history, appointments by the legislature or governor were common (Berkson & Andersen). Over time, people criticized appointive systems for failing the promise of democracy, for the domination by elites of the selection process. Near the beginning of the nineteenth century, election by the people became a popular method of selection. All states admitted to the union after 1846 popularly elect at least some of their judges (Scheurman, 1993). But reforms have again taken hold. Appointive systems, nonpartisan elections, judicial nominating conventions, and direct primaries have been instituted as means to depoliticize the process of judicial selection (id.).

The most common criticism of the election method of judicial selection is that it provides an incentive for judges to do what the people want, not what the law may allow or even require. A related criticism is particularly important in the context of criminal sentencing. If judicial elections are won or lost depending upon which candidate is likely to be the most punitive, the likely effect on judicially imposed sentences is clear.

Table 5 shows the methods of selecting trial judges in Oklahoma and its surrounding states. Oklahoma uses nonpartisan elections to select it trial judges. In a state whose criminal justice policies are, compared to the rest of the nation, as punitive as Oklahoma’s, it is unlikely that the state’s trial judiciary, subject to the election process as it is, will serve as a brake. As importantly, there is little the trial judiciary can do. Since 98% of felony convictions in Oklahoma are achieved by way of plea (Table 3), the State would need to look at other criminal justice actors to influence its high incarceration rate.

### Table 5: Judicial Selection: Trial Courts

<table>
<thead>
<tr>
<th></th>
<th>OK</th>
<th>LA</th>
<th>MO</th>
<th>AR</th>
<th>TX</th>
<th>NM</th>
<th>CO</th>
<th>KS</th>
</tr>
</thead>
<tbody>
<tr>
<td>NE</td>
<td>PE</td>
<td>PE/MS*</td>
<td>NE</td>
<td>PE</td>
<td>MS**</td>
<td>MS</td>
<td>MS/PE***</td>
<td></td>
</tr>
</tbody>
</table>

MS = Merit Selection  
NE = Nonpartisan Election  
PE = Partisan election  
*Partisan election used for all but four counties.  
**Partisan Elections at next general election after appointment.  
***17 Districts use appointive system, 14 Districts use elective system.
There is another reason why state trial judges are unable to counteract expensive state sentencing policies. Mandatory minimum sentences, particularly those mandated in the repeat offender context, can tie the hands of judges who might be disposed in particular cases to impose punishments other than incarceration or to impose shorter terms of incarceration.

Sheriffs are elected in all eight states in the region, as are district attorneys. Oklahoma is in the mainstream in terms of popular elections for these offices. But as we would not expect an elected trial judiciary to seek to counterbalance a policy propensity to disproportionate punishments and incarceration rates even if it could, so too would we not expect elected district attorneys or sheriffs to exert influence to relieve the system of its inertia toward long terms of imprisonment and the imprisonment of many people.

Sheriffs will be perceived to be doing a good job if they are filling their jails, and prosecutors will be perceived to be doing a good job if they achieve a high conviction rate attended by punishments that are perceived as rigorous.

Oklahoma has a criminal justice culture that is more Southern than Midwestern or Western. Its incarceration rate, for example, resembles the Southern states (Louisiana and Texas) in its region – states which, along with Mississippi and Oklahoma, lead the country in this regard. The Western states of Colorado and New Mexico have incarceration rates far below Oklahoma’s, as do the Midwestern states of Kansas and Missouri. Against the backdrop of this criminal justice culture, it is likely that selecting criminal justice officials through elections, whether partisan or non-partisan, will not create incentives for these officials to exercise their discretion in ways calculated to mitigate the consequences of Oklahoma’s penal policy.

At the same time, it is doubtful that there is much that these officials could do, unless district attorneys would take it upon themselves to recommend terms of imprisonment significantly shorter than they now do. Similar problems led the New Mexico state legislature to pass the Sentencing Standards Act because “Prison beds are a scarce resource” and “imprisonment should be used when necessary to ensure public safety or to provide an appropriate level of punishment.” (Criminal and Juvenile Justice Coordinating Council). New Mexico’s determinate sentencing scheme had removed much of the discretion trial judges had in sentencing. The Sentencing Standards Act – introduced in the 1999 legislative session - called for a reduction in the number of offenses carrying prison terms. While the number of violent offenses carrying prison terms increased under the Act, the numbers decreased for property, drug, public order, and “other” offenses (id.). This legislation fell victim to a gubernatorial veto.

This is not to say that Oklahoma would benefit from a determinate sentencing scheme. The risk of moving to such a regime is the continued upward adjustment of terms of imprisonment (through increased sentences and increasing constraints on release programs) to levels that are neither financially sustainable nor, in some cases, appropriate. Indeed, New Mexico is facing such problems today. Nor would judges be able to do anything about such terms, even if they were so inclined.

In the end, it is unclear whether Oklahoma’s high rate of incarceration is attributable to the fact that its people elect their trial judges, sheriffs, and district attorneys. Historically, Oklahoma’s elected public officials have enacted laws and policies that are more punitive.
than have their peers nationally. One might guess that other elected officials (district attorneys, for example) are similarly inclined.

Despite finger-pointing regarding the Department of Corrections budget crisis and the burgeoning prison population in Oklahoma, it is ultimately the legislature’s responsibility to enact criminal justice legislation that will protect the public in a fiscally responsible way.

The Governor’s Role in Parole

Article 6, section 10 of the Oklahoma Constitution vests power in the governor to grant commutations, pardons, and paroles upon recommendation by the Pardon and Parole Board. Thus, parole cannot be granted without the governor’s approval. Such a system is at least unusual and may be unique (Quinlan, 1996). Should this system be preserved? Even in a corrections system not faced with the pressures of Oklahoma’s, the answer is probably no. But realities in Oklahoma make it even less wise to involve the governor in parole matters.

In 1995, Oklahoma prisoners served 25% of their sentence overall. By 2000, the percentage had nearly doubled to 45% (Facts and Trends, 2002). Notably, the proportion of sentence served rose more radically for non-violent offenders than for violent offenders. This percentage more than doubled in the period from 1995 (when non-violent offenders served 21% of their sentence) to 2000 (when non-violent offenders served 44% of their sentence) (id.). This trend correlates with a radical downturn in Parole Board approval rates (from 47.9% in 1991 to 9.9% in 1997) and the termination of statutory early release programs in 1996 (id.). Further, legislation in 1998 limited parole eligibility to offenders who had served 33% of their sentence (id.). Legislation in 1999 limited parole eligibility for offenders who had committed specified crimes to those offenders who had served 85% of their sentence (id.). There are currently nearly 1400 such offenders in prison in Oklahoma.

This trend began in 1996, the year that an inmate was released from an Elk City work center under a specialized supervision program and within three days had killed three people. The ensuing fallout resulted in laws and policies that no longer tolerated legitimate risk in the matter of early release. Oklahoma has an overcrowded and ever-growing prison system that – in the absence of other change - needs to exploit early release programs to reduce pressures toward unsustainable numbers and lengths of incarcerations. To burden the governor with unrealistic and unjustified accountability for every parole decision made with respect to such a system does little more than erect one more obstacle to managing the State’s formidable corrections problems. This is not to suggest that early release programs are sufficient to solve the State’s crisis in corrections. It is only to recognize that they are necessary.

Any additional layer of scrutiny achieved through involving the governor in parole is largely imaginary, given the size of Oklahoma’s inmate population. Further, “Those decisions which obviously entail a degree of risk should not be shouldered by a political elected official. The elected official is too often unable to take legitimate correctional risks with people who are being considered for these programs.” (Quinlan, 1996).

Recommendation

- Oklahoma’s Constitution should be amended to remove the governor from the parole process, except for making appointments to the Pardon and Parole Board.
Conclusion

Oklahoma’s criminal justice policies continue to imperil the financial and social health of the State without any measurable return such as comparatively low crime rates. Its corrections system continues to require more and more resources. Private prisons have created the opportunity to spend even more on incarceration, providing as they do such a substantial and atypical proportion of the available prison space in the State. Political pressures for even more punitive penal policies continue.

In the absence of fundamental change, laws need to be enacted that will provide some hope for coming to terms with the crisis in corrections.

- Lawmakers should take a “zero-based budgeting” approach to the issue of felonies in Oklahoma. They should look for compelling public safety reasons to label conduct as felonious. To the extent that non-violent conduct remains felonious, such felonies should not enhance the sentences of repeat offenders in the absence of a careful determination to the contrary.
- Oklahoma’s sentencing ranges should be brought closer to national norms.
- Oklahoma’s incarceration rate should be brought closer to the national norm.
- Article 6, section 10 of Oklahoma’s Constitution should be amended to remove gubernatorial participation from the parole process, except for appointing members of the Pardon and Parole Board.
I thank my research assistants Audrey Huffman, Monica Smith, Catheryn Koss, Chris Carroll, and Michael Greer for their substantial work in gathering the state comparative data relating to sentencing ranges, the felony/misdemeanor distinction, judicial selection methods, and the governor’s role in the parole process.

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APPENDIX-SENTENCING RANGES FOR SELECTED CRIMES (FIRST-TIME OFFENDERS)

Burglary Sentencing Ranges

Burglary Minimum Sentence

Art LeFrancois
Legal and Constitutional Issues
Burglary Maximum Sentences

Child Abuse Sentencing Ranges

** Statute provides not more than $1,000 fine or not more than 10 years
*** Statute range is by imprisonment in the State Penitentiary not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not less than $500 nor more than $5,000, or both such fine and imprisonment
Indecent Liberties Sentencing Range

State:
- Texas
- New Mexico
- Missouri
- Louisiana
- Kansas
- Colorado
- Arkansas
- Oklahoma

Years

Indecent Liberties Minimum Sentence

State:
- Oklahoma
- Arkansas
- Colorado
- Kansas
- Louisiana
- Missouri
- New Mexico
- Texas

Years

* Statute provides for up to $1,000 fine

Art LeFrancois
A 19
Legal and Constitutional Issues
Indecent Liberties Maximum Sentence

Marijuana Possession Sentencing Ranges

* Statute provides (1) a fine not to exceed $2,000; (2) confinement in jail for a term not to exceed 180 days; or (3) both such fine and confinement.
** Statute provides a basic sentence only which is a fine between $50 and $100 and jail up to 15 days (0.04 years)
*** Statute provides for a fine not more than $100
**** Statute provides for probation of not less than one year
***** Statute provides misdemeanor punishable by confinement for not more than one (1) year

Assumption: minimum statutory amount for marijuana possession
Marijuana Possession Minimum Sentence

- Statute provides for probation of not less than one year
- **Statute provides for a fine not less than $100 and by imprisonment for not more than 15 days for 1 oz. or less

Assumptions - sentence range for first time offenders and minimum statutory amount for marijuana possession, if amount is provided by statute.

Marijuana Possession Maximum Sentence

- **Statute provides basic sentence only; maximum sentence is a fine of $100 and by imprisonment of 15 days (0.04 year)
- **Statute provides for (1) a fine not to exceed $2,000; (2) confinement in jail for a term not to exceed 180 days; (3) both such fine and confinement.

Assumptions - sentence range for first time offenders and minimum statutory amount for marijuana possession, if amount is provided by statute.
**Methamphetamine Manufacturing Sentencing Range**

- Texas < 4 g.
- New Mexico
- Missouri < 25 g.
- Louisiana
- Kansas
- Colorado
- Arkansas < 25 g.
- Oklahoma < 50 g. **

**Statutory maximum is life.
Assumption - minimum statutory amount for meth manufacturing.

---

**Methamphetamine Manufacturing Minimum Sentence**

- Oklahoma < 50 g.
- Arkansas < 1 oz.
- Colorado
- Kansas
- Louisiana
- Missouri < 0.85 oz.
- New Mexico
- Texas < 1 g.

Assumption - minimum statutory amount for meth manufacturing.
Methamphetamine Manufacturing Maximum Sentence

* Statute provides a maximum of life for less than 50 g.
Assumptions - minimum statutory amount for meth manufacturing

Rape Sentencing Ranges

**Statutory maximum is life.
***Statutory maximum is life, life without parole, or death.
Rape Minimum Sentence

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*Statutory maximum is life, life without parole, or death
**Statutory maximum is life
Voluntary Manslaughter Minimum Sentence

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Voluntary Manslaughter Maximum Sentence

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* No statutory maximum
Involuntary Manslaughter Sentencing Ranges

- Texas
- New Mexico
- Missouri
- Louisiana
- Kansas
- Colorado
- Arkansas
- Oklahoma

Years

Involuntary Manslaughter Minimum Sentence

- Oklahoma
- Arkansas
- Colorado
- Kansas
- Louisiana
- Missouri
- Iowa
- Texas

Years

*Statutory minimum is a fine not exceeding $1,000.
Rational Justice Policy

Findings and Recommendations

A report to the

Oklahoma State Senate

[ Pursuant to SR #61 ]

From the

Oklahoma Alliance for Public Policy Research, Inc.

February 24, 2003