

Making Sense of Sentencing: State Systems and Policies

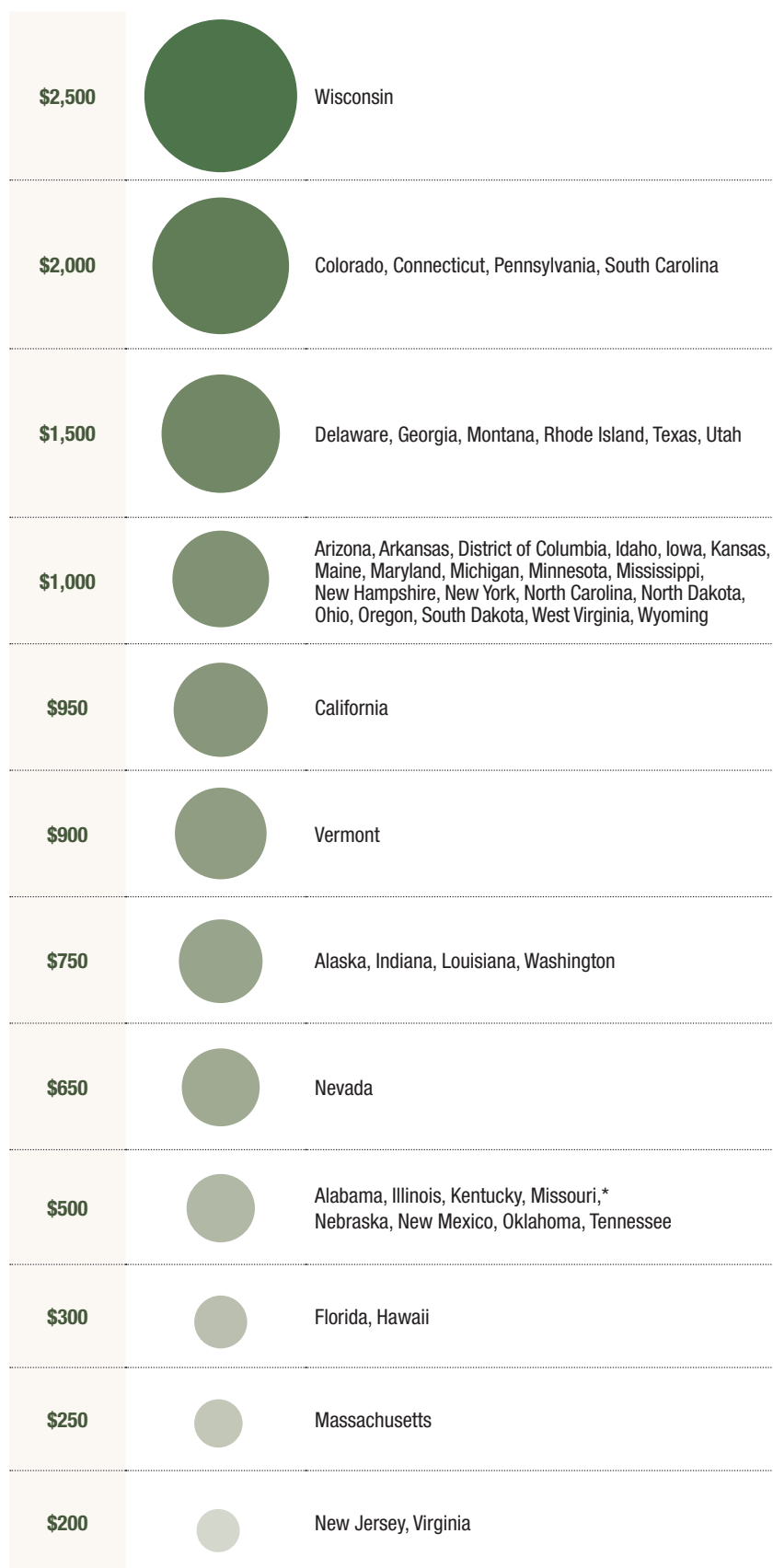
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BY ALISON LAWRENCE

In each state, the legislature has established a criminal code and sentencing system. These govern decisions about which criminal offenders are eligible for community placement, jail or prison, and how long offenders should be behind bars or under supervision. While each state's system is unique, they share common objectives of holding offenders accountable and protecting public safety. Effective sentencing systems strive for fairness, consistency, certainty and opportunity. In order to continue to achieve these objectives over time, legislatures regularly update their criminal codes and change aspects of their sentencing policies.

Figure 1: State Felony Theft Threshold Amounts



*Missouri threshold will be \$750, effective Jan. 1, 2017.

Source: NCSL, 2014

CRIMINAL CODES

State criminal codes define what constitutes a crime and the appropriate type and length of punishment for offenders. Most states classify offenses by severity and assign penalty levels accordingly. Infractions are the lowest class, are generally punishable by a fine, and often do not involve a criminal conviction. Misdemeanor convictions are punishable by a fine or incarceration in local jails, generally no longer than one year. Felonies are the most serious offense class and are usually punishable by more than one year of incarceration in a state-run correctional facility. Offenses also are often sorted by crimes against persons, property crimes, drug crimes and other categories.

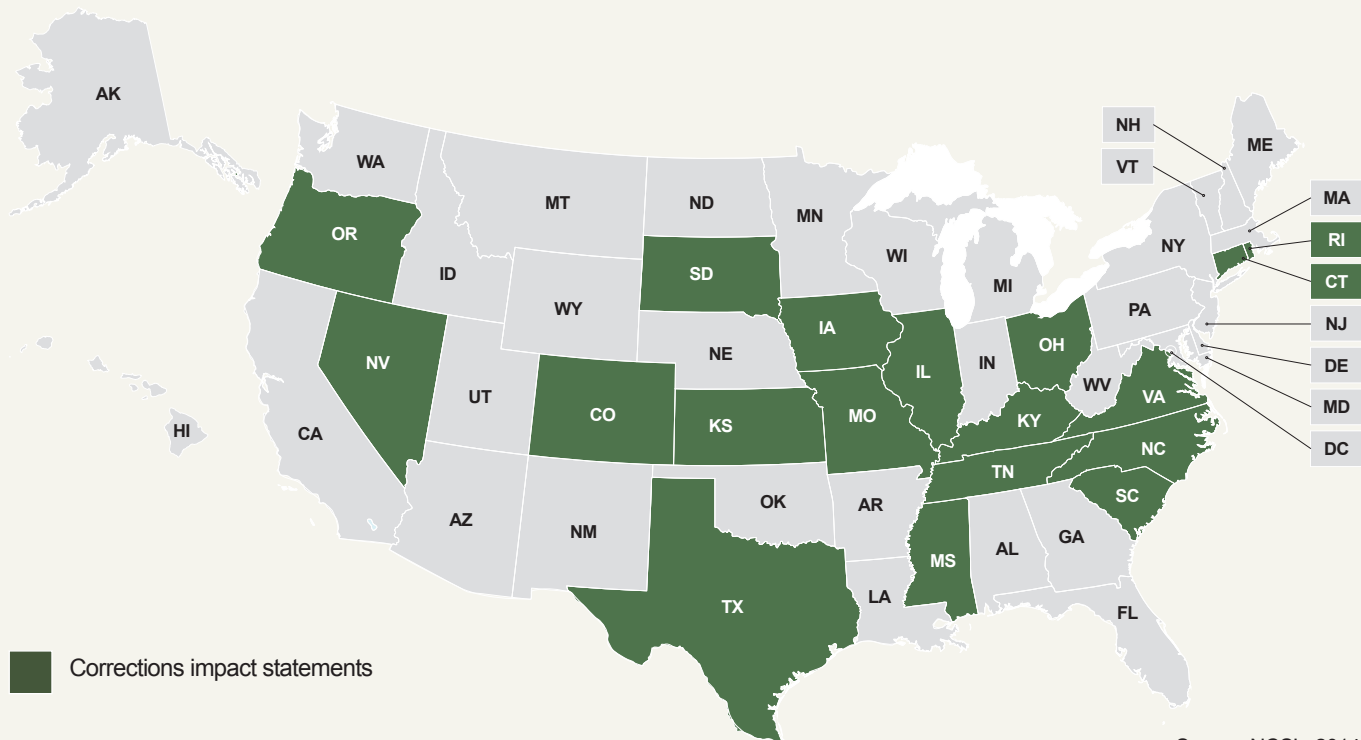
Property and Drug Crimes

The amount of harm or damage caused is one factor used to determine the severity of an offense. For example, penalties for property offenses typically are based on the value of stolen or damaged goods. States set a monetary amount that qualifies as a felony theft offense, also known as the felony theft threshold. The majority of states—30 and the District of Columbia—have thresholds of \$1,000 or greater, 15 have set them at \$500 to \$950, and five have thresholds below \$500. Legislatures have recently revisited thresholds to ensure these amounts keep pace with inflation and the increase in price of consumer goods. Since 2005, at least 26 states and the District of Columbia have increased the felony theft threshold. This is an example of lawmakers evaluating and modernizing criminal codes. Raising felony thresholds also complements state reforms designed to focus prison beds on the most serious offenders, rather than relatively low-level ones.

Figure 1 shows the current felony theft thresholds in states.

State laws identify a broad penalty range for each offense level and courts then determine sentences in individual cases from within these statutory ranges. In recent years, many states have amended penalty ranges for drug offenses. More than a third of states have amended drug penalty thresholds and levels in the past five years. California, Colorado, Georgia, Kentucky and Utah are among

States Requiring Corrections Impact Statements



Source: NCSL, 2014

DATA-DRIVEN DECISIONS

Legislatures are increasingly using data to inform decisions about sentencing laws.

Statistics on who goes to prison and for how long, recidivism rates, program performance and operational costs are some of the data used by legislatures to consider how policies affect cost, correctional populations and public safety.

Colorado lowered penalties for low-level drug use and possession in 2010 after determining that many offenders convicted of these crimes would be appropriate for community-based treatment, rather than prison. The state has saved more than \$30 million in prison costs and reallocated much of that money to community-based treatment services. In Kentucky, between 30 percent and 50 percent of the inmate population historically had been released without post-prison supervision. In 2011, the state adopted a law

requiring inmates to serve the final six months of a prison term in the community. A recent study by The Pew Charitable Trusts found that recidivism rates of inmates released under Kentucky's new law were 30 percent lower than those released without supervision.

States have codified a number of policies on data collection, evaluation and oversight. Legislatures in 18 states have adopted laws requiring specialized corrections impact statements for legislation that would modify criminal offenses and penalties. Legislatures now often consider prison population projections and agencies' use of evidence-based offender programs to help inform the budget process. Twenty-five states and the District of Columbia have established sentencing commissions to analyze and monitor sentencing practices; many of these commissions also conduct research, estimate fiscal

impacts and make policy recommendations to the legislature. Courts and corrections agencies also are responsible for collecting and compiling offender, program and system data.

A public-private partnership of the Bureau of Justice Assistance in the U.S. Department of Justice and The Pew Charitable Trusts' Public Safety Performance Project has provided more than half of states with support and assistance on major sentencing and corrections reforms. Known as "justice reinvestment," the partnership helps states collect data and analyze factors of prison population growth and cost; develop and adopt policies addressing those factors; and measure the impact of policy changes.

These tools and resources help legislatures ensure that policy choices are data-driven and that desired results are sustained.

states that have made significant changes. The intent in some states has been to differentiate possession offenses from those that involve selling or manufacturing illegal substances. For example, Georgia and Kentucky incorporated the weight of the drugs into offense classes so those arrested with lower drug amounts are penalized less severely. Colorado created a separate sentencing scheme for drug offenses that gives courts more authority to order treatment or diversion programs for drug offenders and reduces penalties for some low-level drug offenses. California and Utah have shifted many drug possession offenses from the felony to misdemeanor level. Nineteen states and the District of Columbia have decriminalized the personal consumption of small amounts of marijuana. These jurisdictions have reclassified the offenses as infractions or low-level misdemeanors with no possibility of jail time.

State-Local Resources

Amending crime levels can have implications for state and local corrections resources. Infractions and misdemeanor offenses are processed at the local level while the state becomes responsible for felony offenders after conviction. Responsibility for felony offenders sentenced to community supervision may rest with local jurisdictions. To help improve public safety and control prison costs, some legislatures have reinvested a portion of state savings from reduced prison populations into local corrections supervision. This includes “performance incentive” funding structures established to ensure that public safety, reduced recidivism and accountability goals are met. At least nine states have adopted these state-local funding mechanisms, which offer local supervision agencies incentives to keep offenders in the community rather than send them to prison. To further offset burdens placed on local corrections agencies, states have limited holds in jail pending probation and parole violation hearings and sped up the post-conviction transfer of inmates from jails to prisons.

SENTENCING SYSTEMS

State sentencing systems guide courts, parole boards and corrections agencies on how to carry out punishments authorized in the criminal code.

These systems vary in the amount of discretion courts or parole boards have for determining offenders’ penalties, or “sentences,” and the amount of time they serve in prison, or “time served.” Generally, state sentencing systems are characterized as “indeterminate” or “determinate.” Most states used indeterminate sentencing until the late 1970s, when some began to move toward more determinate sentences. Indeterminate sentences are imprecise, while determinate sentences are fixed. Some states also began to incorporate structure into their sentencing systems.

Indeterminate

In indeterminate systems, legislatures assign wide sentencing ranges to offenses. Courts have broad discretion to decide whether to impose community supervision or a prison term, and the sentence length that best fits the individual case and offender. Rationale for indeterminate sentencing is a highly individualized penalty that provides opportunity for rehabilitation and includes review of an offender’s progress toward that objective. A parole board determines when an offender has served sufficient time in prison and when he or she can safely be released on parole. Today, 33 states operate a primarily indeterminate sentencing system.

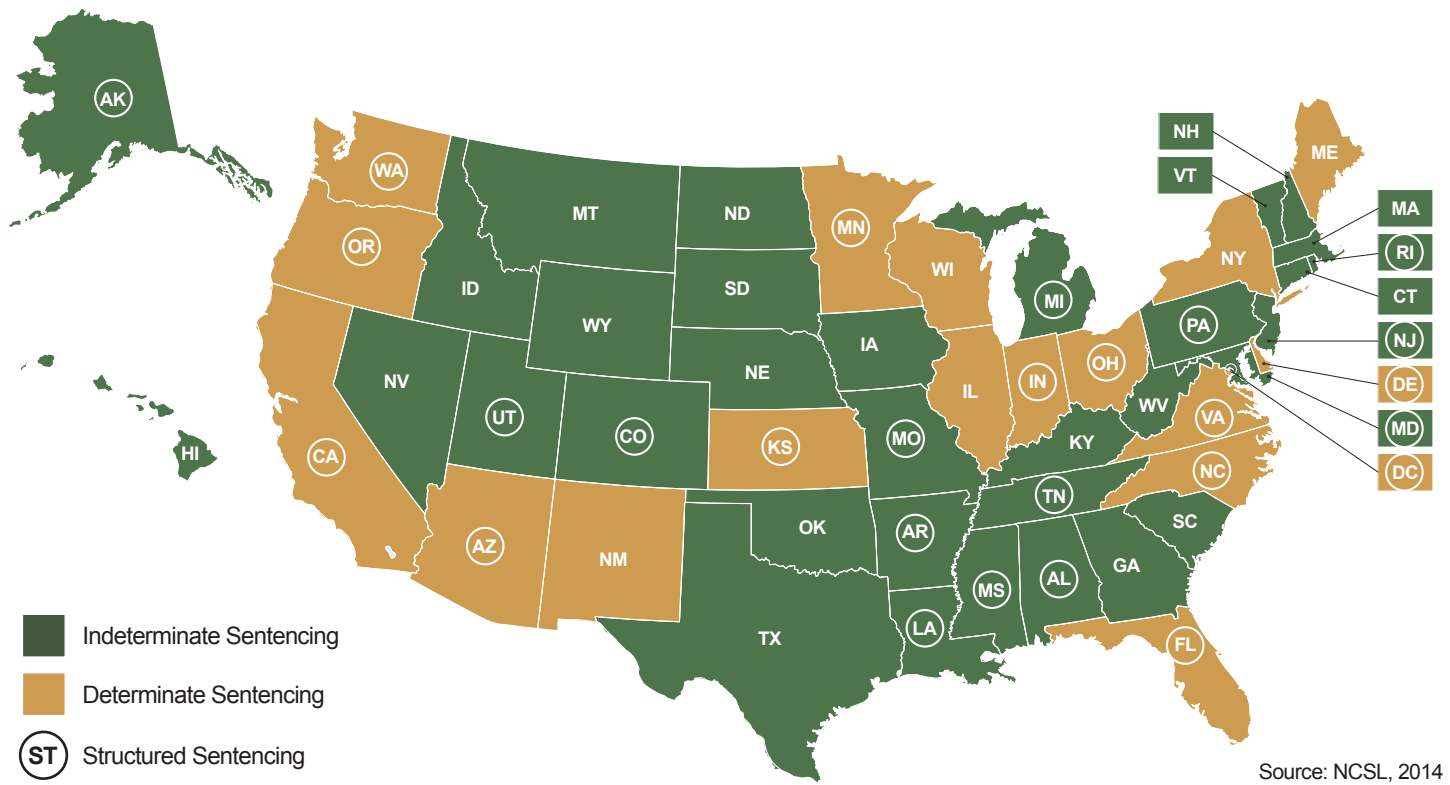
Determinate

Determinate sentencing is characterized by fixed sentence lengths. Such sentences may be community or prison terms, and prison sentences generally include an additional term of supervision in the community. The amount of time served is primarily determined by the courts, and parole boards and discretionary release do not exist in determinate systems. Rationale for determinate sentencing is to increase certainty in the amount of time served, improve proportionality of the sentence to the gravity of the offense, and reduce disparities that might exist when sentences are more indeterminate. Today, 17 states and the District of Columbia operate a primarily determinate sentencing system for felony offenders.

Structured

While states can be characterized as primarily indeterminate or determinate, no state is pure-

Figure 2: States' Primary Sentencing System



ly one or the other. Half of states have added a structured component to their primary sentencing system in order to provide judges guidance, within broad sentencing ranges, on the type and length of sentence to order. Structured components are designed to increase certainty and consistency across jurisdictions for similar offenses and offenders.

Sentencing guidelines are one example of a structured component. Created by an administrative sentencing guidelines commission with legislative authorization, guidelines prescribe penalties based on offense severity and criminal history. Guidelines have been codified in some states, and they may be advisory or mandatory. Presumptive sentences are another example of structured sentencing. Narrow penalty ranges are set in statute based on the severity of the offense, and courts are required to sentence within these ranges unless they find that circumstances warrant a different sentence length.

In states with a structured component, release from prison is still determined by the primary sentencing system—a parole board in indeterminate

systems and at the end of a fixed prison term in determinate systems. The rationale for structured sentencing is to enhance fairness and consistency for similar crimes and categories of offenders.

Figure 2 shows each state's primary sentencing system and if they have incorporated a structured component.

SENTENCING OPTIONS

Every state has sentencing options other than incarceration.

Community Supervision

State laws allow probation or other community supervision and define eligibility requirements. Courts are given broad authority to order probation for felony offenses, though the most serious and habitual offenders are prohibited from receiving this sanction. Eligibility for other community placements is generally more narrowly defined, such as for certain low-level or drug-involved offenders. States that have incorporated structured sentencing often include a directive on whether probation

COMMUNITY SENTENCING OPTIONS

Type	Features	Level of Surveillance Typically Provided
		Level of Treatment or Services Typically Provided
Deferred Sentence	The sentence is suspended and is not imposed if the defendant abides by certain court-ordered conditions, such as remaining drug- and crime-free and paying restitution. Generally involves little or no reporting and monitoring requirements.	<p>Low Medium High</p>
Probation	A sentence to community supervision, rather than jail or prison, with court-ordered requirements and conditions. Can be combined with drug treatment, specialty courts, electronic monitoring or residential placements.	<p>Low Medium High</p>
Diversion	Routes defendants away from formal criminal processing for a specified period of time and subject to certain requirements and conditions. Upon successful completion, the conviction will be sealed or dismissed. Often paired with drug treatment programs or specialty courts.	<p>Low Medium High</p>
Specialty Courts	A specialized court docket that uses increased monitoring, treatment and services to address targeted needs of a defendant. Includes drug courts, mental health courts and veterans' courts. Can be pre- or post-adjudication and can result in sealing or dismissing a conviction.	<p>Low Medium High</p>
Intensive Supervision Probation	A probation sentence with increased monitoring and other conditions, such as daily reporting, substance testing and restricted activities. Generally paired with treatment programs or electronic monitoring.	<p>Low Medium High</p>
Electronic Monitoring	An electronic device is used to track an offender's whereabouts and monitor compliance with conditions, such as curfew and travel restrictions. Often used in lieu of incarceration and combined with house arrest or intensive supervision.	<p>Low Medium High</p>
Community Corrections Centers	A structured living environment that provides support services, such as counseling and employment services. Commonly includes residential or non-residential treatment.	<p>Low Medium High</p>

Source: NCSL, 2014

or other community sentencing should be ordered.

Presumptive probation policies direct courts to sentence certain offenders to community supervision instead of prison. In structured sentencing states, presumptive probation can be established through sentencing guidelines. For example, Kansas has reduced the incarceration rate of drug-involved offenders by requiring community-based treatment for certain offenders identified on a drug-specific sentencing grid. Minnesota has achieved one of the lowest incarceration rates in the country, in part by incorporating into its sentencing guidelines mandatory probation for certain offenses. In Kentucky and South Dakota—both indeterminate states—judges are required to order probation for some low-level felonies unless they find that the offender cannot be safely supervised in the community.

Community supervision is generally ordered as a fixed term for which courts have broad authority, while nearly every state has placed a statutory maximum on the length of probation. The limit for felony offenses that are not sex crimes is generally between three and 10 years. At least 18 states cap probation at five years and nine states have limits that vary based on offense or offense class. Other states limit probation to no more than the maximum time that may be ordered for a sentence to incarceration. Earned discharge credits, available in at least a dozen states, allow probationers to earn a reduction in their supervision terms by adhering to conditions and rules.

Diversion

Diversion policies provide courts with the option to route defendants away from formal criminal processing and are designed to address offenders' treatment needs. Criminal offenders have high rates of drug abuse, addiction and mental health disorders (sometimes co-occurring), and often require specialized services. Specialty courts, in place in every state, are a common kind of diversion. These include drug, mental health, veterans or other courts that address the particular needs of target populations.

Some states have codified best practices and require oversight of diversionary treatment programs to ensure that, as a sentencing option,

these programs are effective in meeting offender needs and reducing crime. Policies providing for diversionary or deferred sentences allow offenders, usually for first-time, nonviolent offenses, to have their conviction cleared upon successfully completing the program. Record-clearing policies can remove barriers to employment and restore some rights and benefits lost as a result of criminal conviction.

Risk and Resources

Community supervision and diversion policies can support a risk- and resource-sensitive system that holds offenders accountable, reduces recidivism, and reserves prison space for the most serious offenders. Strong systems of community supervision also may include allocating resources to supervision agencies to focus the most intensive supervision on the most serious offenders. In addition to reforms that reinvest prison savings into programs that safely and successfully supervise offenders in the community, states also increasingly are requiring state-funded corrections programs to provide data and evidence that treatment and supervision strategies effectively reduce recidivism.

Sentencing decisions, including who is appropriate for certain community supervision programs, are aided today by risk- and needs-assessment instruments developed after several decades of experience and study. These incorporate actuarial, data-based information related to criminal behavior for people with similar characteristics. This helps courts determine who is at risk for committing new crimes, and supervision agencies to assign an appropriate level of supervision and suitable treatment and services. About one-quarter of states instruct sentencing courts to consider these assessments as part of the sentencing process. In Virginia, an assessment is used to identify and sentence to community supervision low-level drug and property offenders who, under the state's sentencing guidelines, would otherwise be recommended for a prison sentence. Colorado, Kansas, North Carolina and Oklahoma have laws that limit eligibility for intensive supervision and drug treatment programs to moderate- or high-risk offenders, as determined by modern risk-assessment tools.



Mandatory Penalties

Mandatory penalty policies, including mandatory minimum sentences, are in place in every state. These policies trump a state's primary sentencing system by requiring a minimum sentence length or a minimum amount of time or percent of sentence to be served in prison. Mandatory minimum sentence policies may affect broad categories of crimes, including repeat offenders and many drug crimes. Some target the most dangerous, repeat offenders, often including those who commit violent and sex crimes, offenses committed while possessing or using deadly weapons, certain drug crimes, and crimes involving children, elderly or other vulnerable victims.

Many mandatory policies that were adopted in the 1990s require offenders to serve a certain portion of their sentence in prison prior to being eligible for release. At the time, federal incentives encouraged state policies requiring that serious, violent offenders serve 85 percent of their sentence in prison. Other enhanced penalty policies require increased sentence lengths upon a second or subsequent

conviction, sometimes for broad categories of repeat offenses. Popular in the 1990s, these include "three strikes and you're out" laws that require a 25-year, life without parole, or other lengthy sentence upon a third conviction.

In the years since their enactment, mandatory penalties have in effect shifted discretion from sentencing courts to prosecutors. For offenders charged with and convicted of crimes that have a statutory mandatory penalty, courts must sentence the defendant in accordance with the law. Prosecutors can choose whether to charge a defendant with an offense that carries a mandatory term or to offer a plea bargain to a lesser crime that does not carry a mandatory sentence.

From 1990 to 2009, the average time served in prison grew by 36 percent, according to a report by The Pew Charitable Trusts. The report found that mandatory penalties have contributed to the longer average prison stays, which cumulatively contribute to increases in state prison populations.

Recently, many states have revised some mandatory penalties, especially for nonviolent and drug

offenses. Since 2000, at least 29 states have eased mandatory penalties, according to a study by the Vera Institute of Justice. The study found that new laws have given judges greater discretion to depart from mandatory penalties, limited the circumstances under which courts must impose mandatory sentences, or narrowed categories of offenders subject to the penalties.

RELEASE POLICIES

The sentence imposed is only part of the calculation for determining how long an offender spends in prison. Sentence credits, parole eligibility and automatic release policies also affect when an inmate is eligible and suitable for release. Mandatory supervision policies ensure offenders receive a period of post-prison supervision.

Sentence Credits

Sentence credits—known as earned time and good time—are an administrative tool used to encourage and reward good behavior and participation in prison rehabilitative programs. Earned-time credits are awarded to certain inmates who participate in or complete educational courses, vocational training, treatment, work or other recidivism-reduction programs. Good-time credits are granted to inmates who follow prison rules and participate in required activities. Earned time can be offered in lieu of or in addition to good-time credits.

Forty-one states and the District of Columbia allow most inmates to earn some time off their prison term. In indeterminate systems, sentence credits generally allow inmates to advance their parole eligibility date. Under determinate systems, time is reduced from the prison term. State laws vary considerably in the amount of credits that can be earned. Credits are prohibited or capped for inmates with mandatory penalties. Research has found that sentence credits reduce time served and lower incarceration costs; and participation in recidivism-reduction programming can improve offender success after release.

Parole Eligibility

Parole boards are the primary release mechanism in states with predominately indeterminate sentencing. Absent a mandatory minimum sentence,

statutes generally specify a minimum amount of time that must be served before one is eligible for parole. The requirement varies from one-quarter to half of the total sentence length. In some states, an inmate can be considered for parole earlier than the statutory requirement because of sentence credits earned. Parole boards consider time served, behavior while incarcerated, progress with individual case plans, victim input and other factors when determining if an inmate should be released.

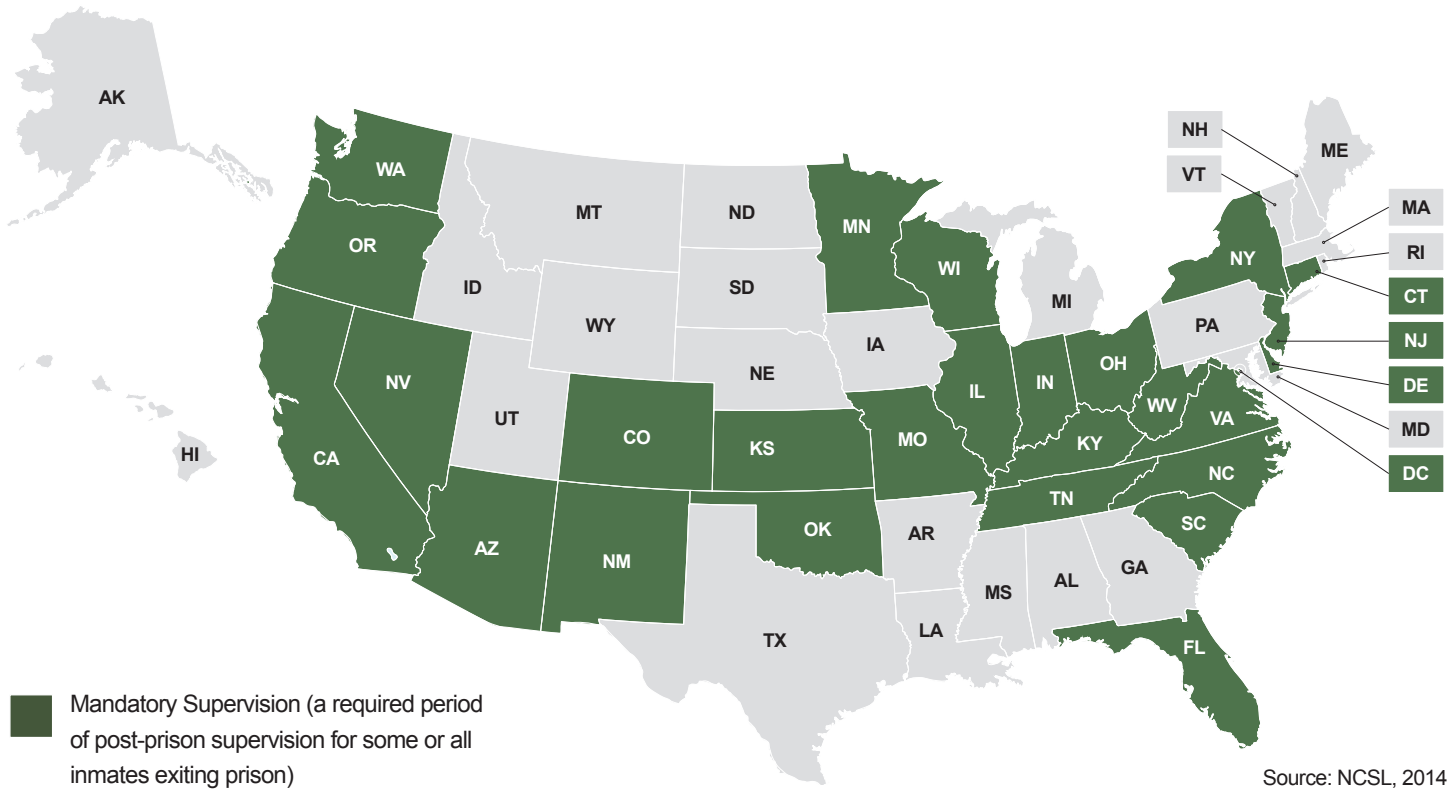
Some states limit parole boards' discretion in making release decisions. For example, presumptive parole policies in Hawaii and New Jersey require release of some inmates at the earliest possible parole eligibility date unless the board finds that release would not be in the interest of public safety. Laws in some states also require use of release guidelines to help inform release decisions. South Dakota and Tennessee have codified guidelines that set release eligibility based on offense class and criminal history. Other states, including Colorado and Texas, have adopted such guidelines administratively. Texas' statute instructs the parole board to incorporate risk-assessment results in the release decision.

At least four states with primarily determinate sentencing require certain serious, violent or sex offenders to be granted release by a parole board. California, New Mexico and Ohio require offenders convicted of certain serious crimes or sentenced to life with the possibility of parole to be reviewed by a parole board. Washington has created the Indeterminate Sentence Review Board to review parole eligibility of sex offenders.

Automatic Release

Under determinate sentencing systems, inmates are automatically released or transferred from prison to community supervision at the end of their fixed prison term. In some states, the post-prison supervision term is set by statute as a portion of the total sentence. For example, Minnesota law requires an offender to be released to community supervision after serving two-thirds of the total court-ordered sentence. Release can be delayed, at the discretion of the corrections department, for violations of prison rules. In other states, the sentencing court is permitted, or required, to order

Figure 3: States with Mandatory Supervision Laws



a period of community supervision separate from the prison term. In Illinois, inmates are released to community supervision at the end of the court-ordered prison term, less the amount of time an eligible inmate earns from sentence credits.

Mandatory Supervision

Twenty-six states and the District of Columbia require a period of post-prison supervision for some or all exiting inmates, with seven states adopting or expanding such a policy in the last five years. In a majority of these states, the mandatory post-release supervision term is ordered by the court and served after the expiration of the prison term. In other states, inmates are released to community supervision during the final portion of their sentence, usually the last 60 to 180 days.

Figure 3 shows states with mandatory supervision policies.

Mandatory post-release supervision provides offenders with a formal link to transitional support services and allows corrections agencies to monitor offenders during their initial return to the com-

munity. Improving public safety and reducing recidivism are rationales for this policy. Nearly one in five inmates in 2012 was released with no post-prison supervision, according to a report by The Pew Charitable Trusts. The report indicated that policies that eliminate parole, require minimum lengths of stay, or otherwise increase time-served requirements were the primary reasons that offenders were released without supervision.

INFORMED CHOICES

Legislative decisions about sentencing can have important, far-reaching, and often long-lasting effects on criminal justice systems. Actions designed to address one identified problem or aspect of the system often will have impacts in other areas. Legislatures today can benefit from data collection, analysis and technology improvements that support and fulfill information needs. Use of this information by interbranch and intergovernmental councils or task forces can help lawmakers gather input from a broad group of stakeholders and make informed choices on matters of criminal sentencing.

REFERENCES

Colorado Correctional Treatment Board. FY2016 Funding Plan. Denver, Colo.: Judicial Branch, n.d.

Lawrence, Alison. Cutting Corrections Costs: Earned Time Policies for State Prisoners. Denver, Colo.: National Conference of State Legislatures, July 2009.

Subramanian, Ram, and Ruth Delaney. Playbook for Change? States Consider Mandatory Sentences. New York, N.Y.: Vera Institute of Justice, February 2014.

The Pew Charitable Trusts. Mandatory Reentry Supervision: Evaluating the Kentucky Experience. Washington, D.C.: The Pew Charitable Trusts, June 2014.

The Pew Charitable Trusts. Max Out: The Rise in Prison Inmates Released Without Supervision. Washington, D.C.: The Pew Charitable Trusts, June 2014.

The Pew Charitable Trusts. Time Served: The High Cost, Low Return of Longer Prison Terms. Washington, D.C.: The Pew Charitable Trusts, June 2012.

Enactments

Calif. Prop. 47 (2014)

Colo. HB 1352 (2010)

Ga. HB 1176 (2012)

Ky. HB 463 (2011)

Utah HB 348 (2015)

Statutes

Cal. Penal Code §3000

Colo. Rev. Stat. §17-22.5-404, §18-1.3-208

Haw. Rev. Stat. §706-670

730 Ill. Comp. Stat. Ann. 5/5-8-1

Kan. Stat. Ann. §21-6824, §75-5291

Ky. Rev. Stat. Ann. §218A.010

Minn. Stat. §§244.01, .09

N.C. Gen. Stat. §143B-1154

N.J. Stat. Ann. §30:4-123.53

N.M. Stat. Ann. §31-21-10

Okla. Stat. tit. 22, §988.18

Ohio Rev. Code Ann. §2967.13

S.D. Codified Laws §22-6-11, §24-15A-32

Tenn. Code Ann. §40-35-501

Tex. Gov't Code Ann. §508.144

Va. Ann. Code §17.1-803

Wash. Rev. Code §9.95.420

RESOURCES

National Conference of State Legislatures, Criminal Justice Program

www.ncsl.org/research/civil-and-criminal-justice

NCSL's Criminal Justice Program is a resource for state lawmakers and staff on a wide range of topics that reflect the many aspects and functions of criminal justice systems. Special project work helps legislatures tap the best research and

information available on sentencing and corrections policies that meet both public safety goals and fiscal objectives.

The Pew Charitable Trusts, Public Safety Performance Project

www.pewstates.org/publicsafety

Pew's Public Safety Performance Project helps states advance data-driven, fiscally sound policies and practices in criminal and juvenile justice systems that protect

public safety, hold offenders accountable and control corrections costs. The project provides expert, nonpartisan research, analysis and assistance to states to help explore sentencing and corrections reforms that will reduce reoffending and cut costs. The project also conducts and publishes research on key criminal and juvenile corrections trends and highlights policies and practices that demonstrate better outcomes at less cost.

FURTHER READING

"Of Fragmentation and Ferment: The Impact of State Sentencing Policies on Incarceration Rates, 1975-2002" by the Vera Institute of Justice is a survey and assessment of state-level sentencing and corrections policies implemented between 1975 and 2002.

- www.vera.org/sites/default/files/resources/downloads/Of_Fragmentation_and_Ferment.pdf

"The Growth of Incarceration in the United States: Exploring Causes and Consequences" contains findings and

recommendations on the effects of high rates of incarceration from the Committee on Law and Justice of the National Research Council.

- nationalacademies.org/claj

The "Model Penal Code" was first completed in 1962 by the American Law Institute. The Institute is currently re-examining the Code's provisions on sentencing, as well as sexual assault and other offenses.

- www.ali.org

"Sentencing in America, 1975-2025" by University of Minnesota Professor Michael Tonry analyzes American sentencing policy over the last 50 years.

- papers.ssrn.com/sol3/papers.cfm?abstract_id=2321174

"Using Offender Risk and Needs Assessment Information at Sentencing" provides guidance for courts by a National Center for State Courts' working group.

- www.ncsc.org/~media/Microsites/Files/CSI/RNA%20Guide%20Final.ashx

Acknowledgments

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