

Numbers Don't Lie (But People Do)

At Hercules and the Umpire, Judge Richard Kopf takes Attorney General Holder to task [for his speech](#) before the National Association of Criminal Defense Lawyers.

“By basing sentencing decisions on static factors and immutable characteristics—like the defendant’s education level, socioeconomic background, or neighborhood—they may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society,” Mr. Holder told the defense lawyers. Criminal sentences, he said, “should not be based on unchangeable factors that a person cannot control, or on the possibility of a future crime that has not taken place.”

Judge Kopf sees the AG as sticking his head in the sand, that he is “naïve and manifestly wrong.”

Indeed, a former policy analyst for the federal courts wrote three years ago that:

Evidence-based sentencing is based upon social science. Criminological meta-analysis has identified fifteen key variables that are significantly related to recidivism: 1) criminal companions, (2) antisocial personality, (3) adult criminal history, (4) race, (5) pre-adult antisocial behavior, (6) family rearing practices, (7) social achievement, (8) interpersonal conflict, (9) current age, (10) substance abuse, (11) intellectual functioning, (12) family criminality, (13) gender, (14) socio-economic status of origin, and (15) personal distress. If those variables can be used in sentencing, it may be possible to safeguard public safety while reducing the financial and social costs associated with mass incarceration.

J.C. Oleson, Risk Assessment at Sentencing, ASU Law Journal (June 20, 2011).

This is the age of empiricism, which many, myself included, will argue is a great step forward from the age of wives tales, ignorant assumptions and the dreaded “common sense.”

In my opinion, the use of empirical methods to assess risk at sentencing and upon supervised release is the most important aspect of the present movement toward criminal justice reform. We can and should aspire to depopulate our prisons. We can and should aspire to treat certain offenders less harshly. We can and should do a better job of helping offenders on supervised release. But if we believe that public safety is or should be a central goal of our criminal justice system we ought not to ignore the truth—certain characteristics that we have shied away from in the past because we worried too much about vague notions of “equality” or “fairness” tell us a lot about future danger.

This is a highly provocative assertion, that in order for empiricism to do its job, we cannot remove “static factors” such as race and gender from the calculus because of our overarching belief in

equality and fairness. The numbers tell a story, regardless of where we want that story to go.

I agree with Judge Kopf. Judge Kopf is wrong.

The strong trend toward an evidence-based view, whether in recidivism or any other human endeavor, is far more meaningful and useful than our reliance on commonly held beliefs that lack, or defy, evidence. Beliefs are great for religion, but lousy for law.

But when this argument is made, it must be fully made, fully explored. Empiricism isn't born of guys with guns and shields doing what they usually do, rounding up the usual suspects in neighborhoods where people with darker skin live. Garbage in, garbage out.

Empiricism must be real, suck up all of reality, not just the easy stuff a bad system stuffs into the numbers box. There are reasons why wealthier neighborhoods provide better education to their youth. There are reasons why kids from middle class families who are convicted of crimes aren't prone to recidivism. There are reasons why black and Hispanic kids are tossed, arrested, prosecuted, convicted, imprisoned in grossly disproportionate numbers.

If we're going to adore empiricism, then we need to understand it fully and appreciate what it requires before worrying about what it gives us back in return. The effort to create a sentencing regime based on empirical analysis of who is most likely to commit crimes after their punishment is completed is a worthy one, but one that can't possibly be accomplished. At least not now.

At this point in our history, the system spews out on the back-end of convictions nothing better than what's taken in on the front end. It would clearly suggest that people of color are more prone to be criminals in the first place, and more prone to recidivism afterward. That's the story the numbers tell. But the numbers are only as good as the input.

More young black men are recidivists because more black men are arrested, even though there is evidence that they don't commit more crimes than white men. They just get arrested more, because they are who the police spend their time arresting. This gives rise to an internal community spiral, missing fathers (because they're in prison), poor education, poor job prospects, etc. Toss in a criminal conviction and ask empiricism why they aren't being hired for well-paying jobs at IBM.

So I completely agree with Judge Kopf that there can be no viable empiricism when we introduce politically correct factors into the analysis. The numbers speak for themselves, and if empiricism is to work, we can't screw with the numbers to make them conform to political notions of equality and fairness.

And I completely disagree with Judge Kopf that there is any possibility of this happening under the existing regime, because its input is so rife with bias that counting heads on the way out the door of prison does nothing more than reinforce the prejudice of poor black and Hispanic young men being taken in day after day, with only lousy options before and far worse options afterward.

Let's definitely do empiricism. And let's definitely include all factors, no matter how we want the number to turn out. Just not until we can do better than garbage in. And that's all we have now, garbage in, and all empiricism will do for us until this changes is give us garbage out. That's not empiricism. That's confirmation of the lie that the criminal justice system isn't still rife with prejudice.

This entry was posted in Uncategorized on August 11, 2014
[<http://blog.simplejustice.us/2014/08/11/numbers-dont-lie-but-people-do/>] by SHG.