

Sentencing In The 21st And The Necessity Of A Permanent Sentencing Commission In New Jersey



The New Jersey
Commission to
Review Criminal
Sentencing

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I. Introduction

Intelligent policy decisions depend on the collection and consideration of relevant information. Permanent sentencing commissions across the country are proving that the development of smart, fair, and cost-effective sentencing policy likewise requires the ongoing accumulation and analysis of sentencing data. This report explains in detail how and why New Jersey can greatly benefit from the creation of a permanent sentencing commission.

The Commission to Review Criminal Sentencing was created by the New Jersey Legislature in 2004, but on a temporary basis. In creating the Commission, the Legislature noted that since enactment of the New Jersey Code of Criminal Justice in 1978, new offenses had been added to the Code and penalties for many existing offenses had been enhanced. These many changes adopted in a piecemeal fashion over the last twenty seven years have affected the proportional relationship between the harm of criminal acts and the severity of the punishment authorized for those acts, a proportional relationship that was incorporated in the 1978 version of the Code. The Legislature created the Commission to Review Criminal Sentencing in response to this problem and charged the Commission with responsibility for reviewing the sentencing provisions of the Code and with responsibility for making “recommendations for legislation to be enacted by the Legislature that would ensure that these sentences are fair and proportionate to other sentences imposed for criminal offenses.”

The Commission has fifteen members; two members of the Senate of different political parties appointed by the Senate President, two members of the General Assembly of different political parties appointed by the Speaker of the General Assembly, three cabinet members or their designees who serve ex officio (the Attorney General, the Public Defender and the Commissioner of Corrections), the Chairman of the Parole Board or his designee, the Chief Justice or her designee, the President of the County Prosecutor’s Association or his designee, the President of the New Jersey State Bar Association or his designee and four public



members, two appointed by the Governor, and one each appointed by the Senate President and Speaker of the General Assembly. Importantly, Commission members serve without compensation and the Commission currently employs only one staff member, an Executive Director who is also a Deputy Attorney General for the State of New Jersey.



II. The Work Of The Commission Thus Far

In December 2005, the Commission released a major report, based upon a close study of the empirical data, regarding the efficacy and human cost of the current drug-free school zone criminal legislation. Among other things, the report concluded that the legislation had the unintended result of seriously discriminating against minorities, as well as costing the state tens of millions of dollars in incarceration costs which were, at least arguably, unnecessary and excessive. That report has now become a national model for critiques of this kind of legislation. In early April 2006, for example, the Justice Policy Institute, a Washington, D.C. public policy and research organization, praised the Commission's report and suggested that other states conduct similar analyses of state data.¹

In addition, the Commission studied a provision of the Code of Criminal Justice, N.J.S.A. 2C:35-16, dealing with mandatory forfeiture of drivers' license upon conviction for certain drug offenses. The Commission subsequently recommended that the provision be modified to allow waiver of forfeiture upon a showing by defendants of compelling circumstances. In January 2006, the provision was amended by the Legislature.

The Commission also reached an historic information-sharing agreement with the Administrative Office of the Courts (AOC) and developed sophisticated software to electronically collect, store and organize sentencing information. The creation of the Commission's database will place it in the unique position of being able to describe current sentencing practice and empirically model alternative sentencing provisions that it is considering.



III. The Momentum Toward Permanent Sentencing Commissions Throughout The Nation

A. COMMISSIONS AND THE FORMULATION OF COST-EFFECTIVE CORRECTIONS POLICY

The empirical work undertaken by the New Jersey Commission to support its policy recommendations reflects the general trend, throughout the country, resulting from permanent and independent sentencing commissions. At least 22 states have, at some point or other, established such commissions. While their statutory mandates have varied somewhat, sentencing commissions have generally been created to:

- ☛ consider correctional resources, including, but not limited to, the capacities of state and local correctional facilities, in promulgating sentencing policy;
- ☛ examine past sentencing practices, consider their rationality, and establish a list of “sentencing factors” which would either guide, or limit, judges in assessing sentences for individual offenders; and
- ☛ seek to establish uniform sentences throughout the jurisdiction.

Historically, state sentencing commissions are created and become particularly important in times of severe fiscal difficulty. The Minnesota legislature was the first in the nation to recognize that reconciling the paramount goal of public safety with fiscal realities required a fact-based and data-driven approach to the formulation of sentencing policy. As a result, the Minnesota Sentencing Commission pioneered an approach involving the study of the probable effects of alternative policies on criminal justice operations using sophisticated modeling and simulation technology, as well as the vast store of sentencing information it had accumulated.ⁱⁱ



Other commissions have successfully followed the Minnesota Commission's lead in effectively harnessing data and technology to assist in the policy making process. The results have been very positive.

For example, North Carolina's legislature required its sentencing commission to develop a computerized corrections population simulation model to project the resources needed to implement recommendations and policy changes. In response, the North Carolina Sentencing and Policy Advisory Commission began by building an extensive database containing information on offenders, their criminal histories, their sentences, the time they were expected to serve, and other important characteristics. The database enabled the North Carolina Commission to understand current sentencing practices and to monitor the implementation of new laws.ⁱⁱⁱ

Information from the database was then fed into the simulation model to project future prison populations. In formulating its recommendations, the commission was able to navigate often contentious waters by relying on the simulation model to assess the systemic costs of various possible sentencing proposals. In fact, with the help of the simulation model, the North Carolina Commission was able to produce two plans for the legislature to consider, one with more severe sentences, and another with slightly less severe sentences that would forestall the need to build new prisons for a few more years.

In fact, all state sentencing commissions are presently "developing useful sentencing policy expertise, a comprehensive state-wide view of punishment priorities, better management of resources, and a long-term perspective."^{iv} As a result, these commissions are proving that the goals of cost-effective sentencing policy and enhanced public safety are not mutually exclusive.

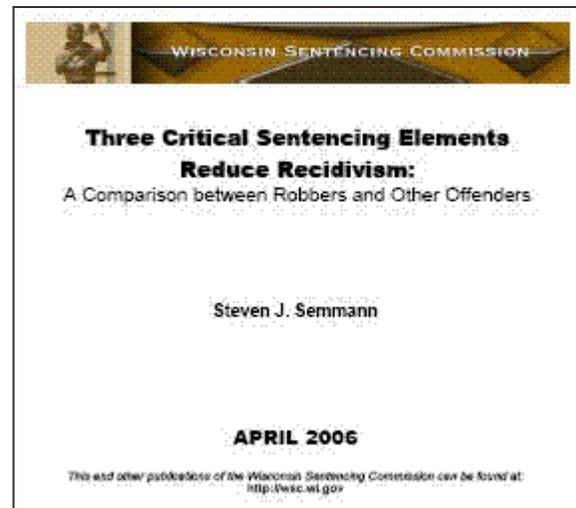
B. COMMISSIONS USE DATA TO DEVELOP SENTENCING POLICY WHICH BETTER PROTECTS THE PUBLIC

Equipped with sentencing and offender data, sentencing commissions have and continue to aggressively focus on allocating correctional resources where they will do the most good in changing offender behavior and preventing recidivism. In other words, commissions are actively engaged in answering this fundamental question: what works on which offenders?



As with cost-effectiveness, the study of recidivism, i.e., the relapse into criminal behavior by offenders -- is inherently fact-driven and data-intensive. This point is illustrated by a report recently issued by the Wisconsin Sentencing Commission entitled, “Three Critical Sentencing Elements Reduce Recidivism: A Comparison Between Robbers and Other Offenders.”^v The goals of this study were threefold:

- ✚ First, to help criminal justice practitioners better understand the traits associated with specific groups of repeat offenders, in this case robbers;
- ✚ Second, to raise awareness of the significance of those traits when sentencing or making policy; and
- ✚ Finally, to attempt to identify what an effective sentence is to prevent robbers from re-offending.



The Wisconsin report underscores that integrating offender data into the realm of sentencing policy enables policy-makers to better tailor the appropriate disposition to the right offender in order to increase the probability that he or she will not reoffend upon release.

C. THE INHERENT VALUE OF COLLECTING AND REVIEWING SENTENCING DATA

The benefits of collecting and analyzing of sentencing information on an ongoing basis extend beyond the formulation of cost-effective sentencing policies that enhance public safety. The 1984 legislation establishing the United States Sentencing Commission (USSC) requires it “to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues”, but does not, in contrast to many states, explicitly mandate that the USSC consider corrections costs in formulating sentencing policy. Nonetheless, the USSC quite recently proved itself an indispensable resource to Congress in response to an



upheaval within the federal criminal justice system triggered by a recent United States Supreme Court decision.

In a landmark decision issued in January 2005, the United States Supreme Court declared the entire federal sentencing system unconstitutional in United States v. Booker^{vi}. To remedy the constitutional problem, the Supreme Court concluded that the federal sentencing guidelines would be merely advisory – a result which was viewed by some as restoring the wide discretionary sentencing authority which federal judges had enjoyed prior to the promulgation of the guidelines.

The Booker decision stunned the federal criminal justice system: after all, the federal sentencing guidelines had been in effect since 1984 and, moreover, had withstood a host of constitutional challenges during the intervening years. Understandably, lawyers, judges and legislators immediately pondered how the Supreme Court’s “advisory guidelines” remedy would impact federal sentencing practice. Related questions arose as to whether Congress would be required to intervene in order to forestall potential problems wrought by the Booker decision.



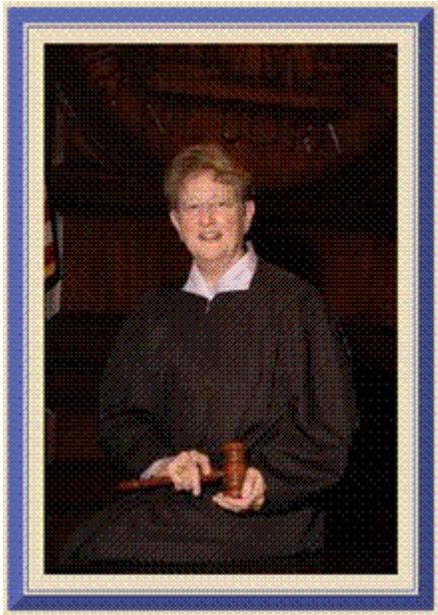
The USSC responded swiftly, holding hearings within weeks after the decision. In March 2006, it published a richly-detailed portrait of post-Booker federal sentencing.^{vii} The study was based on the accumulation and analysis of sentencing data derived from federal district and appellate courts across the country. The contents of the study will inevitably shape and inform the current debate about the direction of post-Booker federal sentencing policy since the report comprehensively and objectively answers many of those questions which have arisen in the convulsive aftermath of the decision. It cannot be too strongly emphasized that had the USSC not existed, and had it not, during its twenty-two-year existence, developed and refined its state-of-the-art capacity to acquire and review relevant sentencing data, it is doubtful that such a comprehensive report could have been prepared, much less prepared so swiftly.

States that have **not** established permanent sentencing commissions have regretted that decision. South Carolina’s Chief Justice, Jean Toal, in an annual



speech before the South Carolina General Assembly this year, urgently called for a policy summit on sentencing to address the state's exploding prison population.^{viii} Chief Justice Toal stated that the six-fold increase in state and federal prison populations has "led to a huge drain on state and local resources."

Notably, Chief Justice Toal asserted that South Carolina was hindered in its ability to reform its sentencing system because, in her words, "We don't know the answer now as to how the system is being run because it's been such a long time since [anyone has] taken a real hard look at it." She added, "I want to know if there are better ways to sentence and incarcerate than what we are using now" and held up North Carolina as a model for sentencing reform.



Chief Justice Toal's despair is even more poignant because, years earlier, the South Carolina legislature had first created, and then abolished, a sentencing commission. In response to Chief Justice Toal's comments, State Senator Jake Knotts, a Republican and former police officer, publicly called for the resurrection of the state's sentencing commission.

A similar concern has arisen in California. The abrupt resignation of Roderick Hickman as California's top prison official, has put that state's overcrowded \$8 billion corrections system in disarray; policy experts are emphasizing that the many of the system's troubles stem from poorly thought out criminal justice policies that were based more on headlines and emotional pleas than a growing body of data that suggests how states can run cost efficient and effective prisons and parole system.^{ix}

In response to the crisis, commentators have observed that instead of implementing major policy reforms similar to those enacted in other states that have cut costs and not upped crime rates, California lawmakers continue to enact piecemeal changes to the criminal justice system. This approach, characterized as "drive-by-policymaking," rarely involves serious considerations of cost or



effectiveness of the provisions being enacted. Legislators in Sacramento are now pondering the creation of a state sentencing commission.

California and South Carolina are clearly not among the 22 states that currently benefit from the expertise and data provided by their permanent sentencing commissions. In response to this crisis, policy makers and legislators in both states find themselves lacking the most basic and necessary tools with which to develop cost-effective and rational sentencing policy.

D. A UNANIMOUS CONSENSUS THAT PERMANENT SENTENCING COMMISSIONS ARE A VITALLY IMPORTANT COMPONENT OF ANY EFFECTIVE CRIMINAL JUSTICE SYSTEM

Based on the foregoing, it is hardly surprising that in the past decade, several national organizations interested in the criminal justice system have embraced the concept of permanent sentencing commissions. A powerful consensus among criminal justice professionals has emerged that permanent commissions are an indispensable component of any successful sentencing system. Among these organizations are the American Bar Association, the American Law Institute and the Constitution Project.

The Constitution Project describes itself as "a bipartisan nonprofit organization that seeks consensus on controversial legal issues through a unique combination of scholarship and activism." In response to several recent decisions by the United States Supreme Court, including Booker, the Constitution Project's Sentencing Initiative assembled a blue-ribbon committee of current and former federal and state prosecutors, defense attorneys, judges, academics, and other sentencing experts. The committee, which has been engaged in developing the framework for a model sentencing system that both protects public safety and respects the constitutional rights of defendants, published, in March 2006, a document entitled, "Principles For the Design and Reform of Sentencing Systems A Background Report."^x Principle Nine elaborates on the necessity of a permanent commission:

Essential to the successful operation of a sentencing system is a sentencing commission or similar entity with the expertise and stature to study sentencing issues,



gather data, and formulate proposed sentencing rules and amendments. The commission should continually assess the performance of sentencing rules and should periodically recommend modifications, which may include either upward or downward adjustments of sentences, based on its assessment. Commission processes should include transparency and fair administrative rulemaking procedures.

The Constitution Project's emphasis on the necessity of a permanent sentencing commission echoes that of the American Law Institute (ALI), a body of scholars and practitioners who developed the Model Penal Code (MPC), a comprehensive body of model criminal provisions, including those to govern the imposition of criminal sanctions. The final version of the original Model Penal Code was completed in 1962. The MPC eventually served as the foundation for New Jersey's Code of Criminal Justice, which the Legislature enacted in 1978.

The ALI is now revising the sentencing provisions of the Model Penal Code based on the accumulated experiences of both the federal and state courts since 1962. Contained in the preliminary drafts of the revised sentencing provisions is a model provision that expressly **requires** the establishment of a permanent and independent sentencing commission.

Of particular significance, the ALI persuasively elaborates on the importance of permanence in a commentary which accompanies the model provision:

A number of states have chosen to create temporary sentencing commissions, or have abolished standing commissions at some point after the commission's guidelines have taken effect. As a result, the monitoring, research, planning, consensus-building, and lawmaking functions normally entrusted to a commission are performed by no one on a continuing basis. Discontinuation guarantees that the commission's work product will become obsolete over time, and no institutional memory will inform ongoing changes to the sentencing structure . . . Crime rates change, as do the



politics of punishment, the availability of resources, and the feedback from various sources on how well the sentencing is working.^{xi}

California and South Carolina's current predicaments confirm beyond any doubt the wisdom of the foregoing observations, as well as the related recognition by the ALI that, "If there is a need for the expertise of a sentencing agency in the first instance, that need does not dissipate once the agency has completed a single set of studies or guidelines."^{xii}

Finally, almost a decade ago, the American Bar Association, in its Third Edition of Principles Relating to Sentencing, similarly urged the adoption of Sentencing guidelines, and the establishment of state agencies, like Sentencing Commissions, to oversee and monitor the implementation of those guidelines.^{xiii}



IV. The Future Of A Sentencing Commission In New Jersey

Given New Jersey's severe budgetary crisis and the need to review sentencing laws for undue disparity, there can be no room for complacency. Cogent and rational decisions about using costly correctional resources, as well as whether such resources should be employed as they are now, require continuous collection of data on crime, and analyses of those data if the legislature is to receive reliable guidance to control both crime and corrections costs.

For example, in 2002, alone, 14,849 men and woman were released to the community by the New Jersey Department of Corrections. In fact, almost all individuals incarcerated in the state of New Jersey – 95 to 97% – will eventually be released back into the community. A comprehensive report issued in December 2003 estimated that 70,000 individuals will be released from state prison over the next five years; more will be released from jails and juvenile facilities.

More sobering is the stark reality that most offenders sentenced to imprisonment reoffend upon release. Bureau of Justice Statistics reflect that sixty-seven percent of former inmates released from state prison in 1994 committed at least one serious new crime within the following three years and 272,111 offenders discharged in 1994 had accumulated 4.1 million arrest charges before their most recent imprisonment and another 744,000 charges within three years of release. Acknowledging these statistics, Judge Michael Marcus, an outspoken proponent of the crime-control model of sentencing, persuasively argues that, "Our only sane course is to improve our knowledge and our ability to guide our sentencing behaviors based on good evidence . . . We actually 'know' a great deal . . . criminologists and students of corrections have actually generated an enormous body of studies about the relative efficacy of various programs and custodial and noncustodial sanctions."^{xiv}

With only one staff member and an austere budget, the New Jersey Commission to Review Criminal Sentencing has already produced one major report, suggesting significant changes in sentencing drug offenders. One need not agree with that particular recommendation, of course, to recognize the importance



of the data collected, and analyzed, by the Commission. Moreover, New Jersey's sentencing system must be reviewed as a whole.

To continue its work and replicate the more ambitious initiatives now undertaken by more established sentencing commissions elsewhere, the Commission requires only a modest increase in funding. Moreover, a permanent sentencing commission, with clear, statutory authorization, is much better positioned to acquire assistance from federal and philanthropic organizations concerned with promoting rational sentencing policy. Simply stated, the prospect of securing such funding is contingent upon a showing of clear and unambiguous support for the Commission by both the Governor and the Legislature expressed through enactment of pending legislation to establish a permanent sentencing commission.



V. Conclusion

Based on the foregoing, we respectfully request Governor Corzine and the Legislature enable the Commission to bring to New Jersey objective data-driven approaches which twenty-two of our sister-states and the federal government have already adopted by supporting pending legislation to make the Commission permanent. In return, a permanent sentencing commission will continue to lead New Jersey's sentencing policy into the 21st century.



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Deputy Attorney General Ben Barlyn
Executive Director



Endnotes

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- ^{xiv} Hon. Michael Marcus, “*Justicia’s Bandages, Blind Sentencing*,” 1 *Int’l.J.of Punishment and Sentencing* 1 (2005), accessible at http://www.sandstonepress.net/ijps/IJPS_sample.pdf.

