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Three Good Reasons for Sentencing Commission

Forum Column

By Kara Dansky

California needs a new approach to criminal sentencing. We need a reliable system for collecting and analyzing sentencing data to ensure that sentencing policy decisions have empirical support. We need a coherent sentencing structure that is based on principles of fairness, justice, proportionality and a commitment to public safety. We need a method for predicting the effect of sentencing policy decisions on our finite correctional resources and massive prison population. We need a state agency capable of achieving these objectives - a sentencing commission.

Until 1976, California had an indeterminate sentencing system. Judges had almost complete discretion to impose sentences within broadly defined ranges, and parole authorities had almost complete discretion to release inmates any time before the expiration of the imposed sentence. Sentencing experts and policymakers were virtually united in their opposition to this system, condemning it for lacking uniformity, proportionality and transparency, and for unrealistically promoting rehabilitation as a primary goal of sentencing.

In 1976, the California Legislature enacted the Determinate Sentencing Act, explicitly describing the new law's philosophy as rooted in punishment rather than in rehabilitation. The act grouped crimes into categories, with each category tied to a sentencing "triad" containing a high, middle and low sentence. The law directed judges to presumptively impose the middle sentence or, if justified by aggravating and/or mitigating factors, the higher or lower sentence. The act also abolished discretionary parole release.

There is now growing agreement among practitioners, policymakers and academics that California's post-1976 sentencing structure has contributed to serious problems that no one anticipated in 1976 - a correctional system plagued by egregious overcrowding, unsafe conditions for officers and inmates, racial imbalances, high recidivism, a troubled parole revocation system, increasing expenditures, a lack of systematic data collection, and an incoherent sentencing structure.

Why? One primary failing of criminal sentencing in California is that it is not based on empirical research. We should be collecting historical and current sentencing data. We should be using this data to predict the effect of sentencing modifications on correctional resources, to evaluate the ability of various sentencing practices to reduce recidivism and improve public safety, to correct racial imbalances in sentencing, and to make well-founded offender

risk assessments. We currently do none of this.

A second problem is philosophical. When the California Legislature declared in 1976 that the purpose of imprisonment is punishment, it locked itself into an unnecessarily rigid approach to criminal justice policy. It is certainly true that punishment is a purpose of imprisonment. That fact alone, however, tells only a small part of the story. Criminal sentencing is about much more - it is about public safety; it is about fairness; it is about reintegrating offenders into their communities once they are released from prison; it is about restoring victims; it is about ensuring that any particular punishment is proportional to the crime for which it is imposed and that all sentences actually serve the purposes that justify their imposition.

Designing a sound sentencing structure and imposing criminal sentences require an exacting inquiry into many nuanced factors. By limiting the purpose of imprisonment to punishment, California lawmakers deprived themselves, judges, victims, prosecutors and defense attorneys of the opportunity to engage with one another in this kind of analysis.

A third problem with California's sentencing system is that, in fact, there is no "system." The Determinate Sentencing Act itself is a relatively short section of the Penal Code. It states, essentially, that judges must sentence offenders in accordance with other provisions of the code. This in itself is not complicated. What is complicated are the literally hundreds of other sections and subsections of the code that address sentencing. Laws relating to sentencing are scattered throughout the Penal Code without any clear organizing framework. They can be, and are, created either by voter initiative or by legislative enactment. They are frequently enacted in response to a public outcry surrounding the commission of a particularly horrific crime, in a piecemeal, haphazard manner. This has resulted in an extremely complicated set of rules and restrictions.

In short, California's sentencing system, such as it is, is plagued by three main failings: (1) it has no empirical basis to justify it, (2) its inherent rigidity deprives us of the opportunity to ask important questions about how to impose just sentences, and (3) its complexity makes it extremely difficult for the relevant players to understand and apply it. It is time to remedy these failings, and the most reasonable way to start is to create a sentencing commission.

To better appreciate why we need a sentencing commission, it is important to understand what a sentencing commission is, and what it is not. A sentencing commission, roughly speaking, is a regulatory body that bears primary responsibility for collecting and analyzing statewide sentencing data and for developing statewide sentencing policies.

A sentencing commission is not a sentencing or releasing agency. California's sentencing commission would not have the authority to sentence any individual, or to release any individual prior to the expiration of that person's sentence. Anyone who opposes the creation of a sentencing commission on the basis that the

commission would release people from prison has been misinformed as to the roles and responsibilities of sentencing commissions.

The purposes of the California sentencing commission should be: to improve the collection and analysis of sentencing data; to ensure that California's sentencing structure is based on sound, data-driven, and rational sentencing policy; and to enhance lawmakers' ability to predict correctional costs. As part of its work on sentencing policy, the sentencing commission should have the authority to address problems associated with the parole revocation system, such as the high number of people serving time for parole revocations and the lack of transparency in the system.

Commissioners will obviously have their own institutional loyalties and constituencies, but they should nonetheless be appointed on the basis of their commitment to consensus and to the purposes of the commission. It must have the power and resources to hire experienced and skilled staff.

The commission should begin its work by developing a data collection tool, a database, and an analytical methodology, as well as a risk-assessment tool for predicting an offender's ability to function in society and a correction simulation model for predicting the effect of sentencing modifications on correctional resources and prison populations. It should simultaneously begin the process of reviewing every provision of the California Codes that relate to sentencing and of devising improved ways of organizing the state's sentencing laws. To be effective, the commission must be a permanent body and must have the authority to regulate sentencing policy.

When California enacted the Determinate Sentencing Act in 1976, it demonstrated its willingness to step into the forefront of sentencing policy. For reasons that could not have been foreseen at the time, the act has not proven to be the panacea of sentencing policy that reformers had hoped. Nonetheless, if it did nothing else, it demonstrated that California lawmakers are capable of uniting in a nonpartisan effort to move the state's criminal justice policies forward. It showed that California can be a national leader in the development of criminal justice policy in general, and of sentencing policy in particular.

There are several ways a state can go about creating a sentencing commission, one of which is for a concerned legislator to sponsor enabling legislation. Since 1984, California legislators have attempted this on eight separate occasions. Three of these attempts to create a sentencing commission were killed by a gubernatorial veto. There are probably enough California legislators who care enough about improving sentencing policy to pass enabling legislation during the upcoming legislative session. Unfortunately, however, if the governor does not support this effort, we will be no closer to improving sentencing policy than we are today.

Gov. Arnold Schwarzenegger should include a sentencing commission in the 2007 budget that he will submit to the Legislature in January. This is the best way to ensure that the commission will have bipartisan support, be adequately funded and be given a proper

mandate. California can create a sentencing commission and can lead the nation in developing sound, rational, fair and data-driven sentencing policy, but we need the governor's leadership to do it.

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