The End Of Determinate Sentencing:

How California's Prison Problem Can Be Solved With Quick Fixes and A Long Term Commission

SEAN HAYES
PROFESSOR PETERSILIA—CALIFORNIA PRISON REFORM—AUTUMN 2005-2006
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Abstract: This paper will analyze the problem of the Determinate Sentencing system in the California Correctional System. Once thought to be the only way to keep sentencing fair, the system is largely viewed now as a failure that guarantees reform is no longer a part of the prison system. Combined with tough-on-crime solutions such as Three-Strikes and increased mandatory minimums, California's sentencing scheme is a mess. This paper will look to other states for proposed fixes, such as early release, drug treatment, or more heavily supervised parole. Finally, the paper will address the greatest solution to this problem, the creation of a sentencing commission and the possible implementation of presumptive sentencing guidelines.

Table of Contents

Introduction

Polly Hannah Klaas was taken from her Petaluma, California bedroom and murdered. The killer, a multiple kidnapper who in other states would have surely been kept behind bars, was released because determinate sentencing commanded it. A man who assaulted four people in the 1992 Los Angeles riots, and who threw a brick at the head of truck driver Reginald Denny, served less than four years for his crimes because determinate sentencing had cut the punishment for his charged crimes to make the system "fair." In Sacramento a man was shot dead in broad daylight by a parolee who should have already been returned to prison because of drug and weapons violations. He was not sent back to prison, however, because of attempts to keep down the prison population. In California these stories are far too common. The system is broken[*].

Sentencing in California today is a paradox. The state's three-strikes law has resulted in life imprisonment for individuals who steal $200 worth of videotapes[1]. On the other hand, there is an equally horrifying story of an offender, released early because of determinate sentencing, who commits an even more terrible offense the second time around. Once hailed as the savior of the prison system, determinative sentencing has become a disaster. Jerry Brown, the governor who lobbied heavily for the law and praised its passing, now calls it an "abysmal failure."[2]

Determinate sentencing has come a long way from the days of its inception. In 1977 the California State Government adopted the Uniform Determinate Sentencing Act.

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[*] These examples are taken from the Little Hoover Commission's January 1994 report.
[1] Michael Vitiello and Clark Kelso, *A Proposal For A Wholesale Reform of California's Sentencing Practice and Policy*, 38 Loy. L.A. L. Rev. 903, 926 (2004).
[2] Jennifer Warren, *Jerry Brown Calls Sentence Law a Failure*, L.A. TIMES, Feb. 28, 2003, at A1.

The UDSA was unveiled as the utopian solution to crime that California desperately needed.[3] The system in place previously was synonymous with racial and economic disparities. Wealthy and white offenders were consistently receiving sentences much more lenient than those doled out to their poor or minority counterparts. Instead of flat sentences, offenders were given broad timelines: a first-degree murder conviction, for example, would get the felon anywhere from "five years to life" in prison—it would be up to the parole board to determine how much time was served.[4]

This system of obvious carrots and sticks was supposed to motivate the incarcerated to rehabilitate. Yet, the process was easily contaminated, allowing critics on each side to easily pick their poison. Liberals saw a system that continually discriminated against African Americans and created a wide disparity largely based on economics. Conservatives viewed the system as too lenient, with too much power given to judges and parole board officials; they wanted criminals to go to prison and stay there.[5] Empirical and economic factors also stacked against the old system. Overcrowding in prisons or a bottom-line watching warden could influence a parole board's decision to grant release even more than evidence of rehabilitation. When these factors were not a consideration, the evidence of actual rehabilitation was still scant.[6]

Thus Determinate Sentencing seemed like a fair and easy solution. It sounded tough on crime, which resonated well with voters and thus their elected representatives, and it also seemed fair, thus appeasing those concerned with prison policy. However, before 1977, only one other state had done away with the discretionary parole system,

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[3] *Id*.
[4] John Howard, *Waiting For Judgment Day*, 61 CALIFORNIA JOURNAL 17, May 1, 2004, at 8.
[5] *Id*.
[6] *Id.*

and that was only a year earlier when Maine did so. Thus, empirical data was scarce on whether this would work.[7] Former Governor Brown has admitted that the law was passed based solely on "mood".[8] In short, it sounded good. Yet, the evidence that Determinate Sentencing failed is obvious. Polly Hannah Klass was exhibit one that recidivist violent offenders were released too soon. Nonviolent offenders could find themselves doing enormous stretches of hard time for something as simple as stealing nine children's videotapes.[9] By eliminating racial and economic differences one could say the system today is "fair". It is not, however, "just."

In 1994, the Little Hoover Commission began the process of finding California a solution to its prison-sentencing problem. The Commission took nearly half a year to analyze California prisons in their entirety, and recommended the following steps be taken:

1. A complete reworking of sentencing to ensure overall cohesiveness.
2. Indefinite sentences for violent criminals and habitual offenders, with restricted ability to reduce sentence time.
3. A lengthening of the parole system beyond a year.
4. Improve work programs to give prisoners a work ethic and actual skills.
5. Improve literacy programs.
6. Standardization of polices and centralized accountability to make the prison system a cohesive unit.
7. Adopting a prisoner's Bill of Rights to model that in the federal system.[10]

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[7] JOAN PETERSILIA, WHEN PRISONERS COME HOME 66-67 (2003).
[8] Warren, *supra* note 1.
[9] *60 Minutes* (CBS television broadcast July 10, 2003).
[10] "Putting Violence Behind Bars: Redefining the Role of California's Prisons", Little Hoover Commission. Jan 18, 1994.

In 1994 Santa Clara Democrat John Vasconcellos, spurred to action by the Little Hoover report, introduced Legislation AB 2944. The bill would have ended the tyranny of Determinate Sentencing by creating a Sentencing Commission (later we will discuss in detail the successes of this type of reform in other states). The legislation would first call for a standing committee of jurists and lawyers to devise new sentencing guidelines. Then, the bill would create a judicial advisory committee of judges to advise the sentencing guideline commission when needed or necessary.[11] Vasconcellos hoped the "creation of a sentencing guidelines commission (would) depoliticize sentencing by taking it out of the hands of the Legislature."[12] The bill received a great deal of support in both the California House and Senate and was sent to Governor Pete Wilson's desk for his signature.

Unfortunately for prison reform advocates, 1994 was an election year. A month before the election, a U.S. District Judge shut down California's gas chamber and made the death penalty and crime the number one campaign issue.[13] Wilson's opponent, State Treasurer Kathleen Brown, was personally opposed to the death penalty, and thus considered weak on crime.[14] Wilson, afraid of appearing soft on crime, promptly vetoed the bill on sentencing reform, as to not give up any ground in the electoral war.[15] He said at the time: "The growth of California's prison population is caused by many deplorable

[11] "Bill Calendar", THE RECORDER, Feb. 22, 1994 at 18.
[12] John Vasconcellos, Speech to the California Legislature Assembly Committee on Ways and Means. Jan. 1994.
[13] Susan Yoachum, "Death Penalty Decision Fits Neatly Into Wilson's Campaign," S.F. CHRONICLE, Oct. 5, 1994 at A4.
[14] *Id*.
[15] *Id*.

factors. Long prison sentences has not been one of them."[16] Vasconellos reacted to the stalemate on prison reform with this: "It's politicians trying to be popular with people's fear, that's as simple as I can say it…and the public is a co-conspirator in all of this."[17]

This paper will focus on the first three suggestions of the Little Hoover Commission, and the work of Vasconcellos, to determine if a sentencing commission is the answer Californians have been looking for to fix their prison problem. What this paper will argue is the following:

1. In order for California to create a more equitable criminal justice system, some form of sentencing discretion must return to the process.
2. Presumptive sentencing guidelines may be the answer.
3. A sentencing commission is sorely needed for California.
4. Above all, this paper hopes to propose "real" solutions to the problem of determinate sentencing. These solutions typically will involve ways in which prisoners can be released earlier in order to relieve problems of overcrowding, or the immense financial burden the state must bear for each additional prisoner.
5. Finally, this paper hopes to address the real political problems a sentencing commission may face in its inception, and how to overcome them.

The Problems of Determinate Sentencing

In the late 1970s, a rising crime rate, concern over individual rights, and a distrust of the government in the wake of ineffectual national policy resulted in a rush to change

[16] Steven T. Jones, *Prisons, Politics and Public Perceptions*, Monteray County Weekly, Jul. 23, 1980 at 1.
[17] *Id*.

criminal sentencing.[18] While California, Maine and Indiana passed determinate sentencing systems, other states made massive changes to the existing system through their legislatures. The only individuals lobbying against the change to the determinate system were prison officials. They felt that the "medical model" was the right answer: a system that takes into account an individual's needs to tailor prison towards re-entry into society and not simply punishment. Underlying this was the basic belief, widely accepted, that criminal activity "is not freely willed by the individual, but is caused by individual and societal maladjustment."[19] The problem, however, was that the system was not operating *too well*, but too *independently.* A system of probation, suspended sentences, and the manipulation of judicial devices will allow for individualized treatment, but it will also create arbitrary and diverse results.[20] As previously mentioned, this disparate results offered something for everyone: both sides of the aisle could find within them a reason to support determinative sentencing. Thus, California announced: "The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances."[21]

We know that determinate sentencing has many problems. The Draconian solution can freeze out of the California justice system a lot of hope of discerning between individuals convicted of the same or similar crime. What is most problematic about this, from a theoretical perspective, is that the determinate sentencing regime is an

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[18] Wallce M. Rudolph, *Punishment or Cure: The Function of Criminal Law*, 48 Tenn. L. Rev. 535 (1981).
[19] *Id*.
[20] *Id.*
[21] Cal. Penal Code 1170(a)(1) (West 2004).

aberration of deterrence. At its most simplistic, criminal punishment is above all a method of deterrence. Determinate sentencing makes the criminal justice system into one focused solely on punishment, and this fails to take into account that not every criminal is the same person. What may deter one individual from committing a crime again may be vastly different from what deters the next individual. An indeterminate sentencing system may return common sense to criminal justice, by taking into account the fact that just because two individuals were prosecuted under the same statutes does not mean that they must serve the exact same sentence. Rather, a proper balance can be obtained in each case: the amount of retribution through imprisonment or parole that the state requires, and the amount of punishment necessary to deter the criminal in the future.

Why is a return to indeterminate sentencing so desirable? Such a system will introduce into the criminal justice system in California something that has been gravely missing since the 70s: variables. The first variable will always be the initial sentence, and the second the discretion of judges, parole officials, and other penal authorities to vary how that sentence is served. Within these two variables, however, Wallace Rudolph[22] writes that a multitude of stop-gaps and releases could achieve a more just legal system:

1. The Plea Bargain: Without determinate sentencing, plea bargains can once again become creative. With increased awareness of the need for emotional or mental rehabilitation, innovative solutions involving drug treatment or faith-based rehabilitation are back on the table. One of the little known dangers facing California is that often three-strikes enhancements are *not* charged, but rather used as a bargaining chip in plea negotiations. Ironically, despite the fact that California's prison is spiraling out of control, it could

[22] *Id*. at 540-543.

become astronomically worse if prosecutors found their hands more tied in the future with increased pressure to use mandatory minimums or automatic enhancements.[23]

2. The Sentencing Judge: In a determinate sentencing regime, this individual has little power. In a system without determined sentences, the Judge will regain authority to take a more individualized approach to sentencing, thus offering unique solutions for those who might need it.
3. The Parole Board: Under determinate sentencing this organization has not completely disappeared (it is still used for the "…to-life" offenders), an indeterminate sentencing system would allow prisoners to once again "earn" their release. A more discretionary parole board will be able to reward those prisoners and individuals whom actually make the effort to rehabilitate.
4. Drug Policy Sensibility[24]: Criminal filings exploded in California courts during the second half of the twentieth century. Beginning with the marijuana prosecutions in the late sixties and early seventies, and continuing with the crack & cocaine prosecutions of the 80s and even today, California was seeing nearly exponential increases in its criminal prosecutions for drug related proclivities.[25] The superior courts in California, which deal with felony prosecutions, saw a 394% rise in their criminal cases.[26] When the Determinate Sentencing Act was passed, it decimated any hope drug offenders may have had for rehabilitation instead of incarceration. The only power left was no longer in the judge's hands, but the prosecutor, who had charging discretion. A movement back towards indeterminate sentencing may finally allow drug prosecutions to guarantee that we are not blindly punishing the convicted, but getting the convicted addicts the help they need.

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[23] Debra L. Dailey, Summary of the 1998 Annual Conference of the National Association of Sentencing Commissions.

[24] While Rudolph does not address this, I believe that if you look at the numbers, indeterminate sentencing reform would introduce a release valve where it is most needed: in our nation's typically scape-goated drug laws.

[25] Harry N. Scheiber, *Innovation, Resistance, and Change: A History of Judicial Reform and the California Courts, 1960-1990*. 66 S. Cal. L. Rev. 2049, 2065 (1993).

[26] *Id*. Citing Candance McCoy, *Politics and Plea Bargaining: Victim's Rights in California* (1993).

Feel-good "stopgaps" and "release valves" aside, the main reason why we need an indeterminate sentencing culture in California is simple: Determinate Sentencing doesn't work. There is scant research to support the idea that mandatory minimums, predetermined sentencing, or three-strikes reduces the crime rate at all.[27] The Chairman of the Utah Board of Pardons and Paroles has said:

"The threat of punishment has little impact on criminal behavior because most of the criminals believe they will not be caught, they have little knowledge of what sentencing laws would apply to them, or they commit crimes while intoxicated, angry, or high and thus are not rationally analyzing the consequences of their behavior. An AP wire story out of Los Angles had the headline "Judges Uphold 3-Strikes Term In Food Burglary" citing the case of Gregory Taylor, who tried to pry open a church kitchen door, as a third-strike felon. This case with trappings from 'Les Miserables' found the offender with 2 robbery convictions from the 1980's and a 1899 parole violation. His sentence of 25 years to life for this attempted St. Joseph's Church Breaking seems high. But maybe I'm missing something."[28]

All we seem to have done is add on to punishment: between 1984 and 1991, California passed over 1,000 crime bills. "Virtually none of them reduced sentences and many of them imposed sentence enhancements…often the crime bill was a reaction to the 'crime of the month.'"[29] For example, in 1987 the legislature enhanced the sentence for a murder that occurs while the shooter is inside a car, to quench the public's thirst for

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[27] Vitiello and Kelso, *supra* note 1 at 907.
[28] Michael R. Sibbett remarks to the National Association of Sentencing Commissions. 1999 Conference. Salt Lake City, Utah.
[29] *Id.*

harsher treatment of drive-by-shooters. Politically this sounds smart, but in reality there is scant difference between a murder done at a standstill and one done at 15 miles per hour.

Determinate sentencing, mandatory minimums, and three strikes laws are also logically inconsistent. With respect to drug crimes, the individual is punished not for the act of buying, selling, or possession of drugs, but for the *amount* of drugs. If the goal of any criminal system is either punishment or rehabilitation, then it makes little sense to punish someone more for purchasing a lot of drugs for personal use, whereas punishing someone less who intends to sell a small quantity of drugs to a child. All of this is compounded by sentencing guidelines that require a judge to add on time for an individual's second or third conviction. In these cases, the individual is not being punished for the crime they are charged with; they are being punished because they have a status as a multiple offender.[30] As mentioned earlier, a defendant with a prior conviction was sentenced to two consecutive twenty-five-year-to-life sentences for stealing videotapes valued around $200—the Supreme Court upheld the sentence as not "grossly disproportionate."[31]

In the end, however, the relative "fairness" or "just" nature of a sentence is not the real debate. What should be the focus of our prison system is rehabilitation. What would be the purpose of having a prison system that only serves to release dangerous or potentially criminal individuals back on the streets with no hope of a normal, crime free life? As the director of the California prison system, Jeanne Woodford has said, prisons, if they ever hope to come close to solving the crime problem, must focus on the

[30] *Id*.
[31] *Id*.

individual and rehabilitation, not just punishment.[32] Individuals who are sent to prison under a determinative sentencing regime have no incentive to rehabilitate. In reality, there really is no point to it. Participating in faith-based groups, attending drug counseling meetings, or volunteering for work will not reduce a prisoner's sentence. Therefore, the "carrot" necessary to get prisoners to help themselves is missing. An indeterminate sentencing regime would fix this terrible problem, and hopefully motivate the incarcerated of California towards helping themselves once again.

Perhaps it is best to merely look at the pros and cons of each system, side by side[33]:

Determinate Sentencing	Indeterminate Sentencing

[32] Remarks to Stanford Law School Class. Nov. 9, 2005.
[33] Vasconcellos, *supra* note 12 at 7-8.

* Convoluted and complicated	*Easy to understand
* Becomes more complex and arcane each year as it is modified and expanded by case law and statutory law.	* Case law and statutory modification fit easily into its structure.
* As a rigid one-size-fits-all device it has failed to achieve the major goal of retaining dangerous felons in prison.	* With its annual review system, it has the flexibility necessary to keep dangerous inmate incarcerated.
*Its rigid structure wastes taxpayer money by incarcerating who could be released.	* Its annual review system affords the flexibility to release people who can adjust to community life.
*Quite simply: does not work.	*May save California's prison system.

Yet, before moving on to real solutions, a timely reminder of how important immediate change may prove to be. In the 1990s California was able to increase prison spending enormously—the dot-com surge gave the state a lot more revenue.[34] Today, this is not the case; in fact it was the never-ending flight of businesses from California that prompted the recall election that gave us our current Governor. California cannot keep spending its way to a prison solution without real problems. For example, the city of New York has the same population it did nearly two generations ago, but now has close to 30% more government employees—an economic situation that can not be sustained forever because the increased governmental bureaucracy requires increased revenues. This problem is precisely why New York City, which once boasted the world

[34] Michael Vitiello, *Reforming Three Strikes' Excesses*. 82 Wash. U. L. Q. 1, 4 (2004).

headquarters of 140 Fortune 500 Companies, now only has 30 remaining.[35] All great economic machines can rust, and if California does not find pragmatic solutions to their enormous prison system, there is a very real danger that the state will no longer be able to afford it.

Short-Term Solutions To The Prison Problem

The ultimate goal of reform is to create a system of "one strike." California State Senator Vasconcellos said it best:

> "The concept is simple: design a smart, simple and tough sentencing system to incapacitate violent offenders for as long as necessary—"one strike"—with sufficient flexibility to work with and ultimately release offenders who demonstrator the ability to responsibly return to society, rather than needlessly warehousing them for life at $21,000 per year."[36]

In 2004 the California Performance Review Commission released a report that can easily be used as the first step in any meaningful sentencing reform. The report[37] recommended the following in regards to the California sentencing culture:

- Modify the Penal Code to allow inmates to earn supplemental sentence reduction credits after they complete specified education, vocational, or drug-treatment goals.
- Establish a program to identify older inmates who could be safely released early from prison.

[35] John Fund, *And The Winners Are…*Wall St. Journal, Nov 14, 2005.
[36] Vasconcellos, *supra* note 12 at 3.
[37] Available at:
http://cpr.ca.gov/updates/archives/pdf/10_20_2004/Public_Perspective/Chapter_5.pdf

We address these solutions first because they are the "quick-fixes". These do not propose radical changes to the determinative sentencing regime, but they can start the prison system on a path where the rigid requirements of determinate sentencing no longer bind the state's hands. However, these recommendations were met with a variety of critiques. Some argue that a process that begins to take age into account when paroling or releasing inmates sends the wrong messages and ignores the purpose of imprisonment. Critics of such a plan argue that judgments provide finality in sentencing and closure for victims; releasing prisoners because of their age would release them of full accountability for their actions.[38] Yet, it is obvious from the system in place now that even prisoners who have access to the most helpful rehabilitation services may not actually rehabilitate. Thus the state is faced with keeping the system in place now, something we know is untenable, or perhaps taking a chance on a system that does not rely on reading the tea leaves of who is rehabilitated and who is not, but instead uses the universal behavior-slowing factor of age as a determinant.

An "age-release" program is aimed at one goal: reducing the prison population. "Overcrowding is the single biggest reason for the problems in the correctional system."[39] An at-capacity prison has less space for rehabilitation programs and puts a straightjacket on management flexibility. Another possible solution to get free up more prison space would be an early non-violent release program. The California Performance Review Commission writes that a law "authorizing the release of non-violent inmates anytime during the last 30 to 60 days of completion of their term" could result in

[38] *Id.* at 284.
[39] *Id.*

"significant annual savings" for the state.[40] The Review Commission is light on actual numbers proving this, but their reasoning supporting this indicates that it would require less time moving individuals in and out of the system at a considerable savings (and reduced health costs for older prisoners). These significant savings could be the first step in loosening the noose of determinate sentencing.

Budgetary constraints should be a real concern if California plans meaningful sentencing reform. Often what government officials promise and what they are able to provide are vastly different; for example, universal health care sounds fantastic, but paying for it is another matter. This, however, never happens when politicians discuss crime and punishment. No cost is too high, but this is a large reason why California has so many prison problems; the state cannot afford to build more prison space, so inmates are stacked on top of each other, and money or facilities for rehabilitation is not available. Thus, "the requirement of a fiscal impact statement for new sentencing laws brings our criminal justice policies into the same conservative fiscal framework as other social policies."[41]

Rehabilitation for reduced sentencing is typically the reform met with the most opposition. The most obvious critique is that allowing for reduced sentences after completion of certain programs runs the very real risk of releasing dangerous offenders back into the population.[42] Yet, this ignores a shocking statistic. Amongst the current prison population, 90% will eventually be released on parole. Of that huge group, nearly

[40] *Id.*
[41] Jeremy Travis, "Address to the North Carolina Sentencing and Policy Advisory Commission." December 7, 2000.
[42] *Id*. at 283.

50% will find themselves back in prison.[43] So, for those worried about releasing individuals back on the streets who will commit crimes again it must be said: we are already doing it. Drug treatment, education, *real reform*; these are the only tools the state has at its disposal to actually rehabilitate prisoners, and hopefully end their felonious lifestyles. Above all, however, with determinate sentencing there is no reason to reform; prisoners will be released on the same day regardless of whether or not they attempt to reform. Since other authors will address rehabilitation more in-depth, it is appropriate to leave rehabilitation at this and move on to actual sentencing reform.

North Carolina may offer the most unique solutions to California's sentencing problems. The state currently offers "Deferred Prosecution" as a way to combat prison overcrowding without increasing expenses. Deferred prosecution is a district attorney's decision to withhold prosecution in order for the offender to make amends.[44] These conditions often include restitution or community service. North Carolina limits this option, which is strictly supervised and requires court approval, to first time non-violent offenders. Despite the use of this program for a few years now, North Carolina does not provide the total number of defendants afforded this opportunity because "of the status of current records."[45]

The state also offers Drug Education Schools (DES) for misdemeanor drug offenders. On average, this program reaches 25 year old first time offenders who are able to avoid a prison sentence. DES is a community punishment program which is essentially a "scared-straight" drug treatment course in which the very real dangers of

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[43] *Id.* at 281.
[44] Compendium of Community Corrections in North Carolina, Fiscal Year 2002-2003. Available at: http://www.nccourts.org/Courts/CRS/Councils/ spac/Publications/Corrections.asp
[45] Compendium of Community Corrections in North Carolina, Fiscal Year 2003-2004. Available at supra note 36.

drug use are explained in detail.[46] Students of DES must participate and attend the session, and will not be cleared until they identify a personal plan reflective of informed self-assessment that will focus on preventing recidivism.

One of the more unique opportunities North Carolina offers is the Residential Center. This highly restrictive probationary tactic allows offenders to live in a structured stetting with privileges to leave for work or activities such as drug treatment of community service. The North Carolina Department of Correction operates several of these, but they all adopt the same basic structure: orientation, treatment, reentry preparation, and aftercare release.[47] As Undersecretary Woodford explained, it is basic reentry preparation and post-release supervision that is most lacking in today's California Penal system, and North Carolina's system that serves to "strengthen the residents' natural and extended families" may be one of the sentencing solutions that California needs.[48]

The Sentencing Commission

Before we outsource the battle of ideas to North Carolina, however, it is worth discussing that the answer to California's prison problem may have already been proposed. In January of 1990, a California Blue Ribbon Commission on Inmate Population Management recommended the following:

> "…a Sentencing Law Review Commission consisting of representatives of all segments of the criminal justice system should be established to review and make recommendations to the Governor and the Legislature

[46] *Id.* at 9.
[47] *Id.* at 19.
[48] *Id* at 20.

> regarding…1) clarification and simplification of the state sentencing structure…2) the efficacy of establishing sentencing guidelines or a sentencing grid incorporating local and state punishment options."[49]

Michael Tonry, a professor of Law and Public Policy at the University of Minnesota Law School, and one of the premier scholars on prison reform, firmly believes that a sentencing commission is the only way to fix California's problems: "The explanation is that no other general mechanism now exists that would enable California to reduce sentencing disparities, increase use of intermediate punishments, and rationalize the use of incarceration."[50]

Tonry does not believe that easing the complexity or rigidity of the California determinate sentencing structure is the answer. Illinois and Indiana have adopted such systems with little reward.[51] Sentencing guidelines do not seem to be much help either, mainly because that is essentially what determinate sentencing is, and "there is no reason to suspect that legislatures are institutionally competent to develop fine-grained sentencing policies."[52] It is not only a question of competence, however. We have already discussed in this paper how easily politics can corrupt any meaningful sentencing reform. "Get tough on crime" demagoguery has already given us determinate sentencing and Three-Strikes, so why on earth would we want to throw sentencing reform back into partisan politics?

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[49] Michael Tonry, *The Politics and Processes of Sentencing Commissions*, Crime & Delinquency, Vol. 37 No. 3, July 1991, 307.
[50] *Id.* at 308.
[51] *Id*.
[52] *Id*.

Even though Tonry wrote of the importance of a Sentencing Commission in 1991, this is not an out of date idea. The 2004 California Performance Review Commission report discussed earlier also argued for such a system:

> "Charter a commission with appropriate members from the judicial and corrections fields to develop a presumptive sentencing model. The model would apply only to sentences for offenses that are not subject to "two-strikes," "three-strikes," or other life terms."[53]

Presumptive sentencing is not a drastic change. In such a system individual cases are presumed to fall within the range of sentences authorized by guidelines. Judges can impose a sentence within the range or deviate from the recommended stretch. If a Judge does deviate, they are to provide reasons for the record why the presumption should be overcome. An appellate court can then review those reasons.

These systems have seen great successes in Washington and Minnesota. Throughout the 1980s both states were able to keep their prison population within capacity and achieved greater consistency in sentencing.[54] It is Minnesota especially, however, that Tonry notes has had huge successes with the appellate review of its presumptive sentencing model. A "common law" of sentencing has begun to emerge.[55] The successes of the Minnesota and Washington models are evident in the Imprisonment Rates of Sentenced Prisoners for 1980, 1985, and 1990[56]:

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[53] Sibbert, *supra* note 28 at 284.
[54] Tonry *Supra* note 49 at 311.
[55] *Id.*
[56] *Id*. at 313. *Quoting* U.S. Bureau of Justice Statistics (1990b, p.3).

Jurisdiction	1980	1985	1990	
Minnesota	49	56	73	
Washington	106	156	152	
California	98	181	303	

While California was witnessing a prison population explosion, Minnesota and Washington were more or less holding steady. The numbers clearly favor that California follow the lead of these two states. North Carolina has had successes with a sentencing commission as well:

> "So now, ten years after the North Carolina Commission was created, the record shows that your goals have been met—the rise in prison populations has been managed prudently, individuals convicted of serious felonies are serving longer sentences, 'truth' has been introduced to your sentencing practices, community correction has been reinvigorated (but not yet enough), and the public discourse about crime and punishment has become more tempered."[57]

The deviations possible under a presumptive sentencing model do not have to begin and end with the judge. It is possible to reconstruct the California *court* system in order to provide more alternative punishments for offenders. The state could create domestic violence courts, mental health courts, community courts, or DUI courts. These courts would help bring back judicial discretion, something that has been missing from

[57] Travis, *supra* note 41, at 3.

the California court system. Furthermore, they represent a pragmatic approach to issues that concern the public and can instill greater public confidence in the court system.[58]

Yet, it has certainly not been all wine and roses for the presumptive sentencing model. There have been failures. In fact, "there have been many more failed sentencing commissions than successful ones."[59] Ironically enough, "for all the risks attendant upon creation of a sentencing commission, there is no more plausible vehicle for comprehensive reform of California's sentencing policies" because determinate sentencing is "nearly unworkable."[60]

There are essentially two ways that sentencing commissions have failed: by either failing to find a purpose, or by succumbing to politics.[61] In the former, states like Maine and Connecticut have formed sentencing commissions, only to have the commission recommend that sentencing guidelines should not be adopted because they will usurp the power of the judiciary.

This most likely will not be a problem in California. It would be ludicrous to form a commission to save California from the bind of determinate sentencing, only to have that commission return to sing the praises of the system it was supposed to destroy. What could be problematic, however, are the political ramifications of a sentencing commission.

When New York tried to use a sentencing commission, the parties involved acted as political representatives of the affected institutions, and outside groups seized on the

[58] *Id*. at 6.
[59] *Id*. at 314.
[60] *Id*. at 326.
[61] *Id.*

opportunity to use "tough on crime" language for political gain.[62] While the New York commission never got anywhere, it is downright hilarious that the District of Columbia "produced one of the most intellectually sophisticated sets of sentencing guidelines to date", only to fail to obtain the requisite number of votes from the city council.[63]

It is a very real danger that a California Sentencing Commission would fail because of political pressures. A look at any recent election shows that while the United States of America may be drastically split between the red and the blue, crime may be the last issue on which any two candidates of opposing parties can agree. Vasconcellos sums up the politics of crime discussion: "The campaign consultants make it clear that the only way you can get elected is to have a good, tough, law-and-order image. And to get a cops group endorsement…it's bullshit, and it ought to be called."[64]

During the 1998 California Governor's race, Republican Dan Lungren and Democrat Gray Davis both proudly proclaimed their toughness on crime and supported building more prisons and enacting stiffer sentencing laws.[65] In the 2003 recall election in California, crime was a non-issue. In the 2004 Presidential election it was barely addressed. In fact, the only time crime is discussed in any real way during an election is when a candidate is accused of not being "tough enough" on criminals. This is evidenced by the 2005 Virginia Governor's race, in which Democrat Tim Kaine was challenged for being morally opposed to the death penalty. Kaine, of course, loudly proclaimed he would enforce Virginia's death penalty law.

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[62] *Id.* at 315.
[63] *Id.*
[64] Jones, *supra* note 16 at 2.
[65] *Id*.

The fact that California has yet to honestly pursue a sentencing commission is somewhat embarrassing: State officials have known since 1991 that such a commission was a "top" recommendation of a Blue Ribbon Commission.[66] It is odd that politics is the biggest challenge facing any sentencing commissions; the commissions are actually envisioned as a way to insulate sentencing from political pressures: "the sentence is what people look to when assessing the criminal justice system…increasing sentences is vulnerable to political whims because the costs are not felt for years."[67]

Maybe California's governors are to blame. The mid 1990s governor's race sidelined any hope for Vasconcellos' bill being signed into law. At the time a soft-on-crime-glow had enveloped the Governor's challenger, and the Governor used his veto power to bury his electoral opponent. Amazingly, however, nearly ten years *before* this veto, there was yet another veto of a sentencing commission measure in 1985. Then-Governor Deukmejian vetoed a bill that "easily passed" the Legislature because he felt that it was unnecessary.[68] Deukmejian thought that all the recommended changes could be implemented with the formation of a commission.

Past failures of sentencing commission proposals show that in the end, any hope of actually creating a commission must be feasible *politically*. Unfortunately, at the current juncture of California politics any legislator or candidate for office hoping to create a commission is short-stacked against the deep pockets of those opposed to meaningful reform. In 2005 reform itself[69] was delivered a terrible blow when four ballot

[66] "Sentencing in California: Where Are We Today? Where Are We Going?" Issue Summary of the California Research Bureau. Feb 21, 1992, at 8.
[67] Dailey, *supra* note 23 at 6.
[68] California Research Bureau, *supra* note 66 at 9.
[69] The author does not wish to make any claims about the merits of the failed propositions other than the fact that they basically offered to *change* the system currently in place.

propositions, billed as a reform package, were soundly defeated by the voters. Regardless of the merits of each ballot proposition, those opposed to the four issues supported by Governor Schwarzenegger spent an estimated $130 million dollars to defeat them; whereas the money spent on advertising and voting efforts on behalf of the propositions topped out at $30 million.[70] A good chunk of the money spent lobbying against the measures was driven by the desire to defeat the Proposition that would place another check on a union's power to spend dues on political advertising. The union of California prison guards was firmly opposed to such a measure, so in any effort to establishing a sentence commission their political clout must be taken seriously and respected.

In order to succeed politically, a sentencing commission needs to be a political process that eschews the red-blue divide that makes any political movement nearly impossible in today's climate. Commission development should be an "open political process" that actively solicits the input and advice of anyone and everyone who will be affected by the changes.[71] The key, however, is this: *creating a sentencing commission is not a process in which one side gains at another's loss.* California's prison system is nearly unworkable and a commission may provide the solution the state desperately needs. Thus, the overall goal of any legislator should be to simply create the commission. If Governor Schwarzenegger decides to head up the creation of a commission, he should do so by making sure that those with the political clout to kill such a proposal are happy. If this means that the demands of the prison guards must be met, then so be it. As long as the demands groups want to support a commission are not

[70] Fund, *supra* note 35 at 1.
[71] Tonry, *supra* note 49 at 321.

outlandish, politicians should remember that the overall goal is doing what is best for the prison system. That system needs a sentencing commission, and it does not matter if one political party or interest group is able to claim a "win" if in the end the state benefits.

Establishing the commission is going to be an immense process. Thus the day-to-day goal must always be the same: progress. The individuals creating Minnesota's sentence reform decided early in the process that any agreed upon issues could not be revisited after the fact as part of horse trading for the current debate (i.e. "If you don't support green uniforms, I withdraw my previous support for brown shoes.")".[72] This is an absolute-must for California, especially because the political environment gives so much power to a group like the prison guards union. They should be involved heavily, but they should not be able to retain so much power in the process by being able to withdraw their support for a previously debated item in order to get what they want at the present juncture.

Ignoring for a moment the individual players involved in the creation of the commission, suppose that the true success of this political process was determined by merely drumming up support. If some 55% or above of Californians are willing to support a commission, then it may be a great deal more difficult for legislators or the union to oppose such an action. In Minnesota, Washington, and Oregon, those in charge of creating the commission met regularly with reporters and editorial board members, to carefully explain and disseminate valuable information about the process.[73] This battle for the hearts and minds of the people may be the best possible way to keep support leaning towards the creation of the commission. Suppose polling showed public support

[72] Tonry, *supra* note 49 at 321 *citing* the work of Dale Parent.
[73] *Id*. At 322.

for such a commission was always around 30%; it would give those opposed to the commission or those who won't budge on a particularly touchy issue more incentive to walk away. Thus, the public must be accurately and consistently informed about why the commission is needed and why it is ultimately a good thing for California.

It is not only because of the political ramifications that the public needs to be kept informed. Ignoring for a moment that public support will translate to political support, the fact remains that after many years in which our criminal justice system unfairly punished minorities and the economically downtrodden unfairly, the public might need to be won over on a new initiative.[74] Keeping the public knowledgeable of the racial, ethnic, and financial changes that may result from the use of a sentencing commission is a benefit in itself, obviously, because of the increased information available. Yet, this will also keep the debate focused on the actual outcomes and results, thus pushing aside the usual crime language common to the debate.

It is important to address one issue that has the potential of torpedoing a sentence commission: the separation of violent and non-violent offenders. This paper began with recitations of the more famous violent crimes that swayed California towards determinate sentencing and three-strikes in the first place: violent crimes that the public thought could be avoided in the future with harsher sentences. This has not turned out to be the case, since determinate sentencing applies across the board and three-strikes can lock up individuals for felonies that do not involve violence. Thus, it may be necessary to truncate the creation of a sentencing commission in the beginning by separating violent offenders from non-violent ones.

[74] "A Constructive Rethinking of U.S. Incarceration Policy" from "Prisons and Jails" at 105.

The problem, of course, is that rhetoric concerning violent offenders has the most potential to sway and influence public opinion. Three-strikes passed with incredible support because it was so easy to demonize the issue: most of the voters thought that they were voting for life in prison *only* for individuals who had already committed two violent crimes, and were now being sentenced for a third.[75] Even when those close to the issue such as Polly Klaas' father turned against the issue, it was too late; the public believed the law was necessary to protect society from violent criminals.

There is the possibility of a huge payoff if California begins its sentencing commission experiment by leaving violent crime out of the mix. If a sentencing commission, in its early days, released a violent offender and created another Polly Klaas situation, it could kill the program before there was any real chance for a long term analysis or benefit. It would give those opposed or those unhappy with the commission as established a huge opportunity to demagogue the process into submission. Yet, if we leave violent offenders out of the mix, there is opportunity for huge political compromise, and prison reform gain. First, leaving violent offenders under the old system for the time being takes emotion out of the process. No one will be able to say that California is forgetting those affected the most—the victims of violent crime.

Most importantly, however, ignoring violent offenders for the time being allows a sentencing commission to go to work on the issue that many believe is hurting prison systems all over the country: drug offenses. Mandatory minimums, determinate sentencing, and an unbreakable cycle of communities destroyed by illegal narcotics has put an enormous strain on the prison system, especially in California. The possibility of success with a sentencing commission is only increased if they can leave out the crime

[75] Class Video.

that polarizes the electorate. Thus, California would be free to focus all of its reforms on non-violent offenses, and the drug crimes that make up a huge chunk of that. With the use of a commission and the innovative solutions already being practiced in states like North Carolina, California may see real reform take place within its prison system. With this early trial balloon a success, it would be easier to combat the rhetoric sure to arise when the commission tries to take on violent crime.

Thus, California is faced with the obvious question: what should our sentencing commission look like? There are a number of great suggestions already available, and California should be able to build the sentencing commission the state needs from the ideas already in play. First, there needs to be a real determination of *why* California punishes—the state must move past clichés towards a meaningful rationale that everyone can understand.[76] It is not enough for California to simply announce that it is getting tough or crime or enacting truth in sentencing. The state must establish whether this is being done for rehabilitation, punishment, etc…

California is fortunate because there are several states, such as Minnesota, Washington and Oregon that have already established sentencing commissions, and can guide the Golden State in its decision on how to establish the nuts and bolts of such a program. Basically, most commissions thus far have done several the following: First, the commission establishes a sentencing grid. The judge must follow the grid to determine the sentence for the convicted; the sentence can be increased depending on the seriousness of the crime and the criminal history of the offender.[77]

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[76] *Id.* at 327.
[77] California Research Bureau, *supra* note 66 at 9.

Within this grid, however, is something that California desperately needs: flexibility. A sentencing commission needs to have an immediate purpose, obviously, and in California, that immediate purpose could be a solution that will stem the overcrowding problem facing the state by increasing the flexibility available to the sentencing judge.[78] Michael Tonry recommends that a California sentencing commission must immediately establish that they will not develop a system that will allow the prison population to grow in excess of 95% of rated capacity.[79] The beauty of a presumptive sentencing regime, however, is that a commission can easily tailor such a system to obey this command.

Tonry also recommends a complete end to the determinate sentencing nightmare. In order for presumptive sentencing to succeed, the state must allow it to do so. Thus, all mandatory sentencing laws should be repealed simultaneously with the effective date of the operation of the new presumptive sentencing guidelines.[80] Combined with a statement on why the state punishes, such a full-scale switch to presumptive sentencing will help explain to all that California is committed to enacting a sentencing regime that works.

A new sentencing commission has many options on how to act first, but many states have had success with increasing punishment for violent offenders, while scaling back the penalties and prison time given to non-violent offenders.[81] This may be a sound decision for California. Three-strikes and the legislature's crime of the week syndrome are almost always spurred by violent offenders, so ratcheting up penalties for these

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[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *A Constructive Rethinking of U.S. Incarceration Policy*, Prisons and Jails, p. 107.

crimes should be a snap. However, the commission would be able to reduce the harsh punishments that determinate sentencing has placed on non-violent offenders, and this may finally put some sanity back into California's anti-drug policy. A legislative slight of hand by the commission, increasing violent offender time while reducing it in less incendiary areas, might be exactly the political move needed to get the sentencing commission moving towards reform.

It is the politics that may kill the commission, though, and any sentencing commission needs to be created so that it may live independently of such pressures.[82] There are several ways that this can be done. In California, the ballot-initiative or the legislature could create a sentencing commission, but ultimately the key is that the language creating such a commission must also create an independent one. This can be achieved by making sure that the commission created draws its talent from a large pool of qualified judges, lawyers, legislators, or policy wonks. This will prevent the commission itself from being highjacked by the same tough on crime rhetoric that broke California in the first place. Thus, the commission should set ranges for sentences and not the legislature.[83] Secondly, while it is important that there is *some* check on a commission, many members of commissions in states that have not succeeded in using them will say that a continual problem is that the legislature is constantly threatening to disband the whole process.[84] Otherwise, as discussed earlier, internal checks can be created by agreeing that there will be no ex-post horse trading, and leaving violent offenders out of the first run may lower outside political influence.

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[82] Dailey, *supra* note 23 at 3.
[83] California Research Bureau *supra* note 66 at 9.
[84] *Id.*

Conclusion

> "In conclusion, may I challenge you collectively, as Sentencing Commissions to review your laws that take away individual review and judgment in favor of one sentencing box for all criminal action. Question the cost to society of minimum/mandatory sentences, 3-strikes, and 85% federal mandates. Don't be soft on crime, be smart on crime, and sort out those that need to be in prison for a long time from those whose short stay can redirect their energies."[85]

If California needs to get "smart on crime" in order to solve its prison problem, then there are a plethora of options available. Yet first we must agree on one thing: the prison system in California doesn't work. Three-strikes has created a draconian nightmare that sends people to jail for life for committing petty crimes. Even three-strikes nightmares, however, are a small part of the problem. The real problem is that so many parolees are leaving prison only to return shortly after; while the current prison population has little reason to rehabilitate in the first place because determinate sentencing has locked in their time. Even for those who wish to rehabilitate, often they will not be able to do so because overcrowding not only puts a pinch on the funds available, it also puts a strain on the space available for programs.

Short term fixes are available. The state of California can compile significant savings by giving prisoners time credits by attending drug or educational programs. Even releasing older prisoners earlier may free up more beds and taxpayer dollars for other needed programs. California can rip its solutions straight from the successes of other states like North Carolina. Supervised release, half-way houses, drug treatment that

[85] Sibbert, *supra* note 28 at 5.

works, etc…all of this is available to save California money and save the California prison system.

Above all, however, California needs to move to presumptive sentencing and the supervision of a sentencing commission. A presumptive sentencing regime would finally restore sentences to a case-by-case system in which the convicted would be analyzed as an individual, and not merely another cog in the determinate sentencing wheel. Judges and prosecutors would be able to deviate from presumptive sentencing guidelines when the situation permits, and "throw the book" at those offenders who deserve it. A sentencing commission, however, is sorely needed because they would have the power to take a full account of sentencing in California, and find where fixes could be made.

We cannot ignore the obvious political realities that come with such broad change. In order to make a sentencing commission work, all interested parties must be brought to the table, and from the first day they must continue to work towards progress. There is a very real compromise available to avoid seeming soft on crime, the commission could begin in earnest by increasing slightly the time for violent crimes, as a way to deflect political heat from the first attempts at reform in other areas. This could allow California to be one of the first states to try and revolutionize their non-violent crime sentencing rules, and offers the possibility of real change.

Of course, we must not forget that there are even smaller ways in which to fix the prison system. The Little Hoover Commission did recommend things this paper did not discuss (as being outside of its scope) such as job training and literacy. Improvements here are as noble goals as the creation of a sentencing commission. They may be a bit smaller, such as this paper's recommendations on early-release or drug treatment, but

they all work towards Representative Vasconcellos' goal of restoring sensibility to California's system.

In the end, however, this is why a sentencing commission is needed today. If California successfully reforms its prison system with a commission—a big sweeping change in its own right—then the citizens of California may be more willing to put more money into programs like job training. We should begin with a sentencing commission for many reasons: the experts recommend it, the possibility of real reform is enormous, and beginning reform in the area of punishment may convince people change is needed in the areas that will help prisoners prepare themselves for life after jail. A sentencing commission could be the first step, a very large step, towards a California prison system that is truly just.