

CALIFORNIA'S DE FACTO SENTENCING COMMISSIONS

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The concept of a sentencing commission as a mechanism for governance of a jurisdiction's criminal justice system has achieved great prominence in recent years and been the subject of much important commentary. In light of California's recent passage of A.B. 109, legislation that drastically overhauls the state's sentencing and correctional systems, now is an ideal time to evaluate California's adoption and implementation of the commission model.

Readers who are familiar with California criminal justice will pause quizzically at that last sentence, observing that the California Legislature has steadfastly *refused* to create a sentencing commission. But my argument here is that there is now, in effect, a California sentencing commission even if not by explicit law. Indeed, I will argue that collectively the branches of our state government have, whether intentionally or not, created a number of sentencing commissions.

The current context: California has by many measures the most dysfunctional incarceration system in the nation. Most notably, it has the most overcrowded prison system nationwide. Many trace the problem to the severity, rigidity, and complexity of the California Penal Code, especially as it was revised in 1977. Passage that year of the Determinate Sentencing Law (DSL) led to more frequent and longer sentences, effects exacerbated by a myriad of enhancement upgrades added to regular sentences. While retaining old-fashioned life-parole sentences for the most serious offenders, the DSL also created so-called mandatory parole of up to three years for the average prisoner. Huge numbers of inmates released on mandatory parole have been cycled in and out of the state prisons for parole violations, some of which are true crimes and some of which are administrative violations.¹

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1. The DSL and these effects are elaborated in JOAN PETERSILIA, CAL. POLICY RESEARCH CTR., UNDERSTANDING CALIFORNIA CORRECTIONS (2006).

These forces have not only added to the prison population but also rendered it very difficult to manage because of chaotic inflows and outflows. Although recidivism is difficult to define and measure because of the complexity surrounding parole revocations, the standard view is that California has had the highest rate in the nation for many years. And while California, like other states, went on a prison-building binge in the 1970s and 1980s, it stopped being able to afford to do so some years ago, so the ratio of prisoners to real estate grew, and the conditions for prisoners progressively worsened.

At least some reconsideration of the DSL seemed reasonable to reformers. But strong political forces resisted any penal code change. Perhaps the key opponents were state prosecutors, who gain great strategic advantage in criminal litigation from the menu of charging and sentencing options they can deploy. But another legislative option was proposed to address these problems from the sentencing side of the criminal justice process: creation of a sentencing commission.

The story of modern state sentencing commissions is important, and it can inspire optimism in those otherwise pessimistic about American criminal justice.² We can start the story about a decade ago. After many years of a sharp upward spike in imprisonment rates, officials in some states began to have buyers' remorse about the politicization of crime and resulting harsh legislation that led to those increased rates. The remorse was mostly budgetary—state and local fiscal resources could no longer afford the size of the jail and prison populations. But it was also partly moral: political rhetoric gave way to some regret about the severity, rigidity, and perverse social effects of the 1970s' infamous mandatory minimum drug laws that were a key instrumentality of the incarceration spike. In other words, some states actually began to take a fresh look at incarceration as a matter fit for cost-benefit rationality, just like other government programs, instead of as a theological imperative. As a result, some of these states adopted, and others reinvigorated an older version of, a sentencing commission. Such a commission is a type of administrative agency designed to conduct these cost-benefit analyses in a way at least partly shielded from the vagaries of politics.

Sentencing commissions are not well known, and the one that is best known is the most unfortunate of them. That is the United States Sentencing Commission, whose guidelines' structure was immediately—and often continues to be—denounced by the defense bar, criminal justice reformers, and federal judges themselves.³ The U.S. Sentencing Commission threatened to give state commissions a bad name. But state commissions have survived and in some places thrived, with such states as Minnesota, Kansas, North Carolina,

2. For a full telling of this story, see Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179 (2007).

3. See KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

Pennsylvania, and Virginia winning bipartisan plaudits for the success of their commissions. It may seem odd that yet another government agency can do much about so roiling a set of issues. But there is plenty of academic research showing that commissions have done quite well according to a number of parameters.

There are commissions in more than half the states now.⁴ Some sit in the executive branch, some in the judiciary, but the formal separation-of-powers location of such commissions has generally proven uncontroversial and inconsequential. These agencies have a variety of compositions, but they are usually a mix of legislators, judges, parole and other agency officials, prosecutors, defense lawyers, research experts, and ordinary citizens. They are generally aided by research staffs. Depending on their authority, these commissions may use carrot and stick and exhortation to achieve more harmonious sentencing practices among judges across their respective states and to reduce disparity traceable to racial and ethnic factors.⁵ They often provide officials with information about the economic, social, and public safety consequences of any proposed changes in the state's penal code, or in executive or judicial practices, to guide the decisions of other policymakers. They do so by predicting how many additional prisoners a new sentencing upgrade will produce, or by assessing how certain sentencing, parole, or probation changes will affect recidivism rates. On the whole, they have improved transparency in sentencing and have seen their work at least correlated with lowered crime rates and lowered prison populations or prison costs.⁶

Now to return to California: as overcrowding and unsafe conditions in the state's prisons worsened, the federal courts entered the fray. Civil suits challenged, among other things, the medical care system⁷ and the mental health care system⁸ of the prisons. Owing to clear Eighth Amendment violations, these cases led to aggressive federal court oversight of the prisons, including the use of special masters and a powerful court receiver over the medical care system. And more recently, the underlying cases blended into a "mega-order" whereby the federal judiciary might actually demand a reduction in the prisoner-facility ratio under the rules of the Prison Litigation Reform Act.⁹

While the litigation proceeded, the legislature had a chance to head off final injunctions by spending more or spending more wisely, or by changing its pe-

4. For a comprehensive overview of these commissions, see the National Association of Sentencing Commissions website. NAT'L ASS'N SENT'G COMMISSIONS, <http://thenasc.org> (last visited Nov. 7, 2011).

5. See John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235 (2006).

6. Weisberg, *supra* note 2, at 210-17.

7. *Plata v. Brown*, No. 3:01-cv-01351-TEH (N.D. Cal. filed May 5, 2001).

8. *Coleman v. Brown*, No. 2:90-cv-00520-LKK-JFM, 2011 U.S. Dist. LEXIS 82475 (E.D. Cal. July 22, 2011).

9. The Supreme Court upheld the power of the special three-judge court to issue such an order in *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011).

nal code in ways that might alleviate the overcrowding while ensuring public safety. Small steps were taken to reallocate parole supervision to focus on the most dangerous parolees. A law was passed to build intermediate reentry facilities that might reduce recidivism. But on the whole the legislature did little—never even funding the reentry construction.

The state's failure has many sources. Some blame the antiquated constitutional structure of state government whereby the legislature is rendered moot by the referendum-initiative process and the bizarre two-thirds requirement for tax increases. Others point to a fiscal tradition: the see-no-financial-evil habit of deferring imprisonment costs to revenue-lease bond issues. But as noted above, any major changes to the DSL that might have alleviated the overcrowding met fierce pushback.

Meanwhile, in 2006, some legislators proposed a true California Sentencing Commission—at least a weak version of the ones that have succeeded in other states.¹⁰ A formal commission might have helped the state think and plan its way out of its miseries, but the politicians struck it down.¹¹ Their main stated motivation, abetted by the prosecution bar, was that the legislature should not cede any of its power to determine crimes and sentences to an unelected body. This was something of a non sequitur because some versions of the proposed sentencing commission did not even involve a transfer of default power. Nevertheless, slopes were quickly described as very slippery, and in any event, even a research-focused commission was suspect because of the theoretical dominance of academic experts overly sympathetic to offenders.

Now to return to the admittedly perverse assertion I made at the start: while the commission idea failed *de jure*, it “succeeded” *de facto*. This is because the legislature in effect did cede power to the “sentencing commission” constituted in the United States District Courts for the Northern and Eastern Districts of California. These courts have taken over much of the administration of the prison system. They have ordered the state's Department of Corrections and Rehabilitation to exhaustively study and, where necessary, change sentencing and corrections practices without legislative participation, and they have directly drawn on the state treasurer's bank account to pay for it.

10. For a proposal that captures the gist of the census model legislators advocated, see Kara Dansky, *A Blueprint for a California Sentencing Commission*, 22 FED. SENT'G REP. 158 (2010).

11. Proposals generated from within the legislature and by Governor Schwarzenegger were stripped from a major prison reform bill. Michael B. Farrell, *California Assembly Passes Diluted Prison Reform Bill: Lawmakers Stripped Out Crucial Reforms Such As a Proposal for an Independent Panel to Review Tough Sentencing Guidelines*, CHRISTIAN SCI. MONITOR (Sept. 2, 2009), <http://www.csmonitor.com/USA/2009/0902/p02s04-usgn.html>. For a summary of the heated debate that led to the rejection, see *Possibility of California Sentencing Commission Continues to Generate Controversy*, SENT'G L. & POL'Y (Aug. 20, 2009, 10:45 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2009/08/creation-of-california-sentencing-commission-continues-to-generate-controversy.html.

For some years now, through exercise of these injunctions, these courts have been forcing the state to come up with plans to resolve the medical care fiasco and other problems, and to find ways the state can afford (though at higher cost than the legislature has been willing to bear) to reduce the overcrowding. In these negotiations the courts have requested and received detailed plans that include projections of the demographic, financial, and recidivism effects of any particular change in the plan. Thus, in the absence of any self-initiated constructive action on the part of the legislature, the federal judiciary became the California Sentencing Commission. Political power is a hydraulic phenomenon, as are political and fiscal responsibility and responsibility for public safety. Once the vectors of crime rates, safety concerns, fiscal limitations, voter preferences, constitutional norms, demographic trends, and bureaucratic inertia begin to interact as they inevitably do, power and responsibility go *somewhere* if they are not sensibly united or coordinated in the right place.

Meanwhile, to the surprise of many, the legislature *did* take some action. There was no chance that the legislature would lower sentences in any large, structured way or repeal mandatory parole. Instead, it passed the much-publicized A.B. 109, the Criminal Justice Realignment Act of 2011.¹² A.B. 109 is the most significant change in the California Penal Code since the DSL was passed. But it operates more indirectly than any straightforward rewriting of the Penal Code. The gist of the new law is to shift control over thousands of prisoners from the state to the counties. Simply put, A.B. 109 does the following. First, low-level felons that normally would serve one to a few years in prison will now serve their time in county jails. Second, parole supervision of inmates released from prison will shift down to county probation officials. Third, and especially notably, parole revokees will see their revolving door slightly redirected—they will serve their penalties for violations in the county jails. Thus, A.B. 109 has effected a significant transfer of responsibility downstream, but perhaps without a corresponding transfer of resources.

A.B. 109 was passed because at some point the legislature had to find ways to do what the federal court was ordering. And the legislature recognized that the complexities of recidivism under the DSL demanded a systematic overhaul of criminal justice. Such an overhaul would require reallocation of both resources and responsibility among local, county, and state governments. But the federal injunctions were not the only cause of A.B. 109. The post-2007 budgetary disasters would have required changes in the prison system even if the courts had never intervened. The result has been a revolutionary and sudden overhaul of the system that falls under the interesting euphemism of “realignment.”

The theories behind A.B. 109 are several: There is space in some jails in some counties, so the mere shift of prison population helps satisfy the federal court order. Plus, the counties may be better at addressing recidivism and reen-

12. A.B. 109, 2011 Leg., Reg. Sess. (Cal. 2011).

try problems because of the possibility of better coordination between social services and prisoners and their families. There is also the matter of simple economic theory. Under the usual state/county structure, county prosecutors have major power to determine who goes to prison, but the state bears the costs of prison and parole. Depending on how the funding formulas work under A.B. 109, the counties might be forced to internalize the costs of their own criminal justice practices. How well these theories work out is currently a matter of a wild guess. But the burden is now on the counties to reassess in a comprehensive and holistic way not only their criminal justice systems, but also their social services system and how it relates to criminal justice. A key figure becomes the county sheriff, the new “prison warden,” who now must triage the jail population among convicted misdemeanants, newly convicted felons, and parole revokees. Further, the sheriff must carry out this triage while also accommodating (or adjusting) the already large population of jail inmates who are awaiting trial.

So who is in charge of all these operations? A.B. 109 requires each county to create a Community Corrections Partnership (CCP) to develop and recommend to the county Board of Supervisors a comprehensive plan for carrying out all the demands of the new realignment mandate. Each CCP is to consist of the chief probation officer, the sheriff, local police chiefs, the district attorney, the public defender (or head of the relevant defense organization), the presiding judge of the superior court, and representatives from such agencies as social services, mental health, and alcohol and substance abuse programs. The CCP must satisfy the state that the plan is sound, and then presumably it will be charged with implementing and monitoring the plan over time. So the CCP must be the cost-benefit analyst, information manager, and overall administrator over vast portions of the criminal justice system.

I submit that by virtue of its membership and functions, the CCP is a sentencing commission. The CCPs are now scrambling to figure out how to survive this massive transfer of authority with what might prove to be insufficient funds and without clear data to predict the size and nature of its new inmate, probationer, and parolee populations. A.B. 109 does not make any substantial changes to the actual sentences contained in the Penal Code. But because of all these triage decisions, the transfer of authority may have the effect of changing the amount of time convicts serve as well as the place where they serve it. Carrying out the triage will demand that the counties change the sentencing rules under the radar. They will have to undertake risk assessments of individuals in these populations to decide who is high priority for jail and who is not, and who is a serious parole violator and who is not.

So now California has fifty-eight sentencing commissions (or fifty-nine if you count the federal judiciary). California could have had just one, and it could have made that commission a responsible and well-coordinated branch of state government. Perhaps recklessly, it chose this other path. The lesson: a

criminal justice system in sufficient crisis will have a sentencing commission—
one way or another.