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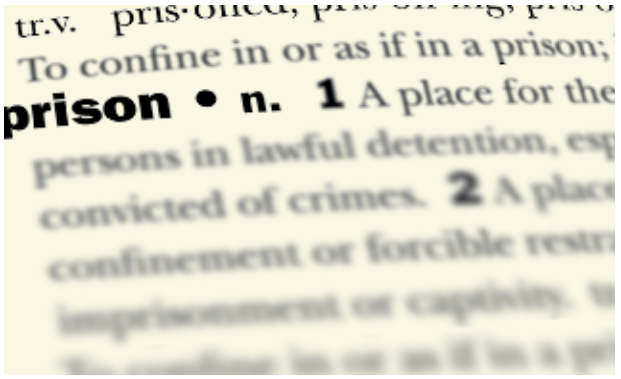
The Stanford Executive Sessions on Sentencing and Corrections

The Role of the Judiciary in Shaping Sentencing Law and Policy





Report and Analysis

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The *Stanford Executive Sessions on Sentencing and Corrections*, organized and hosted by the Stanford Criminal Justice Center (SCJC), is a forum for bringing together key California stake-holders, including academics and policymakers, institutional leaders and advocates, in an effort to develop concrete strategies for reform of the California sentencing and correctional systems. The third meeting of the Executive Sessions was on the Role of the Judiciary in Shaping Sentencing Law and Policy.

The meeting convened California judges with academics and judges from other states who have been influential in developing sentencing law and policy in their states. Our goal was to enable state judges to share their views – and see what, if any, consensus they might reach – on a series of questions related to the future of sentencing in California.

The meeting was divided into four discussion sessions, which focused on the following topics:

- Discretion in Sentencing;
- The Role of Risk Assessment in Structuring and Monitoring Sentences;
- The Role of Judges in the Civic Arena; and
- Judges and Sentencing Commissions

We also had the privilege of a lunch address entitled *Access to and Use of Sentencing Information*, by the Pennsylvania Commission on Sentencing's Mark Bergstrom.

What follows is a description of the discussions that occurred throughout the course of that meeting, along with a summary of Mr. Bergstrom's presentation. The meeting followed the typical Executive Sessions format – each topic was introduced by one or two speakers who provided some initial comments to lay the groundwork for discussion, and the conversation evolved organically from there. Consistent with our typical pattern of reporting the content of the Executive Sessions, we will note areas of consensus and divergence, and highlight particularly illuminating comments or areas of discussion. Following our usual custom, we do not attribute remarks made during group discussions to individual speakers. However, because of the unusually substantial role they played in setting the context for discussion, we have identified introductory speakers and summarized their remarks.

The concluding section of this report is a bit more substantial than typical report conclusions – in it we have attempted to analyze some of the themes that emerged throughout the Executive Sessions meeting, offer some concluding remarks, and make some suggestions for questions the California judiciary might wish to examine in finer detail in future discussions.

The report is punctuated by excerpts from other sources, including law review articles, judicial opinions, and formal judicial addresses. The inclusion of these excerpts here is not intended to imply an endorsement of the sentiments they reflect. We have included them here, rather, in order to provide some additional context for the themes that we addressed during the course of the meeting.

The SCJC is grateful to the Pew Charitable Trusts and the Vera Institute of Justice for their partnership in organizing this meeting. We are grateful for the participation of the California Judiciary and look forward to continuing this conversation with them in the future. ❖

MANDATORY MINIMUMS AND THE CRACK/POWDER SENTENCING DISPARITY

On September 6, 2007, the SCJC had the honor of hosting U.S. District Judge William K. Sessions III and former U.S. District Judge Paul G. Cassell to discuss the pertinent issues of federal mandatory minimum sentencing and the disparities between penalties imposed in crack and powder cocaine cases.

Judges Sessions and Cassell provided much-needed insight into these unnecessarily complicated aspects of federal sentencing procedure, elucidated the injustices associated with mandatory sentencing, and clarified the ways in which mandatory sentencing in general and the crack/powder disparity in particular cause the already troubling disproportionate number of African Americans in prison to increase.

A video reproduction of the program is available online and can be downloaded by going to http://www.law.stanford.edu/calendar/details/828

The theme for the third meeting of *The Stanford Executive Sessions on Sentencing and Corrections* was inspired by the California Judicial Symposium on Public Safety, Sentencing and Corrections, which the SCJC's Faculty and Executive Directors attended in June 2007. Organized by California's Administrative Office of the Courts (AOC), the purpose of this conference was to update participants on the state of California sentencing and corrections and to initiate a discussion in California on the role of the judiciary in this area. The conference's primary audience was California jurists, although several academics, program administrators, and practitioners attended as well.

One observation made at the AOC Conference was that California's judges seem to differ markedly from their counterparts in other states and in the Federal Judiciary in their views regarding the role of the judiciary in sentencing in several respects:

- First, while they view the *imposition* of sentence as a distinctly judicial responsibility, they do not necessarily consider themselves as playing a significant role in the *determination* of what sentences ought to be (they view this as primarily a legislative responsibility).

"while [California judges] view the *imposition* of sentence as a distinctly judicial responsibility, they do not necessarily consider themselves as playing a significant role in the *determination* of what sentences ought to be."

- Second, they are somewhat averse to the notion that judges can or should contribute to the public discourse regarding the development and implementation of sentencing policy (by, for example, testifying before the legislature, publishing legal scholarship, or taking formal positions on questions germane to sentencing).

- Third, because of the limited role they see themselves as having in the determination of sentences, judges do not necessarily view risk-needs assessment tools as relevant to the performance of their duties (and, to the extent that they perceive risk-needs assessment tools as beneficial, they feel that such tools are no better in any significant respect from the pre-sentence reports currently prepared by county probation departments).

Two other notable themes percolated throughout the June 2007 Conference. One – which may illuminate a division within the California Judiciary – was that while some judges seem troubled by how little sentencing discretion they have vis-à-vis county prosecutors, others seem perfectly comfortable with the allocation of discretion among sentencing actors. A second was that regardless of judges' positions on any other issues related to sentencing, on the whole their views of sentencing commissions might best be characterized as cautious curiosity.

Upon returning from the June 2007 conference, the SCJC directors decided to use the third meeting of the Executive Sessions as an opportunity to examine these observations in finer detail. Specifically, we hoped that the meeting might serve: (1) to determine whether the observations made at the 2007 judicial conference are accurate; and (2) if so, to then examine the premises underlying California judges' views, evaluate the validity of those premises in relation to both existing California sentencing structures and sentencing innovations being developed in other jurisdictions, and finally, offer some insight into the role the California judiciary might play in the development of sentencing law and policy in the future. To that end, we invited several prominent California jurists, jurists from other states and the federal judiciary who have been influential in the development of sentencing law and policy in their jurisdictions, and legal scholars who have a particular expertise in sentencing law and policy, to attend the third meeting of the Executive Sessions.

In publishing this report, we intend to illuminate some of the themes that emerged from the Executive Sessions meeting and to inform what we hope will be a continuing discussion about the role of the judiciary in shaping sentencing law and policy in California. ❖

We began the day with a discussion regarding the nature of sentencing discretion in general. What does the term "sentencing discretion" mean? Who has and should have the power to exercise such discretion? Can we envision a system in which various actors make informed decisions with respect to sentencing along a continuum of sentencing discretion? How much discretion and control do California judges currently have in sentencing, especially in comparison to what they think a model system for California would grant them? Who are the other actors who exercise discretion in sentencing in California? Which actors have the most power under different types of sentencing regimes? What structural changes, if any, in the state sentencing system would bring us closer to the type of sentencing regime that would give judges the optimal amount of sentencing discretion?

INTRODUCTORY REMARKS

PROFESSOR MARC MILLER, UNIVERSITY OF ARIZONA, JAMES E. ROGERS COLLEGE OF LAW

Professor Miller made three general points regarding the nature of sentencing discretion. His first point is that sentencing scholars and experts often operate under some dangerous misconceptions regarding sentencing discretion's parameters. One of these misconceptions is that there is some normatively accepted standard of sentencing discretion – that there is some benchmark of discretion that all sentencing actors must meet in order for a sentencing system to operate properly. Miller argues that in fact, sentencing discretion is pliable – that the optimal amount of discretion for any sentencing actor to possess is contestable and flexible. Scholars and experts – in the states and nationally – can and should continue to discuss and debate how much discretion sentencing actors ought to have with respect to one another and with respect to the system as a whole.

A second misconception is that sentencing discretion operates at two poles, rather than along a continuum; that a sentencing actor either has complete discretion to determine the consequences to an offender of committing a crime or that she has none whatsoever. In fact, under *any* sentencing structure, *all* sentencing actors have *some* amount of sentencing discretion. Even under indeterminate sentencing in California, for example, each sentencing actor – the legislature, prosecutors, probation authorities, judges, and parole authorities – had some say in determining the amount of time an offender would spend in jail or prison. Without a nuanced understanding of this continuum of sentencing discretion, it is impossible to craft a reasonable sentencing structure.

Professor Miller's second point relates to the need to appreciate the degree of discretion embedded in the criminal justice system more generally. Actors in the criminal justice system make discretionary decisions every day that have tremendous impacts on the lives of other actors in the system. This is not to diminish the importance of sentencing discretion in any jurisdiction's criminal justice system, nor to suggest that lawmakers and scholars should not continue to explore innovative ways to structure sentencing discretion. It is simply worth noting that failure to appreciate the scope and effects of system-wide discretion make it difficult to have a sensible discussion regarding the scope and effects of sentencing discretion.

Finally, his third point is that the perspective from which one considers the question of sentencing discretion is critical – that the question of how much discretion any sentencing actor ought to have depends in large part on whether the person asking the question is viewing the situation from that actor's perspective or from another's. Most sentencing actors believe that they have little discretion vis-à-vis other sentencing actors, that their day to day decisions constitute routine adherence to established norms rather than exercises of discretion, and that the little discretion they do possess is exercised reasonably. For example, if I am a prosecutor, I view the decision to request a high bail as a routine performance of my duties, while other actors in the system may view the same decision as an act of discretion. If I am a parole officer, I view the decision to violate an offender as a routine performance of my duties, while other actors in the system may view the same decision as an act of discretion. This is not to sug-

"the perspective from which one considers the question of sentencing discretion is critical ... the question of how much discretion any sentencing actor ought to have depends in large part on whether the person asking the question is viewing the situation from that actor's perspective or from another's."

gest that prosecutors should not request high bail amounts or that parole officers should not violate offenders. It is to say, however, that these decisions – which, when viewed from the actor's perspective constitute compliance with established norms and practices – constitute exercises of discretion when viewed from the outside.

With respect to judicial discretion in particular, Professor Miller argues that judges should have sufficient discretion to determine and impose sentences that fit the circumstances of the unique cases before them. This is an area of the law where the unique aspects of each case can have an astounding impact on the outcome and where judges ought to have the ability to consider these aspects. Professor Miller argues further that requiring judges to apply abstract rules in unique cases is not a sensible allocation of authority.

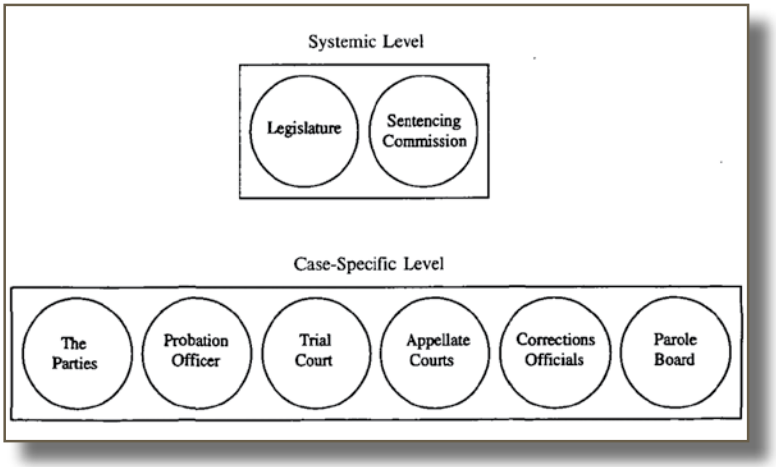
In light of the foregoing observations, Professor Miller offers three principles or precepts regarding judicial discretion in sentencing:

1. Sentencing systems should permit judges to consider how much a sentence mandated by statutes or rules deviates from discretionary sentences imposed by fellow judges in similar cases, and to adjust sentences accordingly.

2. Judges ought to be able to review and incorporate the defense's claim that law enforcement took significant conscious actions likely to have a dramatic effect on the outcome in imposing sentences.

3. As a general matter, judges ought to be able to consider system-wide sentencing disparities when imposing sentences in like cases.

Professor Miller suggests that implementing these precepts may serve to safeguard a minimally acceptable degree of judicial discretion in sentencing. Even if they would not sufficiently safeguard judicial discretion, or if there is no agreed-upon minimally acceptable degree of judicial sentencing discretion, these precepts at least illuminate the key questions for discussion: how much power and authority should judges have over what kinds of sentencing issues and with how much discretion for consideration and review of sentencing decisions made by others?



"Sentencing Discretion Diagram," from Kevin Reitz, Modeling Discretion in American Sentencing Systems, 20 Law & Pol'y 389 (1998)."

GROUP DISCUSSION

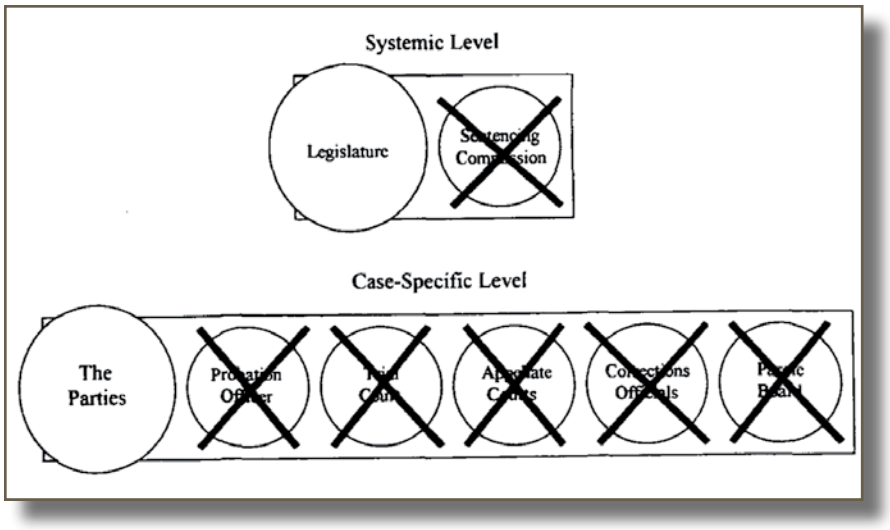
Participants first debated Professor Miller's argument that judges ought to be able to consider the actions of law enforcement in imposing sentences[1]. Some participants felt that this would never be proper because it would always undermine law enforcement's ability to aggressively investigate and prosecute crimes. Others felt that it might sometimes be proper in light of the need to locate a suitable balance between law enforcement's ability to investigate and prosecute crimes and judges' ability to impose fair sentences. Still others argued that permitting judges to consider the actions of law enforcement in imposing sentences does not actually undermine law enforcement's ability to investigate and prosecute crimes at all – that it simply shifts the sentencing consequences of law enforcement's activities from law enforcement itself to the judiciary.

The discussion then segued into a conversation regarding plea-bargaining. Some California judges argued that judges ultimately have little sentencing discretion because the vast majority of cases are disposed of through plea-bargaining. One point to emerge from this discussion is that judges' involvement in plea-bargaining varies dramatically across the state, with

1. One version of this is "sentencing entrapment," which occurs when police officers deliberately manipulate the amount of drugs or weapons involved in an undercover operation in order to increase the amount of time an offender will serve in prison. The U.S. Court of Appeals for the Eighth Circuit has defined sentencing entrapment as "outrageous official conduct [which] overcomes the will of an individual predisposed only to dealing in small quantities for the purposes of increasing the amount of drugs . . . and the resulting sentence of the entrapped defendant." *United States v. Barth*, 990 F.2d 422, 424 (8th Cir. 1993). The California Supreme Court has rejected the doctrine of sentencing entrapment, *People v. Smith*, 31 Cal.4th 1207 (200-3), and has declined to decide whether defendants may raise the related doctrine of sentencing manipulation. *Id.* at 1222.

the amount of judicial involvement depending at least in part on the size of the county – in smaller counties, judges are intimately involved in negotiating settlements; in medium sized counties judges indicate the sentence likely to be imposed upon a plea to the charges but do not actually get involved in negotiations; and in larger counties judges get involved only when there is concern on the part of the parties that a negotiated settlement may not go through. It is unclear whether judges across the state are aware of the degree to which their involvement in plea-bargaining may differ from that of judges in neighboring counties.

This discussion sparked conversation on one of the key themes of the meeting – it is not so much a question of *whether* California judges have discretion in sentencing, but *where* in the sentencing process their discretion lies. On this point, one participant observed that California's sentencing system is "schizophrenic" – there is enormous discretion at one end of the process and almost no discretion at the other. As the previous discussion demonstrated, for the most part judges have a tremendous amount of discretion at the front end, when pleas are entered early or when a probationary sentence is imposed. At the back end, if the offender has been convicted of a felony, judges have almost no discretion when it comes to imposing sentence.



"A Discretion Diagram of Mandatory Sentencing," from Kevin Reitz, Modeling Discretion in American Sentencing Systems, 20 Law & Pol'y 389 (1998)."

Another concern raised by the participants is the potential for abuse by judges and parties. Where discretion is exercised and abused in ways not intended by the legislature, the legislature responds. An example provided was the Mentally Disordered Sex Offender program. According to one participant, this began as a sound alternative to prison for sex offenders whose offenses arose as a result of mental illness. As time wore on, however, and as prisons became increasingly overcrowded, judges and the parties began to use the program as an alternative to prison for violent sex offenders who were not necessarily mentally ill. Because the program was not being used as the legislature had intended, the legislature predictably ended the program.

A significant portion of the morning discussion centered on the relationship between *discretion* and *policy-making*. Several participants took the view that exercises of discretion constitute policy-making and that policy-making is not a judicial responsibility. These participants generally believe that sentencing policy is to be made by legislators and prosecutors and that it is not for judges to be second-guessing the sentencing policy decisions of their counterparts in the executive and legislative branches.

Other participants agreed that exercises of judicial discretion constitute policy-making but maintain that it is perfectly appropriate for judges to make these kinds of decisions in the determination and imposition of sentences. One participant of the sessions argued that all sentencing actors (including judges) are, in one way or another, policy-makers. That participant went on to suggest that judges should not shy away from viewing judicial decision-making as policy-making because when judicial policy-making is conducted properly (i.e., when decisions are not egregiously out of bounds), it provides an opportunity for the legislature to correct what the judiciary has done if it is inconsistent with legislative intent. According to this view, not only is it not improper for the judiciary to be engaged in policy-making, such judicial policy-making is necessary for the proper functioning of a tripartite system of government.

This disagreement regarding the propriety of judicial policy-making highlights one key point of consensus to emerge among all participants – that the act of judging can itself constitute policy-making. An example used to illustrate this point is the *Romero* case, in which the California Supreme Court ruled that Three Strikes did not eliminate judicial discretion to dismiss prior serious or violent felony convictions. In *Romero*, the Court expressly permitted trial courts to make policy decisions regarding when California's Three Strikes law should

and should not apply.

Of course, numerous questions arise in response to the proposition that acts of judging can constitute policy-making. Questions, for example, such as: Should judges shy away from exercising discretion in circumstances where such an exercise of discretion would obviously constitute policy-making? Should the legislature provide some sort of clear and concise framework to guide judges' policy decisions? To what extent should judges be reviewing the policy decisions of the other branches of government? More specifically, to what extent should judges' policy decisions over-ride the policy decisions of other actors such as prosecutors? To what extent should appellate courts be reviewing the policy decisions of trial judges? Should the legislature provide explicit guidance on these issues? These are critical questions that go to the heart of our chief concern at the third Executive Sessions meeting – the role of the judiciary in shaping sentencing law and policy – and we look forward to examining them in closer detail in future discussions.

One way that other jurisdictions have approached these questions is through the use of sentencing guidelines. Sentencing guidelines take factors that naturally enter into the minds of sentencing actors – factors such as prior record, degree of culpability, acceptance of responsibility, and the personal circumstances of offenders – and codify them in a sentencing structure that makes straightforward policy determinations regarding allocations of discretion. Guidelines systems attempt to make more transparent both the factors that enter into sentencing decisions and the allocations of authority between decision-makers.

Toward the end of the discussion, California judges were asked to describe the areas in which they would like to see enhanced judicial discretion. These are some of their responses:

- At the misdemeanor level, judges (at least those in large counties) have discretion at sentencing to impose incarceration and/or probation, and to impose participation in various rehabilitative programs as conditions of sentence. At the felony level, judges have very little discretion as soon as status and conduct enhancements come into play. California judges need more discretion with respect to when and how to impose status and conduct enhancements.

- We need to be mindful that any increase in judicial sentencing discretion is likely to upset the plea-bargaining process. Enhancing judicial discretion is likely to increase prosecutors' case loads, which might disrupt the entire system.

- The proper breadth of judicial discretion depends on the purpose of sentencing. If sentencing is simply about imposing punishment, which is backward-looking, little judicial discretion is necessary – judges can simply impose sentences prescribed by the legislature. However, if California is to take seriously the notion of recidivism-reduction, which is forward-looking, then judges need to have more power in structuring rehabilitative sentences in all cases.

The participants as a whole did not necessarily reach consensus on any of these points, and we do not put forth this list as recommendations to be adopted. Nonetheless, we believe that this discussion regarding discretion in sentencing was exceptionally educational and provocative, and we are grateful to the members of the California judiciary for providing these insights. ❖

In addressing the topic of risk assessment, we considered how, if at all, California judges see themselves using risk-needs assessment tools in performing their sentencing responsibilities. How much responsibility do judges currently have to supervise intermediate and post-release sanctions? How much responsibility should they have in these areas? What risk assessment tools exist to help judges structure and monitor sentences? How could these risk assessment tools be improved? What of the discrepancy of judges' power and control as between probation and parole – should California judges monitor post-release supervision and make revocation decisions, as they do in some other states?

INTRODUCTORY REMARKS I

THE HONORABLE ROGER WARREN (RETIRED), PRESIDENT EMERITUS, NATIONAL CENTER FOR STATE COURTS

Former California judge Roger Warren, now Scholar in Residence at the California Judicial Council and President Emeritus at the National Center for State Courts, began the discussion by presenting some of his work on evidence-based practices in the area of risk-needs assessment. Judge Warren's primary argument is that there is a tremendous body of research demonstrating that rehabilitation can work, but that the key to successful rehabilitative programs is that they are evidence-based and rely on effective risk-needs assessment tools.

It is important to understand the terminology being presented. First, evidence based practices are professional practices supported by the "best research evidence." "Best research evidence" consists of scientific results based on systematic reviews and a body of supporting evidence. Research on evidence-based practices demonstrates that well-implemented programs that are directed at the right people and that are doing the right things can reduce recidivism by on average 10-20%.

Evidence based practices are based on two key principles: the risk principle (who is being targeted) and the needs principle (what is being targeted). A third principle (specific methods of treatment) is beyond the scope of the Executive Sessions discussion. The risk principle is that programs should target medium to high risk offenders and should not target either low risk offenders (who will not really benefit from supervision) or extremely high risk offenders (who probably need to be incarcerated). The needs principle is that programs should target criminogenic needs (such as anti-social attitudes, friends, and activities; family and/or marital factors; and substance abuse, educational, and vocational needs) and should not target non-criminogenic needs (such as anxiety, low self-esteem, creative ability deficiencies, medical needs, and physical conditioning). Research demonstrates that targeting at least four criminogenic needs can result in a 32% reduction in recidivism.

From Hon. Roger K. Warren (Ret.), "The Role of Risk/Needs Assessment", presented at the Stanford Executive Sessions on Sentencing and Corrections, September 7, 2007. Source: Gendreau P., French S.A., and A. Taylor (2002). What Works (What Doesn't Work) Revised 2002 Invited Submission to the International Community Corrections Association Monograph Series Project.

Risk-needs assessment tools have evolved over time as researchers and practitioners have learned more about how to predict an offender's likelihood of recidivating. The first generation of instruments consisted solely of the subjective judgment of the assessor. The second generation of instruments consisted of actuarial assessments of static risk factors. The third generation of instruments consists of actuarial assessments of static and dynamic risk-needs factors.

Judges can use risk-needs assessment instruments in: determining offenders' suitability for probation or diversion; determining the kind of treatment and behavioral controls to be ordered; determining appropriate conditions of probation to be imposed; and determining appropriate responses to violations of probation.

Potential constraints on the use of risk-needs assessments include: prohibitive state sentencing policies (including policies that do not allow for sufficient discretionary decision-making for judges); prosecution policies that make it impossible to take risk-needs assessments into proper consideration; lack of support for risk-needs instruments among county probation

departments; and a state-wide absence of evidence-based programs and intermediate sanctions.

INTRODUCTORY REMARKS II

THE HONORABLE RICHARD WALKER, CHIEF JUDGE, NINTH JUDICIAL DISTRICT, STATE OF KANSAS

The Honorable Richard Walker, a judge in the state of Kansas and a leader in the sentencing reform movement of that state, then provided a synopsis of the approach Kansas has taken to the use of risk-needs assessment tools. Kansas has a presumptive sentencing guidelines system that applies two grids (one for drug cases and one for non-drug cases) to the sentencing of felony offenders. In adopting its guidelines system, Kansas was driven by three overriding principles (1) the need for truth in sentencing, (2) the value of information gathering, and (3) the importance of developing a population prediction model to forecast the effect of sentencing policies on prison populations.

When Kansas enacted its guidelines system, it also created a community corrections program. However, that program was unsuccessful for two reasons: (1) probation and community corrections were run entirely at the county level, while prison and post-prison supervision programs were run entirely at the state level, resulting in a lack of coordination; and (2) judges varied considerably in their trust of – and consequent likelihood of sentencing offenders to – community corrections.

In 2001 Kansas adopted a new state-wide community corrections program to remedy these deficiencies. First, the 2001 program instituted a system of state-wide standards regarding the imposition of community corrections, ameliorating somewhat the lack of coordination problem. Second, these state-wide standards both provided judges with information regarding the circumstances under which community corrections sentences are warranted and required judges to consider a community corrections sentence in all eligible cases. Under the current system, judges always have the discretion not to impose a community corrections sentence, but they are required to consider the purposes of community corrections and how those purposes would or would not be served in each of the cases that come before them.

GROUP DISCUSSION

Participants overwhelming agreed on the value of evidence based practices and risk-needs assessment instruments, although there was some divergence of opinion on how these compare with California's current system.

One participant expressed the view that risk-needs assessments are about recidivism reduction and restoring the health of communities – not about rehabilitating individual offenders. Another participant expressed the need to clearly articulate the purpose of any particular risk-needs assessment instrument before implementing it system-wide. One California judge expressed skepticism that California judges would have much use for risk-needs assessments, given the lack of discretion they have in supervising the non-incarcerative periods of criminal sentences. On this issue, a participant questioned whether it is possible to argue in favor of California adopting an effective risk-needs assessment instrument without advocating in favor of fundamental changes in the sentencing structure.

A number of California judges questioned whether a risk-needs assessment tool would be an improvement upon the current pre-sentence reports that county probation departments provide. However, there was general consensus that risk-needs assessment tools may be more effective in the following ways:

- We currently have no way of evaluating whether county probation pre-sentence reports effectively identify the factors that drive offenders' behavior, which is precisely what scientifically-validated risk assessment tools are designed to do.

- Judges currently have no way of monitoring an offender's progress in any particular program unless and until the offender comes before the judge for a probation revocation proceeding, whereas programs committed to using evidence based treatment methodologies provide periodic status reports and other tools to help judges and probation departments monitor offenders' success.

- Risk-needs assessment instruments are faster to prepare and could provide a cost savings to counties. Traditional pre-sentence reports can take up to eight hours to prepare, whereas evidence based risk-needs assessment instruments can take as little as 50 minutes.

States across the country are experimenting with the various risk-needs assessment tools that exist today and are demonstrating the effectiveness of these tools in reducing recidivism and enhancing public safety. One participant concluded the session by remarking that risk-needs assessment is an area in which the judiciary can take a leadership role without jeopardizing its impartiality or threatening its credibility. ❖

ACCESS TO AND USE OF SENTENCING INFORMATION

MARK BERGSTROM
EXECUTIVE DIRECTOR, PENNSYLVANIA COMMISSION ON SENTENCING

For our lunch presentation, we asked Pennsylvania Commission on Sentencing Executive Director Mark Bergstrom to provide an overview of Pennsylvania's JNet – a web portal that provides a common online environment for authorized users to access public safety and criminal justice information. Mr. Bergstrom described for us the political environment surrounding JNet's creation, the sources of its growth and development, and its value to Pennsylvania's criminal justice agencies today.

Sentencing information systems do not simply arise in a vacuum, and Pennsylvania's experience shows that there are four over-arching keys to the successful development of a comprehensive criminal justice information sharing system: policy coordination, information collection, information exchange, and information integration.

In terms of policy coordination, Pennsylvania benefited from the executive sponsorship of then-Governor Tom Ridge, who issued an Executive Order calling on criminal justice agencies to create a unified statewide information system to protect public safety. JNet's creators and developers had Governor Ridge's support all along the way. JNet also enjoys the benefit of a coherent 3-level governance structure consisting of an executive council, steering committee, and organizational oversight. Whatever differences the contributing agencies have between each other, they share a common goal of promoting public safety. In creating and developing JNet, each agency was willing to set aside its own interests in order to support the broader enterprise.

With respect to information collection, the JNet Executive Council decided early on that each agency would maintain its own information and give other agencies access as appropriate, rather than requiring each agency to turn its information over to a central repository. Each system is linked to the others, and each agency makes its own determination as to who will have access to its system. JNet takes a system-wide approach to information collection, processing information from arrest through post-release supervision. It also ensures that information is collected and maintained at a sufficient level of granularity so that information accessed can actually be helpful in conducting system-wide analyses. The system employs common identifiers for offenses and offenders so that distinct agency systems can easily share information. Finally, the system is capable of aggregating from individual case data and is completely automated.

As for information exchange, the system allows for highly sophisticated protocols, including: a flexible search capability that allows users to obtain specific

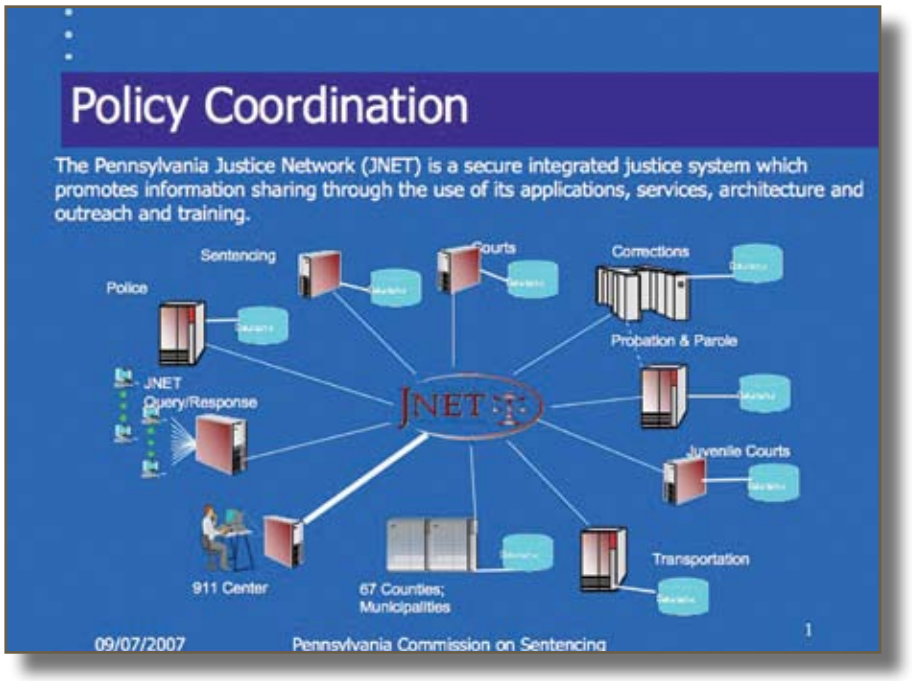
EXECUTIVE ORDER
COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE

I, Thomas J. Ridge, Governor of the Commonwealth of Pennsylvania, by virtue of the authority vested in me by the Constitution of the Commonwealth of Pennsylvania and other laws of the Commonwealth, do hereby establish the Pennsylvania Justice Network (JNET) Governance Structure. By so doing, I invest it with the necessary powers to perform the duties and functions set forth herein and to advise and counsel me in the development and operation of the JNET System specifically with respect to the Commonwealth's overall duty to ensure public safety.

Signed on June 8, 1999, by Thomas J. Ridge, Governor.

information regarding a case, offender, or offense; a notification capability that allows users to receive specific information automatically (e.g., probations officers can be notified any time one of their probationers shows up in an arrest context, court proceeding, etc.); an interface capability that allows users to import and export case information; and an index capability that allows users to manage case specific and aggregate information.

Finally, the system's information integration functions include: sentencing simulations, which allow users (including judges, prosecutors, and defense attorneys) to simulate the likely sentence to be imposed upon presentation of a particular set of circumstances; corrections population predictions, which allow policy-makers to determine the likely consequences of a change in sentencing policy on their prison populations; utilization levels, which allow users to review, at the local level, the number of offenders sentenced to non-confinement, county facilities, some combination of state and county facilities, and state facilities; targeting, which allows local users to compare their utilization levels with those of other localities; and research and evaluation, which allow users to study the impact of sentencing policies and guidelines, evaluate rates of disparity, make comparisons with other jurisdictions, conduct program evaluations, and evaluate the effectiveness of sentencing policies and practices including mandatory minimums, economic sentences, and sex offense penalties.



From Mark Bergstrom, "Access to and Use of Sentencing Information", presented at The Stanford Executive Sessions on Sentencing and Corrections, September 7, 2007.

Pennsylvania's JNet is a sophisticated information system that enables all criminal justice agencies in the Commonwealth of Pennsylvania to access each other's information, experience real time notification of offenders' activities, prepare prison population projections, analyze sentencing trends, inform the legislature of pertinent developments in criminal justice issues, and provide information to judges that helps them impose sound sentences that are consistent with the sentencing guidelines and tailored to fit the circumstances of individual cases. It would be an excellent model for the state of California, should the state ever decide to undertake a comprehensive evaluation of its sentencing policies and practices. ❖

For our first afternoon session, we addressed the question of how much responsibility judges do and should have in contributing to the public discourse on sentencing issues. Assuming there is some measure of consensus among judges as to the goals of structural sentencing changes, what role can the Judiciary play in the civic arena – in the political and legislative processes – to make their views known and to influence possible proposals for reform? Might judges have a role in raising concerns regarding inter-statutory coordination in sentencing statutes in terms, for example, of the relationships between statutory sentencing enhancements and the California triad system? What are the implications of *Cunningham* and post-*Cunningham* statutory changes on the judicial role in sentencing? Might the Judiciary have a role in influencing legislative changes to the statutory sentencing scheme in the wake of Cunningham?

INTRODUCTORY REMARKS I

THE HONORABLE ISABEL GOMEZ (RETIRED), EXECUTIVE DIRECTOR, MINNESOTA SENTENCING GUIDELINES COMMISSION

Isabel Gomez, a former Minnesota trial judge and current Executive Director of its Sentencing Guidelines Commission, began this portion of the meeting by drawing a key distinction between disinterestedness and lack of interest, making the point that to say that a judge is disinterested is not to say that she is uninterested. Judges take an active interest in many issues – including statutes of limitations, drug courts, and *Blakeley* fixes – and sentencing need not be any different. Society benefits from hearing the voice of the judiciary on these matters. When Judge Gomez took the bench in 1984, judges rarely spoke outside the confines of their courtrooms; however, in the late 1980s, the Minnesota Supreme Court began to encourage more transparency in the judiciary, and since then Minnesota judges have taken a more active role in the civic arena. In Minnesota, some judges invite legislators into their courtrooms to see what occurs in typical criminal cases. This process is educational – it helps legislators appreciate what is going on in the courtroom, thereby informing public policy.

Judge Gomez argued that judges have a distinct voice to offer as witnesses both to the inner workings of the system and to the human tragedies that occur in the context of individual criminal cases. Judges witness the human realities that constituents pay them to oversee – judges resolve disputes, predict behavior, look at hard issues in individual cases, and make sound decisions

Former U.S. District Judge Paul G. Cassell

Mr. Chairman and Distinguished Members of the Committee,

I am pleased to be here today on behalf of the Judicial Conference of the United States and its Criminal Law Committee to discuss the damage mandatory minimum sentences do to logic and rationality in our nation's federal courts.

Mandatory minimum sentences are one-size-fits-all injustice. Each offender who comes before a federal judge for sentencing deserves to have their individual facts and circumstances considered in determining a just sentence. Yet mandatory minimum sentences require judges to put blinders on to the unique facts and circumstances of particular cases, producing what the late Chief Justice Rehnquist has aptly identified as "unintended consequences."

Mandatory minimum sentences not only harm those unfairly subject to them, but do grave damage to the federal criminal justice system . . . . Perhaps the most serious damage is to the public's belief that the federal system is fair and rational . . .

Congress should act to reform mandatory minimum sentences so that they no longer serve as engines of injustice. . .

From The Honorable Paul G. Cassell, United States District Judge, District of Utah. Testimony before The Subcommittee on Crime, Terrorism and Homeland Security, Committee on the Judiciary, United States House of Representatives. March 16, 2006.

regarding outcomes. There is a lot of power in their perspective, and because of this power, judges have a role to play in contributing to the public discourse. Policy-makers care about what judges think regarding issues as important as crime and punishment.

Judge Gomez provided two examples of what can happen when judges lend their voice to the public debate. One example comes from her witnessing the operations of the juvenile justice system, the other from her role in witnessing the tragedy of individual cases.

As a judge in Minnesota's juvenile court, Judge Gomez observed that what happened to the children caught in the juvenile justice system occurred in a "black box" – unknown to the public, unchecked by anyone. Child protection cases were simply filed away in secret. Judges like herself had almost unbridled power to determine the course of juvenile offenders' lives. She was uncomfortable with this and believed that the system needed to be more transparent and more accountable. She testified to this at a hearing before a legislative committee and subsequently, the juvenile system was altered to make files public and officials more accountable. She is not certain that much changed in terms of the operation of the overall juvenile justice system, but she does believe that it is now more accountable. Her testimony had an effect on the work of juvenile prosecutors, child protection workers, and probation officers.

Some years later, after she had retired and gone to work for the Sentencing Guidelines Commission, Minnesota was faced with a horrific child pornography crime. In response to this crime, one legislator introduced a bill making possession of child pornography punishable at the same level as first degree child sexual assault. Judge Gomez again testified. This time she testified about presiding over several child pornography cases and having to view some horrific photographs in connection with those cases. She testified that the images of those photographs will never be erased from her mind. And yet, she maintained, no matter how horrifying those images were, they were nothing compared to her experience in sentencing a 28-year-old man who had raped a 9-month-old girl. The situations are simply not the same, and should not be punished as though they were. The legislature was persuaded and the measure failed.

Judge Gomez emphasized that judges possess a tremendous amount of authority, and can speak with genuine authenticity about their knowledge of the criminal justice system. Judges should remain disinterested, but their disinterest should not turn into lack of interest, such that they neglect their duty to speak to matters that affect them and their work. Judges have power, and this power can be deployed effectively to make positive changes in public policy.

INTRODUCTORY REMARKS II

THE HONORABLE BURT PINES, JUDGE,
LOS ANGELES COUNTY SUPERIOR COURT

Before coming to the California bench, Judge Pines worked at the Capitol as a judicial appointments secretary and was the principal liaison with the judicial branch on behalf of the Executive.

Judges Pines began by noting that when *Cunningham v. California* was decided, the Judicial Council, Administrative Office of the Courts, and California judges collaborated frequently about possible solutions. As a body, they urged the legislature to take action; they did not, however, offer the legislature any specific remedy. This was an intentional decision – they did not believe that it was their role as judges to be advising the legislature on policy matters.

Judge Pines quoted a provision of the Judicial Canon providing that "[a] judges shall not appear in a public hearing ... except on matters of law ...," which is included in every copy of the *California Judges' Handbook.* Judges take their ethical obligations seriously, as well they should. What would it mean for a judge to take a public position on a matter of public policy? Is this something they can do consistent with their professional obligations and restraints? Even if they can, should they?

Judge Pines suggests that as a judicial officer, a judge is in a unique position to improve the legal system and, under certain circumstances, to improve the law itself. However, it is crucial that judges abstain from political activity and from influencing the political process. If judges took an active role in the political process, the public would lose confidence in the judiciary. To stimulate discussion, he posed the following questions as examples of the kinds of dilemmas judges face:

- Can/should California judges testify before legislative committees?
- Can/should California judges be permitted to sit on a legislator's advisory committee?
- Can/should California judges write articles calling for improvements in certain areas of law?

- Can/should California judges contact individual legislators and advocate in favor of improvements in certain areas of law?

Judge Pines argued that the basic question centers on the types of advocacy that judges might want to consider engaging in. There is value in having judges identify problems with the system; it is another thing to have judges advocating in favor of or against particular solutions. Where are the boundaries?

GROUP DISCUSSION

One participant raised the issue of the California Judges Association's (CJA) policy of taking positions on matters of *procedure* but not on matters of *policy*. For example, if the legislature is considering legislation that affects how judges perform their responsibilities, the CJA may take a position on it. But what of this distinction between substance and procedure – are there clear dividing lines? How does that distinction hold up under analysis? How does one decide whether proposed legislation pertains to substance or to procedure?

Take, for example, mandatory minimum sentences. Are mandatory minimums a matter of sentence length, and therefore a matter of substance? Or do they interfere with judges' abilities to perform their responsibilities, making them more a matter of procedure? These distinctions are perhaps not always as elegant as they are often made out to be.

Another participant inquired about areas on which judges have a particular expertise, such as, for example, restructuring the sentencing system to make it consistent with the U.S. Supreme Court's 2006 construction of the Sixth Amendment in *Cunningham v. California*. Might the state not benefit from the wisdom of the judiciary on this point?

Participants discussed the ways in which judges on sentencing commissions are somewhat insulated from this problem. When a judge is appointed to a sentencing commission, she is given an express mandate to take positions on matters of sentencing policy. In speaking publicly or before Congress, the sentencing commission judge is in fact speaking on behalf of the commission, not on behalf of the judiciary. This highlights a question – does the fact that judges can speak openly on sentencing commissions demonstrate a narrowing of judges' roles in the public arena (suggesting that judges may speak on policy matters *only* when serving on such a commission) or a widening of these roles (suggesting that perhaps our legal system is actually more open to judicial opining on matters of public policy than we had previously thought)?

One participant noted the difference between the judiciary educating the legislature and the judiciary taking positions on pending legislation. There are few opportunities for legislators to be educated on matters of constitutional significance in ways that are open and non-partisan. The media is not an effective educator on matters of public policy, and legislators are completely beholden to the interests of their constituents. They might really benefit from the opportunity to hear the judiciary speak about how legislation affects the work of the judiciary and the lives of victims, offenders, and their families. Judges can look effectively at what makes sense from a "good government" perspective. There should be no ethical or professional obstacle to the judiciary being able to educate the legislature.

Another participant suggested that the landscape may be changing with respect to the judiciary's ability to speak publicly on matters of public policy. Judges have spoken publicly in opposition to the parental notification requirements of some anti-abortion laws. U.S. Supreme

> "Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule upon. See, e.g., [Laird v. Tatum, 409 U.S. 824, 831-33 (1972)] (describing Justice Black's participation in several cases construing and deciding the constitutionality of the Fair Labor Standards Act, even though as a Senator he had been one of its principal authors; and Chief Justice Hughes's authorship of the opinion overruling Adkins v. Children's Hospital of D.C., 261 U.S. 525 (1923), a case he had criticized in a book written before his appointment to the Court). More common still is a judge's confronting a legal issue on which he has expressed an opinion while on the bench. Most frequently, of course, that prior expression will have occurred in ruling on an earlier case. But judges often state their views on disputed legal issues outside the context of adjudication – in classes that they conduct, and in books and speeches. Like the ABA Codes of Judicial Conduct, the Minnesota Code not only permits but encourages this."
>
> *From Republican Party of Minnesota v. White, 536 U.S. 765, 777-779 (2002), striking down provisions of the Minnesota Canons of Judicial Conduct prohibiting candidates from announcing their views on disputed legal or political issues.*

Court Justice Anthony Kennedy has publicly (in the media, before the American Bar Association, and in testimony before the Senate Budget Committee) embraced the need for more flexible sentencing policies, shorter prison terms, and alternatives to incarceration for non-violent offenders.

This participant went on to suggest two key factors in determining whether a particular policy matter is an appropriate topic for the judiciary to weigh in on. One is how central the matter is to the proper functioning of the judiciary – if the matter at hand is critical to the functioning of the judiciary, the pertinence of judiciary's perspective may override the political debate. The second is whether the issue at hand would be characterized as general or particular – for example, it may be perfectly appropriate for the judiciary to weigh in on the issue of mandatory minimum sentences in general, but to avoid becoming embroiled in a political debate regarding a specific mandatory minimum sentencing proposal.

Another participant expressed the concern that judges call into question their impartiality when they testify as to matters on which they may eventually have to rule. This participant suggested that while testifying as to matters of pending policy may not be expressly unethical, it may nonetheless be unwise. Regardless, individual judges considering taking such action should exercise caution about the potential consequences of their actions.

The conversation then shifted slightly to questions regarding the propriety of judicial contributions to policy debates on matters pending before the executive branch, for example, the Governor's role in developing a comprehensive information system, or the progress the Department of Corrections and Rehabilitation is making in the area of risk-needs assessment. One participant argued that these are areas where judges' participation should be relatively uncontroversial.

Participants came to consensus regarding one aspect of the proper role of the judiciary in the civic arena – all of the participants agreed that at a minimum, it is proper for the judicial branch as a whole to take formal positions on matters of public policy that directly affect the functioning of the judiciary. Some of the issues on which perspectives diverged included the following:

- The distinction between the judiciary speaking as a branch and individual judges voicing their own perspectives;
- The distinction between judges offering testimony on bills pending before the legislature and judges offering testimony or commentary on criminal justice issues generally;
- The question of forum and the distinctions between legal scholarship, public testimony, participation on boards and commissions, dicta in opinion writing, and speaking engagements;
- The continued relevance of the substance/procedure distinction;
- The question of whether judges having to potentially rule on matters on which they've taken public positions remains a concern.

The final point made during this portion of the meeting is that at a national level, it is very common for judges to express their views on matters of public policy in the form of law review articles, op-eds, and in dicta in their own opinions. In recent years, judges have been less apprehensive about speaking publicly and the old maxim that judges may opine publicly only on matters of procedure may no longer hold true. The question of the proper role of the judiciary in the civic arena is one for the judiciary itself to resolve upon a careful weighing of balancing factors – fortunately, this is a function judges are accustomed to performing. We hope that the California judiciary will continue to evaluate its proper role in the civic arena, and offer the above as examples of questions to be explored. ❖

"all of the participants agreed that at a minimum, it is proper for the judicial branch as a whole to take formal positions on matters of public policy that directly affect the functioning of the judiciary."

At the time of the meeting, the California legislature was considering Senate Bill 110, which would have created a sentencing commission for the state of California. While that bill is no longer up for consideration this session, the issue of a sentencing commission is still alive in California. The demise of Senate Bill 110 this session has given the California Judiciary some time to consider its view on sentencing commissions, and on its role in them.

Judges have played different roles in the sentencing reform and sentencing commission movements in other states. What role might judges play in the various sentencing commission models that have been proposed for California? What are the implications of the Chief Justice being the Chair of the proposed California sentencing commission? Might this represent a change in the way the California Judiciary has historically viewed its role in shaping sentencing law and policy?

> [J]udicial participation on the [Sentencing] Commission ensures that judicial experience and expertise will inform the promulgation of rules for the exercise of the Judicial Branch's own business - that of passing sentence on every criminal defendant. To this end, Congress has provided, not inappropriately, for a significant judicial voice on the Commission.
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> *Mistretta v. United States, 488 U.S. 361, 408 (1989).*

INTRODUCTORY REMARKS

PROFESSOR STEVEN CHANENSON, VILLANOVA SCHOOL OF LAW

Professor Chanenson, one of the gubernatorial appointees to the Pennsylvania Commission on Sentencing, gave some remarks regarding the role and value of judges who serve on sentencing commissions and offered some thoughts on how then-pending Senate Bill 110 might compare with the structures and functions of other state sentencing commissions.

Professor Chanenson argued that judges can and must play a vital role in developing sentencing policy, and that sentencing commissions provide an ideal forum for the expression of their views. Judges are at the center of sentencing policy and practice, and their perspectives on how to craft and implement sentencing policies are invaluable. Judges are "first among equals" – equals because they are just as important as the other members of any sentencing commission and "first" because the act of sentencing is inherently a judicial one.

As a practical matter, judges are often leaders on sentencing commissions and, whether they are formal leaders or not, are tremendously effective at influencing commissions' policy decisions. Judges have the inside view on how sentencing policies will operate in practice; therefore, if the judicial members of a commission think a proposed policy will not work, it is unlikely to be adopted.

Central to the issue of commission composition is the issue of the Chair. States handle this issue differently – in Delaware, the Chief Justice picks a sitting judge to be Chair; in Kansas, the Governor selects the Chair. Professor Chanenson thinks that mandating that the Chief Justice be Chair is dangerous for three reasons: (1) although the current California Chief Justice would make an excellent Chair, the commission is intended to be permanent and at any given time the person in the role of Chief Justice may not have much of an interest in sentencing policy and/or may not have the attributes necessary to chair a commission; (2) it is not clear whether the office of the Chief Justice is likely to be able to effectively liaison with trial judges, whose work is directly affected by changes in sentencing policy; and (3) Chief Justices are extremely busy – it would be difficult for the Chief Justice of any jurisdiction, let alone one as large as California, to chair a sentencing commission and manage the entire state judiciary simultaneously.

Professor Chanenson also commented on the fact that Senate Bill 110's commission consisted of only one defense attorney, but had multiple prosecutors and law enforcement officers. His concern is that the commission will be too heavily weighted toward law enforcement. Finally, Professor Chanenson echoed Isabel Gomez's remarks regarding the value of a judge's voice on matters of public policy – having judges serve on sentencing commission provides another opportunity

for them to bring the power of their "witnessing" observations to the debate.

GROUP DISCUSSION

One participant questioned whether California judges could constitutionally serve on a sentencing commission at all, or whether service on a sentencing commission would constitute public office, such that a judge would have to resign from her judicial office for the period of service on the commission. [2]

The conversation then segued into the unique interaction between the legislative and judicial branches that can occur in the context of a sentencing commission. One participant noted the lack of legislative representation on the U.S. Sentencing Commission and suggested that the Commission might be able to work more effectively with Congress if this were not the case. Agreeing with this perspective, another participant described the ways in which the legislative and judicial commissioners in some states work together – their commissions often do not produce wide-sweeping changes in sentencing policy, but they do come up with policy developments that are acceptable to both the legislature and the judiciary. The legislative commission members take judges' views with them to the legislature, where they are accorded tremendous respect. When the legislative and judicial commissioners stand together in agreement on a new development in sentencing policy, that policy tends to be implemented effectively and efficiently. On this issue, one participant pointed out the importance of giving legislative commissioners voting power on the commission, where doing so is constitutionally feasible.

One participant questioned the political feasibility of creating a commission at all, given the forceful opposition of the California District Attorneys Association (CDAA). All of the participants agreed that the CDAA's opposition presents a formidable obstacle. One out-of-state participant noted that district attorneys associations frequently oppose sentencing changes because the sentencing changes being proposed often threaten to transfer some of their power to other actors in the system. Nonetheless, district attorneys are critical actors in the system and often help to bring about positive changes in sentencing structures and practices. On this point, one participant emphasized the importance of finding a political compromise, rather than forcing opponents into positions that result in stalemate. This participant argued that Senate Bill 110's supporters forced a stalemate by, for example, insisting upon creating a commission with binding authority when it was evident that the bill's opponents would have supported an advisory sentencing commission.

One participant questioned the ability of legislatures in states with sentencing commissions to enact sentencing legislation that overrides the commission's guidelines or practices. A key feature of Senate Bill 110 is that it did not contain any provision that circumscribed the authority of the legislature in any manner (it is unclear whether Senate Bill 110's opponents understood this).

> "Legislatures allow sentencing commissions to set sentencing standards and guidelines precisely because of their confidence in the commission's ability to promulgate responsible sentencing policy based on sound data."

To insist upon this, however, is to miss a critical point regarding the interactions between legislatures and sentencing commissions – all state legislatures have the ability to override the policies of the commission; yet, few of them ever do. Most state legislatures view their commissions as partners, not opponents. Legislatures allow sentencing commissions to set sentencing standards and guidelines precisely because of their confidence in the commission's ability to promulgate responsible sentencing policy based on sound data. In addition, as discussed above, most state commissions have legislators serving on the commission, so the commission is not in the dark with respect to the legisla-

2. Article VI § 17 of the California Constitution states: "A judge of a court of record may not practice law and during the term for which the judge was selected is ineligible for public employment or public office other than judicial employment or judicial office, except a judge of a court of record may accept a part-time teaching position that is outside the normal hours of his or her judicial position and that does not interfere with the regular performance of his or her judicial duties while holding office. A judge of a trial court of record may, however, become eligible for election to other public office by taking a leave of absence without pay prior to filing a declaration of candidacy. Acceptance of the public office is a resignation from the office of judge."

ture's interests. Good state sentencing commissions typically do not promulgate policy that is likely to be overturned by their legislatures.

Because one role of a sentencing commission is to collect and analyze data, participants considered the quantity and quality of sentencing and corrections information available in California. Some participants felt that California could benefit from an information collection and analysis system similar to those in place in states such as Kansas and Pennsylvania. Other participants believed that California's data collection and analysis systems are working sufficiently now. On this issue, one out-of-state participant noted that many guidelines systems start by being descriptive – they seek to identify and explain the current situation. This participant emphasized that even states with good corrections data systems don't necessarily collect the kinds of information that are necessary to do data analysis at the aggregate level, predict prison populations, analyze sentencing trends, and evaluate program effectiveness. Commissions really drill down and uncover an enormous amount of detail regarding precisely what is happening from the moment of arrest forward. Many states successfully implement descriptive guidelines without ever looking into prescriptive guidelines. In states where commissions promulgate descriptive guidelines only, commissions do not make normative judgments regarding what sentences ought to be, but simply recommend that judges impose sentences that are consistent with past practices.

In this session, participants reached consensus on the following issues:

- There is no evidence to suggest that sentencing commissions threaten public safety, or that any sentencing commission has ever let a dangerous person out of prison.

- A sentencing commission or research center that collected and analyzed sentencing data and made informed recommendations to the legislature would likely improve California's sentencing system.

Participants also agreed in principle that sentencing commissions should include judges, although there was some disagreement as to whether Article VI § 17 of California's constitution would permit this. ❖

As stated, one of our goals in focusing the third Executive Sessions on the role of the judiciary was to determine whether the observations we made at the 2007 judicial conference are accurate. In general, we believe that they are, although it is clear that California judges' views regarding their role in sentencing are significantly more complex and nuanced than our initial observations reflect.

It is true that judges generally view themselves as imposing sentences that others determine. There is some historical basis for this. Before the enactment of California's Determinate Sentencing Act, judges often had little role in determining the amount of time an offender would serve in prison. In these instances, judges were responsible only for determining *whether* an offender would go to prison – it was up to the parole board to determine how much time he would stay there. When determinate sentencing went into effect, many aspects of the sentencing process changed – discretionary parole release was jettisoned in favor of fixed terms and rehabilitation was rejected as a purpose of sentencing – but one thing that did not change was the extent to which judges had a say in deciding how long offenders would spend in prison. Discretion to determine prison sentence length was transferred from the parole board to the legislature (and, consequently, prosecutors), but it was never handed to judges.

Our two other observations – that California judges are reluctant to get involved in public policy discussions and that they do not view risk-needs assessments as terribly relevant to their work – were confirmed by the discussions during the meeting. However, the second observation requires some qualification. California judges seem to lack interest in risk-needs assessments because they do not necessarily view them as an improvement upon the pre-sentence reports currently prepared by county probation departments. They do use these reports in making the decisions that are within their discretion, and if it is true that risk-needs assessments are in fact better than the reports currently prepared by probation departments, judges might express more interest in using them.[3]

Our second goal for this Executive Sessions meeting was to examine and evaluate the premises underlying the judges' views, and to offer some insight into the role the California judiciary might play in the development of sentencing law and policy in the future. We hope that what follows in the remainder of this conclusion is thought-provoking and that it will contribute to the broadening conversation concerning the role of the judiciary in sentencing.

The distinction between the determination and the imposition of sentences is actually an expression of the distinction between substance and procedure. The determination as to what a sentence ought to be – length of incarceration, amount of restitution or fine, length and type of community service, length and type of intermediate sanction, and length and type of treatment conditions – is a primarily matter of substance, whereas the act of imposing sentence is primarily a matter of procedure. As noted above, the California judiciary has historically had a primarily procedural role in sentencing, as least formally.

Yet, judges have also played an important role in overseeing many aspects of the determination of sentence. Under indeterminate sentencing, judges decided whether or not to send offenders to prison – this is a tremendous decision that has far-reaching consequences for offenders, their communities, the state prison system, and California taxpayers. Judge have also always played important roles in the supervision of probationary sentences – they decide whether to impose probation at all, whether to impose a period of county jail time, and whether to revoke probation and send an offender to prison.

Judges also have less formal ways of influencing sentence determinations. They can prevail upon prosecutors to reduce or dismiss charges or persuade defendants to plead guilty in exchange for non-prison sentences. They also appoint their counties' chiefs of probation, who monitor offenders' compliance with probation conditions and occasionally seek probation revocation.

As noted above, Professor Miller made the point early on in the Executive Sessions meeting that whether a decision constitutes an exercise of discretion depends in part on who is asking the question. Judges view many of their actions as simply following established norms or practices; however, when viewed another way these actions actually appear to constitute acts of sentence-determining discretion.

Although we have not seen any studies on the issue,

3. California's county probation departments vary in their use of validated risk-needs assessment tools. See http://www.cpoc.org/Data/survey/adlassess.php (last accessed September 20, 2007). The Chief Probation Officers of California is in the process of making this more uniform.

there is a significant amount of anecdotal evidence suggesting that judges in other jurisdictions, including the states and the federal judiciary, see themselves as playing an enormous role in the determination of sentence. Sentencing guidelines came into being in part because judges were viewed as having *too* much discretion. Judges in states with binding guidelines still have discretion to determine sentencing outcomes, but are guided in doing so by the guidelines created by their states' sentencing commissions. Some states (and the federal government) have sentencing guidelines that are advisory only. In these states, judges still retain discretion to determine sentencing outcomes, but are permitted to use the guidelines as suggestions. Most of these jurisdictions find that judges tend to comply with sentencing guidelines even where they are completely voluntary. Judges in other jurisdictions are often surprised to learn that California judges do not perceive themselves as playing much of a role in the determination of sentences.

The view that judges should avoid getting involved in policy discussions is rooted in the concern that expressing opinions on public policy matters undermines judges' credibility and impartiality. A full discussion on this topic is well beyond the scope of this report; nonetheless it is worth simply noting here that while this concern is both valid and supported by the traditional view of the judiciary's unique role in government, the concern is also giving way nationally to the view that judges should be able to form and express opinions on matters of public policy and to the recognition that judges already do this anyway. This issue is also worthy of further consideration.

The value of having some sort of risk predictor at the time of sentencing seems not to be in dispute. To the extent that they have discretion to determine the outcome of a case, judges appreciate being as informed as possible about the future implications of their decisions. Currently, county probation departments prepare pre-sentence reports that inform judges of offenders' family backgrounds, social histories, educational and vocational backgrounds, alcohol and drug use, physical and mental health, and other factors that judges may wish to consider in imposing sentence. Proponents of risk-needs assessment tools maintain that these pre-sentence reports do not, however, predict the risk of future recidivism effectively. Policy-makers in California are beginning to investigate the different risk-needs assessment tools in existence; as noted above, the state probation chiefs' association is embarking on an endeavor to make the use of risk-needs assessments more uniform. This is an area where judges might have a significant role to play. If judges think that risk-needs assessment tools would be helpful to them in imposing sentences, they can ask their county probation chiefs to implement the tools. As noted earlier, this is an area where judges could take an important leadership role in implementing a tool that research demonstrates can have a positive effect on recidivism reduction.

The third Executive Sessions meeting revealed more questions about the role of the judiciary than it answered. We believe that the judiciary can provide a critical voice in public policy discussions regarding California's sentencing law and policy development. To that end, we offer the following suggestions as potential questions for future discussion:

➢ The judiciary may want to examine more closely Professor Miller's points about the misconceptions often made about the nature of sentencing discretion (that there is some acceptable normative standard regarding the appropriate amount of discretion and that discretion operates as a polarity rather than as a continuum), about the degree of discretion in the criminal justice system more generally, and about the importance of perspective in examining the amount and type of discretion any particular sentencing actor possesses and exercises.

➢ The judiciary should be free to take positions, consistent with their ethical obligations, regarding the nature and allocation of discretion in California's sentencing system. Professor Miller suggested that judges should be able to consider the effects of mandatory sentencing on their sentencing practices, to take law enforcement's actions into account in imposing sentences, and to adjust sentences as necessary to avoid imposing wildly disparate sentences in like cases. The California judiciary may disagree with Professor Miller on each of these points, and our objective here is not to recommend these principles for adoption. It is simply worth noting that the judiciary ought to be able to have a frank discussion about the discretion it does have, the discretion it ought to have, and the proper means of achieving its goal. In having this discussion, judges should keep in mind that there are many alternative models and structures out there; they should be able to think creatively about these questions, rather than being limited by their understanding of the California sentencing system as it is currently constructed.

- In examining issues of discretion in the California sentencing system, judges should also be free to ask penetrating questions about which sentencing actors currently exercise discretion and at what points along the sentencing continuum. Judges should be free to consider the implications of transferring discretion between sentencing actors, and about the means of doing so.

- Participants at this Executive Sessions meeting came to consensus that the act of judging can itself constitute policy-making. As noted above, this observation raises a host of other questions, the surfaces of which we barely scratched during the meeting. These questions are all worth examining in much greater detail in future discussions: Should judges shy away from exercising discretion in circumstances where such an exercise of discretion would obviously constitute policy-making? Should the legislature provide some sort of clear and concise framework to guide judges' policy decisions? To what extent should judges be reviewing the policy decisions of the other branches of government? More specifically, to what extent should judges' policy decisions over-ride the policy decisions of other actors such as prosecutors? To what extent should appellate courts be reviewing the policy decisions of trial judges? Should the legislature provide explicit guidance on these issues?

- The California judiciary should be given more information about risk-needs assessment tools and evidence-based practices in correctional programming. As noted above, this is an area in which the judiciary can take a leadership role in encouraging the use of tools and programs that research demonstrates can reduce recidivism. Taking this leadership role would not necessarily involve taking a position on a controversial public policy issue or becoming embroiled in a debate with the legislature.

- The California judiciary may want to examine more closely its role in the civic arena. The belief that judges should not be involved in the civic arena is rooted in the view that judges ought not become involved in policy-making. Yet, as noted above, judges are often involved in policy-making in both formal and informal ways. The judiciary should consider ways in which judges already express their opinions on matters of public policy and ways in which they might, consistent with their ethical obligations, do so in the future.

- Having judges serve on sentencing commissions often serves a number of purposes. First, it ensures that the sentencing commission will have the benefit of judges' expertise regarding what occurs in the courtroom; without this perspective, sentencing commissions would not be able to develop manageable sentencing rules and guidelines. Second, it provides a context for judges and legislators to work together on the development of sentencing policy in ways that would be impossible outside the context of a commission. Third, when judges who serve on sentencing commissions speak publicly on sentencing policy, they are usually doing so as representatives of the commission, not of the judiciary; this alleviates many of the concerns about judges compromising their impartiality when expressing their views openly.

The out-of-state participants of the Executive Sessions repeatedly emphasized the importance of the judicial voice in the development of sentencing law and policy, which implies that judges in other states take different views regarding their roles in this arena. This does not mean that California judges can or should model themselves after judges in other states. It does, however, suggest an opening – the role of the judiciary in shaping sentencing law and policy is evolving and we look forward to investigating these questions with California judges more in the future. ❖