

**NATIONAL  
ASSOCIATION OF  
SENTENCING  
COMMISSIONS**



**Examining Our Commissions &  
Sentencing Policy**

**1999 Annual Conference  
Salt Lake City, Utah  
August 8-10**

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**NATIONAL ASSOCIATION OF SENTENCING COMMISSIONS**  
**1999 ANNUAL CONFERENCE**  
**SALT LAKE CITY, UTAH**  
**AUGUST 8-10**

# **EXAMINING OUR COMMISSIONS & SENTENCING POLICY**

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# National Association of Sentencing Commissions

## 1999 Conference Program

Salt Lake City, Utah ♦ Aug. 8 - 10

### "Examining our Commissions and Sentencing Policy"

As we approach the turn of the century, most of our jurisdictions are facing monumental issues in sentencing and corrections. In light of such challenges and opportunities, this conference will provide a forum for candid comparison, reflection, and examination of sentencing commissions and their purposes.

#### Sunday August 8

5:00 p.m. - 7:00 p.m. Registration & Reception

#### Monday August 9

8:00 - 9:00 a.m. Registration & Continental Breakfast

9:00 a.m. Welcome & Introduction

9:30 a.m. Keynote Speaker: **Michael R. Sibbett, Chair of Utah Board of Pardons & Parole and President of Association of Paroling Authorities International**

10:00 a.m. Break

10:15 - 11:45 a.m. 3 Optional Roundtables (Panels & Discussions)

#### 1. **Addressing Disparity**

How are sentencing commissions effectively addressing disparity in sentencing?

Chair, Brian Ostrom  
National Center for State Courts

Rick Kern  
Virginia Sentencing Commission

Kevin Blackwell  
United States Sentencing Commission

Deb Dailey  
Minnesota Sentencing Commission

#### 2. **Issues Related to Prison Population Projections**

How projections are used differently by states, the political implications surrounding projections, accuracy issues, and use of consensus groups.

Chair, Barbara Tombs  
Kansas Sentencing Commission

Susan Katzenelson  
North Carolina Sentencing Commission

Leslie Powell  
Arkansas Sentencing Commission

Pablo Martinez, Ph.D.  
Special Projects Director, Texas

#### 3. **Intermediate Sanctions & Sentencing Commissions**

What is the role of sentencing commissions in developing viable alternatives to prison?

Chair, Paul O'Connell  
Oklahoma Sentencing Commission

Judge Richard S. Gebelein  
Delaware Sentencing Commission

Judge Richard Walker  
Kansas Sentencing Commission

Ray Wahl  
American Probation and Parole Association

Noon Lunch with Speaker: **Hon. K.L. McIff, Judge for 6<sup>th</sup> District Court of Utah**

1:15 - 2:45 p.m. 3 Optional Roundtables (Panels & Discussions)

**1. Post-Release Supervision**

How is structured sentencing dealing with the evolution and abolition of parole?

Chair, Leslie Powell  
Arkansas Sentencing Commission

Don Blanchard  
Utah Board of Pardons and Parole

Sharon Henegan  
United States Sentencing Commission

Fritz Rauschenberg  
Ohio Criminal Sentencing Commission

**2. Predicting Risk**

How do sentencing guidelines predict risk of re-offending?

Chair, Kim Hunt  
DC Advisory Commission on Sentencing

John Steiger  
Washington Caseload Forecast Council

James Creech  
Virginia Sentencing Commission

Jeanneine Gabriel  
United States Sentencing Commission

**3. Discretion Follow Up**

Continued from the '98 Conference. Focus on mandatory minimums, overcrowded prisons, release practices, judicial compliance, sentence negotiations, and revocations. What is the impact of these issues on the balance of discretion and what to do about it?

Chair, Debra Dailey  
Minnesota Sentencing Commission

Kevin Reitz  
University of Colorado Law School

2:45 p.m. Break

3:00 - 4:00 p.m. Open Discussion Groups and Deliberations - Part 1

***Legislative Strategies: Bringing Effective Structured Sentencing Policy into the Political Arena***

How are sentencing commissions creating policy in light of public opinion, media, and victims? (First of two parts on sentencing reform, follow up with action steps at Tuesday session)

5:00 p.m. - 7:00 p.m. Reception

**Tuesday August 10**

8:00 a.m. Continental Breakfast

9:00 - 10:30 a.m. 2 Optional Roundtables (Panels & Discussions)

**1. Role of the Media**

Sentencing policy and release of information

Chair, Mark Bergstrom  
Pennsylvania Commission on Sentencing

Hon. Charles C. Brown  
Pennsylvania Sentencing Commission

Hon. Renee Cardwell Hughes  
Pennsylvania Sentencing Commission

**2. IT Session: Mechanics of Guideline Development & Evaluation**

Different approaches to development and ways to use data to assess how well a system is working. Information Technology and Tracking Sentencing Policy (calculation software, data warehousing, integration of data, standardized coding, etc.)

Chair, Paul Hofer  
United States Sentencing Commission

Brian Ostrom  
National Center for State Courts

Rick Kern  
Virginia Sentencing Commission

10:30 a.m. Break

10:45 - 11:45 a.m. Open Discussion Groups and Deliberations - Part 2

***Follow-up on Previous Days Legislative Strategies: Bringing Effective Structured Sentencing Policy into the Political Arena***

How are sentencing commissions creating policy in light of public opinion, media, and victims? (Second part of previous day's discussion including action steps)

Noon Lunch with Business Meeting

1:30 p.m. Plenary Session (Panel) ***Wrap-up of 1999 NASC Conference and Discussion of Conference 2000 in Pittsburgh!***

3:00 p.m. Closing

## ***Addressing Disparity***

How are sentencing commissions effectively addressing disparity in sentencing?

**Chair, Brian Ostrom (National Center for State Courts)** - Disparity analysis was one of the primary reasons for the initial development of sentencing guidelines. There was much discussion regarding whether guidelines had the ability to reduce disparity. More recently, the discussion surrounding the development and implementation of sentencing guidelines has focused on issues such as truth in sentencing and abolition of parole. However, disparity analysis has remained an important factor for sentencing commissions. The panel focused on three different aspects of disparity: the importance of continuing to study disparity; the importance of quality research; and the interchanging nature of disparity.

**Deb Daily (Minnesota Sentencing Commission)** - Minnesota has a very disproportionate population of minority confinement. Recent growth in prison population has occurred primarily in races other than the white race. What, therefore, is causing this disparity?

In Minnesota, non-white offenders are convicted of offenses which call for imprisonment more often than white offenders and have more serious criminal histories. There are also differences in departure rates. For instance, a disproportionate amount of whites seemingly commit intra-familial sex crimes, which have very high departure rates, much more often than other races. Also, white offenders convicted of assault with a dangerous weapon are more likely to receive downward departures than non-white offenders convicted of the same offense. Another sign of disparity is found in arrests: there has been a large increase in the percentage of non-white people being arrested. There has been an even larger increase in the percentage of non-white people being convicted and sentenced, suggesting that something is happening in the system between the arrest stage and the conviction and sentencing stage. Unfortunately, there is no data to adequately study these trends.

It seems that drug offenses are one of the primary types of offenses contributing to the disparity. In Minnesota, there has been an extraordinary increase in the number of offenders sentenced to prison for drug offenses in the past 15 years. Over a similar time period, there has been a shift in the length of stay numbers for drug-offenders: in 1981, white offenders stayed slightly longer than non-white offenders; however, the most recent numbers show that non-white offenders stay longer than white offenders. Minnesota's tough drug laws may have the unintended consequence of contributing to the disparity problem. Because the law requires large differences in length of stay for very small differences in the amount of drug involved, there doesn't seem to be much difference between offenders being convicted of first degree, second degree, and third degree offenses, etc. However, the tough drug laws are having a particularly heavy impact on minorities, especially African-Americans. Because many of these

things are difficult to impact through guidelines, part of the solution may require legislative changes.

These trends illustrate the importance of continuing disparity studies.

**Kevin Blackwell (United State Sentencing Commission)** - Many researchers are not as familiar with sentencing guidelines as they need to be to do accurate research on disparity. An example is found in a 1995 article which appeared in USA Today using data from the United States Sentencing Commission and concluding that the United States Sentencing Guidelines are responsible for substantial disparity between white defendants and black defendants. The study failed to consider several factors which, when considered, show that the source of the disparity is not the sentencing guidelines.

The study excluded probationary sentences; adding them back in dropped the disparity rate by half. Looking at the following three statutory factors also had an impact: the substantial assistance reduction, the five year weapon enhancement, and instances where the statutory minimum exceeds the guidelines maximum. Examining the racial breakdown on when these factors occur shows that the disparity reported by the USA Today is caused by federal law and by prosecutorial discretion rather than by the sentencing guidelines. Summarizing briefly, white defendants are more likely to receive the substantial assistance reduction; black defendants are more likely to receive the five year weapon enhancement; and black defendants are more often faced with the situation where the statutory minimum exceeds the guidelines maximum.

This does not suggest that there is no disparity in the federal system. It simply demonstrates the need to correctly identify the source of disparity. We cannot adequately address disparity if we do not understand what is causing it.

**Rick Kern (Virginia Sentencing Commission)** - In the early 1980's, Virginia became part of a national trend of studying disparity. As part of an effort to develop a detailed database from which to draw data to study disparity, pre-sentence and post-sentence reports were automated and standardized in 1985. This provided about 250 unique factors on each convicted felon which in turn provided a rich source of data. Studying this data led to the conclusion that disparity did indeed exist. Enough evidence existed to develop voluntary sentencing guidelines that described historical sentencing practices and excluded extra-legal factors. The voluntary guidelines were implemented on a pilot basis in 1989. The pilot study resulted in two conclusions: (1) the guidelines increased neutrality in sentencing, meaning that the impact of extra-legal circumstances was reduced; and (2) consistency increased in the pilot site, meaning that similarly situated defendants were more likely to be sentenced similarly. These conclusions led to the statewide adoption of the guidelines.

In 1995, the sentencing guidelines underwent a major overhaul with truth in sentencing being the basis for the new system. As a result, disparity analysis shifted and began focusing on compliance rates. The Commission has also examined where,

within the guideline ranges, judges sentence, differences in compliance by offense category, compliance rate differences by circuit, geographic patterns, jury cases versus non-jury cases, and inter-judge disparity. (The Commission released a report listing each judge's name, overall compliance rate, aggravation rate, mitigation rate, and number of cases.)

### ***Issues Related to Prison Population Projections***

How projections are used differently by states, the political implications surrounding projections, accuracy issues, and use of consensus groups.

#### **Chair, Barbara Tombs (Kansas Sentencing Commission)**

- This area is unique and has significant potential for political use and misuse.
- Although there exists varying methodologies, common themes are identified.
- Keep it simple.
- Quality of the data is key.
- Use consensus groups.
- Continually monitor projections and findings.
- Use the most honest methodology.

**Pablo Martinez, Ph.D. (Special Projects Director, Texas)** - There are three general issues that need to be considered when producing prison population projections: 1) the technical component; 2) the political environment; and 3) accountability.

The technical component refers to the basic questions of “what” do you do (projecting end of year populations, admissions, probation intakes etc); “when” do you do it, (how frequently you produce projections); “how” do you produce them (the method that you use to develop your projections, which in the case of Texas, it uses its own developed flow model); and finally “who” uses the projections (how useful are the projections. For instance, are they just for information purposes or are they used for budgeting and construction?).

The political environment refers to the process which assures that the forecaster is protected since all projections are based on a series of assumptions. The users must understand the limitations. At the same time, the numbers should be accepted as the official figures to be used for relevant decisions. It is recommended to have senior agency as well as legislative and executive staff involved.

Accountability refers to the process of monitoring the projections in such a way that the forecaster, as well as those involved in the process, know how the numbers are matching reality. In case the reality is changing, the leadership needs enough time to properly react and properly plan.

**Leslie Powell (Arkansas Sentencing Commission)** -The Arkansas Sentencing Commission is currently working on developing in-house expertise. Because they are in a learning process, they do prison population projections every six months; for the fiscal year and the calendar year. The projections are made for the general prison population and are broken out by gender. The Commission currently does not project



for community punishment, but hopes to add this in the future. The Commission is learning a lot from mistakes. When they are wrong they find out why and build on that information. This has built a lot of credibility. Projections have helped identify issues that need to be tracked and studied.

Projections impact policy in at least two areas: the budget process and through impact assessments. Although the budget process is generally concerned with only the next two years, many policy decisions are not effective or do not produce results for up to ten years. Thus, you must look further down the road when performing prison population projections.

The Commission is working on several areas including: expanding the scope of its audience; improving data information systems; and defining, measuring, and improving accuracy.

In explaining results, do not get involved in the minutia of how you do your work; talk about the big picture. Credibility is everything in this business and this includes admitting mistakes. Get legislators more directly involved and educated.

**Susan Katzenelson (North Carolina Sentencing Commission)** - North Carolina has developed one of the most sophisticated simulation models used to do annual prison projections. This model has been fairly accurate to date. The North Carolina Sentencing Commission is also responsible for preparing fiscal impacts for proposed new pieces of legislation that provide the legislature with a projected number of additional prison beds related to a particular piece of legislation. In addition to adult offender projections, North Carolina does bed space projections for juveniles.

A sample legislative summary of the annual projection report demonstrated a number of important points: the political arena, itself, determines much of the openness of the report; be truthful in advertising the conclusions; it is critical to have appropriate context and sources for changes in projections; and the bottom of budget impacts need to be easily presented and read. Successful cooperation between agencies and even branches of government is key. Provide the legislature with enough projection information to assure informed policymaking and budget decisions, but do not overburden them with too much data. If change is projected, identify 4 or 5 of the biggest reasons for it. Be sure to establish ground rules and educate policymakers as to primary assumptions, particularly with long term projections.

North Carolina has experienced a lot of success with intermediate sanctions. Accurate projections have been key in this area as well and is certainly not limited to secure placements.

***Intermediate Sanctions & Sentencing Commissions***

What is the role of sentencing commissions in developing viable alternatives to prison?

**Chair, Paul O'Connell (Oklahoma Sentencing Commission)**

- Integrate intermediate sanctions into sentencing guidelines
- Surveillance models alone in intermediate sanctions are suspect
- Evaluate your jurisdiction's community sanctions
- Sentencing commissions should act in a public relations mode in marketing and selling these sanctions
- Commissions should serve as a buffer to the legislature
- Conduct public opinion surveys
- Serve as a credible source of information
- Judicial support for these sanctions is high and the time is ripe

**Ray Wahl (American Probation and Parole Association)** - Intermediate sanctions are a relatively new approach in corrections nationwide. Recent findings show that simply supervising offenders more closely in the community alone will not reduce recidivism. The surveillance model within intermediate sanctions must be accompanied by treatment because most inmates eventually are released. Simply catching and releasing inmates has proven ineffective and the American Probation and Parole Association (APPA) is involved with grant money to evaluate the effectiveness of various intermediate sanctions approaches in supervising offenders in the community. Nationwide, 75% of drug offenders are on community supervision.

Public safety demands a cooperative effort concerning intermediate sanctions. The following lists the "4 c's" for effective intermediate sanctions:

1. Communication
2. Coordination
3. Cooperation
4. Collaboration

A key to successful implementation of intermediate sanctions is effectively merging them into sentencing guidelines. Diverse membership on a sentencing commission provides the critical cross representation. Sentencing commissions can effectively use political clout in gaining intermediate sanctions reform, weaving the specific sanctions into the sentencing process, and providing a forum for discussion and evaluation of such sanctions.

**Judge Richard S. Gebelein (Delaware Sentencing Commission)** - Delaware has succeeded in significant intermediate sanctions reform. One of the premises of its multi-leveled system has been that prison should be reserved for only the most violent

offenders. Initial concerns of this reform included net widening, alternatives being used primarily for probationers, and waiting lists. Delaware's changes enjoyed the luxury of a unified correctional system which facilitated intermediate sanctions.

Credibility and high public profile were key. If the results were no worse after the intermediate sanctions reform, then at least the state has saved a lot of money. However, public safety cannot be compromised or the reform efforts cannot succeed. Sentencing commissions need to watch, evaluate, and omit ineffective alternative sanctions.

The Delaware Sentencing Commission had a legitimate role in defining the population of an effective drug court. Concepts such as "addiction sentences" and "safe streets" were incorporated which, among other things, resulted in 2/3 of offenders living at home versus 2/3 not at home when it started. Sentencing commissions should serve as a lightning rod away from the legislature. Public opinion needs to be regularly tested and the Delaware Commission had communications with the business community to foster support for community sanctions. High profile community service efforts included the work of clearing wooded areas for school ball parks and chopping the resulting wood for use. Such alternatives were well accepted by the public.

**Judge Richard Walker (Kansas Sentencing Commission)** - Intermediate sanctions preceded sentencing guidelines by 10 years. Kansas embraced the Minnesota model but reform has been slow. This changed in 1993 with the Kansas Sentencing Guidelines. The Kansas Sentencing Commission provided more and more information to the legislature. It also structured intermediate sanctions into sanction "units." A long list was provided which allowed for customized sentencing and all of this, at first, went no where. It was not timely. For intermediate sanctions to succeed, the effort must have the right resources at the right places.

Currently, significant reform has occurred in Kansas and a pretty extensive scope of services is available. The Commission continued to provide good data, accurate projections, and potential cost savings and current success has been tied to credible data and legislative statistical modeling. Sentencing commissions provide needed staff work and data capability.

### ***Post-Release Supervision***

How is structured sentencing dealing with the evolution and abolition of parole?

**Chair, Leslie Powell (Arkansas Sentencing Commission)** - The following issues were identified as important considerations in a discussion of post-release supervision:

- What kind of supervision will be imposed and what type of sanctions will be imposed for violations?
- What determines length of post-release supervision (severity of crime vs. how much time offender served in prison)?
- Are sanctions for revocations related to the sentence?
- How substantive is the supervision?

**Sharon Henegan (United State Sentencing Commission)** - Soon after abolishing parole, Congress realized that supervising offenders who had been released from prison was a good idea and therefore created “supervised release” which is imposed by the court at the time of sentencing. The length of supervised release depends on the seriousness of the offense for which the original prison term was imposed. Although it was originally not revocable, Congress later allowed for the revocation of supervised release, punishable by short prison terms. By statute, supervised release is optional. However, the sentencing guidelines require it in every instance in which the defendant is sentenced to more than one year in prison.

Because the federal system has no paroling authority, a supervised release term is triggered when the Bureau of Prisons releases the offender. United States probation officers are charged with supervising offenders under supervised release and are responsible for reporting any violations to the court that imposed the original sentence.

The United States Sentencing Commission had two options regarding sanctions for violations and revocations of supervised release: it could develop either guidelines or policy statements. The Commission opted to create policy statements which must be considered by the court but, unlike guidelines, are not mandatory.

Reasons for revocation must be found by a preponderance of the evidence at a hearing. An important difference between supervised release and parole is that an offender under supervised release has already served the entire sentence. Thus, supervised release is not a continuation of their sentence and if supervised release is revoked, the offender, upon returning to prison, is not serving the balance of the original sentence. This means that terms of incarceration for revocations of supervised release are much shorter than they were for revocations of parole. A revocation is not intended to approximate the sentence the offender would receive upon conviction for the new criminal conduct. By statute, the purpose of incarcerating the offender upon revocation is not punishment. Rather, revocation is

the result of a breach of trust—the failure to abide by the conditions of supervised release.

**Fritz Rauschenberg (Ohio Criminal Sentencing Commission)** - Before the implementation of sentencing guidelines, Ohio had indeterminate ranges for high level offenses and determinate sentences for low level offenses. This changed when the guidelines took effect in 1996 and Ohio now has a determinate sentence model with post-release control, similar to the federal system.

Parole is an option only for the highest level sentences (life sentences). After termination of sentence, the adult parole authority, which supervises released offenders, imposes a set of conditions. Upon a violation of those conditions, the adult parole authority has limited authority to bring offender back into prison for small amounts of time.

Ohio has also instituted “judicial release” which allows offenders in prison to apply to the sentencing judge for release. In ruling on this, the judge holds an open hearing at which victims, police, the prosecutor, and others can testify. If an offender commits a felony while under judicial release, the adult parole authority can request that the court impose additional prison time for the violation in addition to time imposed for the felony. An offender who is successful in his application for judicial release is usually supervised by the local probation department.

**Don Blanchard (Utah Board of Pardons and Parole)** - Utah has a very strong indeterminate sentencing system. The Utah Sentencing Commission is directed by statute to develop sentencing guidelines, but those guidelines are voluntary. Utah’s sentencing structure for felonies consists of three broad categories (0 - 5 years, 1 - 15 years, 5 years - life) as well as life with parole, life without parole, and death. All of these sentences come under jurisdiction of the Board of Pardons and parole once pronounced. Nearly all mandatory minimum sentences have been repealed in recent years.

The type of post-release supervision used in Utah is traditional parole. Parole decisions are made by the Board of Pardons and Parole which is the sole release authority. Parole hearings are open to public and victims are entitled to attend and testify. The parole system is very workload intensive as the Board must always be open to new information and must always be willing to reconsider new credible information which may impact a prior decision. The decisions of the Board are not appealable, though the procedures utilized by the Board are subject to challenges and litigation. Released offenders are supervised by the Utah Department of Corrections; however, the Board is responsible for establishing the conditions of parole and for revocations of parole. Parole can be revoked on the basis of any violation where guilt has been established through a plea, an evidentiary hearing, or an admission of guilt and a waiver of the revocation hearing. Upon revocation, the offender returns to prison with the remaining balance of the original sentence back in effect and the Board has the same authority as it did for the original sentence.

Even though there will always be regrettable decisions the Board holds very strongly the philosophy that making offenders accountable for getting out of prison makes them more responsible.

## ***Predicting Risk***

How do sentencing guidelines predict risk of re-offending?

**Chair, Kim Hunt (DC Advisory Commission on Sentencing)** - There are three kinds of risk assessment instruments. First generation risk assessment instruments are largely the result of clinical observations and are subjective assessments. A significant problem is that they have poor inter-rater reliability-- the results may vary widely depending on who the rater is. Also, predictive accuracy is not very good. Second generation risk assessment instruments are objective and are based on empirical data. A number of studies have shown good predictive accuracy and have found a good inter-rater reliability. These instruments typically use a lot of static criminal history elements. Third generation risk assessment instruments, also objective, have all the virtues of the second generation instruments as well as an additional advantage: they focus on the needs of offender as well as the risk of offender.

**Jeanne Gabriel (United States Sentencing Commission)** - The reasons for including criminal history on the sentencing guidelines include increasing the defendant's culpability, predicting recidivism, and targeting serious offenders. In developing the criminal history, the Commission tried to create a model that balanced the just desserts theory with risk prediction. The Commission attempted to adapt proven models to fit their purposes and to meet political and practical concerns.

Certain juvenile factors are excluded due to staleness or because they are minor in nature or constitutionally invalid. The Commission was reluctant to categorize by offense types because each state's charging practices and offense descriptions are different. It decided instead to use sentence length to determine the seriousness of prior offenses. The federal criminal history score has been criticized for incorporating prior judge disparity by including prior convictions, as determined by sentence length. Another criticism is that the criminal history does not distinguish between violent offenses and non-violent offenses. However, the alternative is inviting disparity by referencing offense categories that differ widely among the states. The federal system is also starting to consider criminal history in determining offense seriousness meaning that certain factors will be double counted because the factors will receive points in criminal history and will be considered in offense seriousness.

**John Steiger (Washington Caseload Forecast Council)** -In Washington, both adult and juvenile guidelines were originally based on a just desserts model but also include factors that contain a risk prediction component. Neither system originally included much of a risk assessment component. However, the juvenile system, in particular, has seen an increase in the use of risk measures. In the juvenile system, one of the first things done was to develop a risk assessment measure used to determine whether offenders sentenced to the state would go to an institution or community placement. This measure was based on two categories of factors: risk to recidivate and offense

impact (if you committed a serious enough of an offense, you would go to institution regardless of risk to recidivate). It also included factors such as development of social problem skills which can impact risk to recidivate. One important idea was to include enough items so that offenders on the border could change and get a lower score.

Juvenile rehabilitation started using the same instrument to make decisions whether to place a juvenile in a group home after releasing the juvenile from an institution. Most recently, this tool is being used to make discretionary release decisions (whether offenders should be released at the maximum or minimum range). Thus, the total amount of confinement is now related to the risk assessment rather than being based completely on the offense.

The adult system has not incorporated an explicit risk assessment like the juvenile system, but more alternatives are arising which are related to risk assessments. For example, new sentencing options and treatment programs are available for first time sex offenders and drug offenders. These alternatives demonstrate a shift away from the strict just desserts model.

**Jim Creech (Virginia Sentencing Commission)** - Virginia has taken a very empirical approach to the use of risk assessment in sentencing guidelines. The commission is currently involved with two risk assessments intended to be used at sentencing: (1) a risk assessment for fraud, larceny, and drug offenders is in the pilot stage; and (2) a risk assessment for sex offenders is in the data collection stage.

The legislature directed the Virginia Sentencing Commission to develop the risk assessment for fraud, larceny, and drug offenders in order to identify offenders with a low risk of reoffending for purposes of placing them in an alternative sanctions programs. The Commission has established several eligibility criteria which screen out violent offenders, offenders subject to certain statutory enhancements, and offenders who were not recommended to incarceration.

Several factors have been found to be statistically significant in determining if someone is a low or high risk to reoffend. Factors which indicate a higher risk of reoffending include the following: sex (male); age (youth); whether the offender has ever been married; whether the offender was employed at time of offense; whether the offender acted alone; prior arrests; previous adult incarceration; and previous juvenile incarceration.

The unexpressed purpose of the sex offender risk assessment is to identify those offenders most likely to reoffend. Confronted with this information judge are likely to impose harsher sentences. This contrasts with the previous risk assessment where the purpose is to direct offenders into intermediate sanctions.



### ***Discretion Follow Up***

Continued from the '98 Conference. Focus on mandatory minimums, overcrowded prisons, release practices, judicial compliance, sentence negotiations, and revocations. What is the impact of these issues on the balance of discretion and what to do about it?

#### **Chair, Debra Dailey (Minnesota Sentencing Commission)**

- Diagrams of discretion apportionments within a given jurisdiction are a helpful tool to examine the balance of discretion (*See Addendum*)
- Side by side comparisons of state discretion diagrams foster discussion of the differing dynamics and results involved and how sentencing commissions tie in
- Mandatory sentences increase prosecutorial discretion and have a symbiotic effect of limiting judicial discretion and disabling sentencing commissions
- Examples of policies that influence judicial sentencing discretion include specific statutory authority, publication of compliance rates, boundaries defined by appellate courts, and, of course, repeal of mandatory minimum sentences
- A growing area that should be addressed by a future NASC conference is the discretion involved in revocations of both probation and parole

#### **Kevin Reitz (University of Colorado Law School)**

The theme from the 1998 NASC Conference in Minneapolis, Minnesota was "Balancing Discretion." To begin this follow-up, the panel focused on the varying layers of discretion and used diagrams of "bubbles" illustrating varying sizes of discretion apportioned to legislatures, prosecutors, judges, etc. in a given jurisdiction. (*See addendum for samples.*) Interactive discussion followed and included comparison of system-wide and case-specific levels.

Systems employing mandatory penalties had dramatically increased prosecutorial discretion (illustrated by the prosecutor bubble being larger than the judicial bubble). Such discretion even exceeded legislative discretion. A diagram of the federal system captured the symbiotic relationship of varying levels of discretion. Did Congress, for example, intend to so empower prosecutors when it enacted mandatory minimum sentences for drug offenses? Such legislation effectively disables sentencing commissions.

A diagram representing the Massachusetts balance of discretion was subject to interpretation. There, the sentencing judge has deviation power from mandatory penalties and, although this deviation is restricted, it still exists and was reflected correspondingly with an increased bubble of judicial discretion.

Minnesota's diagram showed a more even balance between legislative and sentencing commission bubbles. However, given appellate processes available, it had a large appellate court bubble. One result from this and an impacting appellate decision was much less prosecutor charge inflation. Delaware's model demonstrated a "softening" as a result of its diversion away from mandatory minimum sentences while Washington state's model had a unique bubble representing public opinion through initiative which overruled significant sentencing legislation.

The discussion then turned to guidelines compliance. Given the federal system with its active appellate judiciary and compressed district court discretion bubble, the break out session discussed increasing guidelines compliance short of coercion. Virginia, for example, has sentencing reporting requirements and judges elected by the legislature. Such a system and distribution of discretion seem to foster compliance with guidelines. As a note, public scrutiny of these reported sentences dies down after an initial media blitz.

As a part of sentencing bargaining, parties can plea bargain into a valid deviation. Delaware, for example, is experiencing a substantial erosion of the guidelines due to the negotiations of the parties. This is inherent in all systems to varying degrees. With the federal system, there has been tremendous pressure to plead guilty since the guidelines have been implemented. Perhaps there should exist more accountability for the parties' discretion given their significant role in sentencing bargaining. This could include requirements to specify and document the rationale for the bargaining. If the onus is on the sentencing court to approve and therefore justify, on the record, the previous plea and sentencing bargains, perhaps it should have more say in the matter. Many judges are starting to demand justifications and their recourse is not to approve the bargain.

Future discretion discussions should include revocation decisions. Probation and parole officers and revocations are playing a growing role in impacting prison populations. Is there adequate systemic accountability in these decisions? Should there be guidelines at this end? Delaware and Washington use such an instrument and these efforts are decreasing variability.



## ***Role of the Media***

Sentencing policy and release of information

**Chair, Mark Bergstrom (Pennsylvania Commission on Sentencing)** - Three events prompted the Pennsylvania Commission on Sentencing to formulate a formal release of information policy: (1) a local newspaper requested access to sentencing data; (2) a Pennsylvania trial court judge requested sentencing data to defend himself against charges that he had violated the Code of Judicial Conduct; and (3) a Pennsylvania trial court judge, and later the U.S. Senate Judiciary Committee, requested sentencing data as part of the confirmation process for a federal judicial appointment. After responding to these individual requests the Commission concluded that a formal policy regarding release of information was necessary in order to avoid the need to respond to further requests in an ad hoc manner. Eventually, the Commission adopted a policy which permits the release of both aggregate reports and judge specific reports. The Commission is also planning a “media day” to coincide with the release of information in order to educate the media on the meaning of the sentencing data. A copy of the Commission’s policy is found in the addendum. Mark suggested that NASC be used as a clearinghouse for release of information policies. This would allow states to track policy changes being made in this area and would serve as a useful tool for comparing various state policies.

**Judge Renee Cardwell Hughes (Pennsylvania Commission on Sentencing)** - Judge Hughes, representing the perspective of an urban judge, explained her reasons for voting against the policy, but also stressed that as a member of the Commission, she will do everything possible to see that the policy is properly and fairly implemented. Sentencing commissions, in general, and the release of sentencing data, in specific, attempt to quantify something which is not able to be quantified because they fail to recognize that sentencing is an art, not a science. Thus, the numbers, charts, and graphs which are released to the media and the public do little to illustrate what a judge must consider when a human being, as opposed to a newspaper headline, is standing before the judge for sentencing.

The relationship between the judiciary and the media is often a very tense and sometimes even hostile one. Fifteen second sound bites unfairly characterize and often demean judges without giving the public a fair idea of what the judge’s role is. Labels and stereotypes created by the media do not allow the public to understand why the judiciary makes certain decisions and do not reflect the efforts which go into sentencing decisions.

The Commission’s good faith belief is that the release of sentencing information policy will increase reporting of sentencing data. It is entirely possible that the policy can have this effect. However, it is equally possible that a story centering on one judge and severely criticizing that judge for her sentencing practices could actually lead to a reduction in reporting of sentencing data by the courts.

The policy could also impact retention elections in Pennsylvania. Only one judge in Philadelphia County has not been retained since Pennsylvania began electing judges and that was the result of a media campaign against the judge. The release of information policy could increase the frequency of this type of media campaign as the media will now be armed with additional information which can be easily distorted or misinterpreted. Another problem is that a critic of a particular judge could use the information to suggest that the judge is soft on crime and that judge's hands are tied due to the Code of Judicial Conduct.

**Judge Charles C. Brown (Pennsylvania Commission on Sentencing)** - Judge Brown represented the perspective of a rural judge. Judges who sit in one or two judge districts have been subject to judge specific information for a long time. Thus, the release of information policy was not as big of an issue for judges sitting in less populous districts as it was for judges sitting in more urban districts.

After the policy was formulated the Commission held hearings to explain the policy and receive input. Following the hearings, the Commission appointed a committee to work with and hear from various agencies in the state regarding the policy. The release policy allows each district to submit an explanation of any events or practices occurring in that district which might affect the compliance rate. The explanations will be released with the sentencing data.

In rural counties, judges have failed to be retained quite frequently. The effect that the release of judge specific information will have on this is still unknown. For many judges the result will be a matter of timing as it's effect may depend on whether the information is released before or after the retention election.

**Rick Kern (Virginia Sentencing Commission)** - In 1998, a local newspaper made a request under the Freedom of Information Act for judge specific information. Before that time, the Virginia Sentencing Commission had only released guideline compliance rates by judicial circuit. The Commission denied this request, explaining that it did not compile that type of information. The newspaper followed with a request for the raw data which was determined by the Commission and the Virginia Attorney General's office to be public information. The Commission decided that releasing raw data allowed too much room for error and ultimately chose to perform the analysis necessary to compile the requested data.

The report released to the newspaper included each judge's name, overall compliance rate, mitigation rate, aggravation rate, and number of cases. The information was a big story for a about a week, but quickly blew over. Judges were given a period of time to review the information before its release and any explanations were released to the newspaper with the sentencing data. The media quickly realized that the information was a non-story once all of the caveats and footnotes were considered. However, without those caveats and footnotes, the information could have been very misleading.

Many judges feared that the information would be used as a scorecard when the legislature was considering reappointment of judges. However, it has never been used in this manner.

***IT Session: Mechanics of Guideline Development & Evaluation***

Different approaches to development and ways to use data to assess how well a system is working. Information Technology and Tracking Sentencing Policy (calculation software, data warehousing, integration of data, standardized coding, etc.)

**Chair, Paul Hofer (United States Sentencing Commission)**

- Data is the most valuable thing sentencing commissions have
- A summary of the survey forms on guidelines development and refinement will be provided
- Key issues discussed were data development and quality controls including some herculean efforts in some jurisdictions
- Various states are struggling with issues involving electronic and paper data
- Experimentation with crime seriousness scales
- Future NASC conference may want to further address compliance tracking and assessment and refinement of data

**Brian Ostrom (National Center for State Courts) & Rick Kern (Virginia Sentencing Commission)**

In reaching sentencing commission goals, good data is invaluable. Policy judgments should be backed by data. Accurate, detailed data gathering is the sign of a maturing sentencing commission. States that have good sentencing data all have sentencing commissions. In Michigan, recent disbanding of the sentencing commission has resulted in sentencing guidelines and data simply “floating around.” In all jurisdictions, there always exist issues concerning the quality of the data. Without guidelines or similar system-wide mechanism in sentencing, what can practically be done with the data?

There are a number of examples of states forging through varying levels of reform concerning sentencing data. Pennsylvania, through an audit process, is accumulating and analyzing all sentencing forms. Minnesota is in the midst of detailed tracking of prison commitments and surrounding issues and Utah is developing a 21<sup>st</sup> Century database coordinating the sentencing guidelines with the Department of Corrections and the courts. Unfortunately, a Federal Justice Department effort to provide financial incentives to collect sentencing commission information never got off the ground.

North Carolina’s data is all electronic. However, its sentencing commission is limited to what the data system collects, a common obstacle in states. Its juvenile system, in addition, has internet transmission of data from its probation officers to the Sentencing Commission. Complicated guidelines hinder electronic efforts and this should be considered in any guidelines reform.

Standardization of data and coding is a common issue. In Virginia, pre-sentencing investigation data was standardized 4 years ago. A combination of check boxes and open ended narrative capability have accommodated quality data gathering and analysis. Even though 40% of pre-sentence investigations are waived, post-sentencing investigations are done on all incarceration cases. Information concerning juvenile records is elusive and documenting deliberations and reasons for a particular plea negotiation are common problems.

Different jurisdictions are addressing the reliability and validity of sentencing data. Often, probation officers or other pre-sentence investigators are trained to be “champions” of the sentencing guidelines. Diligent probation officers have been key to the “success” of the federal guidelines. Data samples that have holes are still valuable. Court records are typically spotty. There are varying legal duties imposed upon prosecutors and the accumulation of data from them. Legal requirements of disclosure in prosecutorial practices provide necessary detail in guidelines tracking and revision.

Minnesota has an information policy group that has made some real achievements. It provides a mechanism for practical, beneficial work plus it provides training to connect various parts of the system. Such an effort can facilitate improvement in standardization of codes among different divisions within an entire system. When it comes to coding, the federal government is moving toward a mixed approach. Developing “in house” coding and common definitions are ongoing obstacles to effective sentencing tracking.

Discussion also focused on a survey form entitled *Checklist of Research Methods Used for Guidelines Development, Evaluation, and Refinement* and comparisons were made between various state approaches. (See Addendum) Different “prescriptive” approaches to guidelines development include building in changing statutory penalties and mandatory minimums, prison capacity issues, and personal views of policymakers. Delaware, for example, aspired to a “baseline standard” but it was not achievable.

“Descriptive” guidelines, essentially relying upon past practices, have a number of methodological concerns. In developing Utah’s descriptive sentencing and release guidelines, the sentencing commission had to rely upon inconsistent statistical pools, some of which were fairly small and required judgment calls. Descriptive or empirical approaches to guidelines development are not conducive to reform when a jurisdiction does not necessarily want to rely on the past.

Offense seriousness ranking comes into play in guidelines development and is vulnerable to criticism of lacking rationale. The North Carolina Sentencing Commission is required, by law, to “test” each bill for proportionality. Nevada has used community surveys in comparing sentencing policy and law and these have arrived at interesting results which vary according to crime trends.



Future NASC conferences could examine, in more detail, guidelines compliance tracking methodologies and results and the refinement of sentencing data.

## **Open Discussion Groups and Deliberations**

### ***Legislative Strategies: Bringing Effective Structured Sentencing Policy into the Political Arena***

How are sentencing commissions creating policy in light of public opinion, media, and victims?

The focus of the legislative strategies sessions was developing action steps to accomplish two goals: (1) make sentencing commissions more sensitive to the political realities faced by lawmakers; and (2) make lawmakers more aware of the expertise and resources available through sentencing commissions.

(See Addendum for panelists)

The panel began by identifying possible barriers that occur between sentencing commissions and legislators. These suggested barriers are the result of the panelists' individual experiences and although they may not be true in all cases, they are helpful considerations and served as a springboard to discussion.

- Legislators will defer to experts in many areas, but not in criminal justice policy.
- Criminal justice policy is the only area where a legislator will allow himself to be totally anecdotally driven.
- Legislators are often forced to look for easy answers to complex problems.
- Criminal justice policy should be long-term, but the legislative process is not always conducive to long-term policy making.
- Legislators control the purse strings.

Using these barriers as a starting point, the panels and audience identified the following action steps:

- In discussing recommendations with the legislature, address the benefits of the current system and the proposal as well as cost.
- Explain the effectiveness of the current system in comparison with the effectiveness of the proposal.

- Sentencing commissions should set a reasonable agenda rather than trying to accomplish too much in a limited time period because overreaching can hurt a commission's credibility.
- Give information to legislators outside of the legislative session such as opportunities during the legislative interim process.
- Engage in face-to-face explanations as well as written reports.
- Speak the language of legislators: legislators often want to discuss crime control and costs, not necessarily disparity and proportionality.
- Dig deeper to discover why certain trends exist rather than automatically enhancing penalties.
- Provide solutions in addition to articulating what will *not* work.
- Foster relationships with legislative staff. This will help provide continuity as legislators come and go. In turn, assure that sentencing commission staff make a strong and regular presence.
- Go beyond written reports and push the issue.
- Be proactive.
- Remember that presentation is everything. Find the right person to deliver the right message in the right way at the right time.
- Understand the legislative process and do not attempt to bypass the process.
- Think broader than sentencing. Legislators will not always compartmentalize different areas within criminal justice policy. However, do not extend so far beyond your expertise that your future credibility is questioned.
- Establish trust. Legislators must be able to trust you and your information.
- Remember the exceptions. Sentencing commissions want to focus on the big picture. Legislators must respond to constituents whose problems are often the exception, not the rule.
- Seek to find agreement among the governor, the speaker of the house, and the senate president.

- Hold important conferences in a key area in order to attract attention from the legislature.
- Actively involve legislators in the sentencing commissions business, even at a subcommittee or peripheral level.

# **ADDENDUM**