1-1-2002

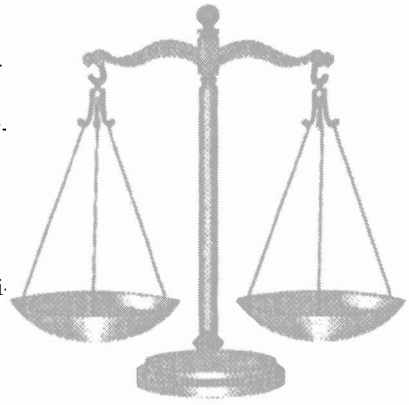
The New Politics of Sentencing

Michael M. O'Hear
Marquette University Law School, michael.ohear@marquette.edu

Publication Information
Published as Michael M. O'Hear, The New Politics of Sentencing, 15 Fed. Sent'g Rep. 3 (2002).

The New Politics of Sentencing

MICHAEL M. O'HEAR
Assistant Professor, Marquette University Law School



With this Issue, the *Federal Sentencing Reporter* concludes its two-issue survey of recent sentencing reform developments at the state level. The previous Issue focused on drug reforms, particularly a series of ballot initiatives in four states mandating treatment in lieu of incarceration for low-level drug offenders.[1] The present Issue places those developments in a broader context. Within the past two years, more than a dozen states have adopted important sentencing reforms. Surprisingly, given the general trajectory of sentencing law over the past three decades, most of the current state-level reforms are calculated to *reduce* sentence lengths (albeit sometimes rather obliquely). Perhaps most notably, legislatures have scaled back mandatory minimums in Connecticut, Indiana, Louisiana, and North Dakota. Thus, one can now ask with a straight face the question posed by Marc Mauer in this Issue: "Is the get-tough era in sentencing coming to a close?"

Recent state reforms may indeed suggest a fundamental change in sentencing politics. Not coincidentally, however, they have occurred during a period of economic stress. Shrinking tax revenues put pressure on all aspects of a state's budget. Corrections spending is no exception. Thus, successful reform efforts across the country, from California to Louisiana to Virginia, have focused on the cost-savings that can be achieved by reducing the size of prison populations. Yet, as the contributions to this Issue emphasize, fiscal pressures cannot by themselves explain the current move away from long mandatory prison terms. Rather, recent state reforms must also be understood as a reflection of social justice concerns and a willingness to employ rehabilitative, instead of purely punitive, approaches to criminal justice problems. Sentence-reducing reforms may thus hold appeal for both fiscal conservatives and social liberals. Not surprisingly, then, reform in many states has been a bipartisan affair. What remains to be seen is whether short-term economic pressures will provide an impetus for far-sighted reform in other states, or, alternatively, promote the adoption of ill-advised quick fixes.

Contributions to this Issue consider recent state developments from three perspectives. First, Marc Mauer, Daniel Wilhelm, and Nicholas Turner offer a national perspective, summarizing recent developments and identifying important patterns across states. Second, Michael Lawlor and Thomas Hammer provide more detailed accounts of recent developments in Connecticut and Wisconsin, respectively. Their articles are complemented by a recent report from the Kansas Sentencing Commission, which also offers an in-depth, state-specific perspective on current reforms. Finally, two recent reports from the Department of Justice's Bureau of Justice Statistics provide a statistical perspective on state-level trends and experiences.

I. National Perspectives

Daniel Wilhelm and Nicholas Turner of the Vera Institute of Justice focus on the role of costs in sentencing and corrections policy. They ask, perhaps facetiously, "Should cost matter when it comes to deciding who goes to prison and for how long?" From a state perspective, the answer must be "yes." (The answer would perhaps be different at the federal level, where government has greater resources, more limited criminal justice responsibilities, and a freer hand to operate in the red.) Assuming the importance of cost, Wilhelm and Turner identify three contrasting approaches that states might use to control corrections spending.

First, states may cut corrections budgets without making changes to underlying sentencing policies. Wilhelm and Turner catalog a litany of prison closures, staff reductions, and program cuts in states across the country. They are appropriately skeptical about whether these strategies, in and of themselves, represent viable long-term solutions to burgeoning corrections budgets. They particularly question the elimination of educational, substance-abuse treatment, and vocational

programs. Second, Wilhelm and Turner discuss sentencing policy changes. Here, they highlight the recent elimination of mandatory minimums in some states. Yet, while they seem less dubious of these reforms than the direct budget cuts, Wilhelm and Turner plainly prefer a more systematic approach. Thus, finally, they turn to structural reforms that would permanently link substantive sentencing law to fiscal constraints. Interestingly, the three states they hold out as models (North Carolina, Kansas, and Virginia) adopted their reforms in the 1990's, prior to the current economic downturn. They focus on the need for a state sentencing commission that devises sentencing guidelines with an eye to resource limitations, advises the legislature on the fiscal consequences of sentencing policy proposals, and develops empirically based risk-assessment tools for the purpose of diverting low-risk offenders from the prison system. It is hard to quarrel with Wilhelm and Turner's vision of a more rational sentencing policymaking process, although Wisconsin's tortured journey—detailed in this Issue by Thomas Hammer—suggests that the politics of this sort of reform may not be simple. Additionally, it remains uncertain whether a time of budgetary crisis is indeed favorable for this sort of reform, which promises long-term benefits but requires immediate expenditures in order to establish a new sentencing bureaucracy.

The recommendations of Wilhelm and Turner are echoed in the document reprinted here from the American Bar Association's Criminal Justice Section, *Blueprint for Cost-Effective Pretrial Detention, Sentencing and Corrections Systems*. The *Blueprint* was endorsed by the ABA's House of Delegates in August 2002. The *Blueprint* characterizes fiscal pressures as a "catalyst" for reform, but acknowledges that its recommendations advance "many of the justice-related goals for which the ABA has long advocated." In Part IV below, however, I raise some questions about the long-term prospects for a marriage between fiscal and justice agendas.

Recent state reforms may indeed suggest a fundamental change in sentencing politics. Not coincidentally, however, they have occurred during a period of economic stress.

In his article, Marc Mauer, Assistant Director of The Sentencing Project, is less concerned with specific policy choices than zeitgeist. He asks whether the get-tough era is coming to an end. Like Wilhelm and Turner, he notes that several states have recently scaled back mandatory minimums, while others have adopted mandatory treatment for low-level drug offenders. Mauer sets these reforms within a context of a long-term decline in crimes rates, changing political and economic realities, and growing public receptivity to alternative sanctions. Yet, Mauer ends his article on an appropriately ambivalent note. As he suggests, it is indeed too early to tell whether the get-tough era is coming to end. Public attitudes may well revert to a punitive orientation when crime rates rebound—as some evidence suggests is already happening[2]—and fiscal pressures ease. Moreover, as Mauer also suggests, the prison-building boom of the 1990's tied the economic welfare of many communities to punitive criminal justice policies; these interests can be expected to resist any significant reorientation away from the policies of the 1990's.

II. The View From the States

In his article, Representative Michael Lawlor, who chairs Connecticut's House Judiciary Committee, details his state's experience with mandatory minimums, culminating in a successful legislative effort in 2001 to restore greater discretion to judges at sentencing. In many respects, the Connecticut case study represents an archetypal example of recent state-level reforms. Drug sentencing was the principal target of reformers, who questioned both the efficacy and the fairness of long mandatory sentences for non-violent drug offenders. Yet, reform efforts did not reach the top of the legislative agenda until Connecticut faced a budget crisis. Then, with the backing of a Republican governor, the state legislature easily passed a bipartisan reform bill.

Lawlor touts his state's success in scaling back mandatory minimums as a "model" for other states, and even the federal government. At the same time, he appropriately notes various unique characteristics that facilitated reform in Connecticut, such as the relatively nonpolitical orientation of the state's judges and prosecutors. Still, the adoption of similar reforms in a state like Louisiana—surely as culturally and economically distinct from Connecticut as any two states can be—suggests that Lawlor may be justified in proposing Connecticut as a national model.

Next, Professor Thomas Hammer describes reforms in Wisconsin, which were adopted in two phases between 1998 and 2002. These reforms, far more systematic and comprehensive

than Connecticut's, effectuated the state's transition from indeterminate sentencing to truth-in-sentencing. The first phase abolished parole. The second, adopted earlier this year after a lengthy period of legislative gridlock, eliminated most mandatory minimums and penalty enhancers; established a new sentencing commission and temporary sentencing guidelines; and provided for early release of some prisoners (notwithstanding the nominal abolition of parole). These most recent reforms, like Connecticut's, are intended to promote more selective use of prison resources during a time of fiscal crisis. In particular, the state faced the prospect of a rapidly expanding prison population because judges did not adequately adjust their sentencing practices so as to compensate for the abolition of traditional parole.[3]

Complementing Hammer's article, this Issue excerpts portions of Wisconsin's new sentencing guidelines. Wisconsin considered and rejected the federal guidelines as a model, adopting instead advisory guidelines. The guidelines, comprised of offense-specific worksheets and explanatory notes, provide a checklist of relevant offense and offender characteristics. The guidelines also make clear the appropriateness of probation for many categories of offenders who have relatively little criminal history.

Rounding out the state-specific materials, this Issue also excerpts a 2002 report from the Kansas Sentencing Commission to the state legislature. Exemplifying the sort of deliberative, cost-conscious role that Wilhelm and Turner envision for state sentencing commissions, the Kansas Commission proposes an elaborate and thoughtful series of reforms comprised of three chief components: the administrative consolidation of probation, community corrections, and parole; the development of a new risk/needs assessment tool; and the diversion of low-level drug offenders from prison to treatment. In keeping with other reforms discussed in this Issue, the Kansas proposal aims to divert from prison low-risk offenders who may safely remain in the community. At the same time, the proposal helpfully recognizes the need for improved community supervision services as a precondition for enhanced diversion.

To the extent that the current BJS study is read as a report card on the get-tough policies adopted in the 1980's and 1990's—as some critics have done—the grades are, at best, mixed.

III. National Statistical Studies

The Issue concludes with a pair of recent reports issued by the United States Department of Justice's Bureau of Justice Statistics ("BJS"). The first constitutes one of the most ambitious empirical studies of recidivism in recent years. The researchers tracked rearrest, reconviction, and reincarceration rates for 272,111 state inmates who were released in 1994. More than two-thirds of the released inmates were rearrested within three years, while slightly below one-half were reconvicted within the same time frame. These numbers are comparable to, or higher than, numbers from a similar BJS study of prisoners released in 1983.

To the extent that the current BJS study is read as a report card on the get-tough policies adopted in the 1980's and 1990's—as some critics have done[4]—the grades are, at best, mixed. Insofar as harsher sentencing was intended to deter repeat offenders, there is reason to doubt the success of that strategy. Indeed, if anything, overall recidivism rates increased from the mid-1980's to the mid-1990's. (At the same time, it is important to note that harsher sentencing may be justified on grounds other than deterring recidivism, such as a desire to advance retributive objectives.)

The BJS report also holds interest in other respects. High rates of recidivism raise concerns that, if measures to reduce prison populations are not implemented carefully, public safety may be compromised, which could prompt a backlash against the new policies. Yet, the report also demonstrates that recidivism rates are not uniformly high, but, rather, vary—sometimes quite dramatically—according to such factors as criminal history and offense of conviction. This data lends further support to the sort of risk assessment tool that is advocated by Wilhelm and Turner.

The BJS report also underscores the critical need for states to focus on reentry programs. The researchers estimate that more than a quarter of the reincarcerated inmates were returned to prison for a technical violation of parole conditions. Moreover, the data indicates that the vast majority of recidivism occurs in the first year following release. Statistics such as these suggest a need to rethink the structure of post-release supervision, as Kansas is doing.

The second BJS study included in this Issue describes nationwide incarceration trends through 2001. The statistics tell three stories that are of particular interest in this context. First, the record numbers of Americans being held in custody—one in every 146 U.S. residents is now incarcerated in a state or federal prison or local jail—provide a dramatic illustration of the legacy of the get-tough policies of the past twenty years. Second, while the U.S. prison population continues to grow, the rate of growth has slowed steadily since 1995 to a rather stable level of 1.1% in 2001. This trend may to some extent reflect new policies and attitudes towards incarceration.

Third, the nationwide statistics mask quite dramatic differences among the states. While ten states have increased their prison population by more than 50% since 1995, four states have actually reduced their prison population during the same time period. Incarceration rates in different states range from 127 persons to 800 persons per 100,000 residents. The get-tough 1990's did not leave a uniformly deep imprint on all states; the new era—if indeed a new era has begun—will also surely be experienced quite differently across the country.

IV. Unanswered Questions

The recent state developments highlighted in this and the previous Issue represent a nascent trend towards a more selective use of incarceration. Yet, the future of this trend remains in many respects quite uncertain. An overarching question, of course, is whether any additional states will go the way of Connecticut, Wisconsin, and the other states that have recently adopted reforms. Efforts to soften New York's Rockefeller drug laws, for instance, appear stalled. Michigan's intriguing ballot initiative on drug sentencing—reprinted and discussed in the previous FSR Issue on state developments[5]—was removed in September from the state ballot for technical defects.[6] Assuming, however, that the trend towards more selective use of incarceration continues to develop at the state level, many important questions remain as to the content and politics of reform. A few of these questions are suggested below.

Advocates for substantive changes in sentencing policy are wise—especially in times of budgetary pressure—to emphasize the cost-saving potential of their proposals.

A. What Is the Ultimate Purpose of Reform?

Two different types of purposes animate recent state reforms: (1) saving taxpayer dollars, and (2) achieving substantive changes in criminal justice policy (e.g., moving drug sentencing from a punitive to a treatment-oriented approach). These different sorts of objectives are by no means necessarily inconsistent. Indeed, recent reform efforts have succeeded precisely by emphasizing statutory changes that promise to deliver better policy at a lower cost. Yet, it is perhaps naïve to think that the current strange-bedfellows coalitions of fiscal conservatives and criminal justice liberals will find many reforms upon which they can agree, or, indeed, that the coalitions will hold together as underlying economic and social conditions change.

For instance, conservatives may support drug treatment as an alternative to incarceration in order to cut corrections budgets. A commitment in principle to treatment, however, is not a commitment to any particular type of treatment program or level of funding. In practice, budget-minded legislators may systematically underfund treatment programs, or oppose controversial treatment tools, like methadone. Operating under these sorts of constraints, treatment may not live up expectations. Confronted with high failure rates, supporters may have difficulty justifying treatment-oriented strategies on a dollars-and-cents basis, and pro-treatment coalitions may fracture.

One may easily envision analogous scenarios in connection with education and vocational training for prisoners, enhanced post-release supervision, sentencing commissions, and any other reforms that require short-term expenditures in order to achieve uncertain or intangible long-term benefits. Likewise, reform-minded coalitions may lose steam if crime rates increase or fiscal pressures ease.

All of this is to suggest that it may matter *why* the public supports reform. Advocates for substantive changes in sentencing policy are wise—especially in times of budgetary pressure—to emphasize the cost-saving potential of their proposals. Yet, over the long run, this strategy cannot take the place of persuading the public that their proposals represent good criminal justice policy (from the standpoint, for instance, of fairness or public safety), and not just good budgetary policy.

B. What Is the Target of Reform?

From California's Proposition 36 to Connecticut's modification of mandatory minimums, many of the most notable recent reforms have targeted drug sentencing. Indeed, a good case may be made that the drug policy pendulum is now swinging away from punishment and towards treatment. This shift, in turn, may be set in the context of a broader movement away from "just say no" and towards a world in which drug policy and politics are more complex and nuanced, perhaps best represented by the legalization of "medical marijuana" in many states, and also by the widespread, often grass-roots, drug court movement.

Viewed in this light, however, recent state sentencing developments may have less to do with changing attitudes towards crime and criminals and more to do with changing attitudes towards drugs and addiction. In practice, of course, sorting out these different categories is nearly impossible. Addiction and intoxication are closely associated with a great many non-drug crimes. Yet, whether the target is ultimately conceptualized as drug policy or sentencing policy may have an enormous impact on the politics and content of reform.

For instance, both the California and Connecticut reforms go to great pains to exclude violent offenders from the benefit of the new laws.[7] As a matter of practical politics, this may be unavoidable. (Representative Lawlor, for one, seems to suggest as much.) But, in the interests of improving *drug* policy, the reforms may distort *sentencing* policy. They suggest a rigid dichotomy between drug crimes and violent crimes. This dichotomy not only disregards the vast range of severity in the conduct that might be categorized as violent, but also obscures the complicated relationship between drugs and violence.[8] Substance abuse and addiction surely lie behind a great many crimes of violence, which should affect the way we view the offender's culpability and rehabilitative potential. Conversely, even "non-violent" drug crimes may contribute to a drug industry and a drug culture that are responsible for a great deal of violence. A rational sentencing policy would take these sorts of considerations into account, rather than creating a per se disparity in the treatment of "drug" offenders and "violent" offenders.

Drug sentencing reform offers an opportunity for richer public dialogue on many issues of great importance to sentencing generally, including the meaning of criminal culpability, the possibility of rehabilitation, and the viability of intermediate sanctions. As drug reform gathers steam, it remains to be seen whether other types of sentencing reform will be carried forward or shunted aside.

Drug sentencing reform offers an opportunity for richer public dialogue on many issues of great importance to sentencing generally, including the meaning of criminal culpability, the possibility of rehabilitation, and the viability of intermediate sanctions.

C. Who Enacts Reform?

The California and Connecticut reforms, while similar in many respects, represent, in another sense, dramatically different models of legal change. Connecticut exemplifies "insider" reform, with proposals emerging from conventional policymaking sources and passing through conventional legislative processes. California exemplifies "outsider" reform, with proposals being enacted directly by the voters through the ballot initiative. Additional insider reform may occur soon in Kansas, while additional outsider reform is possible in states with pending drug treatment initiatives.[9] Indeed, both models may play an important role in state-level sentencing policy changes for many years to come.

Assuming that both insiders and outsiders share the same objectives (at least at the very general level of seeking to divert relatively low-risk offenders from prison), does it really matter whether the impetus for reform comes from inside or outside the political establishment? The recent developments profiled in this and the previous Issue suggest a very tentative yes: insiders and outsiders may have a tendency to structure reform rather differently.

First, while insider reforms like those in Connecticut and Louisiana enhance judicial discretion by scaling back mandatory minimums, the drug treatment initiatives diminish judicial discretion by prohibiting incarceration of qualifying offenders. These contrasting tendencies are perhaps to be expected: to the extent that the judiciary belongs to the existing political establishment, one would expect that political insiders would be more inclined to trust judges than would outsiders. Second, the current initiative efforts in Ohio and Florida would amend the respective state constitutions by adding new drug sentencing provisions. Once again, this is not surprising: it is to be expected that outsiders would want to put

reforms as far beyond the reach of legislative modification as possible. At the same time, one may question the wisdom of constitutionalizing technically complex sentencing laws, particularly when the chief precedent for these new policies—California's Proposition 36—has yet to be thoroughly assessed.

Insider reform, in turn, may be accomplished through at least two quite different institutions: a specialized sentencing commission or a legislature. Kansas exemplifies commission-initiated reform, while Connecticut exemplifies reform that was accomplished in the absence of a commission. In recent years, much skepticism has been expressed about legislative activity in the sentencing arena, with some suggestion that legislatures are by their very nature more likely to take a harsh approach to sentencing.[10] The experiences in states such as Connecticut and Louisiana should serve to qualify these sorts of criticisms. At the same time, there seems little reason to doubt the value, as Wilhelm and Turner demonstrate, of an expert, nonpartisan sentencing commission in the reform process.

D. What Is the Role of the Federal Government?

State sentencing law cannot be viewed in isolation from federal law. State criminal jurisdiction substantially overlaps with federal, perhaps most notably in the narcotics area. Elsewhere, I have described the disparities between state and federal sentencing practices, which create important incentives for prosecutorial forum-shopping.[11] Through cooperative state-federal efforts, police and prosecutors can circumvent state sentencing policies by directing defendants to federal court. Changes in state law that reduce sentence lengths may result in increased use of the federal forum to compensate for the loss of leverage over defendants in state court.

At the federal level, clearer policies are needed to define what is appropriately prosecuted in federal court, and what is best left to state courts. Current ad hoc arrangements not only lend an air of arbitrariness to sentencing, but they may also compromise state policy choices on matters that are chiefly of state concern, such as the sentencing of low-level drug defendants. To the extent that states are now implementing substantially new paradigms for handling drug offenses, the urgency of adopting clear federal policies in this area is all the greater. It is difficult to justify a system in which law enforcement officials—exercising essentially unguided and unreviewable discretion—decide whether the crack addict faces a five-year mandatory minimum in federal court or mandatory treatment in lieu of incarceration in state court.

IV. Conclusion

Faced with crushing budget deficits, states will no doubt continue to look to corrections as a source of cost-savings. This presents new opportunities for sentencing reform, particularly reform that diverts low-risk offenders from prison in favor of drug treatment and other rehabilitative programs. Yet, budget pressures need not necessarily lead to more selective use of incarceration. Instead, the current economic situation may simply lead to reduced programming for offenders, less effective community supervision, more crowded prisons, and other budgetary quick-fixes that may prove in the long run to be penny-wise and pound-foolish. At the state level, this is a time of unusual opportunity and unusual risk.

Notes

1 *See Recent State Reforms I: Developments in Sentencing Drug Offenders,* Federal Sentencing Reporter, Vol. 14, No. 6 (May/June 2002).

2 Sarah Kershaw, *Report Shows Serious Crime Rose in 2001,* N.Y. Times, June 24, 2002, at A10.

3 *See* David Callender, *"Truth" Law Could Break the Bank,* The Capital Times, April 20, 2002, at 1A (discussing evidence of longer sentences in first 18 months after effective date of truth-in-sentencing law in Wisconsin).

4 *See* Fox Butterfield, *Study Shows Building Prisons Did Not Prevent Repeat Crimes,* N.Y. Times, June 3, 2002.

5 *See Michigan Drug Treatment Initiative,* 14 Fed. Sent. Rep. 344 (2002); Michael M. O'Hear, *When Voters Choose the Sentence: The Drug Policy Initiatives in Arizona, California, Ohio, and Michigan,* 14 Fed. Sent. Rep. 337 (2002).

6 *See* Michigan Campaign for New Drug Policies v. Board of State Canvassers, 650 N.W.2d 327 (Mich. 2002); Peter Luke, *Drug Laws Miss Ballot, Hit Budget,* Grand Rapids Press, Sept. 22, 2002, at A23.

[7] For a description of California's Proposition 36, see O'Hear, *supra* note 4, at 338.

[8] For a more elaborate description of my concern here, see O'Hear, *supra* note 4, at 341–42.

[9] Initiative efforts in Ohio and Michigan were detailed in the last issue. The Michigan Initiative has since been disqualified. *See supra* note 5. In addition to the Ohio Initiative, drug treatment initiatives are still pending in the District of Columbia and Florida, although the Florida Initiative will not be on the ballot until 2004. Information about each of the pending campaigns, including the texts of the proposed initiatives, is available on-line at <http://www.drugreform.org>.

[10] *See, e.g.,* Franklin E. Zimring et al., Punishment and Democracy: Three Strikes and You're Out in California 200–03 (2001); William J. Stuntz, *The Pathological Politics of Criminal Law,* 100 Mich. L. Rev. 505, 546–57 (2001).

[11] *See* Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal–State Sentencing Disparities,* 87 Iowa L. Rev. 721, 730–35 (2002).