Address to the North Carolina Sentencing and Policy Advisory Commission

Jeremy Travis
Address of Jeremy Travis
Senior Fellow, The Urban Institute
to the
North Carolina
Sentencing and Policy Advisory Commission

DECEMBER 7, 2000
Judge Spainhour, members of the Commission, colleagues:

I consider it a real honor to be invited to join you at this strategic planning retreat as you reflect on the past decade of sentencing reform in the State of North Carolina and consider the future directions of sentencing policy in your state.

This is an important occasion -- for several reasons. First, as I hope you appreciate, the North Carolina Sentencing and Policy Advisory Commission is very highly regarded in criminal justice policy circles around the nation. In a few minutes, I intend to elaborate upon this observation, but suffice it to say that the work of this Commission has taken on larger significance in the national discussion of sentencing policy. Consequently, any new directions you set will be closely watched and emulated far beyond the boundaries of your state.

Second, you are holding this retreat at an important moment in our nation’s history. Our discussions about crime and justice are framed by two historical facts. Crime rates are at their lowest levels in a generation. Rates of violence, particularly juvenile violence, have gone through a fifteen year cycle of sharp increase, starting in the mid 1980’s, and decline, beginning in 1993, mostly tied to the introduction of crack cocaine into our central cities. Rates of adult homicide have been declining steadily for nearly twenty years. And our rates of property crime have dropped nearly fifty percent over the past 25 years. So, our communities are safer than they have been in a long time.

At the same time, our rates of imprisonment, which have been climbing steadily since 1973, have quadrupled and stand at their highest levels ever. After a very stable per capita imprisonment rate that hovered at about 110 per 100,000 from 1920 to 1973, our rates of imprisonment started to grow and are now four times higher than the 1973 level, at about 452 per 100,000.

The significance of these two facts for your deliberations, in my view, is that there is a new openness on the part of the public and their elected representatives to considering pragmatic, cost-effective approaches to crime and punishment.

Third, we are witnessing significant shifts in the operations of the agencies of the criminal justice system. From community policing, to neighborhood prosecution, to problem-solving courts, to drug treatment infused in justice decision-making, we are seeing the contours of a different approach to the missions of the traditional agencies of justice and, most importantly, their relationship with the world outside the courtroom.

So, this is a moment of great opportunity – to reaffirm the importance of the work this Commission has done in the past, and to define some new directions for the future.

I see my task this evening as offering some reflections on the structured sentencing movement – and the place of this Commission in that movement – and offering some thoughts about the possible connections between your work and those larger
opportunities. I undertake this task with great humility – I am no longer a government official, and realize that I have the freedom of suggesting ideas that need to be considered in the messy environment of public opinion, political realities, and budgetary constraints. But I hope that my years of service in that world of government policy will lend some credibility to these ideas.

I. The Place of the North Carolina Commission in the Structured Sentencing Movement.

We too easily forget the tenor of the public discourse on crime and punishment that marked the end of the 1980’s and the early 1990’s. Crack cocaine had exploded in the mid-1980’s and juvenile violence was rising steeply, with no end in sight. In a short seven-year period from 1985 to 1992, the rate of juvenile homicides, the rate of juvenile violence committed with a gun, and the rate of minority youth arrested for drug offenses all doubled – in just seven years. The war on drugs intensified, sentencing regimes were ratcheted upward, three-strikes laws were enacted, parole came under new attacks, gun policies moved simultaneously in the direction of concealed carry laws and mandatory waiting periods, and the public debate over the best course for our criminal justice policy seemed never to stand still long enough for calm deliberation.

The State of North Carolina experienced its own version of these crosscurrents. Prisons in your state were full, the parole board was releasing offenders at higher rates and at earlier times to make space, the community corrections system appeared to be losing credibility as offenders opted for short prison terms rather than probation.

Your state legislature created a Commission to look into these issues and make recommendations to the General Assembly. After a period of public debate, legislative review, and political compromise, a new sentencing policy was enacted in 1993, one that survived the shifts in the balance between the political parties over the next two elections.

You are the better judge, but it certainly seems to an outside observer that the tenor of the public discourse on these difficult issues has changed in North Carolina. What are the essential ingredients in this shift? First, your commission clearly managed the politics of the matter well. Allow me to offer a perspective from my experience in New York City. I watched as a sentencing commission failed – and with it the promise of a quasi-independent deliberative body where sentencing policy could be given the more careful, empirical and philosophical deliberation that these important issues require. In another state, California, we have seen sentencing policy being made through direct referendum as three strikes laws and, last month, mandatory drug treatment, bypassed any deliberative consideration by a legislature or a commission and were enshrined in the state constitution. From all accounts I have read of your experience here, you at the General Assembly managed to sustain both the integrity of the Commission’s deliberations and the integrity of the legislative process against several key challenges that could have undermined your course.
Second, and related to the first, you introduced the reality of fiscal discipline to sentencing policy discussions. The innovation of the fiscal impact statement was a singularly important contribution to the world of sentencing commissions. This deceptively simple idea requires that the symbolic process of changing sentencing policy – often in the direction of harsher sentences – be put to the test of budgetary tradeoffs. It is natural in our democracy for elected officials to state ambitious goals – like universal health care, mandatory early childhood education, or across the board tax cuts – but these goals must always be tempered with the reality of available funds, the economic consequences of differing revenue policies, and the relative value of competing claims on scarce taxpayer dollars. The requirement of a fiscal impact statement for new sentencing laws brings our criminal justice policies into the same conservative fiscal framework as other social policies.

Third, your Commission made a valuable contribution in simultaneously considering sentences to prison and sentences to community supervision. Many Commissions over our history have thought their primary task was to develop a sentencing framework that primarily determined the length of prison sentences. Your Commission wisely decided to link the policies that would govern imprisonment decisions with a vigorous policy and budgetary discussion about the goals and methods of community corrections and intermediate punishment. This balanced approach, in my view, helped to give the public and criminal justice professionals a feeling of confidence that you recognized the critical interplay between these two forms of sentencing.

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

What is next? I have no special competence to suggest any changes within the framework that you have established. Indeed, the point of your success is that those modifications should be debated within the contours of your Commission and its relationship to your General Assembly and the citizens of North Carolina.

Rather, I would like to focus your attention outside the framework of structured sentencing and outline five developments in the sentencing field that might warrant your attention as you consider future directions. Some of the ideas were discussed within the Executive Session on Sentencing and Corrections sponsored by the Department of Justice in which Judge Tom Ross from North Carolina participated. I strongly recommend that you read the publications produced by the Executive Session. As I read your broad enabling statute, I believe all of these fall within your purview. These are (1) the relationship between sentencing and public safety; (2) problem-solving courts; (3) drug treatment in the criminal justice system; (4) restorative and community justice, and (5) procedural justice.
My central argument is that these innovations on the national stage provide opportunities for sentencing commissions to engage the public in a new conversation about criminal justice. Notwithstanding our low crime rates and high imprisonment rates, many sentencing commissions – and many state legislatures – continue to face pressures to increase the level of punishment. In my view, these new developments in sentencing policy provide effective responses to those pressures – they provide new forms of accountability to the public for the workings of the criminal justice system – in short, they provide leadership opportunities for those charged with developing sentencing policy.

II. Accountability for Public Safety.

We imposed sentences on convicted offenders for a number of reasons, reasons that are often in conflict with one another. In doing so, we strive for a sense of proportionality – a sense that punishment is appropriate for the offense and the offender. The development of sentencing grids that incorporate the severity of the offense and the severity of the offender’s prior history, with ranges of permissible sentences and rules governing departures, can be understood as codifications of the principle of proportionality. Sentencing grids essentially reflect a “just desserts” philosophy, allowing little room for other considerations.

Yet we also impose sentences to enhance public safety – through deterrence, incapacitation or rehabilitation. In our discussion about the purposes of sentencing, and in the public’s expectations, we often express the goal of enhancing safety through our sentencing policies. While there have been any number of efforts to evaluate the success of sentencing policies – particularly sentencing commissions – to achieve proportionality, there have been few that have asked whether a state’s sentencing policy has enhanced public safety.

The Wisconsin Sentencing Commission established by Governor Tommy Thompson asked this question. That commission was unusual in the history of sentencing reform because it had business leaders on the commission, individuals who asked the difficult bottom line question, what are we getting for this particular expenditure of funds? Have we produced communities that are both more just and safer? In some ways, the most telling testimony given to that Sentencing Commission was the police officer who testified about the conditions at the intersection of 9th Street and Concordia in Milwaukee, a particularly dangerous street corner. He made scores of drug arrests on that corner, and those arrests resulted in a high percentage of convictions, and the people he arrested served years of time in prison, but the conditions at 9th and Concordia did not change – and the State of Wisconsin paid a lot of money to house those folks in state prison. So, a reasonable question is whether the public has benefited from this particular criminal justice policy. Put another way, one could question whether the “just desserts” philosophy had triumphed at the expense of effective public safety policies.
It is admittedly a difficult task to assess the public safety impact of sentencing policies. But at the level of the individual offender, this analytical approach introduces an important dimension to our discussion of sentencing policy — namely, what do we know about our ability to reduce the public safety risk posed by an individual? When this question is asked, we start to think about new interactions between the criminal sanction and public safety. For example, in a domestic violence case, a court would need to tailor its decisions in ways that reflect the actual risk of recurring violence, not just the two dimensional grid. For a drug selling conviction, the court would have to consider ways to reduce the recurrence of drug selling by that offender. For a drug addict, the court would have to consider ways to reduce the return to drug use. For a sex offender, the court would have to consider the appropriateness of different interventions.

I am aware that many sentencing judges — and sentencing commissions -- consider this future behavior of offenders beyond their jurisdiction. I am also aware that the concept of rehabilitation has fallen far from its place as a primary goal of our justice system. But I would submit that this is a legitimate concern for your deliberations — both because the public expects these results, and because we know a lot about how to enhance safety. Often these new approaches involve bringing new expertise into the courtroom and creating new partnerships. For example, the dramatic reduction of juvenile crime in Boston was brought about, in large part, because of new partnerships between the police, prosecutors and probation — and the sentences meted out were part of a community wide effort to control behavior, communicate messages to kids involved in gangs, and swiftly enforce those threats credibly. There was no across-the-board increase in sentence severity, no enhancement of punishments, no more prison space allocated, just a commitment to using the criminal sanction to produce public safety.

You face a particular opportunity to reduce crime in your community. The natural consequence of the prison buildup across the country is that more people are being released from prison. This year, 585,000 prisoners will be released from state and federal prisons, about 25,000 from North Carolina prisons. And, if North Carolina is like most states, about two thirds of them will be rearrested in three years. A number of states and communities around the country are experimenting with new ways to reduce the safety risks posed by prisoners reentering their communities — through partnerships between corrections and law enforcement, involvement of the faith community, businesses coming into prison to screen potential employees, etc. I think it is entirely appropriate for sentencing and corrections systems to be measured on their success at reducing recidivism (and note with interest that your Commission is required to produce biennial reports on recidivism rates). I also think it is appropriate for you to challenge these other sectors of society to do their part. The reentry movement around the country has great promise — in part because it can produce safer communities.

I realize that this issue has a unique history here in North Carolina. Your Commission originally recommended the total elimination of post release supervision, then the legislature enacted supervision for a limited period for a limited category of prisoners. And of course offenders sentenced under the “old law” are still released under traditional parole supervision. Yet I think this history puts North Carolina in a good position to
develop new policy on reentry. This process must begin with the recognition that, under structured sentencing, thousands of prisoners leave your state prisons with no systematic attention to reintegrating them into society. One need not violate truth in sentencing principles to devise reentry policies that will enhance public safety.

III. Problem-Solving Courts.

One of the most exciting and important developments in our field these days is the emergence of problem-solving courts – and I think this development raises profound questions about the role of structured sentencing systems. We are all quite familiar with drug courts, perhaps less familiar with domestic violence courts, mental health courts, community courts, or DUI courts. What they have in common is the use of judicial supervision – and inherently the sanctioning powers of the judiciary – to achieve certain changes in offender behavior. For drug courts, the goal is to reduce the level of drug use by the defendant; for domestic violence courts, to reduce the level of violence and other abuse in the relationship; for mental health courts, to provide appropriate treatments to mentally ill offenders; for community courts, to reduce low level offending in the community; for DUI courts, to provide treatment to habitual drunk drivers.

For many reasons, these represent novel approaches to the adjudicatory process. These problem-solving courts extend judicial supervision until behavioral outcomes are achieved, a departure from traditional judicial efficiency models. They consider offender behavior, not simply the legal case, as the unit of work for the court. They typically use judicial sanctions – such as short term detention for the third failed urine test of a drug offender – as the “sticks”, and untraditional events -- such as graduations in drug court -- as the “carrots” to change behavior. They place reduced reliance on traditional adversarial procedures in favor of consensual outcomes. I have sat in any number of these courts around the country and they are unlike any criminal court we were trained to practice in.

What are the implications of these developments for structured sentencing? One answer to this question could be that these new kinds of courts are allowable as forms of diversion for minor cases, and therefore do not invoke fundamentally different principles. I would respectfully disagree. For two reasons, I think these problem solving courts are profoundly important and have implications for the work of sentencing commissions. First, they represent a return to judicial discretion, a quantity that I think has been unduly diminished by the structured sentencing movement. Second, they represent a pragmatic approach to issues that concern the public and therefore can instill greater public confidence in our court systems.

In a number of public opinion polls, we learn that the public is not necessarily as punitive as we might think – rather, they want the criminal justice system to “do something” about the underlying problem. Do something about drug abuse, about family violence, about mental illness, about alcoholism. So, these problem solving courts have taken up that
challenge – and are doing something about the underlying problem that brought this individual, or this situation, to the court.

How could a structured sentencing system accommodate these developments? The first question is whether there is a mechanism to allow consideration of these cases outside the sentencing framework, with the consent of the parties, setting aside the two dimensional grid to add a third dimension, namely the “problem” to be solved. I would be interested in learning whether you think such a mechanism exists. The second challenge is to create new sanctioning powers for the court to impose accountability for failure to respond to judicial expectations. My guess is that this would require new legislation.

As some of you know, Attorney General Reno and I have advocated the creation of reentry courts – a new judicial role in managing the reintegration of offenders into society after serving a prison sentence. And I am delighted to see that a number of jurisdictions have launched reentry courts and the new federal budget hopefully being approved this week will fund more pilot reentry courts around the country. In our view, this idea is no more than a new application of the problem-solving model to an old problem – how to manage the process of reintegration of prisoners. A number of sentencing commissions are considering the development of statutory structures for reentry courts, and I would be delighted if your Commission were to take up this challenge.

IV. Drug Treatment and Criminal Justice.

I would like to share some statistics to underscore the nexus between drug abuse and crime. In most jurisdictions, between half and two thirds of individuals arrested and held by the police test positive for drugs at the time of their arrest. Three quarters of all prisoners have a history of drug and/or alcohol abuse. Yet we do little to reduce the level of drug use in the defendant population. Only 61% of the prisons of this country offer drug treatment. Despite a significant increase in federal funding for drug treatment in prisons, the percent of prisoners receiving drug treatment has dropped, from about 25% in 1991 to 10% in 1997. We know that treatment in prisons works to reduce crime and drug abuse – and works particularly effectively if the prisoner receives treatment following his release from prison. Finally, we know that the rates of relapse are high – for heroin and cocaine addicts who are not treated while in prison, most return to drug use within three months of returning to their communities.

I count myself among those who believe that, faced with these statistics, the criminal justice system has an obligation to use its supervisory powers to reduce drug use within the offender population. As I mentioned before, this perspective argues for expanded use of drug courts – for more offenders, for offenders facing more serious charges and offenders with more serious prior records. This perspective also argues for drug treatment in prisons – we should use this time wisely to give drug addicts the capacity to withstand the temptations of drug use upon return to the community, including post release treatment to get them through the period when relapse is highest. This perspective also argues for a focussed effort within the community corrections components to reduce
drug use through frequent drug testing of those on probation and parole, appropriate treatment for those who need it, and a system of graduated sanctions, similar to those seen in drug courts, for those who need this system of accountability to change their behavior. To make this vision a reality requires careful consideration of the criminal sanctions needed to reduce drug use during the period of supervision. I hope your Commission will take up this challenge.

This systematic approach to drug use is a significant departure from our model of criminal justice. It requires collaboration between the court and treatment communities. It requires statutes to enable judges to impose new sanctions. (In New York State, Chief Judge Kaye has just announced a plan to integrate drug treatment into all judicial decision-making.) It requires a rethinking of community supervision. But the research strongly supports the view that this approach can reduce drug use, enhance public safety, and increase public confidence in the agencies of justice.

V. Restorative and Community Justice.

Over the same thirty-year period that has seen the growth in imprisonment, we have seen the growth of the victim’s movement. This movement has been very successful at changing the role of victims in our criminal proceedings. Here in North Carolina, victims are now given the right to participate in critical court proceedings. But many in the victims movement are now asking whether these procedural rights represent a true victory for victims. Some national organizations, such as the National Center for Victims of Crime, are now arguing for a new approach, called “parallel justice”, which emphasizes the social obligation to respond to the needs of all victims, not just those that are involved in criminal proceedings. Other victim advocates are embracing the call for “restorative justice”, the idea that a nonadversarial forum involving the offender, the victim, and members of their communities who have an interest in the outcome, can better approximate a just outcome.

I would encourage this Commission to have a sustained discussion with victims’ organizations and others in this state (and nationally) to ask whether the criminal justice system is providing justice for victims. And I note that your Commission has victim’s representatives as members. This conversation should also extend to the community at large, asking citizens about their views. The restorative justice movement, and its first cousin the community justice movement, have broken important new ground by bringing new voices into the justice process. In Vermont, the state has created “reparative boards” with trained citizen members who talk to offenders about their actions and mete out appropriate sanctions. In Texas, victim’s representatives sit on panels that advise the prosecutor on sentencing options. In Minnesota, the Department of Correction has hired a restorative justice director. Many state corrections departments allow for victim-offender mediation sessions, and require inmates to participate in victim impact classes to understand the consequences of their actions. In Oregon, the Department of Probation changed its name to the Department of Community Justice and has engaged the
community in designing community service projects for offenders to create value, repay the community, and give justice new visibility.

How would such a discussion intersect with a structured sentencing system? Victim-oriented outcomes such as restitution would be enhanced; victim-offender mediation would be facilitated; victim’ safety needs would be incorporated into bail and sentencing outcomes; community involvement in the sentencing process would be encouraged. But more importantly, these actions open up an important dialogue with the public about the quality and nature of our justice system.

VI. Procedural Justice.

A final thought, one that goes to the day to day work of all criminal justice professionals. There is a very important body of relatively new research that examines the relationship between the actions of those who enforce or administer the law – whether a police officer or a judge – and the attitudes and behaviors of citizens against whom the law is enforced or administered. Most of us share a common sense notion that citizens at the receiving end of the law care most about the impact of the law upon them – was the speeding ticket issued, was the sentence too harsh, was the bail too high. This new research confirms that common sense wisdom, but adds a new insight, namely that it matters – and matters a lot – how the law is administered. This new concept is captured by the phrase, “Procedural Justice.”

If, for example, a police officer explains the reason for his decision to issue a ticket, or stop and frisk, or conduct a search, then the citizen’s sense of justice – sense that he was treated fairly – is much higher. And, in a finding that is somewhat counterintuitive, the way someone is treated is more important than the severity of the enforcement action in determining the overall perception of fairness. So, it would be interesting to ask how our justice system is perceived by victims, witnesses, jurors, defendants, police officers and lawyers. Are decisions explained in clear language? Are individuals treated respectfully? Are people given opportunities to ask questions and share their views?

This research is now influencing the development of new training programs for police officers – teaching them to spend the time with citizens to explain their actions. So, as you are considering engaging the public and providing new forms of accountability, I would urge you to examine this concept of “procedural justice” and help all of the employees of your agencies – whether a police officer, a court clerk, a judge, a lawyer, or a correction officer – remember that the overall sense of justice in our society is enhanced if we treat people fairly, involve them in our work, listen to their concerns, and explain our actions. Sometimes the simplest things are the most powerful.

I offer these five developments for your consideration. I submit that each of them offers an opportunity for leadership, public education, and constructive responses to concerns
about crime. Each of them offers ways to enhance the accountability and legitimacy of our system of justice. Each of them requires the creation of new partnerships and alliances – and new ways of thinking.

Thank you again for the invitation to speak with you. I wish you the best of luck as you chart a new course for your future.