

TESTIMONY BEFORE
THE UNITED STATES SENTENCING COMMISSION

Submitted by:
Jerome G. Miller, D.S.W.

July 15, 1986

NCIA



NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES
Central Office
814 NORTH SAINT ASAPH STREET
ALEXANDRIA, VIRGINIA 22314
TELEPHONE (703) 684-0373

President
JEROME G. MILLER

Advisory Board Members

SEVERA AUSTIN
Human Services Planner
Madison, Wisconsin
LOU BRIN
Department of Sociology
University of Massachusetts
AL BRONSTEIN
National Prison Project
Washington, D.C.
LARRY BROWN
School of Public Health
Harvard University
JOHN M. BURNS
V.P., Westinghouse Broadcasting
New York, New York
JUDI CHAMBERLIN
Mental Patients Liberation Front
Boston, Massachusetts
ROBERT DRINAN
Law Center
Georgetown University
PETER EDELMAN
Attorney
Washington, D.C.
SISTER FALAKA FATAH
Pres./Founder, House of Umoja
Philadelphia, Pennsylvania
SISTER M. ISOLINA FERRE
Director, Playa Ponce
Ponce, Puerto Rico
JAY HALEY
Family Therapy Institute
Chevy Chase, Maryland
JIMMY HARGROVE
Chairman, National Black
Policeman's Association
New York, New York
CHARLENE HARRINGTON
Nursing Home Evaluator
Sacramento, California
JOHN MARTIN
Department of Sociology
Fordham University
JOHN MCKNIGHT
Center for Urban Affairs
Northwestern University
LLOYD OHLIN
Center for Criminal Justice
Harvard Law School
MILTON RECTOR
National Council on Crime
and Delinquency
Hackensack, New Jersey
DAVID ROTHENBERG
Fortune Society
New York, New York
DAVID ROTHMAN
Center for Social Policy
Columbia University
ANDREW RUTHERFORD
University of Southampton
Southampton, England
PETER SANDMANN
Attorney
San Francisco, California
PETER SCHRAG
Journalist
Berkeley, California
ROBERT VINTER
School of Social Work
University of Michigan
THOMAS WINSHIP
Gannett Center for Media Studies
New York, N. Y.
FRED WISEMAN
Documentary Filmmaker
Boston, Massachusetts
MARVIN WOLFGANG
Department of Sociology
University of Pennsylvania
CLAIRE WOMPIERSKI
Department of Social Work
Virginia Commonwealth University
ROBERT L. WOODSON
American Enterprise Institute
Washington, D.C.

I have not come before this Commission with a series of "How to" suggestions as it goes about its task of proposing sentencing recommendations to be attached to the Omnibus Crime Control Bill. Rather, I ask that the commission members and staff view my testimony as a sort of "time-out," an interval less to take notes or listen to legal prescriptions than to pause and reflect a moment or two on a few abiding issues which should never leave the room when this deliberative body meets.

This is not to say I couldn't or wouldn't like to make concrete suggestions. I can and I would. After a decade as an officer assigned to work with the U.S. Military stockade and disciplinary barracks system -- and after two decades working in civilian correctional systems -- many of those years at cabinet-level positions in state government in both Republican and Democratic administration, and after another 8 years heading a private agency staff whose work has been primarily focused on sentencing of felons, I would have a number of specific suggestions. However, I'm sure the Commission will have, or has had opportunity to hear these from others. Moreover, I fear that the recommendations I believe would have the most

OFFICES AND AFFILIATES IN: CALIFORNIA • CONNECTICUT
FLORIDA • INDIANA • NEBRASKA • NEW YORK
NORTH CAROLINA • PENNSYLVANIA • TENNESSEE • VIRGINIA

felicitous effect on sentencing practices and ultimately on the national correctional system -- would probably not be well received by a commission assigned a relatively narrow, technical (dare I say unfortunately, too technical?) mission.

Clearly, the hope and the watchword of those who devised the crime control act was that it would contribute to the commonweal and domestic tranquility of the nation. It was designed and written primarily by lawyers and approved by a body made up near exclusively of lawyers.

As the eminent Norwegian philosopher and criminologist Nils Christie has commented, "Training in law is training in simplification. It is a trained incapacity to look at all values in a situation, and instead to select only the legally relevant ones, that is, those defined by the high priests within the system to be the relevant ones.So few elements of the totality are considered that complete equality is guaranteed. But it is, through its simplifications, a primitive system"¹

The Commission should realize, as it goes about its complicated tasks and adjusts guidelines, grids, and formulae to fit offenses, that at another level, it is still not much beyond the primitive task of those early 19th century European commissions which were given the mission of converting branding and cutting off of limbs into terms of imprisonment -- ten years for a hand, how many for an eye? etc.

As Christie, Foucault and others have demonstrated, there are limits to pain as the means of guaranteeing order. There are even greater problems if we, and particularly you, as Commission members believe that sentencing strictures and time in prison reflect or even have much relevance to the myriad of factors and vagaries which come together to result in the commission of an individual crime of any kind.

The great American philosopher and social psychologist, writing in 1917 on the "Psychology of Punitive Justice" commented that in the legal arena, the social worker is inevitably the sentimentalist. However, in the social settlement, the legalist is an ignoramus. And whether we wish to admit the reality or not, sentencing is in large part, a social settlement -- between offender and society, victim and offender, victim and society, etc. We would deceive ourselves if we really believed that the attaching of set periods of incarceration even minimally met the needs of such a situation. But lawyers with the lost criminal case, much like doctors with the terminal patient, flee from contact and involvement in a task which so clearly reflects the limitations of their professional armamentaria at a most crucial juncture. Retreat to formulae, numbers, and mandatory sentences gives a gloss of rationality and science to a lost cause and makes one's efforts seem more meaningful than facts might otherwise dictate. There are therefore, very real limits to pain in healing or in deterrence in sentencing.

Alduous Huxley, in his classic 1937 book on Ends and Means, noted that progress in civilization has not been progress in technology or

even in justice, but progress in charity. Look to those countries with harsh criminal codes now, or at any time in history -- when held next to their contemporaries. There is little to imitate. We look more to Athens than Sparta, more to Christian Rome than pagan Rome, more to Thomas More than Oliver Cromwell.

The question with the technology of designing a sentencing schema therefore is not simply "what works?" Rather, it is "what can we do which advances a democratic, just and compassionate society?" Obviously, executing first time offenders would probably cut recidivism and serve well the limited needs of specific and general deterrence. But it would be beside the point in our society. Rather, the question is, "How, as you go about your tasks, can compassion be protected in a bill which emanated from a great deal of extreme 'law and order' rhetoric which influenced the kind of passions few would hold as models of civility and temperance?"

It seems to me that you must continually allow that to the degree the individual defendant is sentenced by formulae alone -- and to the degree judicial (human) discretion is removed from the individual case, to that degree we are teaching other less felicitous lessons than the simple message of justice. We are also teaching that the individual matters little, that we prefer not to hear, much less consider unique, eccentric and otherwise troublesome mitigative information in our deliberations. I realize there are limits on these considerations.

Such limits were all encompassing even in the heyday of judicial discretion. So I don't think we need be overly fearful of individual considerations routinely undermining the imposition of sentences under our criminal laws.

But it seems to me, the Commission must attempt to maintain as much discretion in sentencing as politically possible -- precisely because it keeps the human and the fallible involved on both sides of the legal and social settlement. We will be in great crisis as a society when we are able to make infallible decisions based on computer models of sentencing -- for with such decisionmaking we lose the interchange, argument, roughhousing, and doubt, which is crucial to the evolution and development of a democratic society.

In this sense, one can in part see mandatory sentencing itself as a flight from certain realities. In the words of British anthropologist Edmund Leach, it is an example of the "imposition of discipline by force; it is the maintenance of the values of the existing order against threats which arise from its own internal contradictions..."² In a sense, that is one of the unfortunate tasks of this sentencing commission.

I realize of course that this commission has a limited role -- to recommend parameters of pain -- possible "time" to be served for given criminal offenses. May I presume to make some recommendations:

- 1) -- As you set the parameters, let your thinking and moral judgement wander a bit afield from exacting justice, retribution, pain and deterrence -- to include the possibility of healing, reconciliation and forgiveness.

- 2) For those who see criminal justice sentences as absorbed primarily and only in meting out punishment -- at least give equal consideration to pain that is less likely to debilitate, isolate and harden. Reliance on "time" alone (even for deterrent purposes) as the best or even primary means of righting wrongs, guaranteeing justice or giving redress, betray -- if nothing else -- a curious lack of imagination.

May I propose that the Commission members take time for reflection -- look at themselves and ask a simple question -- What would I recommend were I, or a guilty son or daughter, brother or sister, friend or relative before the bench for sentencing? If we have a minimum of insight and humility, surely most in this room could conceive of the possibility of such an eventuality. Those who can't, can of course be harsh. But in such a situation, what would we want a just sentence to reflect?

- o We would not want an errant friend or relative to break the law again.
- o We would be cautious -- but would maintain involved and personal concern
- o We would want individual consideration of, and attention to, the specifics of the offense as well as the vicissitudes and individual characteristics of the offender -- and how the sentence might affect them.
- o We would allow the possibility of leavening justice with mercy on the basis of those unique human qualities in a uniquely human event -- a crime.

I realize it is not the role of the sentencing court to be a loving parent or concerned sibling. But neither is its role alone to be a detached computer -- grinding out sentences to fit plans based in selective inattention and studied ignorance of cantankerous human realities.

The ultimate irony of the crime control act and this commission is that both were created just as the nation is entering an era where we have the possibility and technology to know and store millions of bits

of information about individuals -- with the potential of finally fitting the sentence and rehabilitation to the offender and the crime, -- that at this crucial time in our history we retreat to the meat axe of the set formula mandatory sentence which ultimately disregards, denigrates and degrades the individual under a banner of upholding the majesty of the law.

I would hope therefore that the Commission would keep as much flexibility in the sentencing system as the current irrational climate will allow.

You are inventing a tradition which will set the national course for many decades. More importantly your decisions will affect thousands of individuals whose own identities will be much determined by the outcome of your deliberations.

So I ask, as you reflect on the numbers -- a "year" here, "20 years" there, "life" there, remember the contingent state we share in the all too short lives we have on this earth. Then make the firm decisions.

¹ Nils Christie, The Limits of Pain, p. 57, Martin Robertson Ltd.,
Oxford, United Kingdom, 1982

² Edmund Leach, A Runaway World, (BBC Reith Lectures, 1967), New
York, Oxford University Press, 1968