

Make Jail Time A Last Resort

By Jonathan E. Gradess

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The recent report of the New York State Sentencing Commission, merely toying with sentencing reform, mirrors our past rather than breaking new ground. The Legislature should reject the report, send it to the State Archives, and begin anew.

Despite the best efforts of many administrators, prisons are punitive, negative, alien institutions that deliberately deprive people of normal experience. Prisoners are led away from accountability and learn to live with a false facade. They absorb massive unfairness without recourse and must obey strict rules without explanation. Prison terms are too long, damaging both low- and high-risk prisoners. The Sentencing Commission recommendations would continue this system and its policies.

New York is trapped in a time warp of mandatory sentencing. We have a few programs that do not involve prison, which we thoughtlessly call "alternatives to incarceration." The very words suggest that a presumption of incarceration must be overcome by one seeking community treatment. Our system sentences thousands of people to prison who do not need to be there.

In any reform, there should be an expansion of community reintegration for offenders, and sentences that reflect the genuine needs of victims. Offenders should be held accountable, not "warehoused." By missing this, the Sentencing Commission has merely regifted the present model.

While the pretty ribbons -- the suggestion of some graduated sanctions, a call to end plea-bargaining restrictions and a few other items -- are noteworthy, the total effort is trapped in a history that should be recalled.

For a decade, beginning in 1960, a state commission studied our state's criminal justice system and made recommendations for revising our penal law and criminal procedure law. Between 1967 and 1971, the Legislature revised those statutes accordingly. These two statutes, read together, allowed probation or other community-based treatment as a sentence for any offense less than murder or kidnapping, and created procedures to facilitate non-prison sentences. Pre-sentence reports by probation, the defense and prosecution, and presentence conferences and hearings held by judges were designed to foster creative accountable sentences.

In less than two years, this environment, rich with opportunity to decide individual cases based on individual circumstances, came to an abrupt halt. On Sept. 1, 1973, new mandatory sentencing procedures came into effect as a result of an Albany political compromise. It is that compromise and the effect of the Sentencing Commission's continued unwillingness to undo it that is really before the Legislature.

We hear so many people talk about the "Rockefeller Drug Laws" that we forget how long they have been here, how many leaders have watched them continue to inflict harm, how little has been done to undo them. They're really the Rockefeller-Wilson-Carey-Cuomo-Pataki-Spitzer-Paterson drug laws.

Gov. Nelson Rockefeller, who died 30 years ago, is not responsible for our current dilemma. We are.

The Rockefeller Drug Law compromise came about after Rockefeller had traveled to Japan, observed how harshly the Japanese dealt with drugs and thought New York should try the idea. He disliked the idea of a mandatory second-felony offender law championed by then Dominick DiCarlo, chair of the Assembly Codes Committee. DiCarlo didn't like the uniform paste of mandatory drug laws. They compromised and passed both measures together.

Overnight, based on the Rockefeller/DiCarlo compromise, the Legislature fashioned a new scheme of mandatory sentencing. In one swoop, it undid the sentencing blueprint that had been laid out after 10 years of study by the Temporary State Commission on Revision of the Penal Law and Criminal Code.

Although many are aware of the evils and blatant unfairness of the mandatory drug laws, few realize that the second-felony offender law in many respects has been worse. It, too, has trapped thousands of men and women in prison who should have been able to receive probation or another non-prison sentence that would benefit them and society.

Since 1972, we have taken a prison system containing 12,000 men and women and built a system to house 70,000. Along the way, we starved the other elements of sentencing -- probation, drug treatment and community supervision. Having drained these alternatives of resources, we called them "unavailable," or worse, urged they were ineffectual.

Since 1973, mandatory sentences have proliferated, depriving judges of their power and independence and handing prosecutors nearly unlimited authority in the courtroom. Today, 75 percent to 80 percent of prison commitments are mandatory sentences either because of the statutory charge or through plea agreements. The prosecutor is now the courtroom manager, the defense is the supplicant and the judge is the rubber stamper. This must change.

The Legislature should abolish all mandatory sentences and return full judicial discretion to judges. Prison sentences should be uniformly shorter, and non-incarcerative sentences should be available for every offense. Prison should be viewed and used as a last resort. The presumption of incarceration that has emerged should be replaced with meaningful procedures to fashion appropriate non-prison sentences. A continuum of non-incarcerative, treatment oriented, graduated sanctions should replace the simple "in" or "out" decision that currently characterizes sentencing. We should impose all sentences with an eye toward making people productive.

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Political and election year mandatory sentencing

1973 Rockefeller Drug Law

1980 Mandatory Gun Law

1973 Second Felony Offender Law

1995 Sentencing Reform Act

1976 Designated Felony Law (Juveniles)

1998 Jenna's Law

1978 Violent Felony Offender Law

1978 Juvenile Offender Law