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Incarceration of Persistent Felons

## ABSTRACT

Nowhere in the world incarcerates people in a developed country as does the United States (Mauer, 2004). In fact, currently there are 2.1 million people incarcerated nationally (Mauer, 2004). Of these inmates 95 % eventually return to society (Mauer, 2004). Nationally, 2/3rds of the inmates that re-enter society are returned to prison within three years of their release (Mauer, 2007).

Current statistics in New York State indicate that in 2002, of 25, 634 inmates who were released back into society 38.7% returned to custody within three years of their release (State of New York Correctional Services, 2002). Of that number 44% were predicate felons (State of New York Correctional Services, 2002).

Nationally, in 2005, 32% of all defendants had an active criminal justice status at the time of their newly committed offense (Bureau of Justice Statistics, 2008). Of the currently incarcerated 63,304 inmates in NYS in 2007, 43.8% (27, 756) were second felony offenders (Bernstein, 2007) and 4.0% (2,532) were persistent felony offenders (Bernstein, 2007).

This recidivism rate is a factor that legislators have used to enact laws that allow for the increased incarceration rate of repeat offenders. Is this concept all that it is cracked up to be? Is this a fair imposition of criminal justice? Or does it lead to disproportionate sentencing, overcrowding in prisons, and an aging prison population? Do these laws really lock up the dangerous habitual violent offenders? Or are the majority of people facing lengthy terms people who committed non-violent crimes? Are these policies constitutional or are defendants being deprived fundamental constitutional

rights with the imposition of enhanced sentences? Research confirms these laws aren't as effective as politicians wish us to believe.

### **TOPIC DISCUSSION/PROBLEM STATEMENT**

“Three Strikes and You’re Out” legislation is designed to turn habitual offenders into permanent inmates by enhancing punishment based on the defendant’s criminal record (Mauer & King, 2001). Legislators gain support for this type of punishment by extorting the facts and indicating doing this keeps the streets safer for law abiding citizens (Mauer & King, 2001). In reality, the crime trends and rates have dropped and researchers have attributed this as being unrelated to this law (Mauer & King, 2001). Researchers compared states with three strike legislation and non three strike legislation and the results indicated there was no difference in the crime rates based on imposition of these laws (Mauer & King, 2001).

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currently incarcerated 63,304 inmates in NYS in 2007, 43.8% (27, 756) were second felony offenders (Bernstein, 2007) and 4.0% (2,532) were persistent felony offenders (Bernstein, 2007).

The statistics seem to point to the reality that many criminals in the system are repeat offenders. Should this fact alone allow for imposition of these harsh, lengthy prison sentences? Does incapacitation of these offenders really contribute to reducing crime? Does incarceration of these individuals really deter other criminals from committing crimes? Or does this legislation create other problems for the administrators of criminal justice?

In reality “Three Strikes You’re Out” legislation contributes to the imposition of disproportionate sentences on minorities, creates overcrowding in prisons, and creates an expensive over-aging prison population (Mauer & King, 2001). Additionally, this legislation allows imposition of life sentences for non-violent offenses (Mauer & King, 2001). Despite state challenges being upheld, in New York State this legislation has been found unconstitutional by 3 lower federal courts. The issue is currently awaiting an appellate court’s review.

## LITERATURE REVIEW/FINDINGS

Mauer indicates that this enhanced punishment legislation does not produce a deterrent affect for other criminals (Mauer, 2007). He indicates deterrence is produced by certainty of punishment not severity (Mauer, 2007). Mauer indicates the current trend in criminal justice is moving toward decarceration including using alternatives to incarceration for nonviolent offenders, parole and probation reform, and re-entry (Mauer, 2007).

Mauer indicates the “three strikes” legislation is a distorted use of criminal justice resources (Mauer, 2007). While acknowledging the overwhelming recidivism rates, Mauer further notes recidivism rates drop after an individual has been incarcerated five or more years due to the natural aging process (Mauer, 2007).

Mauer further points to the negative effects of incarceration (Mauer, 2007). Mauer points out, it is very costly to incarcerate an individual (Mauer, 2007). The cost is \$25,000 annually (Mauer, 2007). Nationally, annually, the cost to incarcerate a lifer is 2.5 billion (Mauer, King, & Young, 2004, p. 25). The cost to incarcerate an aging inmate is \$69,000 annually (Mauer, King & Young, 2004 p. 25). Incarceration is expensive.

There is also a communal detriment (Mauer, 2007). Mauer indicates incarceration frays ties in families, it causes financial and emotional burdens, and creates great disadvantages to low – income neighborhoods where the incarceration rate is the greatest (Mauer, 2007). Mauer notes currently 1.5 million children have a parent that is incarcerated (Mauer, 2004). Of that number 1 in 14 are African-American (Mauer, 2004).

Currently, African American males have a 1 in 3 chance of spending time in prison within their lifetime (Mauer, 2004). Of these people when returning home 1 in 8

African-American males cannot participate in the democratic society we live in as their felon status prohibits them from exercising their right to vote (Mauer, 2004). African-Americans have higher arrest rates so they are adversely and disproportionately affected by the “three strikes” legislation (Mauer & King, 2001).

In further analysis, Mauer, King, & Young point out nationally 9.4% of all prisoners are “lifers” (Mauer, King & Young, 2004, p.3) One in four of these individuals have a life sentence without the possibility of ever gaining parole (Mauer, King & Young, 2004, p. 3). In comparison, the number of inmates facing life imprisonment rose by 83% between the years of 1992-2003 (Mauer, King & Young, 2004, p. 3).

In NYS the prison lifer population is 1 in 5 inmates or 19.4% of the 63,304 individuals who make up the prison population (Mauer, King & Young, 2004). Of that population 43.8 % (27, 756) are second felony offenders (Bernstein, 2007) and 4.0 % are persistent felons (2,532) (Bernstein, 2007)

Statistics show nationally, 4 of 5 of these lifers released from prison in 1994 did not recidivate within three years of their release (Mauer, King, & Young, 2004). It appears the statistics maybe inflated by the legislators to further their personal agenda.

What is even more troubling about these laws is that the majority of people that are incarcerated under the persistent felon statutes are people convicted of non-violent crimes (King & Mauer, 2001) In their analysis of the state of California King & Mauer note that 57.9% of people incarcerated under persistent felon statutes were non-violent. Of the second felony offenders sentenced 69% were non-violent (King & Mauer, 2001).

When looking deeper at the results imposed on individuals as a result of these laws it is very troubling. King & Mauer point out, in the case of Scott Bencotter, now

servicing a life sentence under these laws, had two prior burglary convictions, his crime of conviction was stealing a pair of sneakers (King & Mauer, 2001). For stealing a pair of sneakers, he will now serve 25 years- life in prison, a sentence equivalent to what a murderer will face. King and Mauer cite several additional cases wherein non-violent offenders were given the harshest of sentences under these laws including someone who jimmed a church door, someone found in possession of a small amount of crack, and someone who stole \$20 dollars of coffee (King & Mauer, 2001).

In NYS, the imposition of these laws is no different. Mark Hamblett points out in the recent case, of William Washington. Washington was convicted of trying to steal an elderly man's wallet. (Hamblett, 2007). This charge is an E felony, the least serious felony normally carrying a sentence of 2 to 4 years (Hamblett, 2007). Is a life sentence warranted under these circumstances?

### **LEGAL ANALYSIS**

Mauer et al. point out when imposing a life sentence several goals are being considered such as punishment for the seriousness of the crime, incapacitation of the offender, the degree of culpability, community and historical norms, and recently the "get tough" policies on crime (Mauer, King & Young, 2004).

In looking at the life sentences" there are two factors playing here in the increase of the time spent in prison by these individuals. One is the imposition of the life sentence under the "three strikes" legislation (Mauer, King, Young, 2001) The second is the discretion of the Parole Board in releasing these individuals (Mauer, King, Young, 2004)

Generally the non- violent offenders receiving a life sentence under the “three strikes” legislation receive a low level minimum sentence generally between 2-8 years with life on the end. To gain release they must appear before the parole board.

The majority of Parole Boards nationally are staffed with political appointees (Mauer, King & Young, 2004). The use of a politicalized board ensures corruption in the process allowing future electoral and reappointment issues to factor in to the parole release decision instead of a fair decision making process based on the incarcerated individual (Mauer, King & Young, 2004).

In NYS this has increasingly become a problem with the former Pataki administration as demonstrated by the declining parole release rates. (Hammond & Seedlandt, 1999). One of the factors the NYS Parole Board can consider in determining release is an individual’s criminal history (Hammock & Seedlandt, 1999). For people that have been sentenced under second felony and persistent felony statutes this creates a factor in which the Parole Board can deny release based on this factor and ignore the obvious rehabilitation of that inmate (Hammond & Seedlandt, 1999). Hammock et al. points out with abuse of the discretion of the Board, the board is in essence able to actually ignore the minimum sentence imposed by the sentencing judge (Hammond & Seedlandt, 1999)

In the case of the second felony offender and the persistent felony offender sentenced to a non violent crime, who plea bargained to a minimum term and life as a maximum, this means sometimes they will serve prison terms equivalent to that of a defendant serving a murder sentence of 25-life.

In NYS, the “three strikes you’re out” legislation has been enacted since 1965 (Fahey, 2007). This legislation has remained untouched by legal challenges until recently (Fahey, 2007) First in 2000, the Supreme Court decision in Apprendi, and additional recent challenges leave the question as to whether these “get tough on crime” policies can withstand judicial scrutiny (Fahey, 2007).

The legal standards for imposing discretionary persistent felony sentencing are found in NYS Penal Law 70.10 and Criminal Procedure Law 400.20 (Fahey, 2007). Legal challenges began to succeed in 2000. The Apprendi case found, protection is afforded to a criminal defendant who faces having their sentenced increased based on their criminal history (Fahey, 2007). There is a Fourteenth Amendment due process constitutional protection and Sixth Amendment right to jury trial constitutional protection (Fahey, 2007).

Despite this Supreme Court ruling, the NYS persistent felony statute withstood judicial scrutiny until recently. In 2001, the NYS Court of Appeals in People v. Rosen, 96 NY 2d 329 (2001) the court held the statute was constitutional. The court indicated the defendant had no constitutional right to a jury trial to establish the facts of his prior convictions (Fahey, 2007, Rosen (id)).

Fahey points out 3 months later the Supreme Court again ruled in Arizona v. Ring 536 US 584 (2004), in death penalty cases defendants have the right to a trial by jury to determine issues of fact related to maximizing a sentence (Fahey, 2007, Ring (id)).

In 2003, a federal judge determined the NY Court of Appeals misapplied the law in Rosen ruling a prior conviction for enhanced sentencing must be established through procedure, satisfying the fair notice, reasonable doubt, and jury trial guarantees (Fahey,

2007, Brown v. Greiner, 258 F. Supp., 2d 68 (2003)). The judge in Brown emphasized, the rule in question requires that any fact, other than the fact of a prior conviction that increases the penalty for a crime beyond the statutory prescribed minimum must be submitted to a jury and proved beyond a reasonable doubt (Fahey, 2007 Brown (id)). He further states NY courts have held that only the fact of a prior conviction not the additional facts required by NY Penal Law 70.10(2) and CPL 400.20 enhances sentences under the persistent felony offender statute. (Fahey, 2007 Brown (id)).

Additional federal challenges were granted in Blakely v. Washington, 542 US 296 (2004) by the Supreme Court wherein in evaluating the federal sentencing guidelines the court held any factors above the fact of a prior conviction increasing the penalty of a crime based on aggravating factors must be submitted to a jury (Fahey, 2007, Blakely (id)).

When the NY case Brown v. Greiner, was appealed to the second circuit the federal court reversed the lower court's decision (Fahey, 2007). The second circuit held unanimously the issue presented in looking at NY PL 70.10 in this case was whether the court evaluated the extended incarceration and life time supervision of the defendant will best serve the public (Fahey, 2007) This fact requires the court to analyze the defendant's individual characteristics including their history, character of previous offenses, and nature of the circumstances of criminal conduct (Fahey, 2007).

In 2005, the NYS Court of Appeals again looked at this issue in People v. Rivera, 5 NY 3d 61(2005). The court again indicated they believed the only issue controlling was whether an individual had been convicted of prior felonies (Fahey, 2007, Rivera, (id)). Two judges dissented on this decision.

In 2007, in Portlatin v. Graham, a federal judge again held the NY statute was unconstitutional (Fahey, 2007). This federal judge indicated the only way NY could salvage their persistent felony statute was to impose life sentences on all offenders fitting in the category or submit the additional facts to be decided by a jury (Fahey, 2007, Portlatin (id)). Fahey fails to point out additional recent challenges to the NY law have resulted in four cases are currently waiting for appellate review (Washington v. Poole & Phillips v. Artuz, Morris v. Artus, Portlatin (id) ) (Hamblett, 2007).

In assessing this analysis, one must ask how does this issue play out for a persistent felony offender serving a life sentence being denied parole by a Parole Board repeatedly for the reasons of his past criminal conduct? The legal analysis of the constitutionality of the imposition of the life sentence focuses on the fact the aggravating factors are one that should be facts determined by a jury such as past behavior on parole, prior convictions, statements from parole officers, acquitted conduct etc. (Appleman, 2007). If this is true, only a jury can determine to enhance one's sentence? How can a Parole Board after the person has been convicted and served their minimum sentence? Is this not also a violation of the Sixth and Fourteenth Amendments?

A further analysis can be made in looking at this issue in terms of a plea bargain. In most persistent felon cases with a low end minimum, the defendant took a plea but the maximum sentence remains "life". The intent was these people because of their criminal history, need life time supervision, not life time incarceration CPL 400.20. The argument being advanced in the NYS cases are that this law, CPL 400.20 requires the sentencing judge must not only find the defendant had been convicted of two previous felonies but also that there is a second step analysis (Fine, 2007). This second portion requires the

court assess the history and character of the defendant, the nature and circumstances of the criminal conduct, and that lifetime incarceration and supervision will best serve the public interest (Fine, 2007). In doing this, the sentencing judge must place on the record the reasons for setting forth the enhanced sentence PL 70.10 (2).

### **INMATE POPULATION ANALYSIS**

In interpreting the literature reviewed, it is important to point out the sentencing scheme of enhancing punishment for persistent felony offenders seems to be intrinsically flawed. The intent behind these laws unmistakably appeared to be to target the most violent career criminals (King & Mauer , 2001). The public supported these enhanced laws in response to heinous crimes such as violent murders (King & Mauer, 2001). As stated by King and Mauer, the rationale of imposing these laws was, “stop committing felonies and live the remainder of your life in freedom , or spend 25 years to life in prison the next time you are caught and convicted” (King & Mauer, 2001, p.8).

Nationally, it is becoming apparent there are consistent problems in sentencing schemes. One of the policies that have come under fire is the persistent felony statutes as mentioned above. These statutes are not only being examined judicially but legislatively as well. As King points out, many states have begun evaluating their sentencing policies (King, 2008). Problems that have forced this analysis include prison overcrowding, parole reform, re-entry issues, alternatives to incarceration, and new criminal agendas (King, 2008).

King pointed out this country has had an uninterrupted 30 years of a growth in prison population (King, 2008). He indicates his recommendations include changing sentencing laws to allow for more judicial discretion based on individual circumstances

(King, 2008). He also indicates a solution is to reduce parole revocations and invest further in reducing the time people spend in prison (King, 2008). King further indicates a need for a reliance upon evidence based practices to supported assist policy direction (King, 2008, p.26).

As stated, it appears the problem of recidivism fuels the need to enhance punishment for repeat felony offenders. Nationally, 2/3rds of the inmates that re-enter society are returned to prison within three years of their release (Mauer, 2007). These figures appear to be distorted. They do not distinguish whether the offenders are returned to prison for new offenses or for technical parole violations. It is noted in the initial report released by the NYS Sentencing Commission that 40% of parole violations do not include new offenses. (NYS Sentencing Commission, 2007). The rule violations are technical violations such as curfew violations or drug use. (NYS Sentencing Commission, 2007). These violators are often returned to prison and included in the recidivism calculations. Based on this data, it would appear the respective crime factor is not as great as the statistics indicate.

NYS is one of the states that have focused on reforming the sentencing laws (NYS Sentencing Commission, 2007). One of the factors they have noted in their initial review of the state's laws is the persistent felony offender statute (NYS Sentencing Commission, 2007). This commission has examined the legal issues presented in the legal challenges pending in the courts and have agreed the statute is deficient citing that it is imprecisely written and needs further clarification (NYS Sentencing Commission 2007).

NYS had further noticed the need for improvement in the re-entry of inmates into society. The Sentencing Commission has indicated that re-entry will play a major role in reducing recidivism (NYS Sentencing Commission, 2007). NYS had initiated a program at Orleans Correctional Facility wherein the focus is successful re-entry (NYS Sentencing Commission, 2007). The program includes the use of an individualized release plan curtailed for the individual offender (NYS Sentencing Commission, 2007).

The other issue that seems to remain unaddressed is why are these people repeat offenders in the first place? An interesting analysis can be made by examining statistics regarding the incarcerated population. However, further research should be done as this information pertains to persistent felony offenders.

In NYS, of 63,304 inmates incarcerated in 2007, only 52.8% of them have an academic degree (Bernstein, 2007). The remaining 47.2% or 29,977 people have no degree (Bernstein, 2007). Of this number, 33.2% read at an 8<sup>th</sup> grade level or below (Bernstein, 2007). Of this number, 19.2% or 12,184 are not eligible to even take a GED because their reading level is below the 6<sup>th</sup> grade level (Bernstein, 2007). An additional 14% or 8,897 people are between the 6<sup>th</sup> and 8<sup>th</sup> grade level needing additional preparation before they could take the GED (Bernstein, 2007).

Coupled with the high level of offenders with low educational levels there is a huge proportion of offenders with drug and alcohol problems. NYS Department of Corrections quotes 71.7% of offenders have a history of substance abuse (Bernstein, 2007). Additionally, 37.3% are identified as having a problem with alcoholism (Bernstein, 2007).

In the general population it is estimated that 28% of women and 16% of men are sexually abused by the time they reach the age of 16 (Mailings, Marquart, & Hartley, 2003). Ironically nationally, 43% of female criminal offenders and 12% of male offenders were sexually or physically abused prior to their incarceration (Mailings et. al, 2003). Sexually abused prisoners were exposed to societal ills such as neglect, single parent households, and parents with drug abuse and or psychological problems ( Mailings et. al, 2003).

Additionally, there are 200,000- 400,000 mentally ill people currently incarcerated nationally (Human Rights Watch, 2003) HRW notes, “jails and prisons have become this country’s front line mental health service provider” (Human Rights Watch, 2003, p. 24). In the US, there are three times more mentally ill people housed in correctional facilities than in mental institutions and prisoners have a mental illness rate at 2 to 4 times that of the general population (Human Rights Watch, 2003).

Comparatively, 5 % of the US population is mentally ill (Human Rights Watch, 2003) 1 in 5 prisoners are diagnosed as seriously mentally ill nationally (Human Rights Watch, 2003). Incarcerated people have diagnosis including schizophrenia, depression, bipolar disorder, dysthymia, anxiety disorders, and post traumatic stress disorder (Human Rights Watch, 2003). In NYS Specifically, 11% of male prisoners and 26% of female prisoners are currently receiving mental health treatment (Human Rights Watch, 2003). This number has increased 73% since 1991(Human Rights watch, 2003).

### **CONCLUSION**

For the many reasons stated, it is apparent the uses of the persistent felony offender statutes have been distorted to meet the needs of politicians to appear “tough on

crime". The research indicates they do not deter crime and or have an effect on the crime rates in the communities where they are used. Further more the statistics being used to show the need for an enhanced punishment may be distorted including technical parole violations within the recidivism ratios. Parole Board have abused their discretion to re-sentence defendants who have life as a maximum sentence far beyond what the legislators intended. Lastly, in looking at the offender statistics there is a clear indication the people incarcerated have a long list of characteristics indicating these are people in need of help rather than enhanced punishment.

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