

**AMERICAN BAR ASSOCIATION
JUSTICE KENNEDY COMMISSION**

REPORTS WITH RECOMMENDATIONS

TO THE

ABA HOUSE OF DELEGATES

AUGUST 2004



The four sets of recommendations included in this report were approved by the American Bar Association House of Delegates on August 9, 2004 and constitute official policy of the Association. The reports accompanying the recommendations were for explanatory purposes only and were not approved by the House of Delegates or the Board of Governors; they should therefore not be construed as representing Association policy.



JUSTICE KENNEDY COMMISSION

REPORT TO THE ABA HOUSE OF DELEGATES AUGUST 2004

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SUMMARY OF RECOMMENDATIONS OF THE ABA JUSTICE KENNEDY COMMISSION

I. RECOMMENDATIONS ON PUNISHMENT, INCARCERATION, AND SENTENCING

The Resolution urges states, territories and the federal government to ensure that sentencing systems provide appropriate punishment without over-reliance on incarceration. Lengthy periods of incarceration should be reserved for offenders who pose the greatest danger to the community and who commit the most serious offenses, and alternatives to incarceration should be available for offenders who pose minimal risk to the community and appear likely to benefit from rehabilitation efforts.

The Resolution sets out a series of recommended actions, including:

- Repealing mandatory minimum sentences
- Providing for guided discretion in sentencing, consistent with *Blakely v. Washington*, 542 U.S. ___, 72 U.S.L.W. 4546 (June 24, 2004), while allowing courts to consider the unique characteristics of offenses and offenders that may warrant an increase or decrease in a sentence
- Requiring sentencing courts to state the reason for increasing or reducing a sentence, and allowing appellate review of such sentences
- Considering diversion programs for less serious offenses, and studying the cost effectiveness of treatment programs for substance abuse and mentally illness
- Giving greater authority and resources to an agency responsible for monitoring the sentencing system
- Developing graduated sanctions for violations of probation and parole

In addition, the Resolution urges Congress to give greater latitude to the United States Sentencing Commission in developing and monitoring guidelines, and to reinstate a more deferential standard of appellate review of sentences.

II. RECOMMENDATIONS ON RACIAL AND ETHNIC DISPARITY IN THE CRIMINAL JUSTICE SYSTEM

The Resolution urges that state, territorial and federal governments strive to eliminate actual and perceived racial and ethnic bias in the criminal justice system by

- Establishing a Criminal Justice Racial and Ethnic Task Force to study and make recommendations concerning racial and ethnic disparity in the various stages of the criminal justice process;
- Requiring law enforcement agencies to develop and implement policies to combat racial and ethnic profiling;
- Requiring the legislature to conduct racial and ethnic disparity impact analyses, evaluate the potential disparate effects on racial and ethnic groups of existing statutes and proposed legislation, and propose legislative alternatives intended to eliminate predicted racial and ethnic disparity at each stage of the criminal justice process.

III. RECOMMENDATIONS ON CLEMENCY, SENTENCE REDUCTION AND RESTORATION OF RIGHTS

The Resolution urges state, territorial and federal governments to establish standards and a process to permit prisoners to request a reduction of their sentences in exceptional circumstances. It further urges expanded use of the federal statute permitting reduction of sentences for “extraordinary and compelling reasons,” and specifically urges the United States Sentencing Commission to develop guidance for courts relating to the use of this statute. It recommends expanded use of executive clemency to reduce sentences, and of processes by which persons who have served their sentences may request a pardon, restoration of legal rights and relief from collateral disabilities. Finally, it urges bar associations to encourage and train lawyers to assist convicted persons in applying for pardons, restoration of legal rights, relief for collateral sanctions, and reduction of sentences.

IV. RECOMMENDATIONS ON PRISON CONDITIONS AND PRISONER REENTRY

The Resolution speaks to the need to ensure that correctional facilities are safe and secure; that correctional staff are properly trained and supervised; and that allegations of prisoner mistreatment are promptly investigated and dealt with appropriately. It further addresses the need for programs and policies geared toward preparing prisoners for release and reentry into the community, and encouraging community acceptance of returning prisoners. It urges jurisdictions to identify and remove unwarranted legal

barriers to reentry. Finally, it urges that laws schools establish clinics to assist convicted person with legal issues related to their reentry into the community.



ABA Justice Kennedy Commission

Chair

Stephen A. Saltzburg is the Wallace and Beverley Woodbury University Professor at the George Washington University Law School. Professor Saltzburg served as Associate Independent Counsel in the Iran-Contra investigation. In 1988 and 1989, he served as Deputy Assistant Attorney General in the Criminal Division of the Department of Justice, and in 1989 and 1990 was the Attorney General's ex officio representative on the United States Sentencing Commission. In June, 1994, the Secretary of the Treasury appointed Professor Saltzburg as the Director of the Tax Refund Fraud Task Force, a position he held until January, 1995. Professor Saltzburg is the author of numerous books and articles on evidence, procedure, and litigation. He serves as a member of the ABA House of Delegates from the Criminal Justice Section and is a member of the ABA Task Force on Treatment of Enemy Combatants and the ABA Task Force on Gatekeeper Regulation and the Law.

Members

Phyllis G. Bossin practices law in Cincinnati, Ohio, for the past several years exclusively in the field of matrimonial law. She served as Chair of the Section of Family Law during 2003-2004. Ms. Bossin is a Fellow in the American Academy of Matrimonial Lawyers and a Diplomate in the American College of Family Trial Lawyers, and is a certified family law specialist in Ohio. She has served for several years on the faculty of the Family Law Trial Advocacy Institute at the University of Houston Law School. Ms. Bossin has been listed in Best Lawyers in America for the past several years and was recently named as one of Ohio's Super Lawyers in the field of family law. Ms. Bossin has written and lectured frequently on the local, state and national levels in the field of family law. During the first twelve years of her career, she engaged in criminal defense work in both state and federal court, mostly for indigent defendants charged with aggravated felonies. She also holds a Master's Degree in Public Policy.

The Honorable Pamila J. Brown is an Associate Judge for the District Court of Maryland, Howard County, having been appointed in May 2002. Judge Brown received her B.A. from Macalester College in St. Paul, Minnesota and her J.D. from the University of Baltimore School of Law. She is a former Chair of the ABA Government and Public Sector Division and currently serves as the Division's Delegate to the ABA House of Delegates. Judge Brown has been on the faculty of the National Institute of Trial Advocacy, a lecturer for the Defense Research Institute and an Adjunct Professor at the University of Baltimore School of Law. Prior to her appointment she served as a Maryland Assistant Attorney General handling civil and criminal matters. Judge Brown also served as an Assistant City Solicitor for Baltimore City where she engaged in extensive Federal Court practice and as Director of Inmate Legal Services at the

Baltimore City Jail. Judge Brown is a past president of the Bar Association of Baltimore City and has served on the State Bar Board of Governors and the Maryland and Baltimore Bar Foundations. Judge Brown is the recipient of numerous awards and honors including, Maryland's Top 100 women, the ABA Nelson Award and the Alumna of the Year from the University of Baltimore.

Ian Comisky is a partner at Blank Rome LLP. After graduating from the Wharton School of the University of Pennsylvania magna cum laude and the University of Pennsylvania Law School, Mr. Comisky clerked for the Honorable Alfred L. Luongo, Jr. of the United States Eastern District of Pennsylvania. After finishing his clerkship, Mr. Comisky worked 2 ½ years as an Assistant District Attorney in Philadelphia County handling appeals, misdemeanor and felony cases. He then accepted a position as an Assistant United States Attorney for the Southern District of Florida where he worked from 1978 to 1980. Mr. Comisky's practice includes both white-collar criminal and complex commercial litigation and he is the coauthor of a two-volume treatise entitled Tax Fraud and Evasion.

The Honorable Andre M. Davis has been a United States District Judge since 1995. Before his appointment to the federal bench, he was a Maryland state trial judge. He is the 2003-2004 Chair of the National Conference of Federal Trial Judges and a member of the Council of the Judicial Division of the ABA. He is a member of the Criminal Standards Committee of the ABA. He has taught criminal procedure for more than 20 years at the University of Maryland School of Law, where he is also a member of the Board of Visitors.

Robert M. A. Johnson, University of Minnesota Law School 1968; Anoka County Attorney's Chief Deputy 1974-1982, Anoka County Attorney 1983-present; National District Attorneys Association, past President; American Bar Association Criminal Justice Section Council member 1991-1995, Vice Chair for Governmental Affairs 2003; American Prosecutors Research Institute Board of Directors 2000-2003; National College of District Attorneys Board of Regents 2000-2003; American Law Institute, Advisor-Model Penal Code: Sentencing 2002-present; Minnesota National Guard 1968-2003; Minnesota County Attorneys Association, past President; Minnesota State Bar Association Board of Governors; Anoka County Bar Association, past president; Anoka County Joint Law Enforcement Council, chair.

The Honorable Eileen A Kato was appointed to the King County District Court bench in June of 1994, where she has served as presiding judge of the Seattle Division and on the Executive Committee of the King County District Court in 1997 and 2002. Judge Kato currently serves as President of the Washington State District and Municipal Court Judges' Association, as immediate past-chair of the National Conference of Specialized Court Judges of the ABA Judicial Division, and President of the Judicial Council of the National Asian Pacific American Bar Association. Judge Kato's ABA activities include the Council on Racial and Ethnic Justice, Standing Committee of Minorities in the Judiciary, and Judicial Liaison to the Commission on Racial and Ethnic Diversity in the Profession

Albert J. Krieger, Immediate Past Chair of the Criminal Justice Section of the ABA, is a member of the New York, Michigan, and Florida Bars; founding member and past-president of the National Association of Criminal Defense Lawyers (“NACDL”); a member of the House of Delegates of the ABA, has served on the Criminal Justice Standards Committee and various Task Forces; awards include: *Outstanding Practitioner*, Criminal Justice Section, New York State Bar Association, 1977; *Fifth Annual Award for Significant Contributions to the Criminal Justice System*, California Attorneys for Criminal Justice, 1981; *Lifetime Achievement Award*, NACDL, 1987; Robert C. Heeney Award, NACDL, 1995; C. Clyde Atkins Civil Liberties Award from the Miami Chapter of the ACLU and the Lifetime Achievement Award of the Miami Chapter of the FACDL.

Mark Krudys has been engaged in the private practice of law since 1996, in both large and small firm settings. Immediately before entering private practice, Mr. Krudys served as a Special Assistant U.S. Attorney in Miami and Ft. Lauderdale, Florida assigned to the Securities Fraud Unit. While assigned to that Unit, Mr. Krudys primarily prosecuted criminal violations of the federal securities laws, including insider trading, market manipulation, money laundering, mail and wire fraud, perjury, and making false statements to a government agency. From 1990 to 1993, Mr. Krudys was an attorney with the Enforcement Division of the Securities and Exchange Commission in Washington, D.C. He began his legal career as a Judge Advocate in the U.S. Marine Corps, serving initially as a prosecutor and later as a defense counsel. Mr. Krudys earned his Master of Laws degree (Securities Regulation) from Georgetown University Law Center and his J.D. and B.B.A. from Baylor University. Mr. Krudys has taught as an Adjunct Professor at the University of Richmond School of Law. He previously served as Chair of the ABA’s Section of Business Law’s Criminal Laws Committee and Securities Enforcement Subcommittee.

David Craig Landon handles product liability, toxic tort, environmental liability and mass tort litigation. He serves as national coordinating and trial counsel in a variety of litigation settings. Landin is a Past-President of The Virginia Bar Association; Past-President of The Virginia Association of Defense Attorneys and Past-President of The Virginia Law Foundation. He is the current Chair of the ABA Standing Committee on Federal Judicial Improvements and a member of the Lawyers’ Committee of the National Center for State Courts. He is a Recipient of the *Exceptional Performance Award*, Defense Research Institute and was elected a Fellow of the Virginia Law Foundation. He was named to *The Best Lawyers in America*, Seaview/Putnam Press, beginning in 1987 and voted among “The Legal Elite,” Virginia’s Top Lawyers in Litigation, *Virginia Business* (2000, 2001, 2002). Landin lectured at the University of Virginia School of Law as an adjunct professor on Trial Advocacy from 1978-84 and on Civil Litigation, Principles and Practice in 1995-96.

Laura Ariane Miller, Chair of the Government Investigations practice at Nixon Peabody LLP, is the current Co-Chair of the ABA Criminal Litigation Committee. After graduating from Yale Law School, where she worked in the United States Attorney's Office, Ms. Miller clerked at the United States Supreme Court for Justice Byron R. White. In previous years, she served as Special Assistant to the Secretary of the United

States Department of Health, Education and Welfare and was Deputy Commissioner of the United States Administration for Children, Youth and Families. She is also a graduate of the University of Michigan and Harvard's Kennedy School of Government.

The Honorable William D. Missouri was appointed to the Circuit Court for Prince George's County, Maryland on December 21, 1987 by Governor William Donald Schaefer. He was reappointed on November 21, 2003 by Governor Robert L. Ehrlich after his initial 15 year term concluded. He has served as County Administrative Judge since October, 1992 and was appointed by Chief Judge Robert M. Bell to the position of Administrative Judge for the Seventh Judicial Circuit (Calvert, Charles, St. Mary's and Prince George's Counties) on May 1, 1997. Prior to his appointment to the Circuit Court, Judge Missouri served as an Associate and Administrative Judge of the 5th District Court for Prince George's County. At the time of his appointment to the 5th District Court in June, 1985, he was a member of the Prince George's County State's Attorney's Office felony trial staff. In that capacity he tried many serious felonies such as arson, robbery with a dangerous weapon, and murder, including death penalty cases. He is presently admitted to practice before the following courts: Court of Appeals of Maryland; U.S. District Court for Maryland; U.S. Court of Appeals for the 4th Circuit and the District of Columbia; U.S. Court of Appeals for the Federal Circuit; U.S. Tax Court; U.S. Court of Military Appeals; and the United States Supreme Court.

Andrea Sheridan Ordin is a civil litigation partner, resident in the Los Angeles office of Morgan Lewis & Bockius. In addition to her business trial and appellate practice primarily in the areas of environmental, antitrust and securities, she serves as the pro bono partner in Los Angeles. Prior to joining the Firm, she served four years as the United States Attorney for Central District of California under three Attorneys General, and eight years as Chief Assistant Attorney General for the State of California, heading the Public Rights Division. She was a member of the ten person Independent Commission, known as the Christopher Commission which investigated the Los Angeles Police Department, in the wake of televised beating of Rodney King. Ms. Ordin is the former Chair of Federal Judicial Improvement Section of the ABA, an ABA Margaret Brent Award recipient, and is the representative of the Standing Committee on Judicial Independence.

A. Victor Rawl, Jr. is a Shareholder in the Litigation Section of the McNair Law Firm in Columbia, South Carolina, where his practice areas include business litigation, commercial litigation, and health law. After receiving a Masters in International Business Studies and a Juris Doctor from the University of South Carolina in 1995, Vic served as law clerk to the Honorable P. Michael Duffy, U. S. District Judge, District of South Carolina. In the ABA Vic is a TIPS NOW Fellow in the Tort Trial and Insurance Practice Section (a member of the Long Range Planning Committee and vice-chair of the Business Torts Committee), and a member of the Litigation and Health Law Sections. In the ABA Young Lawyers Division, since 1998 Vic has served as chair of the Ethics and Professionalism Committee, district representative for South Carolina and the U. S. Virgin Islands, a member of the Affiliate Assistance Team, a member of Executive Council, and liaison to the Section Officers Conference.

Neal R. Sonnett heads his own Miami, Florida law firm, concentrating on the defense of corporate, white collar and complex criminal cases. He is a former Assistant United States Attorney and Chief of the Criminal Division for the Southern District of Florida. He is past chair of the ABA Criminal Justice Section, which he now represents in the ABA House of Delegates, past chair of the ABA Committee on Criminal Justice Improvements, and past president of the National Association of Criminal Defense Lawyers. He presently serves as vice-chair of the American Judicature Society, chair of the ABA Task Force on Treatment of Enemy Combatants, a member of the ABA Task Force on Gatekeeper Regulation and the Law. and is on the Executive Council of the ABA Section of Individual Rights & Responsibilities. He has been profiled by the National Law Journal as one of the "Nation's Top Litigators" and one of the "Nation's Top White Collar Criminal Defense Lawyers" and was selected three times by that publication as one of the "100 Most Influential Lawyers In America."

Reporters

Angela J. Davis is a Professor of Law at American University Washington College of Law where she teaches Criminal Law, Criminal Procedure, and related courses. Professor Davis is a former director, deputy director, and staff attorney of the Public Defender Service for the District of Columbia. She is a co-author of *Basic Criminal Procedure*, 3rd Edition (2003), and the author of numerous articles and book chapters on racial disparity in the criminal justice system and on prosecutorial power and discretion. Professor Davis is a 2003-2004 Soros Senior Justice Fellow and a 1997 recipient of the National Council on Crime and Delinquency's New American Community Award. She has served on various ABA Committees, including the Criminal Justice Standards Committee, the Criminal Justice Section Council, the Committee on Race and Racism in the Criminal Justice System, and the Ad Hoc Committee on Indigent Defense.

Margaret Colgate Love practices law in Washington, D.C., specializing in post-conviction remedies, executive clemency, and professional responsibility. Previously, she served for twenty years in the U.S. Department of Justice, including seven as U.S. Pardon Attorney under the first President Bush and President Clinton (1990-1997). She chairs the Criminal Justice Section's Committee on Corrections and Sentencing, and serves as a member of the CJS Council. She also chairs the Criminal Justice Standards Committee's Task Force on Collateral Sanctions. From 1995-1996 she chaired the ABA Standing Committee on Ethics and Professional Responsibility, and was a member of the ABA Commission to revise the Model Rules ("Ethics 2000"). She has been awarded a Soros Senior Fellowship for 2004-2005 to study mechanisms for the restoration of rights to convicted persons. A graduate of Yale Law School, Ms. Love also has a Masters Degree in Medieval History from the University of Pennsylvania.



ABA JUSTICE KENNEDY COMMISSION

REPORT TO THE HOUSE OF DELEGATES

INTRODUCTION

A. JUSTICE KENNEDY'S CHALLENGE

Supreme Court Justice Anthony M. Kennedy's dramatic address to the American Bar Association on August 9, 2003 at its annual meeting in San Francisco raised fundamental questions about the fairness, wisdom and efficacy of criminal punishment throughout the United States. Justice Kennedy recognized that arrests, prosecutions and highly publicized trials often command public attention, but there is rarely much interest on the part of the public, including its lawyers, after a person has been convicted and sentenced. What happens to those who are punished is a mystery to many.

As he spoke about corrections and punishment, Justice Kennedy anticipated that many of the lawyers in the audience might not warm to his subject:

The subject of prisons and corrections may tempt some of you to tune out. You may think, "Well, I am not a criminal lawyer. The prison system is not my problem. I might tune in again when he gets to a different subject." . . .

. . . . Even those of us who have specific professional responsibilities for the criminal justice system can be neglectful when it comes to the subject of corrections. The focus of the legal profession, perhaps even the obsessive focus, has been on the process for determining guilt or innocence. When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest. When the prisoner is taken away, our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it.

The failure of the legal profession to pay sufficient attention to corrections and prisons in Justice Kennedy's view was an abdication of responsibility:

In my submission you have the duty to stay tuned in. The subject is the concern and responsibility of every member of our profession and of every citizen. This is your justice system; these are your prisons. The Gospels' promise of mitigation at judgment if one of your fellow citizens can say, "I was in prison, and ye came unto me," does not contain an exemption for civil practitioners, or transactional

lawyers, or for any other citizen. And, as I will suggest, the energies and diverse talents of the entire Bar are needed to address this matter. . . .

. . . . We have a greater responsibility. As a profession, and as a people, we should know what happens after the prisoner is taken away. To be sure the prisoner has violated the social contract; to be sure he must be punished to vindicate the law, to acknowledge the suffering of the victim, and to deter future crimes. Still, the prisoner is a person; still, he or she is part of the family of humankind. . . .

. . . . It is no defense if our current prison system is more the product of neglect than of purpose. Out of sight, out of mind is an unacceptable excuse for a prison system that incarcerates over two million human beings in the United States

It appears that it was not happenstance that Justice Kennedy concluded that “the energies and diverse talents of the entire Bar are needed to address this matter,” for the matter of which he spoke was corrections, imprisonment, and punishment writ large. His address raised fundamental questions about American sentencing and correctional practices.

Justice Kennedy expressed a number of concerns.

(1) About the sheer number of people locked up in the United States as compared to other civilized nations:

Were we to enter the hidden world of punishment, we should be startled by what we see. Consider its remarkable scale. The nationwide inmate population today is about 2.1 million people. In California, even as we meet, this State alone keeps over 160,000 persons behind bars. In countries such as England, Italy, France and Germany, the incarceration rate is about 1 in 1,000 persons. In the United States it is about 1 in 143.

(2) About the disproportionate impact of incarceration on minorities:

We must confront another reality. Nationwide, more than 40% of the prison population consists of African-American inmates. About 10% of African-American men in their mid-to-late 20s are behind bars. In some cities more than 50% of young African-American men are under the supervision of the criminal justice system.

(3) About the costs and length of incarceration:

While economic costs, defined in simple dollar terms, are secondary to human costs, they do illustrate the scale of the criminal justice system. The cost of housing, feeding and caring for the inmate population in the United States is over 40 billion dollars per year. In the State of California alone, the cost of maintaining each inmate in the correctional system is about \$26,000 per year. And despite the high expenditures in prison, there remain urgent, unmet needs in the prison system. . . .

. . . When it costs so much more to incarcerate a prisoner than to educate a child, we should take special care to ensure that we are not incarcerating too many persons for too long.

(4) About the federal sentencing guidelines and mandatory minimum sentences:

In the federal system the sentencing guidelines are responsible in part for the increase in prison terms. In my view the guidelines were, and are, necessary. Before they were in place, a wide disparity existed among the sentences given by different judges, and even among sentences given by a single judge. As my colleague Justice Breyer has pointed out, however, the compromise that led to the guidelines led also to an increase in the length of prison terms. We should revisit this compromise. The Federal Sentencing Guidelines should be revised downward.

By contrast to the guidelines, I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.

(5) About the importance of judicial discretion in sentencing:

Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant

U. S. Attorney, often not much older than the defendant, is misguided. Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.

(6) About the atrophy of the pardon power:

The pardon process, of late, seems to have been drained of its moral force. Pardons have become infrequent. A people confident in its laws and institutions should not be ashamed of mercy. The greatest of poets reminds us that mercy is "mightiest in the mightiest. It becomes the throned monarch better than his crown." I hope more lawyers involved in the pardon process will say to Chief Executives, "Mr. President," or "Your Excellency, the Governor, this young man has not served his full sentence, but he has served long enough. Give him what only you can give him. Give him another chance. Give him a priceless gift. Give him liberty."

(7) About the dehumanizing experience of prison and the importance of rehabilitation as a punishment goal:

The debate over the goals of sentencing is a difficult one, but we should not cease to conduct it. Prevention and incapacitation are often legitimate goals. Some classes of

criminals commit scores of offenses before they are caught, so one conviction may reflect years of criminal activity. There are realistic limits to efforts at rehabilitation. We must try, however, to bridge the gap between proper skepticism about rehabilitation on the one hand and improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose minds and spirits we must try to reach. . . .

. . . . Professor [James] Whitman [*Harsh Justice*] concludes that the goal of the American corrections system is to degrade and demean the prisoner. That is a grave and serious charge. A purpose to degrade or demean individuals is not acceptable in a society founded on respect for the inalienable rights of the people. No public official should echo the sentiments of the Arizona sheriff who once said with great pride that he "runs a very bad jail."

The bottom line, Justice Kennedy concluded, is that "[o]ur resources are misspent, our punishments too severe, our sentences too long." He requested that the American Bar Association turn its attention to these issues:

I hope it is not presumptuous of me to suggest that the American Bar Association should ask its President and the President-elect to instruct the appropriate committees to study these matters, and to help start a new public discussion about the prison system. It is the duty of the American people to begin that discussion at once.

President Dennis Archer committed himself to begin that "new public discussion" and formed the Commission to which Justice Kennedy subsequently agreed to lend his name. President Archer appointed Commission members from within the American Bar Association, thereby assuring broad representation from its membership. Most of its members have substantial criminal justice experience. A few had little experience in criminal justice but brought to their work the discerning eye that good lawyers bring to new problems. Brief descriptions of the members are found in an Appendix to this Report.

B. ACCEPTING THE CHALLENGE

The challenge for the ABA Justice Kennedy Commission was to begin the process of getting the organized bar focused on corrections and punishment, to make initial recommendations for improving public knowledge of and confidence in the sentencing and correctional process, and to seek to make punishment more effective in preventing crime and enabling offenders to reenter society once they have paid the price for criminal activity.

We determined early on that we needed to gather as much information about current sentencing practices, correctional practices, pardon systems and reentry issues as possible. In November 2003, we held three days of hearings in Washington, D.C., and explored a wide range of issues with the help of some of the nation's leading experts. We held additional hearings in San Antonio, Texas, in February 2004, during the ABA Mid-Winter Meeting. Our focus was on the Texas criminal justice system as an illustration of how one state was dealing with the expense of incarceration and many issues similar to those raised by Justice Kennedy. In March,

representatives of the Commission met with the Chair of the Criminal Law Committee of the Judicial Conference of the United States. In April, we held hearings in Sacramento, California, explored issues faced by the state with the largest prison population, and learned about reforms that were being considered in that state. Commission representatives engaged in a discussion at the Stanford Law School with the Latino Law Students Association, which was especially interested in disparities in sentencing disfavoring minority offenders. In May, Commission representatives interviewed Maryland officials responsible for the state criminal justice system concerning reforms that have been adopted and are under consideration.

Throughout the year, we have followed to the greatest extent possible the activity that has occurred in so many states as they consider ways of reducing the costs of their correctional systems. Just keeping up with current recent developments affecting sentencing, prison populations, and prisoner reentry has been a challenge.

All the while we have been aware that in some respects the Kennedy Commission has been asked to reexamine the most fundamental issues that arise in criminal justice debates and to deal with problems that have been present for decades. The questions that must be asked by anyone addressing the issues raised by Justice Kennedy include, but are not limited to, these: What is (or are) the purpose (or purposes) of punishment? How much punishment is necessary for particular crimes? Does a policy of incarcerating a greater number of criminals lead to greater reductions in crime? How do we know when sentences are too long? What factors should mitigate or enhance punishment? How can we prevent unwarranted disparities in sentencing? How can we recognize legitimate differences among offenders charged with similar offenses? Are minorities disproportionately represented in prison because of racial discrimination or insensitivity, conscious or unconscious, or because they commit a disproportionate percentage of criminal acts? At what point do racial disparities erode confidence among minorities that the criminal justice system is fair? Should offenders get a second chance? If so, what is the best way to provide that chance? Should the pardon power be reinvigorated? Can collateral sanctions be eliminated without endangering the public?

The unsurprising conclusion that we reached is that we cannot answer many of these questions, for they do not permit a single, correct answer. Reasonable people can and do differ on the answers. Consider, for example, the purpose(s) of punishment. Some people argue from a moral perspective that one who commits a crime simply deserves punishment, and that no further purpose need be identified. Other people would argue that punishment serves instrumental goals; it deters, reforms, incapacitates, and restores. But, there is no agreement as to which instrumental goals are most important. In the end, we offer no grand conclusions or pronouncements on the criminal justice issues that have been debated by scholars, judges and lawyers for many years.

We have been able to identify some important, but hardly new, principles that appear to command support from a wide cross-section of the population of judges, legislators, prosecutors, defense counsel and scholars from whose testimony, discussion and writings we have benefited. These basic principles undergird the recommendations that we make in the four resolutions that we present to the Houses of Delegates. The resolutions cover (1) punishment, incarceration and sentencing; (2) racial discrimination and unjustified disparities; (3) commutation, elimination of collateral disabilities and restoration of rights; and (4) prison conditions and offender reentry.

C. TEN BASIC PRINCIPLES

(1) There is no universally accepted view of what the goal or purpose of punishment is, but there is something of a growing consensus that (a) while incarceration is an appropriate punishment for many crimes, it is not the only punishment option that should be available in a comprehensive sentencing system; (b) when incarceration is imposed as all or part of a sentence, society and offenders benefit when offenders are prepared to reenter society upon release from incarceration; (c) while there is a place for harsh punishment in a sentencing system, there also is a place for rehabilitation of offenders; and (d) community-based treatment alternatives to prison may be both cost-effective and conducive to safer communities.

(2) It is possible to differentiate among crimes, rank them in relative order of seriousness, and tailor sentences in order to further public safety, economic efficiency, and the ends of justice. Some crimes, but not all, involve egregious conduct. Some crimes, but not all, pose grave danger to the community. Criminal codes in the United States have become enormously complex and cover an incredible array of human conduct. Some crimes require no mens rea at all, while others require specific intent. Some crimes have no readily identifiable victims, while others have identifiable victims who have lost lives, health and property.

(3) For offenders who commit the most serious criminal acts, particularly acts of violence against others, lengthy terms of incarceration are generally warranted to recognize the magnitude of the antisocial act (or as retribution or “just desserts”), incapacitate the offender for the safety of the community, and send a deterrent signal to others.

(4) As the seriousness of crime and threat of harm diminishes, the need for lengthy periods of incarceration also diminishes. Indeed, in many instances society may conserve scarce resources, provide greater rehabilitation, decrease the probability of recidivism and increase the likelihood of restitution if it utilizes alternatives to incarceration like drug treatment. For treatment type alternatives to work, a genuine program must be established and sufficient resources must be devoted to it.

(5) Sentencing guidelines or other systems that guide sentencing courts in sentencing can, as the ABA Standards for Criminal Justice: Sentencing (3d ed. 1994) recognized, help to minimize unwarranted and unjustified disparities in punishment among similarly situated offenders. However, any system that guides the discretion of sentencing courts runs a risk of becoming too wooden unless it permits sentencing courts to take into account individual characteristics of an offense or offender that support an increase or decrease in the guideline or presumptive sentence that might otherwise be imposed. A combination of guidance and an ability to depart offers some hope of a sentencing system in which like offenders are treated alike, while differences among offenders are not overlooked. There is no need for mandatory minimum sentences in a guided sentencing system. As long as there is transparency – i.e., judges explain an increase or decrease in an otherwise applicable sentence – and review of such decisions, the right balance between avoiding unwarranted disparities while recognizing individual characteristics of offenses and offenders can be maintained, and judges can be held accountable for their decisions. This balance can be aided if there is an entity provided with sufficient resources and charged with monitoring the sentencing system, providing public reports

on its operation, and recommending changes in light of crime rates, observed sentencing patterns, racial disparity in sentencing and the availability of sentencing alternatives. Guided discretion may also be useful when probation and parole revocation decisions are made.

(6) Offenders who serve substantial terms of imprisonment and who will be released back into society often are unprepared for their release. If offenders cannot successfully reenter their communities, the chances increase that they will commit future criminal acts. Offenders who serve substantial terms of imprisonment often do not possess the tools necessary to prepare themselves to reenter society. Successful reentry depends upon education, training, and treatment while in prison, and lawful means of supporting oneself in the community after release. Prison conditions should support education, training and treatment of offenders. Inhumane and cruel conditions decrease the likelihood that prisoners will be able to prepare themselves for a successful return to the community.

(7) Collateral disabilities imposed upon convicted offenders may make it difficult for them to resume their place in society. The most important predictive factor as to whether an offender will become a recidivist appears to be employment. Those who find work are less likely to re-offend. Those who cannot find legitimate work are more likely to engage in criminal acts. To the extent that legal and attitudinal barriers to employing people with convictions can be removed, the chances of work increase and the likelihood of recidivism decreases.

(8) As President Bush said in his 2004 State of the Union address which proposed a \$300 million prisoner re-entry initiative, “America is the land of the second chance.”¹ But, it is also a nation in which too often the second chances are not good chances. Compassionate release of offenders based upon circumstances arising after they have been sentenced is theoretically possible, but is rarely provided. It has a proper place in a correctional system. There also is a place for forgiveness. Those offenders who have served their sentences and have demonstrated through years of law-abiding conduct that they have earned forgiveness should receive greater consideration than they now do in the pardon process. Pardons need not only be for the innocent or wrongly convicted, but can be used to recognize the former offender who has seized his or her second chance and made it a success.

(9) Given the history of race in America – e.g., slavery, Jim Crow laws, segregation, Japanese internment, urban ghettos – there is reason for concern when two-thirds of those incarcerated are African-American or Latino. Even though offenders of color may commit a disproportionate percentage of certain types of criminal acts as the result of socio-economic disadvantage and the many other complex causes of crime, there is also evidence of discriminatory treatment of defendants and victims of color at various stages of the criminal process. Every jurisdiction should examine whether conscious or unconscious bias or prejudice may affect investigatory, prosecution, or sentencing decisions and take steps to eliminate such

¹ President Bush announced:

“This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit more crimes and return to prison. So tonight, I propose a four-year, 300 million dollar Prisoner Re-Entry Initiative to expand job training and placement services, to provide transitional housing, and to help newly released prisoners get mentoring, including from faith-based groups. America is the land of the second chance - and when the gates of the prison open, the path ahead should lead to a better life.”

bias. All participants in the criminal justice system, including legislators, should strive to eliminate the racial impact of their decisions.

(10) There is, as Justice Kennedy noted, a crying need for the lawyers of America to involve themselves in the national conversation about these issues. It is long past due for lawyers to understand what happens to people after they are arrested and are convicted and sentenced. There is much that lawyers who understand might do to assist prisoners serving long terms who have been largely forgotten, even if that assistance is only to help them maintain connections with the families and communities they left behind. There is much they might do to assist offenders who have been released from prison to reintegrate into their communities, and thereby increase the likelihood that they will not commit additional crimes. Lawyers who assist convicted offenders may not only help them, but they may simultaneously decrease future crime rates and thereby reduce the number of future victims throughout the United States.

**AMERICAN BAR ASSOCIATION
JUSTICE KENNEDY COMMISSION**

**I. REPORT TO THE HOUSE OF DELEGATES
ON PUNISHMENT, INCARCERATION, AND SENTENCING**

RECOMMENDATIONS

RESOLVED, That the American Bar Association urges states, territories and the federal government to ensure that sentencing systems provide appropriate punishment without over-reliance on incarceration as a criminal sanction, based on the following principles:

- (1) Lengthy periods of incarceration should be reserved for offenders who pose the greatest danger to the community and who commit the most serious offenses.
- (2) Alternatives to incarceration should be provided when offenders pose minimal risk to the community and appear likely to benefit from rehabilitation efforts.

FURTHER RESOLVED, That the American Bar Association urges that states, territories and the federal government:

- (1) Repeal mandatory minimum sentence statutes;
- (2) Employ sentencing systems consistent with *Blakely v. Washington*, 542 U.S. ___, 72 U.S.L.W. 4546 (June 24, 2004), that guide judicial discretion to avoid unwarranted and inequitable disparities in sentencing among like offenses and offenders, but permit courts to consider the unique characteristics of offenses and offenders that may warrant an increase or decrease in a sentence;
- (3) Require a sentencing court to state on the record reasons for increasing or decreasing a presumptive sentence, and permit appellate review of any sentence so imposed.
- (4) Assign responsibility for monitoring the sentencing system to an entity or agency with sufficient authority and resources to:
 - (a) Recommend or adopt alternatives to incarceration that have proven successful in other jurisdictions; and
 - (b) Gather and analyze data as to criminal activity and sentencing and the financial impact of proposed legislation, and consider whether changes in sentencing practices should be recommended or adopted in light of increases or decreases in crime rates, changes in sentencing patterns, racial disparities in sentencing, correctional resources, and availability of sentencing alternatives.

- (5) Study and fund treatment alternatives to incarceration for offenders who may benefit from treatment for substance abuse and mental illness.
- (6) Adopt diversion or deferred adjudication programs that, in appropriate cases, provide an offender with an opportunity to avoid a criminal conviction.
- (7) Develop graduated sanctions for probation and parole violations that provide for incarceration only when a probation or parole violator has committed a new crime or poses a danger to the community.

FURTHER RESOLVED, That the American Bar Association recommends that the Congress:

- (1) Repeal the 25 percent rule in 28 U.S.C. §994(b)(2) to permit the United States Sentencing Commission to revise, simplify and recalibrate the federal sentencing guidelines and consider state guideline systems that have proven successful.
- (2) Reinstate the abuse of discretion standard of appellate review of sentencing departures, in deference to the district court's knowledge of the offender and in the interests of judicial economy.
- (3) Minimize the statutory directives to the United States Sentencing Commission to permit it to exercise its expertise independently.
- (4) Repeal the limitation on the number of judges who may serve on the United States Sentencing Commission.

REPORT

A. SHIFTING SENTENCING MODELS: FROM REHABILITATION TO RETRIBUTION

For most of the twentieth century prior to the Sentencing Reform Act of 1984 (the “SRA”)² and sentencing reform measures enacted in many states, the rehabilitative³ or “medical” model⁴ of sentencing prevailed in the federal (and state) courts.⁵ The assumption upon which sentencing rested was that, through a combination of deterrence motivated by the unpleasant experience of incarceration, and personal renewal spurred by counseling, drug treatment, job training and the like, criminal deviance could be treated like any other disorder. The system recognized, albeit grudgingly, that some defendants were, in effect, “incurable” and thus could only be quarantined through lengthy or life sentences, and that in a few cases the crime was so egregious that the public demand for retribution outweighed rehabilitative considerations.⁶ But the dominant paradigm was rehabilitative. Therefore, sentences were supposed to be “individualized,” in the way that medical treatment is individualized, according to the symptoms and pathology of the offender.⁷

² Title II of the Comprehensive Crime Control Act of 1984, Pub.L. 98-473 (1984).

³ *See generally*, FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL, *passim* (discussing the rise and fall of the “rehabilitative ideal”).

⁴ Michigan purportedly was the first state to adopt a sentencing system based at least in part on a “medical model,” *United States v. Scroggins*, 880 F.2d 1204, 1207 n. 6 (11th Cir. 1989). *See also* PAMALA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND REALITY OF RETRIBUTIVE JUSTICE 11(1991) (discussing the “rise of the rehabilitative juggernaut” between 1877-1970, and noting that “[a] medical analogue was frequently invoked.”); and ALLEN, *supra* note 3, at 35 (referring to the “medical model” of sentencing).

⁵ Professor Allen notes that “rehabilitation ... seen as the *exclusive* justification of penal sanctions ... was very nearly the stance of some exuberant American theorists in mid-twentieth century...” ALLEN, *supra* note 3, at 3. *See also*, American Friends Service Committee, STRUGGLE FOR JUSTICE 83 (1971) (“Despite [its] shortcomings the treatment approach receives nearly unanimous support from those working in the field of criminal justice, even the most progressive and humanitarian.”).

⁶ For example, both the death penalty and life imprisonment were imposed throughout the period when the rehabilitative ideal dominated American sentencing, yet no one would seriously have argued that the purpose of either type of sentence was rehabilitation of the offender. *See* Adam Bedau, *The Death Penalty in America: Yesterday and Today*, 95 DICK. L. REV. 759, 762-64 (1991) (describing widespread use of death penalty in America throughout twentieth century for crimes including murder, armed robbery, rape, and kidnapping). *See also*, Dane Archer, Rosemary Gartner, and Marc Beittel, *Homicide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis*, 74 J. CRIM. L. & CRIMINOLOGY 991 (1983) (attributing use of death penalty in part to disbelief in rehabilitation).

⁷ “Individualized sentencing” was embraced as the philosophy of federal sentencing in *Williams v. New York*, 337 U.S. 241, 248 (1949) (referring to “[t]oday’s philosophy of individualizing sentences”); and *Burns v. United States*, 287 U.S. 216, 220 (1932) (“It is necessary to individualize each case, to give that careful, humane, and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion.”).

Before the advent of guideline systems of sentencing, state and federal sentences were described as "indeterminate," a word often used to refer to two different, but related, ideas in the sentencing context. First, an indeterminate sentencing system is one in which the judge sentences a defendant either to a specified term, or to a range of years (e.g., 5-20), but the number of years the defendant *actually* serves is determined later by an administrative body like a parole board.⁸ For most of the twentieth century, state and federal sentencing was indeterminate in this sense and still is in many states for some or all crimes.⁹ For example, a federal judge would sentence a federal defendant to a specific term of years, but the proportion of the announced term that the defendant would actually spend in a cell was controlled primarily by the United States Parole Commission.¹⁰ The Parole Commission, an executive branch agency, not only created its own guidelines for

⁸ For a discussion of the historical development of parole in Europe and the United States, *see* REID MONTGOMERY, JR. AND STEVEN DILLINGHAM, *PROBATION AND PAROLE IN PRACTICE* 25-32 (1983); and TODD R. CLEAR AND GEORGE F. COLE, *AMERICAN CORRECTIONS*, 2d Ed., 396-99 (1990).

⁹ In 1910, Congress mandated that each federal prison have its own parole board, constituted of the superintendent of prisons of the Department of Justice, the warden and physician of each penitentiary. Act of June 25, 1910, ch. 387, 36 Stat. 819. The parole board of each prison had the discretionary power to release any prisoner who had served one-third of his original stated sentence if the board was satisfied that "there is a reasonable probability that [the prisoner] will live and remain at liberty without violating the laws," and that release "is not incompatible with the welfare of society." *Id.* at § 3. The United States Board of Parole, which later became the United States Parole Commission, was created by Congress in 1930. DON M. GOTTFREDSON, LESLIE T. WILKINS, AND PETER B. HOFFMAN, *GUIDELINES FOR PAROLE AND SENTENCING* 2 (1978). The legal powers of the Parole Commission as it existed immediately before the adoption of the sentencing guidelines are set out at 18 U.S.C. §§ 4201 - 4218 (repealed 1984). For a general study of the operation of parole decision-making, see GOTTFREDSON, WILKINS, AND HOFFMAN, *supra*.

¹⁰ The district court had three options when imposing a sentence of imprisonment: (a) It could impose a sentence under 18 U.S.C. §4205(a) (repealed 1984), in which case the defendant was obliged to serve one-third of his sentence before becoming eligible for parole. (b) Pursuant to 18 U.S.C. §4205(b)(1)(repealed 1984), the court could impose a maximum term of imprisonment, but reduce the minimum term required before parole eligibility to less than one-third of the maximum sentence. (c) The court could fix a maximum term and specify that "the prisoner may be released on parole at such time as the [Parole] Commission may determine." 18 U.S.C. §4205(b)(2) (repealed 1984). When the court imposed a minimum term under either 18 U.S.C. §4205(a), or 18 U.S.C. §4205(b)(1), the Parole Commission retained control over when the defendant would be released after he served the minimum and achieved parole eligibility. In the pre-guidelines period, "federal courts normally sentenced adult offenders pursuant to" §4205(a). *United States v. Scroggins*, 880 F.2d 1204, 1207 (11th Cir. 1989).

There was one other factor at work in determining the actual sentence length of federal prisoners, a statutory entitlement to so-called "good time" credit of up to nearly one-third of the stated sentence. Before the enactment of the SRA, this entitlement was codified at 18 U.S.C. §4161 (repealed 1984).

determining release dates,¹¹ but retained discretionary power to set individual release dates anywhere within the broad parameters dictated by those guidelines.¹²

Second, federal sentencing before the Guidelines was said to be “indeterminate” in the sense that the judge had virtually unlimited discretion to sentence a convicted defendant anywhere within the range created by the statutory maximum and minimum penalties for the offense or offenses of conviction.¹³ As long as the judge kept within the statutory range, there were virtually no rules about how he or she made the choice of sentence.¹⁴ There was no limitation on either the type or quality of information a judge could consider at sentencing.¹⁵ Moreover, none of this information was subject to filtering by the rules of evidence,¹⁶ and the judge was required to make no findings of

¹¹ The creation of parole guidelines was mandated by 18 U.S.C. §4203(a)(1) (repealed 1984). For a discussion of the federal parole guidelines and their operation, see GOTTFREDSON, WILKINS, AND HOFFMAN, *supra* note 9, at 22-37. See also, Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228-29 (1993) (discussing the genesis of the parole guidelines).

¹² The breadth of the Parole Commission’s discretion is indicated by the language of the statute, 18 U.S.C. §4206(a) (repealed), describing its power of parole:

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of the offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare;
subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

¹³ See David Fisher, *Fifth Amendment - Prosecutorial Discretion Not Absolute: Constitutional Limits on Decision Not to File Substantial Assistance Motions*, 83 J. CRIM. LAW & CRIMINOLOGY 744, 745 (1993) (“Prior to the passage of the Sentencing Reform Act, federal judges enjoyed extremely broad discretion in sentencing. A judge could impose any sentence she thought proper as long as it did not exceed the statutory maximum.”); Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 89 (1988) (same).

¹⁴ For example, federal law prior to the enactment of the Sentencing Reform Act of 1984 provided that, as to “any offense not punishable by death or life imprisonment,” the court was free to suspend the imposition of a sentence of incarceration and place the defendant on probation, so long as the judge was “satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby....” 18 U.S.C. §3651 (repealed 1984).

¹⁵ See 18 U.S.C. § 3661: “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” See also *Williams v. New York*, 337 U.S. 241, 249-50 (1949)(due process allows the judge broad discretion as to the sources and types of information relied upon at sentencing).

¹⁶ Federal Rule of Evidence 1101(d)(3) (Federal Rules of Evidence do not apply at sentencing). This rule was adopted in 1975 as part of the original Federal Rules of Evidence, see Pub.L 93-595, §3, 88 Stat. 1949 (1975), and thus was in effect both before and after the creation of the federal sentencing guidelines. See also *Williams v. New York*, 337 U.S. 241, 250-51 (1949) (due process does not require confrontation or cross-examination in sentencing or passing on probation).

fact. Moreover, so long as the final sentence was within statutory limits, it was essentially unreviewable by a court of appeals.¹⁷

The pre-Guidelines federal sentencing system was indeterminate in both senses of the word because its objectives were primarily (though never exclusively) rehabilitative. At the time of sentencing, the system assumed that judges expert in the law and the social sciences, and seasoned by the experience of sentencing many offenders, would choose penalties that maximized the rehabilitative chances of offenders.¹⁸ After sentencing, the assumption was that trained penologists could determine when a prisoner had been rehabilitated¹⁹ and thus advise the Parole Commission about release dates.²⁰

The rehabilitative model was not necessarily favorable to defendants, and it was not necessarily fair. Two defendants committing the same crime under the same circumstances could receive very different sentences depending on a particular judge's or jury's sentencing idiosyncrasies. A parole board could prevent some harshness, but could

¹⁷ See *Koon v. United States*, 518 U.S. 81 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal."); *Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (reiterating "the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.") See also, *Solem v. Helm*, 463 U.S. 277, 290, n. 16 (1983) ("[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.") Although the appellate courts lacked the power to review the substance, which is to say the length, of sentences imposed by district courts, they retained some ability to review the *process* through which sentences were determined. The outer limits of the district court's discretion were set by concepts of due process. See, e.g., *Townsend v. Burke*, 334 U.S. 736 (1948) (holding that a sentence based on erroneous factual information violated due process); and *United States v. Tucker*, 404 U.S. 443 (1972)(vacating on due process grounds a sentence that relied on prior uncounseled convictions); *United States v. Clements*, 634 F.2d 183, 186 (5th Cir. 1981)(holding that court would "not review the severity of a sentence imposed within statutory limits, but will carefully scrutinize the judicial process by which the punishment was imposed"); *Herron v. United States*, 551 F.2d 62, 64 (5th Cir. 1977) ("The severity of a sentence imposed within statutory limits will not be reviewed."); *United States v. Cavazos*, 530 F.2d 4, 5 (5th Cir. 1976) (same); *United States v. Espinoza*, 481 F.2d 553, 558 (5th Cir. 1973) ("[The] discretion [of sentencing judges] is not, and has never been absolute, and while the appellate courts have little if any power to review substantively the length of sentences [citation omitted], it is our duty to insure that rudimentary notions of fairness are observed in the process at which the sentence is determined."). See also, *Stith and Koh*, *supra* note 11, at 226 ("For over two hundred years, there was virtually no appellate review of the trial judge's discretion."); *Fisher*, *supra* note 13, at 745 (noting that before the SRA there was no appellate review of sentencing decisions).

¹⁸ *GRISSET supra* note 4, at 1 (discussing the premises of the "rehabilitative regime" and noting that it rested on the assumptions that "case by case decisionmaking should be encouraged; that future behavior could be predicted; that criminal-justice practitioners possessed the expertise required to make individualized sentencing decisions").

¹⁹ "The indeterminate sentence ... is expressive of the rehabilitation ideal: A convict will be released from an institution, not at the end of a fixed period, but when someone (a parole board, a sentencing board) decides he is 'ready' to be released." JAMES Q. WILSON, *THINKING ABOUT CRIME*, 191 (1975).

²⁰ For a discussion of how social scientists advising the Parole Commission designed and tested statistical models in order to generate predictions about the risk of recidivism for potential parolees, see *GOTTFREDSON, WILKINS, AND HOFFMAN, supra* note 9, at 41-67.

not assure that a defendant did not serve a much longer term than most similar offenders. The unguided nature of the system, which still exists in some states, is strange in American law, as one commentator has noted:

It is curious to see how few standards existed in criminal sentencing prior to the advent of guidelines and truth in sentencing and to compare the discretion awarded judges and juries with other aspects of American life. Suppose that Congress provided in the Internal Revenue Code that the Commissioner of the Internal Revenue Service (IRS) should assess income tax as he or she sees fit. In other words, the Commissioner should make the tax fit the individual taxpayer. Would anyone doubt that such a system would be deemed unconstitutional--either as a denial of equal protection (failing the rational basis test), a denial of due process (also failing a rational basis test and suggesting total arbitrariness and capriciousness), or even as an invalid delegation of power.

Take another example. Suppose that Congress authorized the Social Security Administration (SSA) to make social security payments to individuals as it deems wise. We would have the same constitutional challenges, and I think most legal observers would predict that they clearly would succeed.

Stephen A. Saltzburg, "Due Process, History, and *Apprendi v. New Jersey*," 38 American Criminal Law Review 243, 245 (2001)(footnotes omitted).

In the 1970's and 1980's, the rehabilitative model of sentencing fell into disfavor in state and federal courts for a variety of reasons,²¹ including rising crime,²² mounting evidence that prisoners were not being rehabilitated,²³ and increasing concern that indeterminate sentencing produced unjust disparities among similarly situated offenders.²⁴ A combination of conservatives inclined toward tougher sentences and

²¹ For a more complete discussion of the fall of the rehabilitative model and the rise of the Federal Sentencing Guidelines, see Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons In Learning to Love the Federal Sentencing Guidelines*, 1996 WISC. L. REV. 679, 686-689 (1996) (hereinafter "Bowman, *Quality of Mercy*").

²² See Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 MO. L. REV. 1077, 1079 (noting that during the 1970's "the perception that crime rates were out of control led some officials to demand surer and stiffer sanctions against criminals as a means of preventing crime").

²³ See Steven S. Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 685-86 (1980) ("In part, the massive professional and academic disillusionment with the therapeutic model stems from the simple practical inability of the criminal justice system to reform serious offenders effectively through incarceration."); Andrew von Hirsch, *Recent Trends in American Criminal Sentencing*, 42 MD. L. REV. 6, 11 (1983)("[N]o serious researcher has been able to claim that rehabilitation routinely could made to work for the bulk of the offenders coming before the courts."). See also Michael Vitiello, *Reconsidering Rehabilitation*, 65 Tul. L. Rev. 1011 (1991) (urging that rehabilitation be revisited as a dominant rationale for criminal sanctions).

²⁴ One of the first and most influential critics of pre-guidelines sentencing on the ground of unjustifiable sentence disparity was Judge Marvin E. Frankel. He said of the indeterminate sentencing system in the federal courts that "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law." MARVIN

liberals inclined toward checking sentencing disparity coalesced to produce sentencing reform in the federal system and in many states. The result was the determinate sentencing revolution, which has been characterized by (a) limitations on front-end judicial sentencing discretion through passage of mandatory minimum sentences for certain offenses and sentencing guidelines that narrow the scope of unconstrained judicial sentencing discretion for all offenses, (b) elimination of or drastic limitations on parole or other forms of administrative early release authority, thus requiring defendants to serve a larger proportion of their judicially imposed sentences, and (c) in most places, increases in the statutory and/or guidelines penalties for most serious crimes, particularly violent crimes involving firearms and drug offenses.

The effect on sentencing decisions was enormous. Beginning in the late 1970s, the United States began to respond to concerns about rising crime by implementing an array of policy changes which, in the aggregate, produced a steady, dramatic, and unprecedented increase in the population of the nation's prisons and jails. Between 1974 and 2002, the number of inmates in federal and state prisons rose from 216,000²⁵ to 1,355,748,²⁶ a more than five-fold increase. Between 1974 and 2001, the rate of imprisonment rose from 149 inmates to 628 inmates per 100,000 population, a more than four-fold increase.²⁷ Jail populations have also increased markedly. Between 1985 and 2002, the number of persons held in local jails more than doubled, from 256,615²⁸ to 665,475.²⁹ By mid-year 2002, the combined number of inmates in federal and state prisons and jails exceeded two million.³⁰

The average length of time spent in prison has also increased. Alan J. Beck of the Bureau of Justice Statistics described the increase in his April 16, 2004 Remarks to the

E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973); *see also* Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CINN. L.REV. 1 (1972). *See also*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 23 (Government Printing Office 1967) (finding sentencing disparity to be pervasive); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 142 (Government Printing Office 1973) (same); Peter B. Hoffman and Barbara Stone-Meierhoefer, *Application of Guidelines to Sentencing*, 3 LAW AND PSYCHOLOGY REVIEW 53, 53-56 (1977) (describing criticisms of then-extant sentencing practices on the ground of "unwarranted sentencing disparity"). Peter Hoffman later became the principal draftsman of the Federal Sentencing Guidelines.

²⁵ Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, NCJ 197976, p. 1, tbl. 1 (August 2003) (hereinafter "*BJS, Prevalence*").

²⁶ Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2002*, NCJ 198877, p. 1 (April 2003) (hereinafter "*BJS, Prison and Jail, 2002*").

²⁷ *BJS, Prevalence*, *supra* note 25.

²⁸ Bureau of Justice Statistics, *Correctional Populations in the United States, 1997*, NCJ 177613, p. 21, tbl. 2.4 (Nov. 2000).

²⁹ *BJS, Prison and Jail, 2002*, *supra* note 26, at 1.

³⁰ *Id.*, at 2, tbl. 1.

National Committee on Community Corrections. The average time served in prison was about five years between 1992 and 2001. Between 1980 and 1992, the average time served was only 18 months.

These numbers are unprecedented in American history and represent a marked departure from a long period of relative stability in imprisonment rates. During the 45-year period leading up to the 1970s, rates of imprisonment in the U.S. (excluding jail populations) held roughly steady at about 110 per 100,000.³¹ Moreover, as Justice Kennedy noted in his address to the Association, current rates of incarceration in the United States are strikingly different than the practices of most of the rest of the world, particularly in comparison with other developed countries. The United States now imprisons a higher percentage of its residents than any other country, surpassing Russia, South Africa, and the states of the former Soviet Union.³² And the U.S. incarcerates its residents at a rate roughly five to eight times higher than the countries of Western Europe, and twelve times higher than Japan.³³

The costs of the American experiment in mass incarceration have been high. Between 1982 and 1999, direct expenditures by federal, state, and local governments on corrections jumped from \$9 billion to \$49 billion, an increase of over 440%.³⁴ During the same period, combined criminal justice expenditures (for police, judicial, and corrections activities) by federal, state, county, and municipal governments rose from \$35.7 billion in 1982 to \$146.5 billion in 1999.³⁵ Moreover, the costs of an aggressive program of incarceration extend beyond the direct dollar outlays of governments on functions easily identifiable as part of the criminal justice system. Governments themselves incur a variety of collateral costs when a defendant is sent to prison or jail, including increased expenditures for the maintenance and health care of dependents of inmates, lost tax revenues from income that would have been earned or expenditures that would have been made by defendants left free in the community, etc.

Finally, and not least, the families and communities from which inmates come suffer a wide variety of tangible and intangible harms from the absence of the inmate. These include the emotional, economic, and developmental damage to the children of incarcerated offenders,³⁶ and the disenfranchisement and consequent political alienation

³¹ MARC MAUER, *RACE TO INCARCERATE* 16 (1999).

³² See Marc Mauer, *Comparative International Rates of Incarceration: An Examination of Causes and Trends* (June 20, 2003) (available at <http://www.sentencingproject.org/pdfs/pub9036.pdf>).

³³ *Id.*

³⁴ Bureau of Justice Statistics, *Direct Expenditures by Criminal Justice Function, 1982-99* (available as <http://www.ojp.usdoj.gov/bjs/glance/tables/exptyptab.htm>).

³⁵ Bureau of Justice Statistics, *Direct Expenditures by Level of Government, 1982-99* (available as <http://www.ojp.usdoj.gov/bjs/glance/tables/expgovtab.htm>).

³⁶ See generally MARC MAUER AND MEDA CHESNEY-LIND, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT*. See also, *Collateral Casualties: Children of*

of a significant portion of the young men in the minority communities in which both crime and punishment are most frequent.³⁷

Alan Beck's Remarks, cited above, described the overall impact of incarceration on the American population. Overall, more than three percent of American adults were incarcerated or under criminal justice supervision in 2002. The likelihood of an American going to prison sometime in his or her life more than tripled to 6.6 percent between 1974 and 2001. For an African American male born in 2004, the likelihood of being incarcerated sometime during his lifetime is 32.2 percent.

B. PUNISHMENT AND CRIME

It is unclear what effect increased incarceration has had on crime rates. The homicide rate, which had held steady at five or fewer per 100,000 throughout the 1950s and early 1960s, began rising steeply in 1966 and had nearly doubled by 1974.³⁸ Between 1974 and 1991, homicide rates fluctuated between a low of 7.9 per 100,000 in 1984-85 and highs of 10.2 in 1980 and 9.8 in 1991.³⁹ Property crime rose steadily throughout the 1960s and 1970s, peaking in around 1979-80, and thereafter declining gradually.⁴⁰ Violent crime increased steadily throughout the 1960's and 1970's, declined slightly in the early 1980's, but rose again in the latter half of the decade, peaking at all-time highs in the early 1990s.⁴¹ Similarly, the use of illegal drugs became a common

Incarcerated Drug Offenders in New York, Human Rights Watch Reports, Vol. 14, No. 3 (June 2002) (available at <http://www.hrw.org/reports/2002/usany/USA0602.pdf>).

³⁷ See the joint report of the Sentencing Project and Human Rights Watch, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (summary available at <http://www.hrw.org/reports98/vote/>). This report finds that an estimated 3.9 million Americans, or one in fifty adults, have currently or permanently lost the ability to vote because of a felony conviction; that 1.4 million African American men, or 13 percent of the black adult male population, are disenfranchised, reflecting a rate of disenfranchisement that is seven times the national average; that more than one-third (36 percent) of the total disenfranchised population are black men; and that, given current rates of incarceration, three in ten of the next generation of black men will be disenfranchised at some point in their lifetimes. In states with the most restrictive voting laws, 40 percent of African American men are likely to be *permanently* disenfranchised.

³⁸ Bureau of Justice Statistics, Homicide Trends in the U.S.: Long term trends (available at <http://www.ojp.usdoj.gov/bjs/homicide/tables/totalstab.htm>).

³⁹ *Id.*

⁴⁰ Bureau of Justice Statistics, National Crime Victimization Survey, Property Crime Trends, 1973-2002 (available at <http://ojp.usdoj.gov/bjs/glance/tables/proptrdtab.htm>).

⁴¹ Bureau of Justice Statistics, National Crime Victimization Survey, Violent Crime Trends, 1973-2002 (available at <http://ojp.usdoj.gov/bjs/glance/tables/viortrdtab.htm>); Bureau of Justice Statistics, Four measures of serious violent crime (available at <http://ojp.usdoj.gov/bjs/glance/tables/4meastab.htm>).

feature of the American scene for the first time in the 1960s,⁴² continued to increase until about 1985,⁴³ and remains a significant social problem.

The decline in property crimes has been steady, and in recent years there has been a decline in violent crime, as well as a dramatic drop in homicides and firearm-related violent offenses. Between 1991 and 2002, the number of homicides in the United States fell from its all-time high of 24,700 to 15,517, and the rate of homicide per 100,000 population dropped from 9.8 to 5.5.⁴⁴ From 1994 to 2002, the absolute number of firearm crimes dropped from 1,248,250 to 442,880, a decline of 64.5%. In the same period, the rate of firearm crime per 100,000 declined from 6.0 to 1.9, a decrease of 68.3%.⁴⁵

Some conservative writers have concluded that increased imprisonment has been the most important cause of the crime drop. As Charles Murray of the American Enterprise Institute wrote in 1997, “We figured out what to do with criminals. Innovations in policing helped, but the key insight was an old one: Lock ‘em up.”⁴⁶ Most academic criminologists have been more skeptical, emphasizing that crime rates are affected by a wide array of factors, including changing demographics (particularly the changing proportion of crime-prone young males in the population), fluctuating economic conditions, changes in the drug trade, the availability of firearms, and changes in law enforcement practices.⁴⁷ For example, Professor William Spelman studied violent crime and prison data between 1972 and 1997 and concluded that violent crime would

⁴² The 1960s saw quite startling increases in drug usage. For example, prior to that period, the use of marijuana was rare, becoming common only in the late 1960s. STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* 45 (1993). One source estimates that between 1965 and 1970, the number of active heroin addicts in the United States grew from about 68,000 to roughly 500,000. DAVID J. BELLIS, *HEROIN AND POLITICIANS: THE FAILURE OF PUBLIC POLICY TO CONTROL ADDICTION IN AMERICA* (1981). For a summary discussion of the history of narcotics usage in America from the 1800s through the 1960s, see Frank O. Bowman, III, *Playing “21” with Narcotics Enforcement: A Response to Professor Carrington*, 52 WASH. & LEE L. REV. 937, 951-55 (1995).

⁴³ Sourcebook of Criminal Justice Statistics 2000, p. 260, Table 3.91. Data drawn from U.S. Dept. of Health and Human Services, Substance Abuse and Mental Health Services Administration, *National Household Survey on Drug Abuse*.

⁴⁴ Bureau of Justice Statistics, Homicide Trends in the U.S., Long term trends (available at <http://www.ojp.usdoj.gov/bjs/homicide/tables/totalstab.htm>).

⁴⁵ Bureau of Justice Statistics, Nonfatal firearm-related violent crimes, 1993-2002 (available at <http://www.ojp.usdoj.gov/bjs/glance/tables/firearmnonfatalstab.htm>).

⁴⁶ Charles Murray, *The Ruthless Truth: Prison Works, The Times of London* (1997). In a similar vein, Prof. James Q. Wilson said in 1998 that, “Putting people in prison is the single most important thing we’ve done to decrease crime.” *The Crime Bust*, U.S. News & World Report (May 25, 1998).

⁴⁷ See, e.g., Alfred Blumstein and Joel Wallman, eds, *THE CRIME DROP IN AMERICA* (2000); Jenni Gainsborough and Marc Mauer, *DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990S* (September 2000).

have declined when it did even if the prison buildup had never occurred, although the decline was 27% greater than it otherwise would have been because of the prison buildup.⁴⁸ But, Spelman also concludes that the benefits of incarceration in terms of crimes avoided drops off sharply after a certain point, and that the marginal benefit to society of additional incarceration after that point in terms of crimes avoided is very slight.⁴⁹

Researchers are just beginning to explore the implications of the dramatic growth in incarceration rates for crime rates, for families and communities, for prison management, and for politics.⁵⁰ It is not even clear that the increased use of incarceration has enhanced public safety, although lawmakers for twenty years have acted in reliance on the claimed crime-preventive effect of harsh and certain punishments. It is hard to say for certain whether recidivism rates are rising or falling at a particular moment in time, because of the different measurements used, and because numerous variables (e.g., California's extraordinarily high parole revocation rate) can skew the figures – though the consensus among a number of researchers is that recidivism is not rising.⁵¹ Psychological research has concluded that the effects of a prison stint are minimal, and that “prisoners cope surprisingly well despite an initial period of disorientation and serious anxieties about family and friends.”⁵² This literature also concludes that prisoners can readjust fairly quickly to life in the free community.

The Commission lacks the resources, time and expertise to enter the fray and opine on the precise relationship between incarceration and crime reduction. The existing data suggests that increased incarceration did have a positive impact in reducing crime. The difficulty is in determining when the costs of increased incarceration outweigh the benefits in terms of crime reduction. Just as the data support a conclusion that the movement toward determinate and stiffer sentences produced a drop in crime, they also indicate that jurisdictions that incarcerate increasingly large percentages of their population are not necessarily any more crime-free than other jurisdictions.

The Texas Criminal Justice Policy Council provided the Commission with extensive data it compiled comparing incarceration and crime rates in several

⁴⁸ William Spelman, *The Limited Importance of Prison Expansion*, in Blumstein and Wallman, *supra* note 47, at 123.

⁴⁹ In a later review of studies in the field, Professor Spelman concluded that a doubling of a state's prison population produces a twenty-to-forty percent reduction in crime rate. William Spelman, *What Recent Studies Do (and Don't) Tell Us about Imprisonment and Crime*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH, Vol. 27, ed. Michael Tonry (Univ. of Chicago Press 2002) p. 422. *See also* FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* (1991).

⁵⁰ *See, e.g.*, Michael Tonry and Joan Petersilia, *Prisons* Vol. 26, at 1-5 (1999).

⁵¹ Testimony of James Austin, Director, Institute of Crime, Justice and Corrections, George Washington University, Before the ABA Justice Kennedy Commission, Washington, D.C., November 2003.

⁵² *See* Alison Liebling, *Prison Suicide and Prisoner Coping*, in Tonry & Petersilia, *supra*, at 284, and authorities cited.

jurisdictions. During our San Antonio hearings, judges, prosecutors and defense counsel uniformly praised the accuracy and integrity of the Council's work (and bemoaned the fact that it was effectively abolished when the Governor zeroed it out of the current budget). The Council compared Texas with the nation as a whole and also with other large states. Some of the numbers are instructive. Between 1991 and 2001, there was a 51.6% increase in the national incarceration rate and a 29.5% reduction in the crime rate. In Texas, the incarceration rate for the same period rose 139.4%, while the crime rate was reduced 34.1%. By increasing the incarceration rate by almost three times the national average, Texas decreased the crime rate only slightly more than the national average. California increased its incarceration rate by 42.5% during the 10-year period, and reduced its crime rate by 42.4%. New York increased the incarceration rate for the same period by 10.9% and reduced its crime rate by 53.2%. Thus, California and New York obtained greater reductions in the crime rate than Texas without increasing incarceration at the same pace as Texas. Pennsylvania increased its incarceration rate for the period by 61.5%, while reducing the crime rate by only 16.8%.⁵³

There are various explanations for the various incarceration increases and crime decreases, and the Commission cannot explain precisely why some states achieved greater success in reducing crime with less incarceration. The numbers do suggest, however, that there may well be an overreliance on incarceration in some criminal justice systems, and there is reason to doubt whether constantly increasing the use of incarceration is cost effective. The Washington State Institute for Public Policy has done an analysis that supports these conclusions, at least as to its own state.⁵⁴ The Institute reports that

The key to understanding the costs and benefits of prison as a crime-control strategy is the economic concept of *diminishing marginal returns*. When applied to prison policy, this fundamental axiom of economics means that, as Washington increased the incarceration rate significantly in the last two decades, the ability of the additional prison beds to reduce crime has declined. In 1980, the state had about two people per 1,000 behind DOC bars; today the rate is over five people per 1,000. Diminishing returns means that locking up the fifth person per 1,000 did not, on average, reduce as many crimes as did incarcerating the second, third, or fourth person per 1,000.⁵⁵

⁵³ The Commission also examined year-by-year statistics compiled by the Vera Institute of Justice regarding the violent crime rate and the incarceration rate for virtually every state from 1971 through 2002.

⁵⁴ The Institute's mission is to carry out practical, non-partisan research—at legislative direction—on issues of importance to Washington State. The Institute conducts research using its own policy analysts and economists, specialists from universities, and consultants. Institute staff work closely with legislators, legislative and state agency staff, and experts in the field to ensure that studies answer relevant policy questions.

⁵⁵ Aos, *The Criminal Justice System in Washington State: Incarceration Rates, Taxpayer Costs, Crime Rates and Prison Economics*, <http://www.wsipp.wa.gov/rptfiles/SentReport2002.pdf> (January 2003).

Washington State is not alone in seeking to determine whether the use and length of incarceration should be reduced. In the past several years, there has been substantial activity in a number of states to modify corrections and sentencing policy by reducing sentence length or relying on alternatives to incarceration. Much, if not most, of this activity, originated because of a concern about budget deficits, but there is clear evidence that policy makers in many states believe that they are getting “smarter” on sentencing, rather than relying on the notion that getting “tougher” is always the best policy. In 2003 alone, at least nine states applied prospective and retroactive increases to existing early release credits to shorten time served by incarcerated offenders. Some increases were substantial.⁵⁶

In New York, for example, where draconian drug laws are in place, the state enacted two earned-release provisions. One granted the highest-level drug offenders, who were previously ineligible for any early release credit, twice the merit time available to other inmates. The other created a “presumptive release” system that allows those who have completed a correctional program to be released when eligible for parole without review by the parole board.⁵⁷ Five states reduced sentences for nonviolent offenders in 2003, four states reduced or eliminated mandatory minimum sentences, and in some states “there is an emerging consensus that sentences for drug offenses, particularly low-level possession offenses, should be revisited, and that treatment alternatives may not only be more cost effective but also more appropriate than prison.”⁵⁸

C. CONCERNS ABOUT COST AND SENTENCING POLICY

One of the lessons that the Commission has drawn from the data it has examined and the testimony it has heard is that many prosecutors, judges, defense counsel and legislators who have differing attitudes toward crime and punishment share a feeling that more incarceration and longer sentences are not always in the public interest. The notion that sentencing should be “smarter” rather than “tougher” is one we heard expressed in many places and by people of diverse political views.

Undoubtedly, some of the dissatisfaction with incarceration as a sanction derives in the states from a concern about budget shortfalls. Many states must balance their budgets and cannot operate at a deficit. The cost of the correctional system is one of any costs legislators and the executive must consider. When the costs of the correctional system rise as revenues fall, cost-saving alternatives to incarceration may become increasingly attractive. There is less concern about the costs of incarceration at the federal level. The federal government may operate at a deficit, even a substantial one, and its correctional budget pales before such items as national defense, homeland security, social security, etc.

⁵⁶ Vera Institute of Justice, *Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003*, at 5 (March 2004).

⁵⁷ *Id.*

⁵⁸ *Id.* at 7.

Although cost is definitely a concern among state officials, the evidence the Commission has gathered strongly supports the conclusion that cost alone has not driven many states to consider alternatives to incarceration. As the Vera Institute of Justice has noted, it seems that “attitudes, and not just fortunes, have changed.”⁵⁹ The Vera Institute summarized the developments that took place in a single year, 2003:

In addition to continued cutting of administrative costs, more than 25 states took steps to lessen sentences and otherwise modify sentencing and corrections policy during the 2003 legislative sessions. Thirteen states made significant changes, ranging from the repeal or reduction of mandatory minimum sentences for drug-related offenses to the expansion of treatment-centered alternatives to incarceration. These developments suggest that many states have changed the way they look at sentencing and incarceration.⁶⁰

D. INCREASING RELIANCE ON ALTERNATIVES TO INCARCERATION

It is clear that alternatives to incarceration are being explored in many jurisdictions. Legislators appear to believe that, by adopting sentencing alternatives, they can both save money and adopt more sensible sentencing policies. Given the evidence we have seen, we do not hesitate to conclude that

- a steady increase in incarceration rates does not necessarily produce a steady reduction in crime rates
- in the 1980s and 1990s the majority of new prisoners were nonviolent offenders⁶¹
- some jurisdictions have reduced crime rates to a greater extent and with less reliance on sentences of incarceration than other jurisdictions
- the racial disparities in sentences of incarceration are of great concern

⁵⁹John Wool & Don Stemen, Vera Institute of Justice, CHANGING FORTUNES OR CHANGING ATTITUDES? SENTENCING AND CORRECTIONS REFORMS IN 2003, at 1 (March 2004).

⁶⁰ *Id.* Footnote 1 accompanying the quotation read as follows: For a discussion of states’ first responses to their budget crises, see Daniel F. Wilhelm and Nicholas R. Turner, “Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?” *Issues in Brief* (New York: Vera Institute of Justice, June 2002). For a survey of trends of the past few years, see Judith A. Greene, *Positive Trends in State-Level Sentencing and Corrections Policy* (Washington, DC: Families Against Mandatory Minimums, November 2003). See also Fox Butterfield, “With Cash Tight, States Reassess Long Jail Terms,” *New York Times*, 10 November 2003, p. 1 <http://www.nytimes.com/2003/11/10/national/10PRIS.html> (accessed 10 November 2003); Paul von Zielbauer, “Rethinking the Key Thrown Away,” *New York Times*, 28 September 2003, p. 41 <<http://www.nytimes.com/2003/09/28/nyregion/28SENT.html>> (accessed 29 September 2003).

⁶¹ FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 165 (1995).

- the need for incarceration of nonviolent offenders may have been exaggerated in the past⁶²
- some rehabilitative alternatives appear to work
- the overall costs of incarceration – to families and the community as well as the offender – are too often overlooked or understated when the costs and benefits of incarceration are weighed.

Three of the recommendations that are discussed below are examples of the types of alternatives to incarceration that we recommend. We recommend that jurisdictions study and fund treatment alternatives to incarceration for offenders who may benefit from treatment for substance abuse and mental illness; adopt diversion or deferred adjudication programs that, in appropriate cases, provide an offender with an opportunity to avoid a criminal conviction; and develop graduated sanctions for probation and parole violations that incarcerate only when a probation or parole violator has committed a new crime or poses a danger to the community.

E. RECOMMENDATIONS ON PUNISHMENT AND INCARCERATION

The ABA Standards for Criminal Justice: Sentencing (3d ed. 1994), set forth the purposes of punishment:

Standard 18-2.1 Multiple purposes; consequential and retributive approaches

- (a) The legislature should consider at least five different societal purposes in designing a sentencing system:
- To foster respect for the law and to deter criminal conduct.
 - To incapacitate offenders.
 - To punish offenders.
 - To provide restitution or reparation to victims of crime.
 - To rehabilitate officers.

The Standards also provide for punishment that is no more severe than necessary.

Standard 18-2.4 Severity of sentences generally

The legislature should ensure that maximum authorized levels of severity of sentences and presumptive sentences are consistent with rational, civilized, and humane values. Sentences authorized and imposed, taking into account

⁶² Former Michigan Governor William G. Milliken signed into law tough mandatory minimum drug sentences in 1978. Twenty years later, it was clear that Michigan prisons were filling with low level offenders who sold enough drugs to buy their own. Former Governor Milliken was a leader in the call for repeal of the mandatory minimums, concluding that “[w]e had a system that was just grossly unfair.” John Gibeaut, *Opening Sentences*, March 2004 ABA Journal 55, 56.

the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized.

At the time the Standards were adopted, incarceration rates had begun to rise, but the total number of incarcerated offenders had grown so large by 2003 that it had become a concern of many criminal justice observers, including Justice Kennedy. The recommendation that we make does not purport to limit a jurisdiction's judgment as to the appropriate punishment for offenses, but it does emphasize that jurisdictions should avoid "over-reliance on incarceration as a criminal sanction." This is consistent with the Sentencing Standards and arguably is implicit within them. The time has come, however, to explicitly recognize the danger of incarcerating too many offenders for too long in prisons and jails.

The recommendation to limit lengthy periods of incarceration to the most serious offenders who pose the greatest danger to the community also is consistent with the Sentencing Standards. Most people would agree that crimes of violence against persons are illustrative of grave criminal acts warranting substantial imprisonment. Jurisdictions may well vary on how other crimes are ranked. White collar crime, for example, may be extremely serious depending on the nature of the criminal activity, the number of victims, and the substantiality of the loss imposed on society.

Our San Antonio hearings persuaded us that judges, prosecutors, defense counsel, and legislators generally have little difficulty in agreeing on how to rank most crimes. Witnesses reported that, when Texas redesigned its criminal code to rank offenses in terms of severity, there was substantial unanimity among various participants in the grading enterprise. Our recommendation is that shorter periods of incarceration should be prescribed for offenders whose crimes are not the most serious and do not pose the greatest danger to the community. We believe that the trend throughout the states is to recognize that the seriousness of the crime and the danger to the community are key factors in determining both whether incarceration is an appropriate sanction and how lengthy a sentence of incarceration is warranted.

Each of these recommendations is consistent with the Sentencing Standards, including Standard 18.2-4. They are more explicit, though, in focusing on danger to the community as well as gravity of the offense in determining whether incarceration is an appropriate punishment and whether a lengthy sentence is justified.

F. REPEALING MANDATORY MINIMUMS, AVOIDING UNJUSTIFIED DISPARITIES, RECOGNIZING INDIVIDUAL DIFFERENCES, AND ALTERNATIVES TO INCARCERATION

When alternatives to incarceration are considered, it is extremely important that the alternatives, as well as the incarceration sanction, be employed equitably and fairly. Therefore, the Commission combines its recommendation that jurisdictions consider alternatives to incarceration with the proviso that jurisdictions should assure that all sentencing options are consistent with two principles that form the core of the Third Edition of the Sentencing Standards: (1) unwarranted and inequitable disparities in sentencing between like offenses and offenders should be avoided; and (2) mandatory minimum sentences (i.e., sentences which require a court to impose a minimum period of incarceration mandatory sentence regardless of the circumstances of a particular case or the characteristics of an individual defendant) should be avoided, so that sentencing courts may consider the unique characteristics of offenses and offenders that may warrant an increase or decrease in a sentence.

The Sentencing Standards recommend that jurisdictions should use sentencing commissions to provide guidelines for sentencing courts (18-1.3, 18-4.2), the legislature should undertake to guide the exercise of discretion (18-1.3, 18-4.5) or the legislature should authorize a judicial agency to perform the function (18-1.3, 18-4.6). The notion of “guided discretion” is key to avoiding unwarranted and unjustifiable disparities among similarly situated offenders. While recognizing the importance of guidelines or standards to guide sentencing discretion, the Standards also provide that sentencing courts should be able to consider aggravating (18-3.3) and mitigating factors (18-3.2) as well as certain personal characteristics of offenders (18-3.4) in order to be able to individualize a sentence (18-2.6).

Standard 18-3.21 (b) provides that “[a] legislature should not prescribe a minimum term of total confinement for any offense.” This means no mandatory minimum sentences. Such sentences would be inconsistent with the notion of individualizing sentences within a guided discretion regime.⁶³ There should be no need for mandatory minimum sentences in a jurisdiction that insists upon four elements in sentencing: guidance to judges as to sentencing norms for offenses and repeat offenders, judicial discretion to vary from the norms, on-the-record explanations for any variance upward or downward, and judicial review of any variance from a sentencing norm. All of these elements are found in the Sentencing Standards and are reflected in our recommendations.

Aside from the fact that mandatory minimums are inconsistent with the notion that sentences should consider all of the relevant circumstances of an offense an offender,

⁶³ On their face, the Standards are not entirely consistent. Standard 18-3.11 states that “[t]he legislature should not mandate the use of the sanction of total confinement for an offense unless the legislature can contemplate no mitigating circumstance that would justify a less restrictive sanction.” This could be read supporting mandatory minimum sentences.

they tend to shift sentencing discretion away from courts to prosecutors.⁶⁴ Prosecutors do not charge all defendants who are eligible for mandatory minimum sentences with crimes triggering those sentences. If the prosecutor charges a crime carrying a mandatory minimum sentence, the judge has no discretion in most jurisdictions to impose a lower sentence. If the prosecutor chooses not to charge a crime carrying a mandatory minimum sentence, the normal sentencing rules apply. Although prosecutors have discretion throughout the criminal justice system not to charge offenses that could be charged and thereby to affect sentences, their discretion is pronounced in the case of mandatory minimums because of the inability of judges to depart downward.

Mandatory minimum sentences also may have an adverse effect on minority defendants, who may be more likely to be charged with a mandatory minimum offense than other defendants. In California, for example, where the well known “three strikes” rule (which also applies to offenders with two strikes) has had greatest application, the African-American incarceration rate for third strikes is 12 times higher than the third strike incarceration rate for whites, and the Latino incarceration rate is 45 percent higher than the third strike incarceration rate for whites.⁶⁵ When second and third strike sentences are combined, the African-American incarceration rate is more than 10 times higher and the Latino incarceration rate more than 78% higher than the white incarceration rate.⁶⁶

Federal drug sentences also illustrate some of possible effects of mandatory minimum sentences on racial disparity. When compared either to state sentences or to other federal sentences, federal drug sentences are emphatically longer. For example, in 2000, the average imposed felony drug trafficking sentence in state courts was 35 months, while the average imposed federal drug trafficking sentence was 75 months.⁶⁷ In 2001, the average federal drug trafficking sentence was 72.7 months,⁶⁸ the average federal manslaughter sentence was 34.3 months, the average assault sentence was 37.7 months, and the average sexual abuse sentence was 65.2 months.⁶⁹

⁶⁴ David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L.REV. 211, 215 (2004). Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentences*, 152 U. PENN. L. REV. 33 (2003), argues that mandatory sentencing provisions invade the jury’s function as well as the judge’s.

⁶⁵ Scott Ehlers, Vincent Schiraldi & Jason Ziedenberg, *STILL STRIKING OUT: TEN YEARS OF CALIFORNIA’S THREE STRIKES* (March 2004).

⁶⁶ *Id.*

⁶⁷ BUREAU OF JUSTICE STATISTICS, *Felony Sentences in State Courts, 2000*, at 3 (NCJ 198821, June 2003) (available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc00.pdf>).

⁶⁸ U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 30, tbl. 14. If probationary sentences are included, the average sentence declines slightly to 69.4 months. *Id.* at 29, tbl. 13.

⁶⁹ *Id.* at 30, tbl. 14.

These lengthy sentences largely result from the impact of the Anti-Drug Abuse Act of 1986 (ADAA).⁷⁰ The ADAA created a system of quantity-based mandatory minimum sentences for federal drug offenses that increased sentences for drug offenses beyond the prevailing norms for all offenders. Its differential treatment of crack and powder cocaine has resulted in greatly increased sentences for African-Americans drug offenders.

The Act set forth different quantity-based mandatory minimum sentences for crack and powder cocaine, with crack cocaine disfavored by a 100-to-1 ratio when compared to powder cocaine. Thus, it takes 100 times the amount of powder cocaine to trigger the same five-year and ten-year minimum mandatory sentences as for crack cocaine. The Act does three other things: (1) It triggers the mandatory minimums for very small quantities of crack -- five grams for a mandatory five-year sentence and 500 grams generates a ten-year term. (2) It makes crack one of only two drugs for which possession is a felony.⁷¹ (3) It prescribes crack as the only drug that triggers a mandatory minimum sentence for mere possession.⁷²

The overwhelming majority of crack defendants are African-American, while the overwhelming majority of powder cocaine defendants are white or Hispanic. In 1992, 91.4% of crack offenders were African-American, and in 2000, 84.7% were African-American.⁷³ The disproportionate penalties for crack offenses obviously have a great impact on African-American defendants in federal prosecutions.

G. TRANSPARENCY AND JUDICIAL ACCOUNTABILITY

We recommend that jurisdictions require a sentencing court to state on the record reasons for increasing or decreasing a sentence because of the unique characteristics of an offense or offender, and permit appellate review of any sentence so imposed. Once again, the recommendations are consistent with the Sentencing Standards. Standard 18-5.20 provides that there should be a “verbatim account of the entire sentencing proceeding, including . . . the statements of the sentencing court imposing and explaining the reasons for the sentence.” The drafters apparently assumed that the sentencing court would explain any departure from a guideline or presumptive sentence. Our

⁷⁰ Pub.L. No. 99-570, 100 Stat. 3207 (1986) (as codified in 21 U.S.C. § 801, et seq.). The statute was “[p]assed without any hearings, with no input from the judiciary, and very little input from even law-enforcement agencies.” David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L.REV. 211, 218-19 (2004)(footnote omitted).

⁷¹ U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at 9 (May 2002).

⁷² 21 U.S.C. § 844.

⁷³ U.S. Sentencing Commission, Report to the Congress: Cocaine and Federal Sentencing Policy 62 (May 2002).

recommendation is that jurisdictions explicitly require sentencing courts to explain increases or decreases in sentence from any presumptive or guideline starting point. This is similar to the requirement that Congress imposed upon federal judges in the Protect Act.⁷⁴ Although we criticize parts of that statute in our discussion of federal sentencing, below, we believe that on-the-record departures are essential to assure transparency in sentencing.

Judicial review of departures – i.e., increases or decreases in punishment from a presumptive or guideline norm – is also critical to assure that there is a proper balance between avoidance of unwarranted and unjustified disparities and recognition of the importance of individualizing sentences to reflect the totality of the circumstances regarding an offense and an offender. Standard 18-8.1 states that “[t]he legislature should authorize appellate courts to entertain appeals of sentences.” The emphasis in our recommendation is on appeals from departures, because it is those appeals that permit reviewing courts “[t]o interpret statutes, provisions guiding sentencing courts, and rules of court as applied to particular sentencing decisions and to develop a body of rational and just principles regarding sentences and sentencing procedures.” Standard 19-8.2 (a)(iii).

H. A RESPONSIBLE MONITORING AGENCY

We recommend that each jurisdiction assign responsibility for monitoring the sentencing system to an entity or agency with sufficient authority and resources to perform two tasks: (1) recommend or adopt alternatives to incarceration adopted in other jurisdictions and recommend new sentencing alternatives; and (2) gather and analyze data as to criminal activity and sentencing and the financial impact of proposed legislation, and consider as often as practicable whether changes in sentencing practices should be recommended in light of increases or decreases in crime rates, changes in sentencing patterns, racial disparities in sentencing, correctional resources, and availability of sentencing alternatives.

The first task is not discussed in the Sentencing Standards but is consistent with those standards. This recommendation simply recognizes that successful programs in one jurisdiction might work in another. We recognize that population and attitudinal differences among jurisdictions might suggest that a program that has worked well in one place might require modification in another. The reality, however, is that well designed alternatives to incarceration that save money, protect the community and reduce recidivism are worth exploring once they have been shown to work.

Our recommendation is consistent with, but adds to, the ABA Criminal Justice Sentencing Standards (3d ed. 1993). Standard 18-2.7 (b) states that “[a]t least once every ten years, the legislature should re-examine legislative policies regarding sentencing in light of the pattern of sentences imposed and executed.” When the Third Edition of the Sentencing Standards was adopted in 1993, the Standards Committee, the Criminal

⁷⁴ Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (2003), Sec. 401(n)(1) (amending 28 U.S.C. §991(a)).

Justice Section, and the American Bar Association as a whole could only have guessed how incarceration rates would rise in future years. In 2004, however, we know that the rates are at historically high levels and that many jurisdictions are rethinking reliance on incarceration. There is no reason for legislatures to wait ten years to consider adoption of alternatives to incarceration as long as models exist and have been tested with success in other jurisdictions. If sentencing alternatives are workable and cost-effective, it is in everyone's interests that they be carefully considered as soon as possible.

I. TREATMENT AND DIVERSION OPTIONS

Two of the Commission's recommendations are best considered together. We recommend that jurisdictions (1) study and fund cost-effective treatment alternatives to incarceration for offenders who may benefit from treatment for substance abuse and mental illness; and (2) consider for offenders who commit the least serious crimes adoption of diversion or deferred adjudication programs that provide an offender with an opportunity, through completion of programming or a period of good behavior, to avoid a criminal conviction.

These recommendations build upon what many jurisdictions are considering, i.e., ways to treat offenders who suffer from treatable conditions rather than burden them with the stigma of a conviction and incarcerate them at great expense to the community. The Criminal Justice Section has been concerned with alternatives for substance abusers and the mentally ill for some time. At its Council meeting in April 2004, the Section benefited from an extremely useful presentation by five prosecutors and a state judge on some of the successful programs that have been developed.

One example of the innovations that are occurring in the states is a program developed by Charles J. Hynes, District Attorney, Kings County (Brooklyn), New York. The Drug Treatment Alternative-to-Prison (DTAP) is the first prosecution-run program in the nation to divert prison-bound felony offenders to residential drug treatment. The program focuses on drug-addicted defendants who are arrested for nonviolent felony offenses and who have previously been convicted of one or more nonviolent offenses. The prosecutors screen candidates and invite those qualified into the program. A defendant who accepts must enter a guilty plea and receive a deferred sentence that will be served if the defendant fails to complete the program. The defendant enters a residential therapeutic community for a treatment program that lasts 15 to 24 months. Successful completion of the program results in dismissal of charges. The district attorney has formed a Business Advisory Council to identify and develop employment sources in Brooklyn, and has a job developer who assists those who complete the program to find and maintain employment.

DTAP is innovative in many ways, not the least of which are its focus on repeat offenders who could face strict mandatory minimum sentences and its cost-savings. According to the prosecutor's estimates, it costs approximately \$56,000 to house a Brooklyn inmate for one year (including the cost of prosecution), as compared to an

annual cost for DTAP of \$18,000 a year. 93% of DTAP participants are members of minority groups. 90 % of those who complete the program are employable and have jobs. The recidivism rate is low.⁷⁵

An independent review of DTAP revealed some interesting additional figures regarding the program. More than half of the participants graduate from the program; DTAP participants are 67% less likely to return to prison two years after leaving the program than those in a matched comparison group; DTAP graduates are 3½ times likelier to be employed than they were before arrest; and DTAP participants remain in treatment six months longer than those in most residential treatment program.⁷⁶

San Bernardino County, California has also developed an innovative and successful program that gives an offender three strikes or chances at rehabilitation. The program extends beyond those who are reached by Proposition 36⁷⁷ and includes those who commit lesser offenses rather than drug crimes but have a drug problem that contributed to the offense. The trial judge who oversees the cases and the district attorney who administers the program informed the Criminal Justice Section that they have only had one offender who reoffended out of hundreds in the program.

Cook County, Illinois offers a third example of a successful drug treatment program. It involves a two-step program. The first step is the state attorney's drug school. The recidivism rate is only 11% for those who attend the school, compared to 55% for those who do not attend. The second step is the last chance for people on drug probation. The employment rate is 90% higher for those who participate in the second step than for those who do not.

These are only three of many examples that could be cited.⁷⁸ Drug courts provide another example. These are special courts that are given the responsibility to handle cases involving non-violent substance-abusing individuals through comprehensive supervision, drug testing, treatment services and immediate sanctions and incentives. The October 2003 report of the Center for Court Innovation that was submitted to the New York State Unified Court System and the U.S. Bureau of Justice Assistance indicates that the 106 drug courts in New York have saved the state an estimated \$254

⁷⁵ See generally DTAP: Drug Alternative-to-Prison, Thirteenth Annual Report (December 2003).

⁷⁶ The National Center on Addiction and Substance Abuse, *Crossing the Bridge: An Evaluation of the Drug Treatment Alternative-to Prison (DTAP) Program* (March 2003). The CASA white paper concludes that the average cost of placing a participant in DTAP, including drug treatment, vocational training and support services was \$32,975 as compared to an average cost of \$64,338 if the participant had been placed in prison.

⁷⁷ California voters passed Proposition 36 in 2000. It provides that first- and second-time drug possession offenders receive drug treatment instead of being incarcerated. Even third strikers can receive treatment rather than face a 25-year to life sentence if they have been out of prison for five years before being arrested for their drug possession offenses.

⁷⁸ See generally Eric Blumenson, *Recovering from Drugs and the Drug War: An Achievable Public Health Alternative*, 6 JOURNAL OF GENDER, RACE & JUSTICE 225 (2002).

million in incarceration costs alone. New York and other states have found that drug courts can reduce recidivism for those who successfully complete the programs and sometimes for those who do not.

If treatment works, reduces recidivism, and is cost-effective, it is a desirable alternative to incarceration for many low-level offenders. For treatment to work, programs must be put in place and adequate funding must be provided.⁷⁹

J. GRADUATED SANCTIONS FOR PAROLE AND PROBATION VIOLATIONS

The Commission makes one recommendation concerning probation and parole: i.e., develop graduated sanctions for probation and parole violations that result in incarceration only when a probation or parole violator has committed a new crime or poses a serious danger to the community.

These recommendations reflect the substantial evidence that the Commission heard regarding probation and parole revocation, with the emphasis on parole revocation. Hundreds of thousands of individuals on parole or probation are incarcerated each year for some type of violation of parole or probation. Many of these violations are “technical” – i.e., they do not reflect commission of a new crime or a threat to the community. The revolving door in which inmates are released to the community, returned to prison, released to the community, etc. is most evident in California, but it is also a problem in other jurisdictions. In the words of the State of California’s Little Hoover Commission, “California has created a revolving door that does not adequately distinguish between parolees who should be able to make it on the outside, and those who should go back to prison for a longer period of time.”⁸⁰ The Little Hoover commission summarized the problems with California’s parole system as follows: “The bottom line: California’s correctional system costs more than it should and it does not provide the public safety that it could. Incarcerating parole violators costs \$900 million a year. The State spends another \$465 million on parole, the bulk of which is for parole agents, who spend much of their time filling out paperwork to send parolees back to prison. Another \$600 million is sent incarcerating parolees convicted of committing new crimes.”⁸¹

In our Report and Recommendations regarding prisoner reentry, we discuss the barriers that released inmates face when they try to return to the community. These barriers face parolees as well as those who have served their full sentences. It is not

⁷⁹ “Drug treatment lives on hope. A treatment program therefore must sell a potentially positive future to the drug user to motivate treatment, and it depends on an image of affirmative change in order to gain political and financial support. . . . Recognizing the long-range nature of America’s engagement with drug abuse reminds us that our drug problems can be survived. This is history’s most cheerful and most important lesson.” FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 189, 192 (1992).

⁸⁰ Little Hoover Commission, *Back to the Community: Safe and Sound Parole Policies*, Executive Summary, at i (November 2003).

⁸¹ *Id.*, at ii.

surprising in view of the poor preparation that many inmates receive for their ultimate release from incarceration and the barriers to employment they face when they are released that those who are released on parole may find adjustment to freedom difficult. The question is what to do with those who, unable to overcome the adjustment difficulties, violate conditions of release. The trend in many jurisdictions is to revoke release and reincarcerate. But, this may not be the optimal approach for all offenders.

The Little Hoover Commission, for example, concludes that a number of alternatives would be cost-effective and protect public safety:

- Establish clear, transparent and binding guidelines for parole revocation
- Work with police chiefs and sheriffs to develop a range of sanctions for violations
- Include as sanctions community-based alternatives for “technical violations” (e.g., drug treatment, home monitoring, curfews)
- Identify the serious violations justifying a return to prison; lower the revocation sentences based on offender risk assessments; provide short term incarceration in community correctional facilities as an alternative.⁸²

One way for jurisdictions to improve their parole and probation revocation decision-making is to utilize risk assessment tools. Washington and Oregon are two states that have taken the lead in using risk assessments in their criminal justice systems. Under its Offender Accountability Act, Washington classifies offenders according to the risk they pose of re-offending in the future and the amount of harm they have caused in the past. By classifying offenders by risk, Washington can devote more resources on higher-risk offenders and spend less on lower-risk offenders. Washington also uses risk assessment in linking inmates with post-release services.⁸³

Oregon uses risk assessments to develop an individualized case plan for every offender that attempts to mitigate the risk factors and enable successful reentry of offenders into the community. The plans are used both while an inmate is incarcerated and when the inmate is released into the community.⁸⁴ Jurisdictions may find that risk assessments offer useful data in deciding whether to incarcerate a parole or probation violator.

The recommendation we make concerning parole and probation revocation is a common-sense approach that recognizes that just as all offenders need not be incarcerated

⁸² *Id.* at xii.

⁸³ Washington State Institute for Public Policy, *Washington’s Offender Accountability Act: Update and Progress Report on the Act’s Evaluation* (2003).

⁸⁴ The Oregon Accountability Model: Criminal Risk Factor and Case Planning Component. <http://www.doc.state.or.us>.

or incarcerated for the same length of time, the same is true of parolees and probationers. Not all who violate a condition of parole require imprisonment. Imprisonment may be the correct sanction for violators who commit additional criminal acts or who pose a danger to the community, but a graduated system of sanctions may make as much sense in the parole/probation context as in the basic sentencing decision following conviction.

Risk assessment may help courts and correctional officials determine who should be released in the community and whether, once released, they should be permitted to remain. The combination of risk assessment and adoption of graduated sanctions may result in cost-effective decisions that avoid unnecessary incarceration.

K. REFORM THE FEDERAL SENTENCING GUIDELINES

1. Background

The Sentencing Reform Act of 1984⁸⁵ led to the adoption of the Federal Sentencing Guidelines in 1987.⁸⁶ The statute created the United States Sentencing Commission, an "independent commission in the judicial branch of the United States," whose members are nominated by the President and confirmed by the Senate.⁸⁷ From the outset, no more than four Commissioners could be from one political party, and until 2003, at least three of the Commissioners were required to be federal judges.⁸⁸

The Third Edition of the Sentencing Standards, like the federal system, embraces a guideline approach to sentencing. But the Standards' guideline system envisions a very different type of sentencing system than is found in the federal courts. Not only did the American Bar Association reject the guideline model created for the federal courts, but no state that has adopted guidelines has chosen to follow the federal lead. This rejection by the states is significant when compared to the widespread acceptance and embrace of such federal standards as the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

Michael Tonry has described the federal guidelines in the harshest terms: "[t]he guidelines developed by the U.S. Sentencing Commission . . . are the most controversial and disliked sentencing reform in U.S. history."⁸⁹ The April 11, 2003 ALI Report, Model

⁸⁵ Title II of the Comprehensive Crime Control Act of 1984, Pub.L. 98-473 (1984).

⁸⁶ See generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228-29 (1993).

⁸⁷ 28 U.S.C. § 991(a) (1984).

⁸⁸ *Id.*

⁸⁹ MICHAEL TONRY, SENTENCING MATTERS 72 (1996). See also Kate Stith & Jose Cabranes, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).

Penal Code: Sentencing, at 115, observes that the federal sentencing system “is by far the best known and most criticized of all commission-guidance structures.” The wide-spread criticism of the federal guideline system stands in sharp contrast with the general acceptance and high regard in which the state guideline systems are held. As the ALI Report, notes, “state commission-guideline systems have enjoyed general acceptance and support among the lawyer and judges who regularly use them.”⁹⁰

The ALI Report summarizes well the perceived shortcomings of the federal sentencing guidelines:

- “[P]rosecutors in the federal system have gained unprecedented authority to influence sentencing outcomes”⁹¹
- Federal guidelines are “complex, detailed and mechanistic,” so much so that “the total process is a dizzying progression of calculations that make it hard to remember that the interests of human beings turns on the outcome”⁹²
- “The federal sentencing commissioners were unable to agree on the underlying philosophies of sentencing, and so fell back on an averaging out of prior decisions as the foundation for guideline development”; “[w]hen the U.S. Sentencing Commission broke free of past practice, . . . it lacked a policy framework for assessing the proportionality of the toughened drug penalties against sanctions for other crimes”⁹³
- “The commission in many instances chose to calibrate guideline punishments to mandatory-penalty laws enacted by Congress, without requiring that the mandatory penalties – or the resulting guidelines – be justifiable under stated policy goals.”⁹⁴
- The commission “has failed to take resource constraints into account”; “[t]his came about in part because of deliberate policy preferences in the executive and legislative branches, but was made significantly easier by the fact that correctional

⁹⁰ April 11, 2003 ALI Report, Model Penal Code: Sentencing, at 115 (footnote omitted).

⁹¹ *Id.* at 116. “In contrast, all state guideline systems locate much greater sentencing discretion with the judiciary, primarily through the enactment of relatively permissive legal standards for deviations from the guidelines – and some states have adopted voluntary guidelines that carry no legal force whatever.” *Id.*

⁹² *Id.* at 117-118. “In contrast, the states have designed guideline systems that are relatively simple in operation while also allowing judges more leeway when departing from guideline presumptions.” *Id.* at 118.

⁹³ *Id.* at 119.

⁹⁴ *Id.*

costs, even when growing rapidly, amount to no more than a trivial percentage of the total federal budget.”⁹⁵

- “The federal guidelines allow little room for sanctions other than incarceration, and do nothing to *encourage* the wider use of alternative penalties”; “[n]o one accuses the federal system of leadership – or even of a meaningful presence – in the developing arena of intermediate sanctions.”⁹⁶
- Racial and ethnic overrepresentations in sentenced populations have worsened in the federal system since the advent of sentencing guidelines (along with mandatory penalty laws enacted in the same time frame)⁹⁷
- “[T]he federal law requires sentencing judges to impose punishment for ‘relevant conduct’ that includes alleged offenses for which there have been no convictions.”⁹⁸
- “One of the most pronounced and controversial effects of the federal sentencing guidelines has been to increase the average severity of penalties in the federal system, more so for some offenses than others, but markedly overall.”⁹⁹

2. Time for a New Look

Those practitioners who only know the federal guidelines may mistakenly conclude that it is the movement toward guideline sentencing that has resulted in increased sentences and greater incarceration. While this is true in the federal system, it

⁹⁵ *Id.* at 120-21. “State policymakers, whatever their abstract views of crime and punishment, face fiscal conditions that are far different. . . . [M]ost of the state commission-guideline systems have worked over time to control and restrain prison growth – and every state system that has made the effort has succeeded.” *Id.* at 121.

⁹⁶ *Id.* at 121. “In contrast, several state guideline systems, including those in Delaware, North Carolina, Oregon, Pennsylvania and Washington have incorporated a wide range of nonincarcerative penalties into the express terms of their guidelines. *Id.*

⁹⁷ *Id.* at 122. “State guideline systems, however, have achieved modest success in reducing observable disparities in punishment based on race, as well as gender.” *Id.*

⁹⁸ *Id.* at 123. “All state guidelines key penalties to crimes of which the defendant has been convicted.” *Id.*

⁹⁹ *Id.* at 124. “Outside the federal system, most commission-guideline systems have inclined toward punitive leniency when they are compared with other American sentencing structures in the late 20th century.” Using 2000 figures (the last year for which both federal and state statistics are available), only 68% of state felons were sentenced to a term of incarceration (40% to prison and 28% to local jails), BUREAU OF JUSTICE STATISTICS, *Criminal Sentencing Statistics: Summary Findings* (available at <http://www.ojp.usdoj.gov/bjs/sent.htm>), as compared to 85% of federal prisoners who received a sentence including some time in prison. U.S. SENTENCING COMMISSION, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 30, tbl. 14 (2001). State prisoners averaged sentences of 4/12 years and served 55% of the sentence (2 ½ years), while federal prisoners were sentenced on average to 55.9 months and served 87 % of the time (over 4 years).

is not true of guidelines generally. Indeed, for many veterans of the federal system the surprising discovery is that “[i]nvestigations of patterns of prison growth among the 50 states in recent decades shows that the largest upswing in punishments have occurred in those states that have retained the traditional indeterminate structure for sentencing decisions”¹⁰⁰ In other words, guidelines other than the federal guidelines have tended to diminish the harshness of prison sentences. The federal guidelines are virtually unique in producing the opposite result.

Given the total rejection of the federal sentencing model by the states, the widespread criticism of the federal guidelines, and the generous praise directed at many state guideline systems, the Commission concludes that it is time to take another look at the federal guidelines and recommend some key changes in federal law and in the relationship of Congress and the U.S. Sentencing Commission.

There are at least two reasons why the federal guidelines appear “complex, detailed and mechanistic.” One reason is that the Sentencing Commission chose an approach that the ABA Sentencing Standards reject: i.e., the Sentencing Commission provided that various aggravating and mitigating factors should be given specific weights (upward or downward adjustments). The Sentencing Standards clearly rejected such an approach and stated that the agency formulating guidelines or presumptive sentences should not “assign specific weights to aggravating or mitigating factors.” Standard 18-2.6 (a) (ii). Accord Standard 18-3.2(c) (mitigating factors); 18-3.3 (d) (aggravating factors). The other reason is discussed in the next section.

The policy of the American Bar Association is clear. Guidelines that help sentencing courts in imposing fair and equitable sentences are favored. But judicial discretion is necessary to assure that sentences reflect the totality of circumstances regarding an offender and offense. The federal sentencing guidelines that have been promulgated pursuant to the Act have not been received with favor. The states have rejected them and adopted their own guideline systems. As we heard testimony, it was clear that judges, prosecutors, and defense counsel uniformly praised most state guideline systems and criticized the federal guidelines.

At the time the Sentencing Reform Act was passed, the Third Edition of the Sentencing Standards had not been adopted. The states were only beginning to think about guidelines, and there were few models upon which the Congress or the United States Sentencing Commission could draw. Twenty years later, we have the ABA Standards and a number of state guideline systems that are held in high regard.

We conclude that it is time for Congress to revisit the federal guidelines and to examine carefully the reasons why there has been so much negative reaction to and criticism of them, when the response to state guidelines has generally been positive. In short, it is time for a second look.

¹⁰⁰ *Id.* at 74.

3. Repeal the 25 Per Cent Rule

The federal sentencing guidelines appear to be wooden and unduly complex in large part because of a key statutory limitation on the U.S. Sentencing Commission. Because Congress sought to restrict judicial sentencing discretion in the Sentencing Reform Act, Congress included in the statute what has become known as the “25% rule.” The “25% rule” requires that the top of a guideline sentencing range can be no more than the greater of six months or 25% higher than the bottom of the range.¹⁰¹ As a result of the limitation on sentencing range, the Sentencing Commission could not have covered the full range of federal sentences from 0 months to 30 years to life without a substantial number of offense levels. Although the Sentencing Commission was not required to adopt a sentencing grid of 43 levels, the 25% rule greatly constrained its choices. The Sentencing Commission was required to take criminal history into account, and chose six criminal history categories to distinguish among offenders. The combination of 43 offense levels on a vertical grid and 6 offense levels on a horizontal grid results in a mind-numbing 258 sentencing categories.

Accordingly, the Commission recommends that Congress repeal 28 U.S.C. §994(b)(2), the 25 per cent rule, in order to permit the United States Sentencing Commission to revise, simplify and recalibrate the federal sentencing guidelines, and to consider borrowing from state guideline systems that have proven successful. Of course, the Sentencing Commission could choose again to have 43 levels of offenses and to reject the simpler approaches taken by the states. But repeal of the 25% rule is a necessary step in giving the Sentencing Commission a chance to reexamine the federal guidelines, to revise and simplify them, and to craft a new set of guidelines that will command the same general approbation as those the states have adopted.

The ADAA, referred to above, impacted all drug sentencing, not only mandatory minimum sentences, as a result of a deliberate decision made by the Sentencing Commission. The Sentencing Commission was still drafting its guidelines when the ADAA was enacted.¹⁰² It therefore had to decide what effect the mandatory minimums should have on the guidelines. The Commission decided to create a primarily quantity-based set of guidelines built on the framework of fixed points provided by the statutory minimum sentences of the ADAA. The end result was an increase in the drug guidelines far beyond historical norms and an increase in the guidelines for other crimes in an effort to achieve proportionality among offenses.

¹⁰¹ The “25% rule”(28 U.S.C. §994(b)(2)) provides:
If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

¹⁰² The U.S. Sentencing Commission projected early on that the ADAA would greatly increase prison sentences. *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 67-73 (1991).

Repeal of the 25% rule and of mandatory minimum sentence statutes would not answer all criticisms of the federal guidelines. But these changes would permit the U.S. Sentencing Commission to take a fresh look at its guidelines and those of the states and determine whether a less intricate, complicated and rigid system would be preferable. It would also permit the Commission re-examine the guidelines for drug offenses.

There is reason to believe that Sentencing Commission would change its approach to some crimes if provided the opportunity. For example, on three occasions it has reported to Congress that the 100-1 crack-powder ratio is unjustifiable. In February 1995, the Sentencing Commission prepared a comprehensive report to Congress recommending changes in cocaine sentencing policy,¹⁰³ and in May 1995, the Commission passed an amendment that would have equalized crack and powder cocaine penalties at the level applicable to powder cocaine. Congress responded by rejecting the amendment.¹⁰⁴

4. Reinstate the Abuse of Discretion Standard for Federal Departures

A district judge always is required to justify a departure by reference to factors specified in the Guidelines as appropriate grounds for departure,¹⁰⁵ or by finding “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”¹⁰⁶ Chapter 5, Part H of the guidelines lists factors the Commission determined to be “not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range”: age, §5H1.1; educational and vocational skills, §5H1.2; mental and emotional conditions, §5H1.3; physical condition, §5H1.4; history of substance abuse, §5H1.4; employment record, §5H1.5; family or community ties, §5H1.6; socio-economic status, §5H1.10; military record, §5H1.11; history of charitable good works, §5H1.11; and lack of guidance as a youth, §5H1.12. The word “ordinarily” signifies the Sentencing Commission’s recognition that any of these factors could be considered relevant to sentencing as long as it qualified as “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”

Despite the rise in the federal prison population and the increase in federal terms of incarceration, the Department of Justice complained about downward departures. In

¹⁰³ U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 196 (Feb. 1995).

¹⁰⁴ Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995). In 1997, the Commission once again reported to Congress that the 100-1 ratio could not be justified. In May 2002, the Commission recommended amendments to ameliorate, if not eliminate, the sentencing distinction between crack and powder cocaine.

¹⁰⁵ U.S.S.G. Ch. 5, Pt. K (2002), sets forth grounds for departure.

¹⁰⁶ Congress included the language that appears in the statute, 18 U.S.C. §3553(b), and the Commission set it forth in the Guidelines themselves, U.S.S.G. §5K2.0 (2002).

2003, Congress responded with the Feeney Amendment to the PROTECT Act.¹⁰⁷ The statute overrules a Supreme Court decision, *Koon v. United States*,¹⁰⁸ which adopted a deferential abuse of discretion standard of review of district court departure decisions, and provided for de novo review by appellate courts. Congress also directed the Sentencing Commission to adopt guidelines amendments to “substantially reduce” rates of judicially initiated departures. The Commission responded with amendments effective October 27, 2003.¹⁰⁹

The Kennedy Commission found reason to doubt the claim that federal judges were undermining the guidelines by departing downward excessively. Approximately half of all downward departures are attributable to the government’s motion claiming that a defendant provided “substantial assistance.” The government made no complaint about its own motions. Although the rate of non-substantial assistance departures rose steadily from 5.8% in 1991 to 18.1% in 2001,¹¹⁰ a large percentage of non-substantial assistance departures were initiated by the government, as a result of plea bargaining or as part of “fast track” programs designed to expedite case processing in the five high-volume districts along the Mexican border. In 2001, the Sentencing Commission estimated the rate of non-substantial assistance departures not initiated by the government to be 10.9%.¹¹¹

The Kennedy Commission claims no expertise at identifying the optimal rate of departures or to assess whether 10.9 % is high, low or just right. We conclude, however, that a workable guideline system, one in accord with the Sentencing Standards, should not be rigid and mechanistic and should provide for the reasonable exercise of judicial discretion. As Justice Kennedy observed in his address:

Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts, There is debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided. Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial

¹⁰⁷ Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (2003). The Feeney Amendment is analyzed in David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L.REV. 211 (2004).

¹⁰⁸ 518 U.S. 81 (1996).

¹⁰⁹ U.S.S.G. App. C, amend. 649 (Oct. 27, 2003).

¹¹⁰ United States Sentencing Commission, *Downward Departures from the Federal Sentencing Guidelines*, 64, fig. 16 (2003).

¹¹¹ U.S. Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines*, v, 59-60 fig. 15 (October 2003).

judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.

Justice Kennedy's views find support in the Sentencing Standards and in the practices of the states that have adopted guidelines. Our Commission believes that judicial discretion, exercised openly on the record and subject to judicial review, is necessary to assure that a guideline system actually treats, and appears to treat, offenders as human beings. Judges should be able to depart from guidelines, provided that they do so on the record with their departures reviewable by higher courts and open to criticism by other judges, prosecutors, defense counsel, victims, and legislators.

Sentencing Standard 18-8.2 provides that the legislature should declare that one of the purposes of appellate review of a sentence is “to determine whether the action of the sentencing court was an *abuse of discretion*.” (Emphasis added). The sentencing judge is uniquely situated in a system that takes into account all of the circumstances of an offender and an offense to assess those circumstances. The Congressional rejection of the Supreme Court's *Koon* decision apparently reflects a belief that appellate courts are more trustworthy in sentencing matters than trial courts. We have already explained why we believe that Congress need not fear that federal judges will undermine the guidelines. On the record statements of reasons for departing will always be subject to judicial review. Under any standard of review, departures that are unreasonable and subversive of fundamental principles will be reversed. Those experienced in the criminal justice system – including trial and appellate judges – have no doubt that the sentencing judge is uniquely positioned to determine a sentence. It is the sentencing judge who sees and often hears from defendants and victims. No appellate court will ever have access to as much information as the sentencing judge.

Moreover, judicial review of sentences already is a burden for federal appellate courts because of the complexity of the federal sentencing guidelines. If the 25% rule and mandatory minimums are repealed and the Sentencing Commission is free to take another look at the entire structure of its guidelines, any simplification of the guidelines would ease the current burden on appellate courts. But whether or not the guidelines are changed, a *de novo* standard of review unnecessarily increases the workload on appellate courts and unwisely assumes that appellate courts are better situated to determine sentences than are sentencing judges.

5. Minimize Congressional Mandates to the United States Sentencing Commission

Congress created the Sentencing Commission as an independent body with special expertise. Congress recognized the sprawling nature of federal criminal law and the difficulty any individual or group would have in analyzing the myriad statutes and determining how to classify offenses in terms of seriousness. It knew that efforts to reform the federal criminal code had failed and that a body of experts would be needed to

create and implement sentencing guidelines. Congress also recognized that no perfect set of guidelines could be created instantly and that guidelines would require monitoring and modification over time.¹¹² Thus, Congress created the U.S. Sentencing Commission to perform these complicated and important tasks.¹¹³ In addition to expertise, Congress determined that the Sentencing Commission should be insulated from the distorting pressures of politics and placed the Sentencing Commission within the judicial branch (albeit as a unique entity).¹¹⁴

Congress respected both the independence and expertise of the Sentencing Commission in the initial years. The rejection of the crack cocaine amendment in 1995 was accompanied by rejection of a money laundering amendment, but they were the only rejections by Congress of the Sentencing Commission's amendments to the original sentencing guidelines. Until the mid-1990s, Congress deferred to the Commission generally. It approved proposed amendments and imposed few congressional directives upon the Commission. Since the mid-1990s, however, Congress has increasingly controlled the agenda of the Commission through imposition of directives. On May 1, 2003, the Sentencing Commission submitted to Congress amendments in nine major subject areas. Five of the nine were directly responsive to statutory mandates, and the Commission's 2003-2004 agenda is also heavily weighted toward responding to Congress.

Aside from directives, Congress has directly impacted the core functions of the Sentencing Commission. The most recent example of this trend is the Feeney Amendment to the PROTECT Act.¹¹⁵ As we have noted, the Feeney Amendment rejected the appellate review standard adopted by the Supreme Court in *Koon*. The Amendment also commanded the Sentencing Commission to pass guideline amendments to "substantially reduce" downward departures, thus marking the first time that Congress directly amended the guidelines rather than requesting the Sentencing Commission to consider amendments.¹¹⁶ The Feeney Amendment also limited the number of judges who

¹¹² 28 U.S.C. § 994(o).

¹¹³ One of the original Sentencing Commissioners, Justice Stephen Breyer, described the continuing nature of the enterprise just one year after the guidelines were formulated. *See also*, Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 *HOFSTRA L. REV.* 1, 7-8 (1988) ("[T]he Commission remained aware throughout the drafting process that Congress intended it to be a permanent body that would continuously revise the Guidelines over the years.")

¹¹⁴ *Mistretta v. United States*, 488 U.S. 361, 393 (1989). (noting that the Sentencing Commission "is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch").

¹¹⁵ Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (2003).

¹¹⁶ Section 401(i)(1)(C) of Public Law 108-21, directly amended U.S.S.G. § 2G2.2(b) (Trafficking in Material Relating to Exploitation of a Minor). Section 401(i)(1)(B) of Public Law 108-21, directly amended U.S.S.G. § 2G2.4(b) (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct). Section 401(g) of Public Law 108-21, directly amended U.S.S.G. § 3E1.1 (Acceptance of Responsibility). Section 401(i)(1)(A) of Public Law 108-21, directly amended U.S.S.G. § 4B1.5 (Repeat

can serve on the Sentencing Commission to a maximum of three -- the first modification of the structure and membership requirements of the Commission in its history.¹¹⁷

Expertise and independence were the hallmarks of the Sentencing Commission when it was established. These qualities are as important today as they were in 1984. Congress cannot devote the same time, resources and special knowledge to sentencing issues as the Sentencing Commission. Congressional mandates detract from the Commission's ability to focus on the major problems in federal sentencing, and to assure that the guidelines work most effectively.

There is no reason to believe that Congressional intrusion is more necessary now than it was when the Sentencing Commission was first established. The perception of the Sentencing Commission as an independent agency is undermined by too much Congressional control. Accordingly, we recommend that Congress minimize its mandates to the Commission and permit the Sentencing Commission to do the job it was established to do.

6. Repeal the Limit on Federal Judges Serving as Sentencing Commissioners

The Feeney Amendment's limit on three federal judges serving as Sentencing Commissioners is unwise and unnecessary. Starting with President Reagan, every President and every Congress recognized that judges deal with the guidelines on a daily basis and thus have special knowledge and unique experience regarding sentencing issues. They know works and where the problems are, and their input in the guideline process has been invaluable.

Since each voting member of the Commission is appointed by the President and must be confirmed by the Senate, there is both an executive and a legislative check on the appointment of Sentencing Commissioners whose views are excessively idiosyncratic. There is no sound reason for placing a limit on the number of judges who serve (as opposed to the number of lawyers, academics, or lobbyists). Congress wisely assured in 1984 that at least three judges would be on the Commission, and it should recommit itself to the wisdom of that decision. The limit on judges should be repealed.

7. Possible Implications of *Blakely v. Washington*

The United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. ___, 72 U.S.L.W. 4546 (June 24, 2004), has called into question the constitutionality of

and Dangerous Sex Offender Against Minors). Section 401(b)(1)-(5) of Public Law 108-21, directly amended various sections of Chapter 5 of the U.S. Sentencing Guidelines relating to grounds for departure.

¹¹⁷ Pub. L. No. 108-21, 117 Stat. 650 (2003), Sec. 401(n)(1) (amending 28 U.S.C. § 991(a)).

some, if not all, of the guideline sentencing systems in use in the federal courts and in several states (e.g., Alaska, Arkansas, Florida, Michigan, Minnesota, North Carolina, Ohio, Oregon, and Tennessee).

In light of *Blakely*'s holding that "a judge may impose [a sentence] *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," (emphasis in original), any guideline system that requires a sentencing court to impose a particular sentence as a result of conviction may not, absent a waiver by the defendant, authorize the court to increase the sentence on the basis of findings made by the judge after a plea of guilty is entered or a jury verdict is returned. Sentencing guideline systems that permit courts to increase sentences based upon findings made by the sentencing judge are problematic after *Blakely*.

The Deputy Attorney General sent a memorandum to all United States Attorneys, dated July 2, 2004, indicating that the United States believes that the federal guidelines are valid notwithstanding *Blakely*. The memorandum also explains, however, the position that the United States will take if its *Blakely* argument fails. Some courts have rejected the United States' contention that *Blakely* does not invalidate the federal guidelines. Another Supreme Court decision may be required to finally resolve the issue. Congress might make such a decision unnecessary if it chooses to amend federal law to avoid any *Blakely* problems. Some states may contend that their systems are distinguishable from the *Blakely* system. They too may have to decide whether to litigate the validity of their current systems or to amend them to assure consistency with *Blakely*.

There are several ways Congress and the states could adjust or implement guideline systems to be consistent with *Blakely*. A presumptive sentencing scheme that is advisory and explicitly permits a sentencing court to increase or decrease a sentence within the statutory range is one way. It has the advantage of guiding judicial discretion in an effort to reduce unjustified disparities in sentencing while permitting individual characteristics of an offense and offender to be considered.

In a presumptive sentencing system, there is no reason why judges should not be required to state their reasons for rejecting a presumptive sentence on the record along with their reasons for increasing or decreasing a sentence. Appellate review of increases or decreases appears permissible under *Blakely*, since the guidelines bind neither the sentencing court nor appellate tribunals.

An advantage of a presumptive sentencing system over other alternatives is that the traditional presentence report can be prepared for the court and used in sentencing. As a result, all relevant information regarding the defendant could be considered before sentence is imposed.

A second alternative is to have juries actually find sentencing factors that would justify an increase in an otherwise binding sentence. This alternative could take two forms. One form would have a jury consider sentencing factors after a defendant was found or pleaded guilty. If the jury found factors warranting an increase in a sentence,

the sentencing court could consider applicable guidelines in deciding whether to increase a sentence and by how much. The other form would have prosecutors allege sentencing factors in a charging instrument. The jury would decide them as though they were elements of an offense. The danger posed by this form is that information relevant to sentencing might come before a jury considering guilt and prejudice the guilt/innocence determination. Jurisdictions that consider either form of this alternative would have to decide whether to have juries also consider sentencing factors that would permit a decrease in sentence or leave those factors to judges.

A disadvantage of the second alternative is that it is not clear whether all of the information that is contained in a presentence report would be available when the decision was made as to which factors to submit to the jury. When the defendant elects trial by jury and is convicted, unless there is a substantial time lag between the conviction and the sentencing proceeding it is unlikely that all information regarding the defendant will be available. This disadvantage may disappear when a defendant pleads guilty and the court is able to set a sentencing hearing far enough in the future to permit the gathering of all relevant material.

Another disadvantage of the second alternative is the possible burden on the courts of impaneling juries for sentencing proceedings that traditionally have been conducted by judges. In jurisdictions in which over 90 per cent of defendants plead guilty, unless they waive their right to have a jury consider sentencing factors, the increase in the number of jury proceedings could be considerable and the cost could be great.

A third alternative would be to establish a guidelines system with ranges whose upper limit would coincide with the statutory maximum. Under this alternative, judges would be able to sentence a defendant anywhere within a presumably wide range, from the base of the guideline range all the way to the statutory maximum, and would be free to exercise discretion using a wide range of enhancements and upward adjustments. There would be no upward departures to serve as the basis for appeal, and thus no judicial review except under an abuse of discretion standard. Such a system might result in the very sort of unbridled judicial discretion that guidelines sentencing was intended to eliminate.

The other options for responding to *Blakely* are even more unsatisfactory. These include mandatory sentences, which the ABA has rejected; a return to unguided discretion that permits judges to impose any sentence within a statutory range, which the ABA has rejected; and imposition of a statutory maximum or a life sentence in all non-capital cases with judicial discretion to depart downward, which might well result in an unduly harsh sentencing scheme. Insofar as the latter scheme would encourage defendants to agree to waive their constitutional right to a jury trial, it might well be regarded as an attempt to evade *Blakely*'s holding. Any law or policy that relies upon the ability to force defendants to waive their constitutional rights for its effect must be regarded as extremely problematic in a just society.

The Kennedy Commission takes no position as to the validity or invalidity of particular federal or state guideline systems after *Blakely* or on the appropriate remedial legislation that might be required if guidelines are found to be unconstitutional. Our recommendation requires only that guideline systems be consistent with *Blakely*. The Commission urges the ABA to address *Blakely* issues comprehensively and quickly.

Respectfully submitted,

Stephen Saltzburg, Chairperson
Justice Kennedy Commission

August 2004



ABA JUSTICE KENNEDY COMMISSION

II. REPORT TO THE HOUSE OF DELEGATES ON RACIAL AND ETHNIC DISPARITY IN THE CRIMINAL JUSTICE SYSTEM

RECOMMENDATIONS

RESOLVED, That the American Bar Association urges states, territories and the federal government to strive to eliminate actual and perceived racial and ethnic bias in the criminal justice system by enacting measures that would:

- (1) Establish Criminal Justice Racial and Ethnic Task Forces to:
 - (a) include individuals and entities who play important roles in the criminal justice process, and invite community participation from interested groups such as advisory neighborhood commissions and local civil rights organizations; and
 - (b) design and conduct studies to determine the extent of racial and ethnic disparity in the various stages of criminal investigation, prosecution, disposition and sentencing; make periodic public reports on the results of their studies; and make specific recommendations intended to eliminate racial and ethnic discrimination and unjustified racial and ethnic disparities.
- (2) Require law enforcement agencies to develop and implement policies and procedures to combat racial and ethnic profiling, including education and training, data collection and analysis and other “best practices” that have been implemented throughout the country through voluntary programs and legislation.
- (3) Require legislatures to conduct racial and ethnic disparity impact analyses to evaluate the potential disparate effects on racial and ethnic groups of existing statutes and proposed legislation; review the data gathered and recommendations made by Criminal Justice Racial and Ethnic Task Forces; and propose legislative alternatives intended to eliminate predicted racial and ethnic disparity at each stage of the criminal justice process.

REPORT

A. Introduction

Nationwide, more than 40% of the prison population consists of African-American inmates. About 10% of African-American men in their mid-to-late 20s are behind bars. In some cities, more than 50% of young African-American men are under the supervision of the criminal justice system.¹

When Justice Anthony Kennedy spoke these words in his address to the American Bar Association on August 9, 2003, he identified an issue of enormous concern to many people who have been involved in federal, state and territorial criminal justice systems, and to many citizens who have been alarmed by the increasing number of African-American men incarcerated in America's jails and prisons. As striking as Justice Kennedy's numbers were, he did not exaggerate the problem. Instead, he offered numbers that some observers believe are at the low end of the estimates of the actual number of African-American men who are incarcerated.

Others place the percentage of prisoners who are African-American at close to 50%² and even slightly higher.³ In 1995, a study by the Sentencing Project found that almost one in three black males between the ages of 20 and 29 were under some form of criminal justice supervision – either in prison or jail, or on probation or parole.⁴ A report released by the Bureau of Justice Statistics found that a black male had a 1 in 3 chance of being imprisoned during his lifetime, compared to a 1 in 6 chance for a Latino male and a 1 in 17 chance for a white male.⁵ Although there are not as many African-American women in prison as men, their numbers increased by an alarming 204% between 1985 and 1995.

Disparities also exist for Latino men and women, although to a lesser degree.⁶ In fact, the number of African-American and Latino men, women and juveniles in prisons and jails and

¹ August 9, 2003, Address to ABA House of Delegates.

² Marc Mauer, *Race to Incarcerate* 124 (1999).

³ David Cole, *No Equal Justice* 4 (1999).

⁴ Marc Mauer and Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later*, The Sentencing Project (1995). A recently released report by the Sentencing Project reveals that fifty years after the Supreme Court's decision in *Brown v. Board of Education* nine times as many African-Americans are in prison or jail as in 1954 (884,500 versus 98,000).

⁵ Press Release, Bureau of Justice Statistics, Prevalence of Imprisonment in the U.S. Population, 1974-2001 (Aug. 17, 2003) available at <http://www.ojp.usdoj.gov/bjs/abstract/piusp01.htm>.

⁶ Statistics for Latinos are difficult to obtain due to differences in classification and other causes. For statistics showing the disproportionate representation of Hispanics at every step of the process in the federal system, see Angela Arboleda, *Latinos and the Federal Criminal Justice System*, National Council of La Raza, Statistical Brief No. 1 (July 2002).

at every stage of the criminal justice process is vastly disproportionate to their numbers in the overall population.

These racial disparities in the prison population are a relatively recent phenomenon in American history. In 1930, whites were 77 percent of prison admissions, African Americans were 22 percent, and other racial and ethnic groups were only 1 percent.⁷ By 2000, the racial and ethnic makeup of American prisons was virtually reversed, with African Americans and Latinos comprising 62.2 percent of the total federal and state prison population.⁸

Youth of color in the juvenile justice system face similar disparities:

- African-American and Latino youth are treated more severely than their similarly situated white counterparts.
- In 1997, white youth represented 71% of the youth arrested for crimes across the country but only 37% of detained or committed juveniles.
- African-American youth were *48 times* as likely as white youth to be sentenced to state juvenile facilities for drug offenses. Latino youth were 13 times as likely.
- Among those not previously admitted to a secure facility, African-American youth were six times as likely as white youth to be incarcerated. When charged with a violent offense, they were nine times as likely to be incarcerated.
- For youth charged with violent offenses, the average length of incarceration was 193 days for whites, 254 days for African-American youth, and 305 days for Latino youth.⁹

Youth of color also are overrepresented among juveniles transferred from juvenile to adult criminal court. Reviewing data from 18 of the largest jurisdictions in the country, researchers from the Pretrial Services Resource Center found that youth of color, particularly African-American youth, were over-represented and received disparate treatment at several stages of the process.¹⁰

There is vast disagreement about the cause of racial disparities in the criminal justice system, but few dispute that the problem exacts monumental social, financial, and human costs

⁷ U.S. Department of Justice, Bureau of Justice Statistics, *Race of Prisoners Admitted to State and Federal Institutions, 1926 – 1986*, February 1994, p. 14, Table 7.

⁸ Human Rights Watch, *World Report 2002*, p. 4.

⁹ Testimony of Judge Ernestine Gray, Justice Kennedy Commission Hearings, November 14, 2003, p. 3 (citing the Building Blocks for Youth reports *And Justice for Some: Differential Treatment of Minority Youth in the Justice System* and *Donde Esta La Justicia? A Call To Action on Behalf of Latino Youth in the U.S. Justice System*).

¹⁰ Written testimony of Mark L. Soler, President, Youth Law Center, American Bar Association Justice Kennedy Hearings, November 14, 2003 (citing Jolanta Juskiewicz, *Youth Crime/Adult Time: Is Justice Served?* (Building Blocks for Youth, 2000)).

on the individuals who are incarcerated, their families, and society as a whole. That Justice Kennedy noted the problem in a major address to the largest organization of lawyers in the country speaks to its import. The ramifications of the disproportionate involvement of African-Americans and Latinos in the criminal justice system extend to issues as broad and significant as disenfranchisement, disqualification from public housing and welfare benefits, and the dissolution of families.¹¹ The financial costs to society are as predictable as the costs of building and maintaining prisons. When society incarcerates an individual it not only punishes that person, but it deprives families of financial support. There are real costs imposed upon those who are dependent upon the economic support of a father, mother, or other family member who is incarcerated. The costs increase along with the length of the sentence.

This report will first address three issues that are fundamental to understanding the problem of racial disparity in the criminal justice system: the scope and breadth of the underlying causes, the complexity of discrimination in the criminal process, and the impact of the War on Drugs. It will then address racial profiling, prosecution practices, the indigent defense crisis, and sentencing laws, and the cumulative effect of these issues. Finally, the report will discuss a model project implemented by a community that made a commitment to the elimination of racial disparity in its criminal justice system.

The recommendations that we offer to the House of Delegates will not eliminate the problems of conscious and unconscious bias in our criminal justice system. Nor will they eliminate racial disparity in prison populations. They are, however, necessary steps toward reducing bias and racial disparity, and they signal a societal recognition that the problem is real and requires constant monitoring.

B. Discrimination or Disproportionate Offending?

“All three of my boys smoked pot [growing up]. I knew it. But I also knew if one was caught he would never go to prison. But if any of my neighbors got caught,” Carter said, adding that his neighbors were black, “they would go to prison for 10, 12 years.”¹²

Understanding the causes of racial disparity in the criminal justice system is key to its elimination, and the causes are varied, complex, and many. Some scholars express the issue as a debate over whether the disparity results from racial discrimination by criminal justice officials such as police, prosecutors or judges or from disproportionate offending.¹³ The Commission concluded that a debate that pits claims of discrimination against allegations of over-offending over-simplifies the issues and holds little promise of improvement. The questions that must be asked are subtler, and the answers are more difficult to divine.

¹¹ See generally *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, Marc Mauer and Meda Chesney-Lind, editors (2002).

¹² Eric Rangus, “Carter lays down challenge for law,” Emory Report, October 20, 2003 (quoting former President Jimmy Carter).

¹³ See Kathryn K. Russell, *The Color of Crime* 26-46 (1998), for an in-depth discussion of this debate.

Some of the questions that must be asked are these: If there is discrimination, is it intentional or the result of the racially disparate effects of race neutral decisions by police, prosecutors and judges? If there is disproportionate offending, does it exist in all categories of crimes or only a few, and what are the reasons for the disproportionate offending when it does exist? If there are explanations for disproportionate offending, do they involve the realities of such factors as poverty, unemployment, poor education, and poor physical and emotional health? If they do involve such factors, are they distinct and unrelated to a history of racial discrimination in American society that spans centuries? If these factors account in any considerable measure for disproportionate offending, should these factors mitigate the sentences that are imposed on those affected by these factors?

Available data support some theories about racial disparities in prosecution and punishment. Criminologists have documented the socio-economic causes of crime for decades. People who live in poverty are more likely to engage in certain types of criminal behavior, and the data suggests that we know why people living in poverty commit certain kinds of crimes in their communities. Since there are a disproportionate number of African-Americans and Latinos living in poverty and suffering from various forms of socio-economic disadvantage, it is not surprising that they engage in disproportionate offending in some crime categories.¹⁴

However, the existing research does not support a conclusion that African-Americans and Latinos disproportionately offend in all crime categories. It seems clear that there is proportionate offending in certain crime categories, and there are discretionary decisions made by criminal justice officials that contribute to the racial disparity that exists in the criminal justice system.

When the Commission viewed the criminal justice system as a whole – all crime categories and all communities – we could only conclude that both disproportionate offending (and the various causes thereof) and discretionary law enforcement decisions contribute to racial disparities in our criminal justice system. Thus, our view is that the debate between those who claim discrimination (whether intentional or unintentional) and those who allege over-offending as the cause of racial disparity not only oversimplifies the problem, but it sets forth a false dichotomy. Both explanations account in part for the racial disparities that are so apparent throughout the United States, and it is impossible to identify with precision the extent to which each cause is responsible.¹⁵ Similarly, we cannot be certain as to the extent to which the various causes of disproportionate offending contribute to the racial disparities we observe. Many causes may play a significant role, and all would need to be addressed to successfully resolve the problem.

¹⁴ African-Americans also are disproportionately victimized by crime. Kathryn K. Russell, *The Racial Hoax As Crime: The Law As Affirmation*, 71 INLJ 593, 606 (1996).

¹⁵ *But see generally* Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 University of Colorado Law Review 743 (1993), concluding that, with the exception of drug offenses, 24 percent of the higher black rate of imprisonment may be caused by racial bias or other factors. For drug offenses, Blumstein notes that blacks are over-represented in prison by 43% as compared to their arrest rates. He concludes that drug arrest rates are not necessarily indicative of offending patterns but probably associated with the over-arresting of blacks as compared to whites. *Id.* at. 751-754.

Although we confess our uncertainty as to the exact contribution that various factors make to racial disparity, we do not lack certainty as to what must be done. Our Commission believes that, first, racial disparity must be recognized as a serious problem; and, second, that problem must be addressed in a serious way. So many of the numbers we offer at the beginning of this Report are disturbing, but none is more so than the fact that a black male has a 1 in 3 chance of being imprisoned during his lifetime. Whatever the causes, this cannot be permitted to continue.

We recognize that in many communities minorities are disproportionately victims of crime¹⁶ and may demand and benefit from strong law enforcement. It is nonetheless true that there is a perception among substantial numbers of minorities that the criminal justice system is discriminatory, and the perception frequently is based upon reality. That perception itself may lead to crime, disrespect for the law, and even a willingness to nullify or subvert the law. Accordingly, we must recognize how racial disparities may undermine confidence in our criminal justice system and its ability to prevent crime. We must reduce these disparities by identifying and reducing the factors that produce disproportionate offending, and develop procedures and processes designed to minimize conscious and unconscious bias in the criminal justice system. As we go forward, we must also remember that Justice Kennedy and President Archer asked this Commission to begin a national conversation about this and other issues, not to pretend that we can solve the racial disparity problem in a single report or a single year.

With this caution in mind and with full appreciation that the American Bar Association cannot single-handedly resolve the deeply entrenched socio-economic issues that contribute to the marginalization and criminal involvement of African-Americans and Latinos, we conclude that society will not benefit if we pretend that racial disparity does not exist or that it cannot be reduced. We believe that it is important to encourage responsible officials to identify racial disparities in the criminal process, whether intentional or unintentional, that result in the dissimilar treatment of similarly situated individuals. That racial disparities (or what some observers would call racial discrimination) may exist does not mean that most officials intentionally discriminate against minorities. There is evidence that harsher treatment of minorities as compared to similarly situated whites may result from discretionary decision-making by criminal justice officials who are often unaware of the racially disparate effects of their actions. Once these discretionary decisions are identified, law enforcement officials can develop policies and practices that serve to reduce or eliminate unintentional discrimination.

C. The Complexity of Race Discrimination in the Criminal Justice System

Although we cannot quantify the precise effect of discretionary decisions on identifiable racial disparities, no seasoned observer of the American criminal justice system can doubt that discretionary decisions are made at each stage of the process, from investigation, stops, and arrests to prosecution and sentencing. Given the vast amount of discretion that exists and the numerous opportunities for its exercise, it is undeniable that many African-American and Latino/a men, women, and juveniles in our nation's prisons and jails arrive there as a result not only of their criminal acts, but also because of the discretionary decisions made at various stages of the criminal process.

¹⁶ *Supra* note 16.

It is not difficult to see how disparities may occur and how similarly situated individuals might be treated differently based on race or ethnicity. For example, when a police officer decides to stop a black driver who commits a traffic violation while ignoring the white driver committing the same offense, the officer treats like individuals in disparate ways. Or, when the officer stops both drivers but arrests the black driver while citing or warning the white driver, the officer again treats like individuals in disparate ways. The end result is disparity along racial grounds. In making his decisions, the officer may be unaware of why he or she is reacting to individuals differently. One person's manner or approach may suggest to the officer that leniency is or is not appropriate, and the officer will gauge that behavior based on his or her own experience. If the driver looks and behaves like the officer, the officer naturally may be inclined toward leniency; and, if the driver looks, dresses and behaves differently from the officer, the officer may be inclined against leniency. The officer making decisions may have no conscious idea that decisions are affected by the interaction between officer and driver.

Similarly, when a prosecutor decides to offer a favorable plea bargain to a white defendant but not to a black defendant charged with the same offense and having the same criminal record, there is a racially disparate result. The prosecutor, like the police officer, may honestly and sincerely believe that one suspect is contrite while another is not because of the suspect's manner and behavior. To the extent that the suspect looks and behaves like the prosecutor, the prosecutor may tend toward leniency. To the extent that the suspect looks and behaves differently from the prosecutor, the prosecutor may be inclined against leniency. The prosecutor may have no more conscious idea than the officer in the previous example that a prosecutorial decision may be affected by subconscious views about a particular suspect.

Prosecutors and judges, who have been to college and law school, may tend to find defendants more attractive if they are educated and well employed. When a prosecutor offers a plea bargain to a white defendant that permits the defendant to avoid jail time but fails to offer a similar deal to a black defendant with the same charge and criminal background, race is rarely, if ever, a conscious consideration. The black defendant may be less educated, might be more likely to be unemployed, and may not have community supporters of the same stature as the white defendant. The prosecutor may feel that the white defendant is more deserving of leniency, because the defendant has better prospects, not because the defendant is white. Judges may approve plea bargains favoring white defendants for the same reasons prosecutors offer the bargains. The judges may not know that a black defendant charged with the same crime and having the same criminal record was not offered as good a deal.

Such decisions are made daily. They involve judgments that are made on the basis of experience and intuition, and that often are random and not based on any firm set of charging policies or procedures. The potential for unconscious views to influence judgments about criminality is great. A white criminal justice official -- police officer, prosecutor or judge -- may empathize with a white, first-offender arrested with a small quantity of drugs, viewing his involvement in the criminal justice system as a youthful mistake. The official may think "there but for the Grace of God go I" while reflecting on what are regarded as the prosecutor's own youthful "indiscretions." The same official may view a similarly- situated black first-offender in a very different light based upon experience with a greater number of similar defendants. These

nebulous, subconscious views, although not quantifiable, are very significant because they form the basis for important, discretionary decisions that result in racial disparity.

Interactions between suspects or defendants, on the one hand, and justice officials, on the other hand, occur at every stage of the process. Police, prosecutors, judges, defense counsel, pre-sentence officers, and others interact with suspects or defendants throughout the criminal justice process. They also interact with victims. The reaction to victims on the part of criminal justice officials may also be affected by the similarity or differences between the victims and the criminal justice officials. In short, opportunities to choose whether to be harsh or lenient exist at every stage of the process, and discretionary decisions are made every step of the way. The cumulative effect of discretionary decisions at each step of the process ultimately contributes to the racial disparity in our prisons and jails.

There is little evidence that in 21st century America criminal justice officials intentionally, or even consciously, base their discretionary decisions on race.¹⁷ Few police officers or prosecutors consciously seek out African-Americans or Latinos to arrest or prosecute. However, deep-seated views about criminality often produce a self-fulfilling prophecy. The knowledge that the majority of drug offenders in prison are African-American produces the misperception that African-Americans are more likely to be drug offenders than whites. This misperception causes some police officers to be more suspicious of African-Americans than whites, even when they engage in the same behavior.

The Commission concludes that unconscious biases or preferences undoubtedly create racial disparities. Although there is no evidence of widespread intentional discrimination, we would be naïve to deny that such discrimination might exist. Given the size of our criminal justice systems, it is difficult to believe that the racism that is found in other pockets of society has completely escaped actors in the criminal justice system. It might seem that intentional discrimination would be easier to identify than unconscious or unintentional bias. However, even when intentional discrimination is suspected, it is difficult to prove; and, unless an aggrieved party is able to prove intentional discrimination, he or she has no constitutional legal remedy in the context of his criminal case.¹⁸ Civil lawsuits pose similar legal hurdles that are almost impossible to overcome.¹⁹

The relationship between race (and ethnicity) and social class adds to the difficulty of attributing racial explanations to official decisions. It is frequently difficult to distinguish whether an individual experiences different treatment because of his socio-economic status or

¹⁷ *But see* Vanita Gupta, Assistant Counsel, NAACP Legal Defense & Educational Fund, Inc., *Written Submission to the American Bar Association Justice Kennedy Commission* (November 14, 2003, Washington, D.C.) for a discussion of the Tulia, Texas cases. These cases present a startling modern-day example of intentional discrimination by a law enforcement officer that caused tremendous harm to one African-American community.

¹⁸ *Whren v. United States*, 517 U.S. 806 (1996); *United States v. Armstrong*, 517 U.S. 456 (1996); *Washington v. Davis*, 426 U.S. 229 (1976); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *see* Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 Mich.L.Rev. 2001 (1998) for an in-depth discussion of this issue.

¹⁹ *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13, 40 (1998).

because of his race or ethnicity. There are a disproportionate number of African-Americans and Latinos living in poverty,²⁰ and the vast majority of criminal defendants are indigent.²¹ Indigence affects not only the quality of counsel and therefore the effectiveness of representation, but also the availability of community-based alternatives to incarceration.

For example, an overworked public defender with a heavy caseload and without substantial resources might be unable to locate a drug program or other alternative to incarceration for an African-American defendant that might be acceptable to a prosecutor. A white defendant with resources to pay for drug treatment in a residential facility, represented by private counsel with time to devote to the defendant, might be offered a plea bargain that would permit this outcome. In this example, socio-economic advantage (or disadvantage, depending on where the emphasis is placed) may have more to do with the disparate outcomes than race. Often, both race and class play a role in the decision-making process, and rarely in an intentional or even conscious way.

D. The Impact of the War on Drugs

No single policy has done more to contribute to the current racial disparity in the criminal justice system than the War on Drugs.²² The number of drug arrests almost doubled between 1980 and 1990 – from 581,000 to 1,090,000 – and African-Americans constituted a disproportionate number of those arrested.²³ Since the data indicates that African-Americans are not more likely to use or sell drugs than whites, the disproportionate number of arrests suggests either that decisions about where to enforce the drug laws have a discriminatory effect or that discriminatory policies and practices, even if not intentional, are in place.

The Substance Abuse and Mental Health Services Administration of the Department of Health and Human Services (SAMHSA) reported that in 1999, African-Americans comprised 13 percent of monthly drug users, Hispanics, 11 percent, and whites, 72 percent.²⁴ However, in that same year, African-Americans constituted 35 percent of drug arrests, 53 percent of drug convictions, and 58 percent of those in prison for drug offenses.²⁵ These statistics suggest that African-Americans are arrested, convicted, and imprisoned at a much higher rate than their similarly situated white counterparts.

²⁰ *Id.* at note 12; Scott L. Cummings, *The Paradox of Community: A View From the Prismatic Metropolis*, 13-FALL JAHCDL 8, 12 (2003).

²¹ Francis D. Doucette, *Non-Appointment of Counsel in Indigent Criminal Cases: A Case Study*, 31 New Eng. L. Rev. 495, 511 (1997).

²² Mauer, *Race to Incarcerate* 143 (1999).

²³ *Id.* (citing FBI data).

²⁴ Drug Policy and the Criminal Justice System, The Sentencing Project (2001) p. 4 (citing Substance Abuse and Mental Health Services Administration, Summary of Findings from the 1999 National Household Survey on Drug Abuse, November 2000, pp 6-3 and 6-13).

²⁵ *Id.* at 5 (citing SAMSHSA, FBI and BJS data).

Data focusing specifically on drug distribution offenses is a bit sketchier, but current research suggests that African-Americans are arrested and incarcerated for selling drugs at much higher rates than their white counterparts.²⁶ The responses to SAMHSA surveys indicated that African-Americans were more likely than whites to report that it was easy to buy cocaine in their neighborhoods. Given the segregated nature of housing patterns, these responses would suggest that these drugs were purchased from other African-Americans. However, a report issued by the Wisconsin Policy Research Institute concluded that drug dealing was prevalent in suburban white drug markets as well as the inner-city black and Hispanic neighborhoods of Milwaukee.²⁷ This report found that the inner-city drug sales tended to take place on neighborhood street corners while the suburban sales took place through contacts at work, in bars, and at athletic and cultural events. Thus, suburban sales were likely to be conducted by whites and were more hidden from law enforcement officers. A 1997 National Institute of Justice report supports the Wisconsin study, finding that respondents were most likely to report buying drugs from someone of their own race or ethnicity.²⁸

If African-Americans are not using or selling drugs more than whites (either in overall numbers or proportionately), why then do they constitute an overwhelmingly disproportionate number of arrests and convictions for drug possession and distribution? Law enforcement practices and policies provide one answer. Because so many inner-city drug sales take place in public spaces, these arrests are easier to conduct than the suburban sales that frequently occur in private establishments. In addition, there is more demand for a law enforcement presence in the inner city where the sale of drugs on public streets often endangers the residents and destroys their neighborhoods. Racial profiling, discussed below, is also a major factor that contributes to racial disparity in drug arrests and convictions.

E. Racial Profiling

Under most circumstances, police officers are not legally permitted to use any show of force to stop an individual without reasonable suspicion to believe they are engaged in criminal activity.²⁹ Likewise, they are not allowed to arrest or search an individual without probable cause to believe that person has committed a crime or is engaged in criminal activity.³⁰ When police officers consider race or ethnicity in the decision to stop, search or arrest an individual,

²⁶ In 1995, African Americans constituted 49 percent of all drug distribution arrests. Mauer, Race to Incarcerate 149.

²⁷ *Id.* at 150.

²⁸ *Id.* (citing K. Jack Riley, *Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities*, National Institute of Justice, Dec. 1997, p. 1).

²⁹ *Terry v. Ohio*, 392 U.S. 1 (1968).

³⁰ U. S. Constitution, Amendment IV.

they engage in racial profiling, unless the individual's race or ethnicity is part of description used to identify a suspect.

When police officers racially profile, they do so because they believe that individuals of a particular race or ethnicity are more likely to engage in criminal behavior than others. So when a police officer decides that a young black man walking through a predominantly white neighborhood and carrying a television set is suspicious, he is engaging in racial profiling. Likewise, a police officer engages in racial profiling when she observes numerous cars speeding on the highway, but stops only the car driven by a young black man.

Racial profiling is an ineffective law enforcement tool that greatly contributes to the racial disparity in the criminal justice system and causes great harm to vast numbers of innocent people. It is ineffective because when police officers rely on race rather than behaviors that are indicative of criminal behavior, they are much more likely to stop and detain innocent people. A 1999 New York study revealed that the use of racial profiling made police officers less successful in catching criminals.³¹ Their "hit rate" – the percentage rate at which they found drugs, guns, or criminals when they stopped and searched people – was lower when they engaged in racial profiling. When they stopped and searched whites without using racial cues, they were successful 20 percent more often than when they searched blacks, using race as one of their cues.³²

Racial profiling is also harmful because it results in the detention and harassment of countless innocent individuals. When a police officer uses the pretext of a traffic violation to stop an individual on the highway, the officer creates the opportunity to question the individual and request permission to search. Most individuals consent to police requests to search because they do not realize that they may decline. Such "consent searches" cause humiliation, embarrassment and delay for which there is rarely legal recourse.³³

Racial profiling also greatly contributes to racial disparities throughout the criminal process. It brings a disproportionate number of African-Americans into the system and overlooks similarly situated whites that engage in the same criminal behavior. When there are more African-Americans and Latinos brought into the front end of the process, there are more at each successive stage and ultimately more in prison.

F. Prosecution and Race

Through the exercise of prosecutorial discretion, prosecutors make decisions that

³¹ Testimony of Professor David A. Harris, Justice Kennedy Commission, November 14, 2003, p. 4.

³² Id. For a detailed discussion on the ineffectiveness of racial profiling, *see generally* David A. Harris, *Profiles In Injustice* (2002).

³³ For a discussion of a case in which an African American man successfully sued the Maryland State Troopers for engaging in racial profiling, *see generally* Angela J. Davis, *Race, Cops and Traffic Stops*, 51 U. Miami L. Rev. 425 (1997).

contribute to the disparate treatment of African Americans and Latinos as criminal defendants and as victims of crime.³⁴ As discussed in Section III above, these decisions, frequently at the charging and plea-bargaining stage of the process, are rarely intentionally or even consciously based on race. Nonetheless, race neutral decision-making often produces racial effects.

Prosecutors may legitimately consider a number of factors in deciding whether to bring criminal charges. For example, a prosecutor may consider the nature of the offense, the strength of the evidence, the likelihood of conviction, the interest of the victim in prosecution, the cost and complexity of the prosecution, and a number of other race neutral factors. Yet, her evaluation of these factors may be laden with racial considerations. For example, a prosecutor is more likely to take a case to trial when she is confident of securing a conviction. Thus, she may be more likely to proceed to trial in a case involving an African-American defendant and a white victim if the case will be tried in a predominantly white community.

Legal challenges to racially discriminatory prosecutorial decisions are limited to claims of selective prosecution. The legal standard for challenging selective prosecution based on race is exceptionally high. Unless the defendant can prove that the prosecutor engaged in intentional discrimination, he will not prevail.³⁵ Even strong statistical evidence fails to meet the standard of proof.³⁶ Since the discrimination at this stage is most likely unintentional, there are no effective legal remedies.

G. The Indigent Defense Crisis

Forty years ago, the Supreme Court guaranteed the right to counsel to every individual facing the threat of incarceration, regardless of ability to pay.³⁷ That guarantee has yet to be fulfilled. The American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (SCLAID) held four public hearings in 2003 to determine whether the states are fulfilling the constitutional requirement of providing effective representation to persons charged with crimes. They heard from public defenders across the country, and the results were discouraging. In far too many jurisdictions, representation for indigent defendants is either nonexistent or inadequate.³⁸ The effect of this crisis is particularly alarming in death penalty

³⁴ See generally Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13 (1998); Larry Michael Fehr, *Racial and Ethnic Disparities in Prosecution and Sentencing: Empirical Research of the Washington State Minority and Justice Commission*, 32 Gonz. L. Rev. 57 (1997); Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 Am. Soc. Rev. 842 (1990); Michael Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & Soc'y Rev. 587 (1985); Cassia Spohn et al., *The Impact of Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 Criminology 175 (1987).

³⁵ See *United States v. Armstrong*, 517 U.S. 456 (1996).

³⁶ *Id.*, see also *McCleskey v. Kemp*, 481 U.S. 279 (1987).

³⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1964).

³⁸ See <http://www.abanet.org/legalservices/sclaid/defender/projects.html> for transcripts of SCLAID hearings.

cases, where effective representation has been proven to make the difference between life and death.³⁹

As with so many other issues in the criminal justice system, the crisis in indigent defense has a disproportionate impact on African-Americans and Latinos by virtue of their overrepresentation as criminal defendants.⁴⁰ The indigent defense crisis exemplifies the intersection of race and class, and it is difficult to discern which issue has the greatest effect on the outcome of a criminal case. Even when race appears to be a factor in a criminal case – either at the pretrial or trial stage of the proceedings – the criminal defendant with the resources to mount a strong and effective defense will often achieve a more favorable result.⁴¹

II. The Impact of Sentencing Laws and Practices

Racial disparity in the criminal justice system is most frequently described in terms of the phenomenal number of African-Americans and Latinos who disproportionately occupy the nation's jails and prisons. Yet, the African-American or Latino criminal defendant who receives a criminal sentence has already experienced the cumulative effect of race or ethnicity at each previous stage of the process. The sentencing stage perpetuates this unfortunate pattern.

Although there are no sentencing laws that explicitly target African-Americans or Latinos, a number of sentencing laws and policy changes during the 1980s exacerbated the racial disparity in the prison population. Ironically, some of these changes were implemented to achieve the opposite effect. The movement towards more determinate sentencing was pursued for the purpose of decreasing or eliminating the judicial discretion that many believed was the primary cause of vast sentencing disparities that were frequently based on race or class. It was believed that the reduction or elimination of judicial discretion would result in similarly situated individuals receiving the same sentence. Nothing could have been further from the truth.

What proponents of determinate sentencing did not fully realize was that the elimination of judicial discretion at the sentencing stage would not eliminate disparities as long as police and prosecutors continued to exercise discretion at the arrest, charging, and plea bargaining stages of the process. In essence, the elimination of judicial discretion strengthened the impact of the decisions made by these officials, especially the prosecutor. Judicial discretion had operated as a check on the unbridled, discretionary decisions of prosecutors, who were not otherwise accountable for their decisions. With the removal of judicial discretion and the introduction of sentencing guidelines and mandatory minimum laws, policy makers essentially empowered prosecutors to predetermine the sentence through their charging and plea bargaining decisions.

³⁹ See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But For the Worst Lawyer*, 103 Yale L. J. 1835 (1994).

⁴⁰ David Cole, *No Equal Justice* 94 (1999).

⁴¹ The trial and acquittal of O.J. Simpson provides a compelling example.

The shift toward determinate sentencing resulted in sentencing guidelines that either controlled or eliminated judicial discretion. Many of the state guideline systems reduced judicial discretion but permitted departures under certain circumstances.⁴² However, the federal sentencing guidelines instituted in 1987, as well as a variety of federal and state mandatory minimum sentencing laws, totally eliminated judicial discretion while simultaneously inflating the discretion and power of prosecutors. Since over 90 percent of criminal defendants plead guilty to one or more charges,⁴³ the charging and plea-bargaining decisions determine the sentence in most cases where judicial discretion has been eliminated.

The outcome of this shift in discretion should not be surprising. Racial disparities not only continued, but in many instance increased drastically. A Federal Judicial Center report concluded that in 1990, African-Americans were 21 percent and Latinos 28 percent more likely than whites to receive a mandatory prison term for offenses that fell under the mandatory sentencing laws.⁴⁴ Interestingly, some of the state guideline systems that reduced judicial discretion without eliminating it entirely seem to have reduced racial disparity to a certain degree.⁴⁵

In addition to the racial effects of race-neutral decision-making by prosecutors discussed in Section VI above, prosecutors exacerbate racial disparity through the types of offenses they choose to prosecute. The vision of many of the proponents of sentencing guidelines was the elimination of more favorable sentences for white collar and other wealthy defendants. But there is little evidence that either state or federal prosecutors pursue these types of crimes as zealously as they do crimes typically committed by the poor.⁴⁶

There are other sentencing laws that have had a harsher impact on African-Americans and Latinos than on whites. The federal cocaine laws are perhaps the single most notorious example. These laws distinguish between the crack and powder form of this drug, punishing the possession and distribution of the former much more harshly than the latter. The sale of 5 grams of crack results in the same mandatory five-year prison term as the sale of 500 grams of the powder form of the drug. African-Americans constitute the vast majority of individuals charged with crack distribution in the federal system; the percentage was as high as 88 percent in 1992.⁴⁷

⁴² Mauer, Race to Incarcerate 136.

⁴³ See Bureau of Statistics, Department of Justice, *Felony Defendants in Large Urban Counties* 29 (1992).

⁴⁴ Mauer, Race to Incarcerate 136 (citing Barbara S. Meierhoefer, *The General Effect of Mandatory Minimum Prison Terms* (Washington, D.C.: Federal Judicial Center, 1992), p. 20).

⁴⁵ Michael Tonry, Sentencing Matters (New York: Oxford University Press, 1995), p. 57.

⁴⁶ Mauer, Race to Incarcerate 139.

⁴⁷ *Id.* at 155 (citing United States Sentencing Commission, *Cocaine and Federal Sentencing Policy* (Washington, D.C.: United States Sentencing Commission, February 1995), pp. 122-23).

As with other sentencing laws, the federal cocaine laws underscore the significance of the exercise of prosecutorial discretion. Almost all drug offenses may be charged either in state or federal court. Since the federal sentencing laws are almost always harsher than the state laws, this decision has great consequences for criminal defendants. The *Los Angeles Times* reported that between 1988 and 1994, not a single white person in the Los Angeles area was prosecuted for crack cocaine distribution in federal court while hundreds of white offenders were prosecuted in state court, receiving sentences as much as eight years less than offenders prosecuted in federal court.⁴⁸ Many of the African Americans prosecuted in federal court were low-level dealers or accomplices.

Other sentencing laws that have a disparate effect on African-Americans and Latinos are drug laws that impose an enhanced criminal penalty when the offenses are committed near certain types of facilities, such as schools or public housing facilities. Although these laws do not explicitly target African-Americans or Latinos, few white people live in public housing projects or attend schools in urban areas. Thus, these laws treat the residents of these areas differently from their similarly situated counterparts who live in other, more affluent areas.

The Connecticut enhanced penalty statute exemplifies this problem. Any person who distributes, or possesses with intent to distribute, a controlled substance in, on, or within 1,500 feet of a school, public housing project, or licensed day care facility is sentenced to three years of imprisonment, which may not be suspended and must be served consecutively to the term of imprisonment for the underlying drug offense.⁴⁹ Because of the necessary proximity of these facilities in densely populated urban areas, the statute transforms the entire city of New Haven into a targeted crime zone.⁵⁰ The majority of New Haven residents are African-American or Latino.⁵¹

Although the statute obviously applies to the entire state, including the white suburban communities of Connecticut, it will not have the same impact on those communities for a variety of reasons. First, studies have shown that suburban drug sales are generally conducted at the workplace, in bars, and at athletic and cultural events. Second, there are rarely public housing projects in suburban communities. Finally, suburban communities are not as densely occupied as urban areas.

One of the goals of enhancing the penalty for drug dealing near schools or day care centers is to protect children. However, it may not be fair to punish a drug dealer in an urban

⁴⁸ Dan Weikel, "War on Crack Targets Minorities over Whites," *Los Angeles Times*, May 21, 1995. The United States Supreme Court rejected a black defendant's attempt to obtain discovery in support of a motion to dismiss for selective prosecution filed to challenge these prosecutions. See *United States v. Armstrong*, 517 U.S. 456 (1996).

⁴⁹ C.G.S.A. § 21a-278a(b)

⁵⁰ George Coppolo, *Drug Sales Near Schools, Day Care Centers, and Public Housing Projects*, OLR Research Report, Connecticut General Assembly, Office of Legislative Research, p. 3; Testimony of State Legislator Michael Lawlor, Justice Kennedy Commission Hearings, November 14, 2003.

⁵¹ In the year 2000, 57.5% of New Haven residents were black or Hispanic (36.1% black and 21.4% Hispanic). http://research.yale.edu/datainitiative/data.php?s=1&t=0&g=11&i=270_275&step=3&y%5B%5D=16

area more harshly than his similarly situated counterpart in the suburbs if he has no intent to sell near a school or day care center but cannot avoid the enhancement because it applies to the entire city. The statute permits the suburban drug dealer to avoid the enhancement if he sells to a school age child as soon as the child walks outside of the 1,500 foot radius. However, the urban drug dealer who sells the same amount of drugs to an adult within 1,500 feet of a school when there are no children in the area will receive an enhanced sentence.

I. A Case Study: Monroe County, Indiana

Our Report lays out the reasons why we believe that racial disparity in the criminal justice system is a complex and difficult problem. There are multiple complicated causes, many of which occur outside the criminal process. Within the criminal justice system, the causes are cumulative at each stage of the process and often result from the combined effects of discretionary decisions by criminal justice officials and criminal justice laws, policies, and practices that have a disproportionate impact on African-Americans and Latinos. Thus, any effective solution must involve officials and stakeholders at every stage of the criminal process as well as policy makers, legislators, and interested members of the community.

The Monroe County Racial Justice Task Force provides an example of how the criminal justice officials in one community addressed racial disparity in their criminal justice system. The Monroe County NAACP and the Unitarian Universalist Church in Bloomington, Indiana, spearheaded this effort. These organizations issued a preliminary report documenting the racial disparity in the county's criminal justice system and calling for the creation of a task force to address the problem. Participants in the task force included officials from the District Attorney's Office, the Bloomington Police Department, the Monroe County Deputy Sheriff's Office, the Monroe County Circuit Court, the local NAACP, and the Unitarian Universalist Church. Graduate students from the Criminal Justice Department of Indiana University provided research assistance and data collection.

The Monroe County Racial Justice Task Force sought technical assistance from The Sentencing Project, a nationally recognized non-profit organization that promotes alternatives to incarceration and more effective and humane criminal justice policies. The Sentencing Project provided the Task Force with copies of *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers*, which was produced through the support of the Bureau of Justice Assistance of the United States Department of Justice. This manual provides a step-by-step research design to assist communities in identifying and addressing racial disparity.

The Task Force conducted a comprehensive study of the criminal justice system from arrest through sentencing, designed to determine whether there were racial disparities at each stage, to establish the cause of these disparities, and to recommend and implement concrete strategies, practices and policy changes to eliminate them. This study was made possible because of the participation of key high-level officials with the power and discretion to implement changes. Perhaps the most significant factor in the success of the task force's work was the chief prosecutor's willingness to provide access to internal prosecution data, enabling the

Task Force to determine whether there were racial differences in charging and plea-bargaining decisions. With the assistance of Marc Mauer and Dennis Schrantz, authors of the manual, the Task Force completed its work and published the completed report in October 2003. It is beginning the process of implementing the report's recommendations.

J. Recommendations

The Justice Kennedy Commission recommends that all communities interested in eliminating racial and ethnic disparity in the criminal process establish Criminal Justice Racial and Ethnic Task Forces that include individuals and entities that play important roles in the criminal justice process, and interested groups such as advisory neighborhood commissions and local civil rights organizations. The Commission urges these task forces to 1) design and conduct studies to determine the extent of racial and ethnic disparity in the various stages of criminal investigation, prosecution, disposition and sentencing; 2) make periodic public reports on the results of their studies; and 3) make specific recommendations intended to eliminate racial and ethnic discrimination and unjustified racial and ethnic disparities.

The Commission further recommends that states, territories, and the federal government require law enforcement agencies to develop and implement policies and procedures to combat racial and ethnic profiling, including education and training, data collection and analysis and other "best practices" that have been implemented throughout the country through voluntary programs and legislation.

Finally, the Commission recommends that states, territories, and the federal government conduct racial and ethnic disparity impact analyses to evaluate the potential disparate effects on racial and ethnic groups of existing statutes and proposed legislation; review the data gathered and recommendations made by Criminal Justice Racial and Ethnic Task Forces; and propose legislative alternatives intended to eliminate predicted racial and ethnic disparity at each stage of the criminal justice process.

Respectfully submitted,

Stephen Saltzburg, Chairperson
Justice Kennedy Commission

August 2004



JUSTICE KENNEDY COMMISSION

III. REPORT TO THE HOUSE OF DELEGATES ON CLEMENCY, SENTENCE REDUCTION, AND RESTORATION OF RIGHTS

RECOMMENDATIONS

RESOLVED, That the American Bar Association urges states, territories and the federal government to establish standards and provide an accessible process by which prisoners may request a reduction of sentence in exceptional circumstances, both medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering; and to ensure that there are procedures in place to assist prisoners who are unable to advocate for themselves.

FURTHER RESOLVED, That the American Bar Association urges expanded use of the procedure for sentence reduction for federal prisoners for “extraordinary and compelling reasons” pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) and that:

- (1) the Department of Justice ensure that full and fair consideration is given to prisoner requests for sentence reduction, including the implementation of procedures to assist prisoners who are unable to advocate for themselves; and
- (2) the United States Sentencing Commission promulgate policy guidance for sentencing courts and the Bureau of Prisons in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances.

FURTHER RESOLVED, That the American Bar Association urges states, territories and the federal government to expand the use of executive clemency and:

- (1) establish standards governing applications for executive clemency, including both commutation of sentence and pardon; and
- (2) specify the procedures that an individual must follow in order to apply for clemency and ensure that they are reasonably accessible to all persons.

- F FURTHER RESOLVED, That the American Bar Association urges states, territories and the federal government to establish an accessible process by which offenders who have served their sentences may request pardon, restoration of legal rights and privileges, including voting rights, and relief from other collateral disabilities.
- FU FURTHER RESOLVED, That the American Bar Association urges bar associations to establish programs to encourage and train lawyers to assist prisoners in applying for pardon, restoration of legal rights and privileges, relief from other collateral sanctions, and reduction of sentence.

REPORT

Justice Kennedy observed that the legal profession has an “obsessive focus” on the process for determining guilt or innocence, to the exclusion of what happens after a conviction has become final and the prisoner is taken away. When a mandatory sentence has been imposed, the law may provide no mechanism for a mid-course correction, years down the road when the prisoner’s circumstances (or society’s values) may have changed. To address this shortcoming in the legal system, Justice Kennedy asked the ABA “to consider a recommendation to reinvigorate the pardon process at the state and federal levels.” Noting that the pardon process in recent years seems to have been “drained of its moral force,” and that pardon grants have become “infrequent,” he remarked memorably that “[a] people confident in its laws and institutions should not be ashamed of mercy.”

Although Justice Kennedy’s comments about the pardon power specifically addressed the situation of prisoners under sentence – those who have not served their full sentence but have served “long enough,” and who deserve “another chance” – our Commission also considered the role that pardon plays in recognizing and rewarding rehabilitation for convicted persons who have served their time and successfully reentered the community.

At first blush, Justice Kennedy’s suggestion that pardon should play a role in revising and reducing prison sentences seems to fly in the face of the fundamental tenets of current determinate sentencing policies: i.e., long prison sentences should be imposed on those who commit crime, and that those sentences should be largely served in full. But, a close examination of Justice Kennedy’s address indicates that he did not call for a return to a system whereby individuals sentenced to a specific term of years might predictably expect to be released early on parole. As we understand Justice Kennedy’s message, it is that, wholly aside from the question whether some system of parole should be employed in a given jurisdiction, there is good reason to consider use of the pardon power to provide a mechanism for early release in the same kinds of compelling equitable circumstances that historically have resulted in executive mercy.¹

Although Justice Kennedy identified the chief executive’s pardon power as a method of sentence reduction, the Commission concluded that there are other possible mechanisms for reducing a prison sentence mid-term where equitable circumstances seem to warrant it. For example, the legislature could authorize periodic administrative review of a prisoner’s situation, as is the case with military prisoners. Or, it could empower a court to consider prisoner petitions advancing extraordinary and compelling reasons for sentence reduction, as is the case in the federal system.²

¹ See also *Dretke v. Haley*, ___ U.S. ___, slip op. at 2 (May 3, 2004)(Kennedy, J., dissenting)(“Among its benign if too-often ignored objects, the clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider.”).

² See 18 U.S.C. § 3582(c)(1)(A)(i). The court’s authority under this provision to review a prisoner’s petition seeking sentence reduction depends upon a motion being brought by the Federal Bureau of Prisons (BOP). In the absence of guidance, BOP has interpreted its mandate under this statute very narrowly. See note 8, *infra*.

Whatever the mechanism chosen, the fundamental question for the Commission was whether the criminal justice system in the United States would be improved if it included some opportunity to re-examine sentences years after they are imposed, not only for errors in their original imposition, but in light of intervening developments in a prisoner's situation. In a word, should there be some readily available mechanism by which a court or executive agency could review a prisoner's situation, perhaps years after the sentence was imposed, to determine whether it warrants a gesture of forgiveness or mercy.

Our conclusion is that such a mechanism is desirable in a comprehensive criminal justice system. In the movement toward "truth in sentencing" and the elimination of disparity, American criminal justice has gravitated toward ever-longer sentences. The practical absence of post-sentence review in many jurisdictions presents a risk that, as Justice Kennedy noted, some people will serve sentences that are too long and be denied a second chance that would benefit both them and the community. Justice Kennedy pointed out the number of people incarcerated in the United States and how unusually high a percentage it is when compared to the rest of the world, and the Commission has provided some additional detail on the growth of imprisonment in our Report and Recommendations Regarding Punishment, Incarceration and Sentencing.

Justice Kennedy's concern about the need to breathe new life into the pardon process is equally relevant in the context of offender rehabilitation and reentry, since in many jurisdictions pardon is the only way of regaining rights and privileges lost as a collateral consequence of conviction. Offenders returning to the community may be ineligible for many jobs and housing and even welfare benefits by virtue of their conviction, and are often subject to unreasonable discrimination. Offenders subject to such continuing disabilities may understandably feel that they can never discharge their full debt to society, a circumstance that hinders their successful reintegration into the free community and may even lead them back to crime.

The Commission reviewed the state of pardoning in the United States and found that in most jurisdictions the pardon power is rarely utilized to reduce sentences or to promote reentry of individuals to the community. Although procedures are in place in all jurisdictions for convicted persons to apply for commutations and post-prison pardons, and although the pardon power appears to be administered efficiently in most jurisdictions, the end result is almost universally the same: i.e., with only a few exceptions the pardon process produces very few grants. The atrophy of the clemency function is troublesome not for its own sake, but because the legal system in many jurisdictions offers no dependable alternative relief.³

³ The perceived need for pardon can be a useful barometer of the health of the legal system. See Kathleen Dean Moore, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 129 (1989) ("If pardons grew to an unmanageable number, one would have to be suspicious that the legal codes were seriously out of kilter with the moral code."); Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI. KENT L. REV. 1501, 1534 (while clemency is "ill-suited as a means to overcome wholesale legislative failures," it "may play a role in reopening channels of politics to systemic reform").

A. BACKGROUND – THE CHANGING ROLE OF PARDON

In *Harsh Justice*, Professor Whitman points out that throughout the 19th and well into the 20th century, pardon had a fully operational role in the American justice system.⁴ At a time when the legal system was relatively primitive, presidential and gubernatorial pardons were issued generously to cut short prison sentences and remit fines.⁵ Although the popular view of pardon was that it was an antidemocratic power that could easily be abused,⁶ in fact pardon operated efficiently and out of public view “as part of the ordinary management of the [prison] population.”⁷ In addition, pardon was the time-honored way that criminal offenders could regain their civil rights, and be restored to their place in society.

By the mid-point of the 20th century, the development of legal defenses such as duress and diminished capacity, the availability of appellate review of sentences in some jurisdictions, and the institution of administrative relief in the form of parole and probation in virtually all jurisdictions, made pardon less necessary to the fair and efficient functioning of the penal system. And, by the end of the 1970s, many states had enacted alternative judicial or administrative mechanisms for restoring rights to offenders who had served their time.

The pardon power never became entirely obsolete, however. It was the only remedy in some cases of hardship and in cases in which there were equitable grounds for relief that did not entitle an offender to a specific remedy. Moreover, pardon remained the primary means of restoring rights in many state jurisdictions, and the only restoration mechanism available to federal offenders.

By the end of the 20th century, clearly identifiable movements in both law and politics took their toll not only on the pardon power, but also on the entire notion of taking a second look at sentences. The most significant legal development was the movement toward determinate sentencing based on a retributive model of justice. During his campaign for President in 1968, Richard Nixon declared his intent to declare war on crime, which he did when he became President. That war has been continually fought by every President since. The war on crime had its own sub-war on drugs. The end result was abolition of parole and reduction in the use of

⁴ James Q. Whitman, *HARSH JUSTICE* 183 (2003) (hereafter “Whitman”)

⁵ Relying upon statistics compiled by philosopher Kathleen Dean Moore, Professor Whitman notes that “In the period from 1869 to 1900, 49 percent of federal pardon applications were granted, and in the last five years of the century, 43 percent of federal inmates received some kind of pardon.” Whitman, *supra* note 4 at 183, citing Moore, *supra* note 2 at 53. A 1939 study of release procedures by the federal government described pardon as “the patriarch of release procedures.” 3 U.S. Dep’t of Justice, *The Attorney General’s Survey of Release Procedures: Pardon* 295 (1939).

⁶ Objections to pardon were philosophical (18th century reformers like Beccaria objected that pardon interfered with the operation of the law) and practical (pardons benefited primarily persons of wealth and/or political connections). Whitman says that “[t]his belief that it was the well-connected who benefited from pardons was in fact false – which only makes the strength of the belief more striking.” Whitman, *supra* note 4 at 184.

⁷ Whitman, *supra* note 4, at 183 (“American officials needed pardoning, and they used it. But doing so touched a raw egalitarian nerve among Americans, as it would continue to do down to the Clinton pardons of 2000.”)

probation in many jurisdictions, and a dramatic decline in the number of pardons granted in most jurisdictions.

It was not inevitable that the advent of determinate sentencing and the abolition of parole should be accompanied by a diminished use of the pardon power. In theory, of course, the pardon power could have become more important, because without parole only use of the pardon power could provide a safety valve to protect against excessive sentences.⁸ But, the reality was that in the atmosphere created by the war on crime many legislators and executive branch officials were more concerned about being perceived as “soft” on crime, than they were worried about sentences being inappropriately long in particular cases.

Witnesses before the Commission made the point that highly publicized crimes often accounted for strong executive and legislative calls for increased punishment. Few voices of moderation can be identified in the aftermath of highly publicized crimes. This is not entirely surprising, given the evidence, however anecdotal it may be, that appearing soft on crime can be any political figure’s undoing. Many examples could be offered. One of the most memorable arose during the 1988 presidential campaign. The release of Willie Horton from a Massachusetts prison by former Governor Michael Dukakis became a cause celebre during the race between former Governor Dukakis and Vice President George H.W. Bush. The Bush campaign ads seized on Horton’s release and subsequent homicide – an undeniable fact – and identified Governor Dukakis as one of those who was “soft” on crime. In reality, Horton was not released as a result of any action by the Governor, but rather pursuant to an ordinary prison furlough, but the significance of this distinction appears to have escaped the Dukakis campaign. Whether or not the Bush campaign attacks were overdone, they certainly resonated with some people worried about public safety. The Willie Horton episode drove home what many politicians had recognized for many years: i.e., liberal use of the pardon power is unlikely to produce strong voter support. The political reality is that there are few criticisms of officials who say “no” to a clemency request, and there is considerable risk of political backlash if an offender released by action of the executive commits another crime. There no doubt have been some bold chief executives who continued the practice of pardoning to restore rights to rehabilitated offenders, but by the end of the 20th century even this attenuated function had atrophied in most jurisdictions.

The federal government led the retreat. Historically stable pardon grant rates fell dramatically during the Reagan administration, and continued to slide for the ensuing two decades.⁹ The decline in federal pardoning was, not accidentally, accompanied by a degradation

⁸ Scholars have proposed competing theories of clemency’s role in a retributivist system. On the one hand, Kathleen Dean Moore and Daniel Kobil have posited that clemency should function as an “extrajudicial corrective,” a final court of appeal for persons who have been unjustly convicted or whose punishment exceeds their just deserts. See Moore, *supra* note 2; Daniel T. Kobil, “*The Quality of Mercy Strained: Wrestling the Pardoning Power From the King*,” 69 TEX. L. REV. 569, 613 (1991). In contrast, Elizabeth Rapaport and Margaret Love have argued that clemency plays a redemptive role that is distinct from justice, and that governors or clemency commissions are not bound by the same desert-based considerations as might limit a court. See Rapaport, *supra* note 3, at 1519; Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to Be Merciful*, 27 FORDHAM URB. L. J. (2000).

⁹ During the Reagan and first Bush administrations there were only 16 commutations, compared to 111 during the

of the process for its administration, so that clemency policy and clemency recommendations are now effectively controlled by prosecutors. If federal prosecutors oppose clemency, it is extremely unlikely to be granted. There is no other generally available remedy for someone who has been convicted. The only statutory mechanism for federal sentence reduction is controlled by prison officials, who use it only in cases of imminent (and certain) death.¹⁰ There is no general mechanism for relief from disabilities imposed on convicted persons under federal law, either for state or federal offenders.¹¹

In the states, the practice of pardoning varies so widely that it is difficult to accurately offer many generalizations. However, two things appear to be true: 1) in almost every jurisdiction the instance of pardoning decreased markedly after 1990; and 2) the vitality of the pardon power in a particular state jurisdiction varies depending upon the extent to which its decision-maker is insulated from politics. Thus, pardons tend to be granted more regularly and generously in the five states where the pardon power is exercised by an independent board with no involvement by the governor,¹² than it is in the 22 states where the governor exercises the power subject to no procedural constraints.¹³ Pardoning tends to be somewhat more frequent in the ten states where the governor may act only upon the advice of a board,¹⁴ though sometimes

preceding 12 years (Nixon, Ford and Carter), and 348 in the 12 years preceding that (Eisenhower (2), Kennedy and Johnson). President Clinton had granted only 21 commutations prior to the very end of his term, while President George W. Bush has granted none at all since he took office. Post-sentence pardons also declined, from just under 2000 in each of the two twelve-year periods from 1956-1968 and 1969-1980, to 467 between 1980 and 1992. Bill Clinton issued more than half of his 398 pardons on his last day in office. By the end of his third year in office, George W. Bush had granted 11 pardons, and denied 601 applications for pardon.

¹⁰ Under 18 U.S.C. § 3582(a)(1)(A), the sentencing court may reduce a defendant's sentence at any time upon motion of the Director of the Bureau of Prisons, for "extraordinary and compelling reasons." According to the statute that directs the United States Sentencing Commission to promulgate policy guidance for courts considering such motions, 28 U.S.C. § 994t, "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." The Commission began a study of the issues in anticipation of issuing policy guidance in 2003, at the urging of the ABA Criminal Justice Section's Corrections and Sentencing Committee, but at the time of this writing had issued no proposals for comment. See Mary Price, "The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)," 13 FED. SENT. RPTR. 188 (2001).

¹¹ See Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L. J. 101 (2003). A few federal statutes specifically give effect to state provisions for pardon or restoration of rights. For example, under the Firearms Owners Protection Act of 1986, state convictions that have been expunged, set aside, or pardoned, or for which a person has had civil rights restored, do not constitute "convictions" for purposes of prosecution as a felon in possession. 18 U.S.C. § 921(20) (2000); James W. Diehm, *Federal Expungement: A Concept in Need of a Definition*, 66 ST. JOHN'S L. REV. 73, 99 (1992). In certain cases, an alien may avoid deportation based on conviction if he is pardoned. See Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FED. SENT. REP. 184, 184 (2001).

¹² Alabama, Connecticut, Georgia, Idaho and South Carolina. In Georgia and South Carolina, the board of pardon grants more than half of the petitions for a post-sentence pardon that it receives. In another six states (Utah, Florida, Minnesota, Nebraska, Nevada and North Dakota), the Governor sits as one member of the clemency board.

¹³ In 13 of these 22 states the Governor may but is not required to seek the advice of a board (generally the Parole Board). In the other nine, and in the federal system, the chief executive's power is subject to no legal constraints at all.

¹⁴ Arizona, Delaware, Indiana, Maine, Massachusetts, Montana, Oklahoma, Pennsylvania, Rhode Island, Texas. In another seven states (Arkansas, Illinois, Iowa, Kansas, Michigan, New Hampshire, and Ohio), the governor is

the board doesn't recommend (Texas) or the governor denies in spite of a favorable Board recommendation (Arizona) or the governor doesn't act at all (Delaware). Ironically, pardon has continued to perform a useful role in mitigating sentences only in jurisdictions that also have a healthy parole system, with the two forms of early release often administered by the same personnel.¹⁵

In sum, today the pardon power remains an important equitable remedy in theory, but, as a practical matter, it has become essentially unavailable to imprisoned offenders in almost every American jurisdiction.

Pardon's atrophy does not merely deny convicted persons the opportunity to seek shorter sentences; it also makes it difficult or impossible to avoid the collateral consequences of conviction. Though some states have experimented with administrative certificates of good conduct and judicial expungement or sealing, pardon still provides the most thorough and respectable form of relief from legal disabilities. Pardon also has a powerful symbolic value in restoring an offender's status in the community that even judicial restoration mechanisms do not share. As more and more people are convicted, and as collateral penalties continue to grow in number and severity, an increasing number of convicted individuals have a genuine need for the time-honored "second chance" offered by pardon. Yet, the realistic chance that the need will be met has decreased dramatically in many jurisdictions. In the federal system, although pardon is the only way to regain rights lost as a result of conviction, it has become for all intents and purposes a dead letter.

The Commission is persuaded that pardon must remain an essential component of any just system of punishment, particularly at a time when punishment appears harsh when judged against historical standards, collateral disabilities arising from a conviction are often disabling, and forgiveness is only possible through pardon. Recently, budget-driven reforms in some jurisdictions are mitigating the harshness of some sentences, and reformers in some jurisdictions are working hard to develop alternative sentence reduction mechanisms, including opportunities for prisoners to earn additional good time and to obtain judicial sentence modification. But no similar budgetary link has yet been made to encourage states to facilitate post-sentence restoration of rights. Federal sentencing has become increasingly rigid as well as severe, and federal forgiveness has for all practical purposes become a dead letter.

B. The Contemporary Need for a Pardoning Mechanism

The Commission concludes that every just system of punishment must include some accessible mechanism for reducing a prison sentence or mitigating other penalties in extraordinary circumstances, particularly those that could not be foreseen at sentencing. Such a safety valve was considered an essential component of a sentencing scheme prior to the advent

required to seek a board's advice, but may override its negative recommendation.

¹⁵ Georgia and Oklahoma, for example, appear to treat parole and commutation decisions more or less interchangeably. In Georgia, the pardon power is administered by an independent Board, and the Governor has no part in the process. In Oklahoma, the Governor retains the ultimate power, but the Parole Board effectively makes the release decision.

of determinate sentencing. Today it remains essential, because no court is capable of predicting the changed circumstances that might transform a sentence that appears fair and reasonable at the time of imposition into a cruel and unreasonable punishment that may have tremendously undesirable side-effects.

For example, a healthy prisoner sentenced to a term of imprisonment may develop a serious or deadly illness not foreseen at the time sentence was imposed; or, an inmate with a diagnosed illness or condition may suffer a turn for the worse to a degree unforeseeable at the time of sentencing. Similarly, when a custodial parent is sentenced to incarceration and leaves young children in the care of other family members, the death or serious illness of the care-taking family members may leave the children orphaned if the custodial parent's sentence is not modified. In some cases changes in the law that reflect society's new view of a particular crime are not made retroactive, leaving prisoners sentenced under an old regime effectively stranded.¹⁶ If a sentencing court is permitted to take into account serious health problems and exigent family circumstances in determining an offender's sentence in the first instance, it would seem both reasonable and just to provide a means of bringing these circumstances to the court's attention when they develop or become aggravated unexpectedly mid-way through a prison term. If society's view of the seriousness of a crime changes, it would seem fair (if not entirely efficient) to give those punished under a harsher regime a chance to win their freedom.

Today, in many determinate sentencing jurisdictions the pardon process is the only way that prisoners can have their claims of exigency considered. In such jurisdictions, pardon is necessary to the just and efficient functioning of the criminal justice system. But preliminary research indicates that even in those jurisdictions where the pardon process appears on the surface to be working efficiently, it rarely produces any grants.¹⁷

The Commission also recommends that, in addition to clemency, jurisdictions adopt a legal mechanism to permit individuals serving prison sentences to obtain a reduction of sentence for "extraordinary and compelling" reasons that were not foreseen at sentencing and to provide, as broadly as practicable, opportunities for offenders to apply for restoration of rights and relief from collateral sanctions. One model that could be considered is that employed by the military services, where prisoners come up for periodic review by an administrative board that is empowered to release them using either the parole or pardon authority. Another model is that set forth in 18 U.S.C. § 3582(c)(1)(A)(i), which empowers federal courts to entertain prison petitions for sentence reduction in certain situations, and is discussed below.

Just last year the ABA House of Delegates approved policy urging jurisdictions to evaluate their practices and procedures relating to prisoner requests for reduction or modification of sentence based on extraordinary and compelling circumstances arising after sentencing, to ensure their timely and effective operation. As part of this same resolution, the ABA urged

¹⁶ Maryland officials told the Commission that Governor Ehrlich intends to consider for clemency the cases of some prisoners sentenced under a draconian "three strikes" law, now repealed, applicable to so-called "day-time burglars."

¹⁷ For example, in the first three years of his administration, President Bush granted 11 pardons and no commutations, not quite one grant apiece for the staff of twelve in the Justice Department's pardon office. During this same period, President Bush denied 580 requests for pardon and 2400 requests for commutation.

jurisdictions to develop criteria for evaluating such prisoner requests, and procedures to assist mentally or physically disabled prisoners in making them. The Commission believes that the ABA must do more. Specifically, it should specify the criteria for sentence reduction in a broad range of exceptional circumstances arising after imposition of sentence, both medical and non-medical, including but not limited to old age, disability, changes in the law, exigent family circumstances, and heroic acts or extraordinary suffering. It also calls upon jurisdictions to ensure that there are procedures in place to assist prisoners who are unable to advocate for themselves, for example by reason of mental or physical disability. State bars should take the lead in implementing this resolution, and specifically endorse more expansive non-medical criteria for early release. If executive clemency is the only avenue within a particular jurisdiction by which such prisoner requests may be made, then that mechanism should be the subject of review and evaluation.

Although the federal government has a statutory mechanism in place that would permit consideration of sentence reduction requests, it has been slow to implement it. The United States Sentencing Commission has yet to promulgate policy guidance for sentencing courts and the federal Bureau of Prisons in considering federal prisoner petitions filed under 18 U.S.C. § 3582(c)(1)(A), as directed by 28 U.S.C. § 994(t). The Commission urges that the Sentencing Commission direct its attention at an early date to the only generally applicable statutory “safety valve” that exists under federal law. We also urge that, in developing policy guidance, the Commission incorporate a broad range of medical and non-medical circumstances warranting sentence reduction for “extraordinary and compelling reasons.” We believe it is significant that Congress specified that “rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason,” indicating that rehabilitation may combine with other equitable factors to make out the necessary elements of an “extraordinary and compelling” case. We also recommend that the Department of Justice ensure that full and fair consideration is given to prisoner requests for sentence reduction, and implement procedures to assist prisoners who are unable to advocate for themselves, including by reason of mental or physical disability.¹⁸

There is another contemporary need and place for the pardon power in a comprehensive criminal justice system: i.e., to signal that a convicted individual has successfully rejoined the community and is forgiven. At the time of sentencing, no court can know with certainty whether the defendant will reform, meet all conditions of the sentence imposed, and commit to a post-sentence life without crime. Those who take advantage of treatment, education, and counseling and who reform themselves and become law-abiding members of the community make a powerful case of entitlement to formal recognition of their successful reentry. This is as true in a determinate sentence system as in an indeterminate one.

Post-sentence pardons are entirely consistent with determinate sentences based on the notion that the individual who is punished is receiving just desserts for whatever criminal acts

¹⁸ The Commission considered recommending that prisoners be allowed to bring petitions for relief under § 3582(c)(1)(A)(i) directly to the courts, without requiring a motion by the Bureau of Prisons. However, it seemed unnecessary to recommend so drastic a change in current practice before the other recommended reforms have been attempted, and potentially burdensome to courts.

were committed. A just desserts sentence may well be fair and appropriate in proportion to criminal conduct, but once that sentence is served the individual has paid the dues imposed. Once society has exacted its price from an individual, there is a strong case to be made that society should not only permit, but should encourage, that person to make a positive contribution to society. To make this possible, it is vital that, to the greatest extent practicable, an individual who has successfully completed a sentence should be permitted to exercise rights of citizenship and to be relieved of the collateral consequences of conviction in order to have a real chance of working, providing for family, and avoiding recidivism.

Accordingly, the recommendations presented by the Commission urge jurisdictions to expand the use of the pardon power, both to commute sentences and to restore legal rights lost as a result of conviction. Jurisdictions should also make clear the standards that govern applications for commutation and pardon; specify the procedures that an individual must follow in order to qualify for a grant of clemency; and ensure that clemency procedures are reasonably accessible to all persons. In this fashion, states may share information about “best practices,” and ensure that the pardon process can work to promote justice without jeopardizing safety, and to restore its “moral force.”¹⁹

Last August, the House of Delegates approved new Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons. To promote the development of a more consistent and reasonable approach to collateral consequences, the Commission has encouraged wide circulation of these Standards, and has discussed the desirability of an implementation project in one or more jurisdictions.²⁰

The Commission believes that state bars can play an important role in encouraging the responsible exercise of the pardon power by creating programs and training lawyers so that they may become involved in the pardon process by representing individual clemency applicants. Bar

¹⁹ The Commission’s inquiry into the functioning of the pardon process in a number of states suggests that frequent and regular consideration of cases, along with careful staffing, are essential elements of a credible and reliable pardon process. Other important elements appear to be a formal advisory role for a politically accountable official or officials, and an appropriate balance of confidentiality prior to grants and openness after them. For example, the Commission was informed by Maryland officials familiar with that state’s clemency process that Governor Robert Ehrlich has established a regular routine of monthly meetings in which he gives personal attention to about twenty clemency cases, which have been reviewed by the parole board and then by a member of his personal staff. In each case the prosecuting attorney has also been asked to make a recommendation, and in appropriate cases the sentencing judge as well. Pardon grants are announced to the press, and memorialized in an executive order giving details of the offense and the terms of relief. Governor Ehrlich has evidenced a strong personal commitment to the exercise of his clemency power, and has gone so far as to initiate his own inquiry into the cases of certain incarcerated individuals serving long sentences imposed under a law that was subsequently changed.

²⁰ For example, in the fall of 2004 a symposium at the University of Toledo Law School will feature scholarly presentations measuring Ohio law and practice against the requirements of the Collateral Sanctions Standards. It will include a student project to identify and analyze collateral consequences under Ohio law. An ABA project could build on this symposium. In addition, the New Jersey Institute for Social Justice published a study of collateral consequences in New Jersey that discusses the new ABA Standards in a number of contexts. See Nancy Fishman, *Legal Barriers to Prisoner Reentry in New Jersey*, prepared for the New Jersey Reentry Roundtable (April 11, 2003). New Jersey agencies are currently engaged in an effort to identify and codify all collateral sanctions in state law, and have asked the ABA to provide technical assistance.

programs would be capable of advertising the availability of clemency and encouraging bar members to represent prisoners with meritorious cases, on a pro bono basis if necessary. Bar programs should encourage broad participation and not seek to impose an obligation only upon criminal law practitioners. The ordinary non-capital clemency case requires neither special skills nor a major commitment of time or resources. Clemency representation should become a staple in pro bono bar programs. Bar members who take on clemency representation should be encouraged to propose recommendations for improving the clemency process and making it more accessible.

The Commission also recommends in its Report and Recommendations on Prison Conditions and Prisoner Reentry that law schools give consideration to establishing clinics in which students may gain both understanding and experience in representing those who have committed crimes and are imprisoned as a result, or who are seeking to reestablish themselves in the free community through restoration of rights. Law schools and state bars easily could develop coordinated efforts to expand clemency and reentry efforts.

The best way to discourage the potential for mischief in pardoning are to ensure that the process is open to all, that standards for pardon and commutation are clearly articulated and fairly applied, and that the decision-making process is perceived to be a reliable one. Lawyers are most likely to concern themselves with these issues if they participate in the process through representation of prisoners seeking sentence reduction and released offenders seeking restoration of rights, including pro bono representations.

By taking an interest in the pardon process, the ABA can encourage a national conversation about the role of forgiveness in the justice system, and what the need for a pardoning mechanism teaches about the health of the legal system. Bar groups can reach out to pardon decision-makers, and help create a climate of public acceptance for clemency actions by working with victims' rights and other groups with an interest and stake in a fair, just, compassionate and equitable criminal justice system.

Respectfully submitted,

Stephen Saltzburg, Chairperson
Justice Kennedy Commission

August 2004



JUSTICE KENNEDY COMMISSION

IV. REPORT TO THE HOUSE OF DELEGATES ON PRISON CONDITIONS AND PRISONER REENTRY

RECOMMENDATIONS

RESOLVED, That the American Bar Association urges states, territories and the federal government to ensure that prisoners are effectively supervised in safe, secure environments; that correctional staff are properly trained and supervised; and that allegations of mistreatment are promptly investigated and are dealt with swiftly and appropriately.

FURTHER RESOLVED, That the American Bar Association urges states, territories and the federal government to prepare prisoners for release back into the community by implementing policies and programs that:

- (1) from the beginning of incarceration, provide appropriate programming, including substance abuse treatment, educational and job training opportunities, and mental health counseling and services; and
- (2) encourage prisoner participation by giving credit toward satisfaction of sentence for successful completion of such programs.

FURTHER RESOLVED, That the American Bar Association urges states, territories and the federal government to assist prisoners who have been released into the community by implementing policies and programs that:

- (1) establish community partnerships that include corrections, police, prosecutors, defender organizations, and community representatives committed to promoting successful reentry into the community and that measure their performance by the overall success of reentry; and
- (2) assist prisoners returning to the community with transitional housing, job placement assistance, and substance abuse avoidance.

FURTHER RESOLVED, That the American Bar Association urges states, territories and the federal government, in order to remove unwarranted legal barriers to reentry, to:

- (1) identify collateral sanctions imposed upon conviction and discretionary disqualification of convicted persons from otherwise generally available opportunities and benefits;
- (2) limit collateral sanctions to those that are specifically warranted by the conduct underlying the conviction, and prohibit those that unreasonably infringe on fundamental rights or frustrate successful reentry; and
- (3) limit situations in which a convicted person may be disqualified from otherwise available benefits and opportunities, including employment, to the greatest extent consistent with public safety.

FURTHER RESOLVED, That the American Bar Association urges law schools to establish reentry clinics in which students assist individuals who have been imprisoned and are seeking to reestablish themselves in the community, regain legal rights, or remove collateral disabilities.

REPORT

As we explain in our Report and Recommendations on Punishment, Incarceration and Sentencing, Justice Kennedy did not simply ask the American Bar Association to look carefully at the rate of incarceration in American jurisdictions and the racial and ethnic composition of our prison populations; he also asked the ABA to inquire into the “inadequacies – and the injustices – in our prison and correctional systems.” He observed that the legal profession has an “obsessive focus” on the process for determining guilt or innocence, to the exclusion of what happens after the prisoner is taken away: “When the door is locked against the prisoner, we do not think about what is behind it.” Noting Professor James Whitman’s charge that “the goal of the American corrections system is to degrade and demean the prisoner,” Justice Kennedy specifically asked the ABA to “help start a public discussion about the prison system.”

President Archer echoed Justice Kennedy’s words when he appointed this Commission. Neither Justice Kennedy nor President Archer suggested that the discussion could be completed in a year, and the Commission members knew from the outset that it was no easy matter just to begin the discussion and the discussion, once begun, might extend for many years. How could it be otherwise? After more than two hundred years of imposing punishment, it is unclear what lessons America has learned about corrections and incarceration. It is difficult even to develop a full understanding of what actually occurs in prisons throughout the country. There are ideas afloat but little consensus as to what makes prisons more or less civilized, what opportunities prisons ought to provide to those incarcerated, and how prisons can best prepare inmates to lead law-abiding lives when they return to society.

Justice Kennedy expressed a concern that prison conditions are degrading and likely to lead inmates to continue criminal activity when released. Identifying this concern as important, President Archer, in his charge to the Commission, asked us examine a number of issues raised by incarceration as a crime control strategy, including whether prison conditions are unacceptably dehumanizing and degrading, and more likely to encourage than reduce future crime. He asked us to consider whether prisoners returning home are welcomed and supported in their efforts to reestablish themselves, or shunned and allowed to drift back into their old ways; the extent to which the legal system is complicit in discouraging offenders’ efforts to go straight; and to report on current research into the causes of recidivism.

The Commission set a goal of understanding the issues; describing them for the American Bar Association; and mobilizing this body to continue the discussion that we have begun, to take a real interest in the many thousands of men and women we imprison every year, and to assume responsibility for the correctional institutions our legal system has created and maintained. When we complete our work, the discussion will have only begun. This Association must commit itself to continuing that discussion.

When the Commission began to prepare for its first hearing in November of 2003, none of its members – including its criminal practitioners – was totally familiar with the

facts and figures we considered relating to corrections law and practice, recent research into the causes and effects of increased reliance on incarceration, or the legal rights of prisoners. Some of our members had greater knowledge than the average citizen, or the average lawyer, but even they lacked detailed information concerning the controversies over the impact of incarceration on crime rates, the collateral effects of imprisonment on families and communities, the net-widening effect of intensive supervision strategies, and the efficacy and cost-effectiveness of treatment alternatives to confinement. We knew that the prison infrastructure had grown exponentially since the early 1980s, and as we did our work we saw that state budget deficits have begun to encourage legislators to get “smart on crime” by reducing their prison populations (or, in a few states, cutting prison programming).

The issue of correctional reform is not a new one, and this is not the first time that the bar has been called upon to address it. In the course of its work, the Commission was instructed by the work of an earlier ABA Commission, also called into being by a Supreme Court Justice’s speech about the need for reform of the corrections system. In 1969, Chief Justice Warren Burger urged the ABA, in a speech at its 1969 Annual Meeting, “to assume leadership in a comprehensive examination of the penal system.” He too made this a responsibility of all lawyers and judges, not just those already involved in a criminal practice. In response, the ABA Board of Governors and the House of Delegates created the Commission on Correctional Facilities and Services, an interdisciplinary body conceived as an action-oriented analogue to the then-newly created Criminal Justice Standards Committee. The Commission was chaired for its first five years by Richard Hughes, former governor and later Chief Justice of the State of New Jersey, and later by ABA legend Robert McKay. The Commission carried out its work through a number of separate action programs and information clearinghouse projects, for which it secured more than \$15 million in grants from governmental and private sources over the eight years of its existence. At one point, it had thirty paid staff members. Among its major programs were the National Volunteer Parole Aide Program, the BASICS (Bar Association Support to Improve Correctional Services) program, and the Resource Center on Correctional Law and Legal Services.¹

Yet, for all of the resources and energy and talent devoted to its work, it appears that the ABA Commission on Correctional Facilities and Services left little lasting impression on the legal landscape, and its work was all but forgotten in the crime war of the 1980’s. Given the almost obsessive focus for the last twenty years on increasing the number of people in prison and expanding the prison infrastructure, we probably should not have been as surprised as we were by the magnitude of the present problem, and the extent to which it has been institutionalized. To put the point concisely, the problem is that correctional systems too often fail to do any correcting. They warehouse inmates, and in the process may actually increase the chances that prisoners, once released, will be neither equipped nor inclined to conform their conduct to the law. Current correctional

¹ During the course of its existence, the Commission produced a number of studies and reports. Its final report is available from the Criminal Justice Section Office. See “When Society Pronounces Judgment – The Work of the Commission on Correctional Facilities and Services. Five Year Report, 1970-1975.”

policies enlarge the cadre of people permanently at the fringes of society, and create a prison infrastructure that depends upon a continuing stream of new prisoners.

Although it came as no surprise to us that most people have a generally unsympathetic response to convicted felons, the Commission became acutely aware of an irony that is readily apparent in our treatment of men and women sentenced to prison: i.e., the public expects convicted felons to learn their lesson and become law-abiding citizens, while the legal system burdens them with continuing collateral disabilities that make it very difficult, if not practically impossible, for them to successfully reintegrate into the free community. To the extent that the legal system has itself been complicit in creating this class of “internal exiles,” it is incumbent on the legal profession to try to remedy it.

Justice Kennedy’s expressed concern about the degradation of the prison experience seems intuitively correct, since no matter how well-managed and funded a prison system may be, loss of freedom and all it entails, as well as the social stigma of conviction, must weigh heavily on most prisoners. That said, evidence of dangerous living conditions or correctional staff mistreatment of prisoners has not been systematically collected at a national level, and abuse appears more severe in some state systems than in others.² Prison administrators say there have been sweeping improvements in recent decades, with widespread acceptance that abusive behavior is unacceptable and that proper procedures can minimize it. Advocates for reform and former inmates, however, say a culture of violence persists and is made worse because of tacit acceptance by administrators, politicians and the public. Concerns have been expressed about such issues as medical and mental health services, prison rape, substance abuse treatment and counseling, job training opportunities, prison visiting policies, and the use of “super-max” facilities. Yet the restrictions on prisoner lawsuits in the 1995 Prison Litigation Reform Act have limited the courts’ oversight of prison conditions, and it is not clear what effect this law might have had in bringing back some of the abusive conditions that led to federal injunctions and continuing oversight of prison management by federal courts in some states.

In its hearing in Sacramento in April of 2004, the Commission heard testimony from officials and prison advocates alike about the documented cases of abuse in California prisons that led Governor Schwarzenegger to appoint a blue ribbon commission chaired by former Governor Deukmejian to investigate and make

² The abuse of Iraqi detainees by American military police came to light just as the Commission was finalizing its report, and provoked calls for a closer look at domestic prison conditions. The New York Times editorial page noted recent reports of domestic prisoner abuse, and called for the development of “national prison standards” and “an independent body that enforces them.” See Editorial, *The Dark Side of America*, N.Y. Times, May 17, 2004. See also Fox Butterfield, *Mistreatment of Prisoners Is Called Routine in U.S.*, N.Y. Times, May 8, 2004 (discussing documented reports of prisoner abuse in state prison systems); Jenifer Warren, *State Penal System is Hammered in Report*, LA Times, January 16, 2004 (discussing report filed by federal Special Master John Hagar). A book-length study of American prison conditions by Alan Elsner was published too late for consideration by the Commission. Alan Elsner, *GATES OF INJUSTICE: THE CRISIS IN AMERICA’S PRISONS* (2004).

recommendations about reforms in correctional administration. Witnesses testified to the absence of programming that would prepare prisoners for release, and the predictably high rates of return to prison by parolees. Over 70 per cent of those entering prison in California each year come by way of administrative revocation of probation or parole, most often for minor technical violations as opposed to new criminal activity, rather than a new court commitment. On the other hand, serious new criminal activity by a parolee or probationer is often treated as a violation of release conditions, so that confirmed criminals may return to the community after only a few months. Prisoners in California prisons, particularly women, have a difficult time obtaining competent and humane medical care. Roderick Hickman, the newly appointed Secretary of Youth Authority and Corrections Administration, acknowledged a “cultural disconnect” between those responsible for operating prisons on a day-to-day basis, and prisoners and the communities from which they come and to which they will return.

The research that has been done confirms that being sent to prison has a negative effect on offenders’ later income, employment prospects, and family involvement, all of which is predictive of future criminality. The effect on prisoners’ spouses and children is less certain, but is also likely to be negative. Finally, as to the larger community, prison expansion has had quite different effects on the communities that benefit economically from it, and those that it fragments and impoverishes.³

Spurred initially by budgetary concerns, a number of states have been developing alternatives to incarceration, particularly for the high percentage of prisoners whose offenses are linked to substance abuse.⁴ There is also evidence that many state jurisdictions have recently been willing to consider and approve that early release of inmates as a way to reduce budget deficits and control spending.⁵ These early release programs, while often driven by the common concern about resources, operate quite unevenly from state to state. From what we have been able to determine, there is a consistent effort made by states considering early release to reduce inmate populations without necessarily cutting back on prison programming. Some prison systems are beginning to focus on the importance of developing programs to prepare prisoners for reentry, and to support them on the first critical weeks after their return to the

³ See Marc Mauer & Meda Chesney-Lind, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, Parts IV and V (2002); John Hagan and Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, in Michael Tonry & Joan Petersilia, *Prisons Vol 26*, at 121 (1999).

⁴ See, e.g., John Wool & Don Stemen, Vera Institute of Justice, *CHANGING FORTUNES OR CHANGING ATTITUDES? SENTENCING AND CORRECTIONS REFORMS IN 2003* (March 2004). Mary Ann Saar, Maryland’s Secretary for Criminal Justice, told the Commission that over 80% of Maryland’s prisoners have a substance abuse problem, and this figure seems consistent with reports from other jurisdictions.

⁵ See Judith Greene, *SMART ON CRIME: POSITIVE TRENDS IN STATE-LEVEL SENTENCING AND CORRECTIONS POLICY*(2003) http://www.famm.org/nr_sentencing_news_trends_report_11_03.htm

community.⁶ Research has identified the moment of “hand-off,” when a prisoner is released back into the community, as a critical time when the offender needs support in order to avoid slipping back into old patterns, and committing new crimes. Yet in many states the traditional send-off of “\$50 and a bus ticket” seems still to be the norm.

Prisoners who are “handed off” expect that they have moved from incarceration to freedom, but their freedom brings with it a host of restrictions and constraints not imposed upon the general population. The legal system imposes collateral penalties on convicted felons that are difficult and sometimes impossible to shake off, and social norms invite open discrimination.⁷ Because the number of people with criminal convictions has risen so rapidly in recent years, collateral penalties have become one of the most significant methods of imposing a continuing social stigma and diminished legal status in America.⁸ Federal laws encourage states to exclude people with convictions from participation in a wide variety of federal programs and benefits, including food stamps, housing, insurance, educational assistance, parenting, and drivers’ licenses.

The Commission also heard persuasive testimony that strict parole and probation revocation policies, as well as unnecessarily lengthy periods of supervision in the community, may actually be widening the prison net and thus working at cross- purposes with efforts to control population growth. In California, for example, parole revocation policies have resulted in a revolving door in and out of prison for thousands of people, so that many of them are truly doing “life on the installment plan.”⁹

⁶ Much recent research on prisoner re-entry has been conducted by the Washington-based Urban Institute. Studies on the experience in Illinois, Maryland, New Jersey, and Ohio, can be found on the institute's web site, <http://www.urban.org/content/PolicyCenters/Justice/Projects/PrisonerReentry/overview.htm>. The Commission was particularly impressed by what it learned from Maryland’s Secretary Saar about the efforts underway in that state to implement drug treatment programs in prison, and to begin reentry programming at the moment a prisoner enters the system. See David Nitkin, *Ehrlich set to sign bill to expand prisoner drug treatment*, Baltimore Sun, May 11, 2004.

⁷ The Legal Action Center has recently published a 50-state survey of selected legal barriers to reentry, including how each state has responded to federal laws authorizing but not requiring them to bar persons with criminal records from certain benefits and opportunities. See *After Prison: Roadblocks to Reentry, A Report on State Legal Barriers Facing People with Criminal Convictions*, <http://www.lac.org/lac/index.php> (hereafter “Roadblocks”). A few states, like New York, have laws forbidding discrimination on the basis of a criminal conviction, but it is not clear what effect such laws have on offender opportunities since it is likely that they are difficult to enforce.

⁸ See Bureau of Justice Statistics, U.S. Dep’t of Justice, *Prevalence of Imprisonment in the U.S. Population, 1974-2001* (2003) (estimating that in 2001, 5.6 million or 2.7% of adult Americans had served a term in prison, more than double the percentage in 1974). Jeremy Travis has reported that “[a]n estimated 13 million Americans are either currently serving a sentence for a felony conviction or have been convicted of a felony in the past.” See Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE SOCIAL COSTS OF MASS IMPRISONMENT* 19 (Meda Chesney-Lind & Marc Mauer, eds. 2002), (citing Christopher Uggen et al., *Crime Class and Reintegration: The Scope of Social Distribution of America’s Criminal Class* (paper presented at the American Society of Criminology meetings in San Francisco, Cal. (Nov. 18, 2000)).

⁹ See, e.g., “Back to the Community: Safe and Sound Parole Policies,” Report of the Little Hoover Commission, November 2003, documenting the failure of California’s correctional system to prepare

The Commission has concluded that Justice Kennedy and President Archer were right to focus attention on the state of our correctional system. For far too long, there has been the absence of a national conversation about how to cope with the inevitable downstream effects of the “race to incarcerate” in the 1980s and 90s. That conversation has at long last begun, and it is a bipartisan discussion. As the Commission’s report was being finalized, the disclosures of prisoner abuse by American soldiers in Iraq, some of whom had been prison guards in civilian life, have turned the spotlight on conditions in our own prisons.¹⁰ And, as President Bush noted in his 2004 State of the Union address, almost all prisoners eventually do return to the community, and their ability to establish themselves successfully as law-abiding citizens should, therefore, be a matter of considerable interest to communities across the Nation. Prison conditions and prisoner reentry are a matter of public safety as well as sound public policy.

The Commission concludes that, where prison conditions and reentry are concerned, three steps need to be taken: 1) prison conditions must be safe and humane, for prisoners and staff alike; 2) prison programming must be developed and implemented to help prisoners prepare for their return to the free community; and 3) the legal system must be scrutinized to ensure that it does not itself aggravate the problem of reentry by presenting criminal offenders with insuperable obstacles to reintegration into the community. If the legal system is preventing prisoners from obtaining a true second chance, the alternative for them may be a return to criminality.

Three essentials must coexist if prisoners are to have a genuine second chance. First, prisons must provide resources to assist prisoners in preparing for freedom and coping with the responsibilities it entails. Second, the community must be ready to accept them upon appropriate terms. These first two essentials go hand in hand. The community is likely to be skeptical about returning former offenders until prisons demonstrate that they are preparing former offenders to succeed in freedom. Third, the legal system must support former offenders and eliminate barriers to successful reentry. The fewer the impediments to reentry, the greater will be the opportunities for success. Barriers to employment, education, housing, treatment, and generally available public benefits must be eliminated to the greatest extent possible. The legal system may need to draw on the skills of other disciplines to provide treatment and training before a prisoner’s release and support during the first months at home. It may need to develop and rely upon risk assessment techniques in making release decisions, and in assisting offenders to cope with the issues most likely to trip them up upon reentry. But there are also issues that are entirely within the domain of the law that must be addressed, including in particular parole revocation and supervision policies and collateral sanctions.

prisoners for reentry and its easy resort to parole revocation. The Commission heard testimony from Michael Alpert, Chair of the Little Hoover Commission, who spoke of the same “disconnect” between prison administrators and parole officials, and the communities to which prisoners return.

¹⁰ See note 2, *supra*.

Accordingly, our recommendations are that jurisdictions should review their correctional policies and practices (as California is presently doing) to ensure that offenders are effectively supervised in safe, secure environments; that correctional staff are properly trained and supervised; and that allegations of mistreatment are promptly investigated and dealt with swiftly and appropriately. Further, jurisdictions must take steps to prepare prisoners for release back into the free community beginning from the time they first report to prison (as Maryland is presently doing), including but not limited to substance abuse treatment, educational and job training opportunities, and mental health counseling and services. Prisoner participation in such programs should be encouraged by giving credit toward satisfaction of sentence for successful completion of such programs. Finally, it is essential that correctional officials work with those responsible for community supervision to assist offenders returning to the community with transitional housing and job placement assistance. Correctional officials need to have a stake in the success of prisoners returning to the community, not a vested interest in their returning to prison.

The Commission was impressed by the evidence it saw of a change in law enforcement attitudes toward reentry and the relationship of law enforcement to offenders. For many years in many communities, when offenders were released on probation, parole or after serving sentences, police, prosecutors and probation and parole officers tended to view themselves as adversaries of the offender. Law enforcement officials tended to look for a reason to send offenders back to prison rather than considering ways of assisting them to reintegrate into the community. In many places, the old approach is changing as law enforcement officials recognize that successful reentry means not only that an offender will avoid reincarceration; it means that the offender contributes positively to the community rather than commits additional crimes, and that by eliminating criminal acts there will be fewer victims of crime. We heard testimony in California that prosecutors and police work with offenders and the community to help offenders reclaim their place in the community. Their approach is proactive and supportive, and it is working.

Reentry is not easy for many offenders. Substance abuse, poor job training, and other personal characteristics may complicate the task of moving from prison to freedom. But, the chances that reentry can be successful increase if correctional officials understand that their job is to begin to prepare an offender for release, and law enforcement officials join with the offender and the community upon release to continue to assist with reentry. A true partnership is needed for there to be a promise of success. To succeed, that partnership must value reentry and be prepared to measure the performance of all members by how well they succeed in promoting effective reentry. Probation and parole officers, for example, must understand that they are most effective and most successful when, working in partnership with others, they enable more offenders to avoid recidivism and reincarceration. Performance measures for probation officers should be based upon the number of probationers or parolees who successfully complete their community supervision rather than by the number of revocations or disciplinary measures. By measuring performance in terms of successful reentry as opposed to the number of revocations, a community increases the probability that of

successful reintegration of offenders into the community, and thus the level of public safety.

If each of the official stakeholders in the partnership measures performance by the overall success of prisoner reentry, the partnership will work together to do what is required to promote successful reentry. They will identify the problems that released prisoners face, and they will make efforts to assist released prisoners with transitional housing, job placement assistance, and substance abuse avoidance.

The Commission also strongly recommends that jurisdictions take steps to reduce or eliminate legal barriers to reentry so that only those necessary for public safety remain. As a first step, jurisdictions should identify the legal barriers to reentry, including both collateral sanctions imposed upon conviction and discretionary disqualification of convicted persons from otherwise generally available opportunities and benefits. They should limit collateral sanctions to those that are specifically warranted by the conduct underlying the conviction, and eliminate entirely those that unreasonably infringe on fundamental rights or serve only to frustrate successful reentry.

Perhaps the most important step that a jurisdiction can take is to limit the situations in which a convicted person may be disqualified from otherwise available benefits and opportunities, including employment, to the greatest extent consistent with public safety. This requires an educational program directed not only at public officials and employers, but also at the private sector. Jurisdictions should consider expanding their pardon process, or establishing a process by which returning offenders may obtain a certificate of good conduct, whose effect would be to remove all collateral disabilities that limit employability and other opportunities.¹¹ It seems intuitively plausible that most across-the-board employment bans based on conviction records are unnecessary to assure public safety, and that a system of case-by-case determinations would not be too difficult to administer.¹²

¹¹ According to the Legal Action Center's "Roadblocks" report, *see* note 4, *supra*, six states (Arizona, California, Illinois, Nevada, New Jersey and New York) offer certificates of rehabilitation that remove occupational and licensing bars resulting from a conviction and create a presumption of rehabilitation. The Commission found that a number of other states, including Alabama, Georgia, Connecticut, Nebraska, and South Carolina, have an administrative pardon system that offers essentially the same sort of relief. Many states and the federal government have a pardon process in place that could provide this relief, but at present does not, largely because of a reluctance on the part of the chief executive to appear "soft on crime."

¹² According to the Legal Action Center's "Roadblocks" report, note 4, *supra*, Kansas and Hawaii require all employers to make individual determinations where employment of convicted persons is at issue. Kansas requires that a conviction be reasonably related to the applicant's trustworthiness or the safety or well-being of employees or customers in order to serve as a basis for excluding an applicant for employment. *See* KAN. STAT. ANN. § 22-4710(f). Similarly, Hawaii allows employers to consider only recent criminal convictions that are rationally related to the employment, and only after a conditional offer of employment has been made. *See* HAW. REV. STAT. § 378-2.5.

Jurisdictions must also recognize that there also are practical rather than legal hurdles facing former offenders who try to succeed in reentry. For example, employers who could hire former offenders may be reluctant to do so because of liability concerns. These practical hurdles must not be ignored, although developing a plan to deal with them may be extremely difficult. If there is a commitment to supporting reentry, innovations may be possible. If, for example, the pardon power were reinvigorated, as we recommend, a jurisdiction might consider providing an affirmative defense – reliance on a pardon grant -- to any employer alleged to be negligent or otherwise culpable for hiring a former offender.

Finally, the Commission recommends that law schools establish clinics in which students may gain both understanding and experience in representing those who have committed crimes and are imprisoned as a result, or who are seeking to reestablish themselves in the community through restoration of rights. In the course of their clinic work, students could also have an opportunity to work with the victims of crime, and seek to encourage a community dialogue about rehabilitation and reintegration. Such clemency and reentry clinics may educate the lawyers of tomorrow to the problems of the least among us.

The goal of these recommendations is to ensure humane conditions of confinement for prisoners, to avoid recidivism, and to maximize the chances that former prisoners will work, pay taxes, rear families and become contributing members of their communities. To this end, they seek to enlist members of the legal profession in the important work of removing unreasonable legal barriers to reentry. Reducing recidivism means fewer victims, less crime and less imprisonment. It is win-win for the successfully integrated former prisoner and the community to which that person returns. Successful reentry means that an individual, whose crime and incarceration disrupted the social fabric and imposed upon the community the costs of the crime and the punishment, will add value to the community and serve as a constant reminder that we are indeed a nation of second chances for those who violate the law. It also recognizes what Justice Kennedy described as “the Gospels’ promise of mitigation at judgment” for those who concern themselves with how prisoners are treated, and who are willing to play some part in welcoming them back to the community upon their release.

Respectfully submitted,

Stephen Saltzburg, Chairperson
Justice Kennedy Commission

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