

**AMERICAN BAR ASSOCIATION
JUSTICE KENNEDY COMMISSION**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

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

4 (1) Lengthy periods of incarceration should be reserved for offenders who pose the
5 greatest danger to the community and who commit the most serious offenses.

6 (2) Alternatives to incarceration should be provided when offenders pose minimal risk to
7 the community and appear likely to benefit from rehabilitation efforts.

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

10 (1) Repeal mandatory minimum sentence statutes;

11 (2) Employ sentencing systems that guide judicial discretion to avoid unwarranted and
12 inequitable disparities in sentencing among like offenses and offenders, but permit
13 courts to consider the unique characteristics of offenses and offenders that may
14 warrant an increase or decrease in a sentence;

15 (3) Require a sentencing court to state on the record reasons for increasing or decreasing
16 a presumptive sentence, and permit appellate review of any sentence so imposed.

17 (4) Assign responsibility for monitoring the sentencing system to an entity or agency
18 with sufficient authority and resources to:

19 (a) Recommend or adopt alternatives to incarceration that have proven
20 successful in other jurisdictions; and

21 (b) Gather and analyze data as to criminal activity and sentencing and
22 the financial impact of proposed legislation, and consider whether
23 changes in sentencing practices should be recommended or adopted
24 in light of increases or decreases in crime rates, changes in
25 sentencing patterns, racial disparities in sentencing, correctional
26 resources, and availability of sentencing alternatives.

27 (5) Study and fund treatment alternatives to incarceration for offenders who may benefit
28 from treatment for substance abuse and mental illness.

29 (6) Adopt diversion or deferred adjudication programs that, in appropriate cases, provide
30 an offender with an opportunity to avoid a criminal conviction.

31 (7) Develop graduated sanctions for probation and parole violations that provide for
32 incarceration only when a probation or parole violator has committed a new crime or
33 poses a danger to the community.

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

35 (1) Repeal the 25 percent rule in 28 U.S.C. §994(b)(2) to permit the United States
36 Sentencing Commission to revise, simplify and recalibrate the federal sentencing
37 guidelines and consider state guideline systems that have proven successful.

38 (2) Reinstate the abuse of discretion standard of appellate review of sentencing
39 departures, in deference to the district court's knowledge of the offender and in the
40 interests of judicial economy.

41 (3) Minimize the statutory directives to the United States Sentencing Commission to
42 permit it to exercise its expertise independently.

43 (4) Repeal the limitation on the number of judges who may serve on the United States
44 Sentencing Commission.

REPORT

I. 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.

II. 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.

III. 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.

IV. 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

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

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.”).

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

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).

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;

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

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).

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

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 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.

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 GRISET *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.

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 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

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 be 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 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.

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 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

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.

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.*

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 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.

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

V. 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 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

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/proprtdtab.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>).

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/firearmnonfataltab.htm>).

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 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

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).

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.

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 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

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

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.

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

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

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).

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.

VI. 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 many 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.

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

⁵⁹ John 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).

VII. 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
- 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.

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

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.

VIII. 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:

- (i) To foster respect for the law and to deter criminal conduct.
- (ii) To incapacitate offenders.
- (iii) To punish offenders.
- (iv) To provide restitution or reparation to victims of crime.
- (v) To rehabilitate offenders.

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 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 "overreliance 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 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.

IX. 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, they tend to shift sentencing discretion away from courts to prosecutors.⁶⁴ Prosecutors do not charge all

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.

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.

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

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

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.

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).

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.

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).

X. 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 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).

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)).

XI. 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 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.

XII. 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

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*

San Bernadino 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 1 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 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

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).

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).

XIII. 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 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

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

⁸¹ *Id.*, at ii.

- Sanctions could include 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 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.

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>.

XIV. REFORM THE FEDERAL SENTENCING GUIDELINES

A. 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 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:

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).

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

- “[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 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

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.*

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

- “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

B. 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 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.

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).

¹⁰⁰ *Id.* at 74.

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.

C. 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

¹⁰¹ The “25% rule” 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.

– 28 U.S.C. §994(b)(2).

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.

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

D. Reinstate the Abuse of Discretion Standard for Federal Departures

A district judge always is required to justify a departure by reference to factors specified

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).

¹⁰³ ¹⁰⁰ 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). ¹⁰⁴ 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.

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 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,

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).

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).

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 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

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

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.

E. 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

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).

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 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.

F. 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.

Respectfully submitted,

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 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)).

Stephen Saltzburg, Chairperson
Justice Kennedy Commission

August 2004

APPENDIX

The 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 at her own firm and specializes in family law. She is currently the Chair of the ABA Section of Family Law. During the first twelve years of her career, she also 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.