REPORT OF THE ABA JUSTICE KENNEDY COMMISSION
INTRODUCTION

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 way, 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

---

[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."

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 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.